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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.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 242

[Release No. 34–40760B; File No. S7–12–98]

RIN 3235–AH41

Regulation of Exchanges and Alternative Trading Systems; Technical Amendments

AGENCY: Securities and Exchange Commission.

ACTION: Technical amendments.

SUMMARY: The Securities and Exchange Commission (''Commission'') today is making a technical change to Exchange Act Rules 17a–4(b)(1) and 301(b)(4). These and other rules and rule amendments that relate to the regulation of exchanges and alternative trading systems were published on December 22, 1998 (63 FR 70844).

EFFECTIVE DATE: March 7, 2000.

FOR FURTHER INFORMATION CONTACT: Elizabeth King, Associate Director, at (202) 942–0140, Constance Kiggins, Special Counsel, at (202) 942–0059, and John Roeser, Attorney, at (202) 942–0762, Division of Market Regulation.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1998, the Commission adopted new rules and rule amendments regarding the regulation of exchanges and alternative trading systems.[1] The Commission also repealed Exchange Act Rule 17a–23 and amended the books and records rules by transferring the recordkeeping requirements from Rule 17a–23 to Rules 17a–3 and 17a–4, as those rules apply to broker-dealer internal trading systems. The Commission amended Exchange Act Rule 17a–3 by adding paragraph (a)(16), which requires broker-dealers to make records regarding the activities of internal broker-dealer systems.[2] The Commission stated in the adopting release that the amendments to Exchange Act Rule 17a–4 would require that the records required under Rule 17a–3(a)(16) be preserved for three years, the first two years in an accessible place. This requirement, however, was not included in the amended rule language of Rule 17a–4. Consequently, the Commission is making a technical amendment to Rule 17a–4(b)(1) to include the records required under Rule 17a–3(a)(16).

In addition, Exchange Act Rule 301(b)(4) contains a typographical error that may prove misleading and requires clarification. Specifically, the first sentence of Rule 301(b)(4), prohibits an alternative trading system from charging fees to broker-dealers, that access the alternative trading system through a national securities exchange or national securities association, that are inconsistent with equivalent access, as ''required by paragraph (b)(3)(iv).'' The equivalent access requirement, however, is a paragraph (b)(3)(iii). The Commission is making a technical amendment to correctly refer to the equivalent access requirement in paragraph (b)(3)(iii).

List of Subjects

17 CFR Part 240

Brokers-dealers, Fraud, Issuers, Reporting and recordkeeping requirements, Securities.

17 CFR Part 242

Securities.

Accordingly, Title 17 CFR Part II is amended by making the following technical amendments:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*(d), 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

2. § 240.17a–4 is amended by revising paragraph (b)(1) to read as follows:

§ 240.17a–4 Records to be preserved by certain members, brokers and dealers.

* * * * *

(b) * * *

(1) All records required to be made pursuant to paragraphs (a)(4), (a)(6), (a)(7), (a)(8), (a)(9), (a)(10), and (a)(16) of § 240.17a–3.

* * * * *

PART 242—REGULATIONS M AND ATS

3. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78i(a), 78j, 78k–1(c), 78*l*, 78m, 78mm, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 80a–23, 80a–29, and 80a–37.

§ 242.301 [Amended]

4. In § 242.301, the first sentence of paragraph (b)(4), the reference ''(b)(3)(iv)'' is revised to read ''(b)(3)(iii)''.

Dated: March 7, 2000.

Jonathan G. Katz,

Secretary.

[FR Doc. 00–5993 Filed 3–10–00; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1301 and 1308

[DEA–200F]

Schedules of Controlled Substances: Addition of Gamma-Hydroxybutyric Acid to Schedule I

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final rule.

SUMMARY: This is a final rule issued by the Deputy Administrator of the Drug Enforcement Administration (DEA) placing gamma-hydroxybutyric acid (GHB) and its salts, isomers, and salts of isomers into Schedule I of the Controlled Substances Act (CSA) pursuant to Public Law 106–172. Public

[1] Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998).

[2] 17 CFR 240.17a–3(a)(16).

Law 106–172 also imposes Schedule III physical security requirements for storage on registered manufacturers and distributors of GHB when it is manufactured, distributed or possessed in accordance with Food and Drug Administration (FDA)-authorized Investigational New Drug (IND) exemptions under the Federal Food, Drug and Cosmetic Act (FFDCA). In addition, this final rule places FDA-approved products containing GHB into Schedule III, if or when they are approved.

EFFECTIVE DATE: March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Frank Sapienza, Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, (202) 307–7183.

SUPPLEMENTARY INFORMATION:

What Is GHB and Why Is It Being Controlled?

GHB is gamma-hydroxybutyric acid, including its salts, isomers and salts of isomers. In recent years, the abuse of GHB has increased substantially. GHB is a drug classified as a central nervous system depressant. It is not approved for marketing as a medicine in the United States, although FDA-authorized studies are in progress to examine its potential use in the treatment of cataplexy associated with narcolepsy. GHB is abused to produce euphoric and hallucinogenic states, and for its alleged role as growth hormone releasing agent to stimulate muscle growth. GHB can produce drowsiness, dizziness, nausea, visual disturbances, unconsciousness, seizures, severe respiratory depression and coma. Overdose usually requires emergency medical treatment, including intensive care for respiratory depression and coma. Several Poison Control Centers have characterized and reported cases of GHB-dependence and withdrawal to the DEA. To date, DEA has documented over 5,700 overdoses and law enforcement encounters with GHB in 45 states. DEA has also documented 65 GHB-related deaths.

On November 8, 1990, the FDA issued an advisory declaring GHB unsafe and illicit, except under FDA-approved physician-supervised protocols. On February 18, 1997, FDA reissued its warning on GHB as an unapproved and potentially dangerous, illegal drug in the United States.

GHB is produced in clandestine laboratories using a relatively simple synthesis with readily available and inexpensive starting materials. Gamma-butyrolactone (GBL) is an industrial solvent which is used in the clandestine manufacture of GHB. Once manufactured, GHB is a clear liquid and has been disguised by adding food coloring, flavorings, and/or storing it in different kinds of bottles and containers.

The DEA has received reports that GBL, the solvent precursor for GHB, is being abused due to its rapid conversion to GHB soon after ingestion. On January 21, 1999, the FDA issued a request for a voluntary recall of all GBL-containing products sold in health food stores and warned the public of its danger to the public health. FDA has also declared 1,4-butanediol, a chemical related to both GHB and GBL, a Class I Health Hazard. On May 11, 1999, the FDA issued another warning on 1,4 butanediol, GHB, and GBL stating that these substances pose a significant health hazard. Public Law 106–172 also placed certain controls on GBL. These will be the subject of a separate **Federal Register** Notice.

Under What Authority Is GHB Being Controlled?

''The Samantha Reid and Hillory J. Farias Date-Rape Prevention Act of 1999'' (Pub. L. 106–172) declared that the abuse of GHB is an imminent hazard to the public safety. Section (3)(a)(1) of Public Law 106–172 directs the Attorney General, notwithstanding sections 201(a), 201(b), 201(c), and 202 of the CSA (21 U.S.C. 811(a), 811(b), 811(c) and 812), to issue a final order placing GHB in the same schedule as would apply to a scheduling of a substance under section 201(h)(1) of the CSA (21 U.S.C 811(h)(1)). All substances controlled under 201(h)(1) are placed in Schedule I. Therefore, this final rule will place GHB in Schedule I.

With the issuance of this final order, GHB becomes subject to the regulatory controls and administrative, civil and criminal sanctions applicable to the manufacture, distribution, dispensing, importing and exporting of a Schedule I controlled substance with one exception. Section 3(a)(1)(A) of Public Law 106–172 provides that registered manufacturers and distributors of GHB that is subject to an investigational new drug (IND) application exemption under the FFDCA subject to Schedule III physical security requirements rather than the otherwise applicable Schedule I physical security requirements for storage.

In Sections (3)(a)(1)(A) and (B) of Public Law 106–172, reference is made to certain scheduling recommendations contained in the May 19, 1999, letter from the Department of Health and Human Services (DHHS) to the DEA. Pursuant to Public Law 106–172, the DEA is publishing a copy of the May 19, 1999 letter from David Satcher, M.D., Ph.D., Assistant Secretary for Health and Surgeon General. The letter follows:

Assistant Secretary for Health, Office of Public Health and Science, Washington, D.C. 20201

Mr. Donnie R. Marshall, Deputy Administrator, Drug Enforcement Administration, Washington, D.C. 20537

Dear Mr. Marshall:

In response to your request dated September 16, 1997, and pursuant to the Controlled Substances Act (CSA), 21 U.S.C. § 811(b), (c), and (f), the Department of Health and Human Services (HHS) recommends that gamma-hydroxybutyric acid (GHB) should be subject to control under Schedule I of the CSA, except that GHB substances and products that are the subject of investigational new drug (IND) applications authorized by the Food and Drug Administration (FDA) should be subject to control under Schedule III.

GHB is a central nervous system depressant. As discussed in the attached analysis, GHB has a high potential for abuse relative to substances controlled in Schedules III, IV, and V. GHB has no accepted medical use, and when manufactured clandestinely, it is unsafe for use under medical supervision. Accordingly, and except as provided below, HHS recommends that GHB be controlled in Schedule I of the CSA.

Formulations of GHB currently are being studied under FDA-authorized INDs. At least one sponsor's formulation has been granted orphan drug status under Section 526 of the Food, Drug and Cosmetic Act, and is available under a treatment use protocol under 21 CFR § 312.34. None of the reports of actual abuse of GHB that support the Schedule I recommendation have involved GHB that was diverted from an authorized study. Moreover, given the ease with which GHB can be synthesized from readily available materials, it is unlikely that authorized studies will become a source for abuse. Rather, the abuse potential of GHB, when used under an authorized research protocol, is consistent with substances typically controlled under Schedule IV. Information on the dependence-producing effects of GHB is limited, but available data suggest that its potential for physical and psychological dependence is also consistent with control under Schedule IV.

Authorized formulations of GHB, however, do not meet the ''accepted medical use'' criteria set forth in Schedule IV. An authorized formulation of GHB is far enough along in the development process to meet the standard under Schedule II of a drug or substance having a ''currently accepted medical use with severe restrictions.'' Under these circumstances, HHS recommends placing authorized formulations of GHB in Schedule III.

You will find enclosed a document prepared by FDA's Drug Abuse Evaluation Staff that is the basis for the combined Schedule I/Schedule III recommendation.

Should you have any questions regarding this recommendation, please contact Stuart L. Nightingale, M.D., FDA's Associate

Commissioner for Health Affairs, at (301) 443–6143.

Sincerely yours,

David Satcher, M.D., Ph.D., Assistant Secretary for Health and Surgeon General

Enclosure

Specifically, as noted above, Section (3)(a)(1)(A) of Public Law 106–172 directs that the physical security requirements for registered manufacturers and distributors of GHB that is subject to an IND application exemption under the FFDCA shall be those which apply to the schedule recommended in the first paragraph of the DHHS letter. The schedule referred to in this paragraph is Schedule III. This paragraph applies only to GHB which is the subject of an FDA-authorized exemption and does not affect the physical security requirements for GHB manufactured, distributed or possessed for any other purpose or for any other controlled substance handled by the registrant.

Section (3)(a)(1)(B) of Public Law 106–172 directs that a drug product containing GHB for which an application is approved under section 505 of the FFDCA, shall be placed in the schedule recommended in the last sentence of the fourth paragraph of the DHHS May 19, 1999, letter. This sentence recommends Schedule III. Currently, there are no GHB drug products approved under section 505 of the FFDCA. However, if or when a drug product containing GHB is approved by the FDA under this section, it shall be a Schedule III controlled substance except that it will be subject to the criminal sanctions applicable to a Schedule I controlled substance, pursuant to Public Law 106–172. This paragraph applies only to drug products containing GHB which are approved under section 505 of the FFDCA and does not affect the schedule of any other form of GHB handled by the registrant.

Therefore, pursuant to Public Law 106–172 and notwithstanding sections 201(a), 201(b), 201(c), and 202 of the CSA, the Deputy Administrator of the DEA orders that GHB and its salts, isomers, and salts of isomers be placed in Schedule I. With the issuance of this final order, GHB will be subject to the regulatory controls and administrative, civil and criminal sanctions applicable to the manufacture, distribution, dispensing, importing and exporting of a Schedule I controlled substance with the following one exception. Registered manufacturers and distributors of FDA-authorized IND exempted GHB shall be subject to Schedule III physical security requirements for storage purposes. In addition, an FDA-approved drug product containing GHB for which an application is approved under section 505 of the FFDCA shall be placed in Schedule III.

What Requirements Will GHB Be Subject To?

Except as noted below, the Schedule I controls on GHB and, where applicable, the Schedule III physical security requirements on GHB will be effective on March 13, 2000. In the event that any of these requirements impose special hardships on the registrants, the DEA will entertain any justified request for an extension of time to comply with the Schedule I regulations regarding GHB. The applicable regulations are as follows:

1. *Registration.* Any person who manufactures, distributes, dispenses, imports or exports GHB or who engages in research or conducts instructional activities with GHB, or who proposes to engage in such activities, must submit an application for Schedule I registration in accordance with part 1301 of Title 21 of the Code of Federal Regulations (CFR) by May 12, 2000.

However, if and when there is an FDA-approved GHB-containing product for which an application is approved under section 505 of the FFDCA, any person who manufactures, distributes, dispenses, imports or exports that product or who engages in research or conducts instructional activities with such an FDA-approved GHB-containing product, or who proposes to engage in such activities, must submit an application for Schedule III registration in accordance with part 1301 of Title 21 of the Code of Federal Regulations.

2. *Security.* GHB is subject to Schedule I security requirements and must be manufactured, distributed and stored in accordance with §§ 1301.71, 1301.72(a), (c), and (d), 1301.73, 1301.74, 1301.75(a) and (c) and 1301.76 of Title 21 of the Code of Federal Regulations.

There is, however, an exception for registered manufacturers and distributors of GHB when manufactured, distributed or possessed in accordance with FDA-authorized IND exemptions under the FFDCA for storage. GHB used in FDA-authorized IND studies and FDA-approved GHB containing products are subject to Schedule III security requirements and must be manufactured, distributed and stored in accordance with §§ 1301.71, 1301.72(b), (c), and (d), 1301.73, 1301.74, 1301.75(b) and (c) and 1301.76 of Title 21 of the Code of Federal Regulations.

3. *Labeling and packaging.* All labels on commercial containers of, and all labeling of GHB, including FDA-authorized IND exempted formulations, which are distributed on or after May 12, 2000 shall comply with the requirements of §§ 1302.03–1302.07 of Title 21 of the Code of Federal Regulations. Any commercial containers of GHB packaged on or before May 12, 2000 and not meeting the requirements specified in §§ 1302.03–1302.07 of Title 21 of the Code of Federal Regulations shall not be distributed on or after June 12, 2000.

Any labels on commercial containers of, and all labeling of, an FDA-approved GHB-containing drug product shall comply with the requirements of §§ 1302.03–1302.7 of Title 21 of the Code of Federal Regulations.

4. *Quotas.* Quotas for GHB are established pursuant to part 1303 of Title 21 of the Code of Federal Regulations. Any manufacturer who desires either a manufacturing or procurement quota for GHB shall apply for such quota to DEA on or before May 12, 2000.

5. *Inventory.* Registrants possessing GHB are required to take inventories pursuant to §§ 1304.03, 1304.04 and 1304.11 of Title 21 of the Code of Federal Regulations. Every registrant who desires registration in Schedule I for GHB shall conduct an inventory of all stocks of GHB on or before May 12, 2000.

6. *Records.* All registrants must keep records on GHB pursuant to §§ 1304.03, 1304.04 and §§ 1394,21–1394,23 if Title 21 of the Code of Federal Regulations.

7. *Reports.* All registrants are required to submit reports on GHB to the DEA pursuant to §§ 1304.33 of Title 21 of the Code of Federal Regulations.

8. *Order Forms.* Each distribution of GHB, with the exception of an FDA-approved GHB-containing product for which an application is approved under section 505 of the FFDCA, shall utilize an order form pursuant to part 1305 of Title 21 of the Code of Federal Regulations.

9. *Prescriptions.* If a drug product containing GHB is approved under section 505 of the FFDCA, all prescriptions for that product are to be issued pursuant to §§ 1306.03–1306.06 and 1306.21–1306.26 of Title 21 of the Code of Federal Regulations.

10. *Important and Exportation.* All importation and exportation of GHB shall be in compliance with part 1312 of Title 21 of the Code of Federal Regulations.

11. *Criminal Liability.* Any activity with GHB not authorized by, or in violation of, the CSA or the Controlled Substances Import and Export Act shall be unlawful on or after March 13, 2000.

Public Law 106–172 directs DEA to publish this final rule and DEA has no discretion in this matter. However, this action is structured in such a manner that limits its financial impact by reducing the physical security requirements for GHB under certain circumstances. Specifically, Congress directed DEA to apply Schedule III physical security requirements to registered manufacturers and registered distributors for the storage of GHB and GHB-containing formulations that are the subject of IND exemptions authorized by FDA.

This regulation has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. DEA has determined that this rule is not a significant regulatory action under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has not been reviewed by the Office of Management and Budget. Further, this action will not have a significant economic impact on a substantial number of entities whose interests must be considered under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). This action places GHB in Schedule I of the GSA, but provides a reduction of the physical security requirements for GHB under certain circumstances. Specifically, Schedule III physical security requirements will apply to registered manufacturers and registered distributors for the storage of GHB and GHB-containing formulations that are the subject of IND exemptions authorized by FDA.

Unfunded Mandate Reform Act

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132 Federalism

This 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. Therefore, in accordance with E.O. 13132, it is determined that this rule will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Plain English

The DEA makes every effort to write clearly. If you have suggestions as to how to improve the clarity of this regulation please contact Patricia M. Good, Chief, Policy and Liaison Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, phone (202) 307–7297.

List of Subjects

21 CFR Part 1301

Administrative practice and procedure, Drug traffic control, Security measures.

21 CFR Part 1308

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

Under the authority vested in the Attorney General by section 201(a) of the CSA (21 U.S.C. 811(a)), and delegated to the Administrator of the DEA by the Department of Justice regulations (28 CFR 0.100) and redelegated to the Deputy Administrator pursuant to 28 CFR 0.104, the Deputy Administrator hereby amends 21 CFR parts 1301 and 1308 as follows:

PART 1301—[AMENDED]

1. The authority citation for Part 1301 continues to read as follows:

Authority: 21 U.S.C. 821, 822, 823, 824, 871(b), 875, 877.

2. Section 1301.72 is amended by revising the introductory text of paragraphs (a) and (b) to read as follows:

1301.72 Physical Security controls for non-practitioners; narcotic treatment programs and compounders for narcotic treatment programs; storage areas.

(a) *Schedules I and II.* Raw material, bulk materials awaiting further processing, and finished products which are controlled substances listed in Schedule I or II (except GHB that is manufactured or distributed in accordance with an exemption under section 505(i) of the FFDCA which shall be subject to the requirements of paragraph (b) of this section) shall be stored in one of the following secured areas:

* * * * *

(b) *Schedules III, IV and V.* Raw material, bulk materials awaiting further processing, and finished products which are controlled substances listed in Schedules III, IV, and V, and GHB when it is manufactured or distributed in accordance with an exemption under section 505(i) of the FFDCA, shall be stored in the following secure storage areas:

* * * * *

PART 1308—[AMENDED]

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

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

2. Section 1308.11 is amended by redesignating the existing paragraphs (e)(1) through (e)(2) as (e)(2) through (e)(3) and by adding a new paragraph (e)(1) to read as follows:

§ 1308.11 Schedule I.

* * * * *

(e) * * *

(1) gamma-hydroxybutyric acid (some other names include GHB; gamma-hydroxybutyrate; 4-hydroxybutyrate; 4-hydroxybutanoic acid; sodium oxybate; sodium oxybutyrate)	2010

* * * * *

3. Section 1308.13 is amended by redesignating the existing paragraphs (c)(5) through (c)(11) as (c)(6) through (c)(12) and by adding a new paragraph (c)(5) to read as follows:

§ 1308.13 Scheduling III.

* * * * *

(c) * * *

(5) Any drug product containing gamma hydroxybutyric acid, including its salts, isomers, and salts of isomers, for which an application is approved under section 505 of the Federal Food, Drug, and Cosmetic Act	2012

* * * * *

Dated: March 3, 2000.

Donnie R. Marshall,

Deputy Administrator.

[FR Doc. 00–5925 Filed 3–10–00; 8:45 am]

BILLING CODE 4410–09–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[GA44 & GA36–9948a; FRL–6547–4]

Approval and Promulgation of Revisions to the Georgia State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is approving the State Implementation Plan (SIP) revisions submitted by the State of Georgia on February 11, 1998, and November 19, 1998. The February 11, 1998, revisions update references to the August 15, 1997, version of Georgia's ''Procedures for Testing and Monitoring Sources of Air Pollutants'' manual. The November 19, 1998, revisions adopt new Permit by Rule provisions for several, small source categories, including: certain types of fuel-burning equipment, on-site power generation, concrete mixing plants, hot mix asphalt plants, cotton ginning operations, coating and/or gluing operations, printing operations, non-reactive mixing operations, fiberglass molding and forming operations, and peanut/nut shelling operations.

For these categories of sources that operate below the major source threshold, the rules may negate the need to file for a Part 70 Permit (also known as a ''Title V Permit'') or a synthetic minor permit.

DATES: This direct final rule is effective May 12, 2000 without further notice, unless EPA receives adverse comment by April 12, 2000. If adverse comment is received, EPA 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: All comments should be addressed to: Michele Notarianni, Air Planning Branch, Air, Pesticides, and Toxics Management Division, EPA Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303.

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

EPA Region 4, Air Planning Branch, 61 Forsyth Street, SW, Atlanta, Georgia 30303. (To make an appointment, please contact Michele Notarianni at 404/562–9031.)

Air Protection Branch, Georgia Environmental Protection Division, Georgia Department of Natural Resources, 4244 International Parkway, Suite 120, Atlanta, Georgia 30354.

FOR FURTHER INFORMATION CONTACT: Michele Notarianni at 404/562–9031 (or by e-mail at: notarianni.michele@epa.gov).

SUPPLEMENTARY INFORMATION:

I. Revisions Approved by EPA

The EPA is approving SIP revisions to Georgia's Rules for Air Quality Control included in the February 11, 1998, and the November 19, 1998, submittals. Below is a summary of the approved revisions.

Air Quality Control, Rule 391–3–1

- *Rule 391–3–1.02(3):* The revision updates the reference date of Georgia's ''Procedures for Testing and Monitoring Sources of Air Pollutants'' manual from March 1, 1997, to August 15, 1997.
- *Rule 391–3–1.02(6):* The revisions to subparagraphs (a)2.(v)(I), (a)2.(vii)(I), (a)2.(vii)(II)I, and (b)1.(vi) update the reference date of Georgia's ''Procedures for Testing and Monitoring Sources of Air Pollutants'' manual from March 1, 1997, to August 15, 1997.
- *Rule 391–3–1–.03(11):* A new paragraph, (11), is added to adopt new Permit by Rule provisions for the following 11 small source categories: (1) Fuel-burning equipment burning natural gas/liquid petroleum gasoline (LPG) and/or distillate oil; (2) fuel-burning equipment burning natural gas/LPG and/or residual oil; (3) on-site power generation; (4) concrete mixing plants; (5) hot mix asphalt plants; (6) cotton ginning operations; (7) coating and/or gluing operations; (8) printing operations; (9) non-reactive mixing operations; (10) fiberglass molding and forming operations; and (11) peanut/nut shelling operations. For these categories of sources that operate below the major source threshold, the rules may negate the need to file for a Part 70 Permit or for a synthetic minor permit. Facilities in these categories that have potential emissions greater than major source thresholds even after the Permit by Rule is met or are not able to meet the relevant conditions established in the Permit by Rule may be required to obtain a Part 70 Permit. A more detailed description of this new paragraph follows.

—*Rule 391–3–1–.03(11)(a):* A new subparagraph, (a), is added to identify general requirements for sources covered by the Permit by Rule. Eligible facilities must certify in writing to the Georgia EPD that they can comply with the Permit by Rule.

—*Rule 391–3–1–.03(11)(b)1:* A new subsection, (b)1, is added to establish Permit by Rule standards for applicable facilities with fuel-burning equipment burning natural gas/LPG and/or distillate oil. Applicable facilities must meet the following conditions. During any 12 consecutive months, facility fuel usage is limited to 900 million cubic feet of natural gas (or 7.0 million gallons of LPG) and 1.6 million gallons of distillate oil except in the counties of Cherokee, Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Paulding, and Rockdale (13 county ozone nonattainment area), where fuel usage is limited to 450 million cubic feet of natural gas (or 3.5 million gallons of LPG) and 800,000 gallons of distillate oil. Monitoring and record keeping requirements include maintaining a log of monthly fuel usage.

—*Rule 391–3–1–.03(11)(b)2:* A new subsection, (b)2, is added to establish Permit by Rule standards for applicable facilities with fuel-burning equipment burning natural gas/LPG and/or residual oil. Applicable facilities must meet the following conditions. During any 12 consecutive months, annual facility fuel usage is limited to 1,000 million cubic feet of natural gas (or 7.5 million gallons of LPG) and 400,000 gallons of residual fuel oil except in the 13 county ozone nonattainment area, where fuel usage is limited to 400 million cubic feet of natural gas (or 3.2 million gallons of LPG) and 400,000 gallons of residual fuel oil. Monitoring and record keeping requirements include maintaining a log of monthly fuel usage.

—*Rule 391–3–1–.03(11)(b)3:* A new subsection, (b)3, is added to establish Permit by Rule standards for applicable facilities that operate fuel-burning equipment for on-site power generation. Applicable facilities must meet the following conditions. During any 12 consecutive months, a facility's power generation is limited to a total of no more than 6.7 million horsepower-hours except in the 13 county ozone nonattainment area, where the total is no more than 3.35 million horsepower-hours. Monitoring and record keeping

requirements include maintaining a log of the monthly total horsepower-hours for the facility based on the number of hours of operation of each unit per month multiplied by the maximum horsepower rating of that unit.

—*Rule 391–3–1–.03(11)(b)4:* A new subsection, (b)4, is added to establish Permit by Rule standards for applicable concrete mixing plants, which must meet the following conditions to operate under the Permit by Rule. Production on the plant site is limited to 600,000 cubic yards during any 12 consecutive months. Monitoring and record keeping requirements include maintaining a log of the plant's monthly production.

—*Rule 391–3–1–.03(11)(b)5:* A new subsection, (b)5, is added to establish Permit by Rule standards for applicable hot mix asphalt plants, which must meet the following conditions to operate under the Permit by Rule. New asphalt plants (which commenced construction or modification after June 11, 1973), permitted to burn natural gas/LPG and/or distillate oil only must maintain a log of the monthly production and hours of operation and, during any 12 consecutive months, must limit production to 400,000 tons and operation to 3,000 hours. During any 12 consecutive months, new and existing asphalt plants permitted to burn natural gas/LPG, distillate oil, and residual oil in any combination must limit: production to 200,000 tons, operation to 3,000 hours, fuel oil usage to 678,000 gallons, and fuel sulfur content to less than or equal to 1.5%. Monitoring and record keeping requirements for these plants include maintaining fuel oil certifications showing sulfur content less than or equal to 1.5% and a log of production, hours of operation, and monthly fuel use.

—*Rule 391–3–1–.03(11)(b)6:* A new subsection, (b)6, is added to establish Permit by Rule standards for applicable cotton ginning operations. To operate under the Permit by Rule, applicable facilities must limit production to 65,000 standard bales of cotton during any 12 consecutive months and maintain a log of the monthly production.

—*Rule 391–3–1–.03(11)(b)7:* A new subsection, (b)7, is added to establish Permit by Rule standards for applicable coating and/or gluing operations. Applicable facilities must meet the monitoring and record keeping requirements and declare which of the four, following options will be met to operate under the Permit by Rule. The options are: (1) Consumption of any Volatile Organic Compound (VOC) and/or Hazardous Air Pollutant (HAP) containing materials shall be less than 20,000 pounds during any 12 consecutive months; (2) usage of coating, gluing, cleaning, and washoff materials shall be less than 250 total gallons each month; (3) usage of coating, gluing, cleaning, and washoff materials shall be less than 3,000 total gallons per rolling 12-month period; or (4) usage of materials containing less than five tons of any one HAP per rolling 12-month period, less than 12.5 tons of any combination of HAPs per rolling 12-month period, less than 25 tons of VOC per rolling 12-month period for sources located in the 13 county ozone nonattainment area, and less than 50 tons of VOC per rolling 12-month period for facilities not located in the 13 county ozone nonattainment area.

—*Rule 391–3–1–.03(11)(b)8:* A new subsection, (b)8, is added to establish Permit by Rule standards for applicable printing operations, which must meet the following conditions to operate under the Permit by Rule. The consumption of any VOC and/or HAP emitting materials (including but not limited to inks, thinners, and solvents) by the facility is limited to 20,000 pounds during any 12 consecutive months. Monitoring and record keeping requirements include maintaining a log of the monthly consumption of VOC and/or HAP containing material.

—*Rule 391–3–1–.03(11)(b)9:* A new subsection, (b)9, is added to establish Permit by Rule standards for applicable non-reactive mixing operations, which must meet the following conditions to operate under the Permit by Rule. Materials mixed are limited to 500 tons during any 12 consecutive months, mixing/blending tanks must be equipped with lids, mixing tanks must be maintained at a temperature of less than 150 degree Fahrenheit, and tank lids must be closed at all times during operation except when charging raw materials, retrieving samples, or discharging finished product. Monitoring and record keeping requirements include maintaining a monthly log of materials mixed.

—*Rule 391–3–1–.03(11)(b)10:* A new subsection, (b)10, is added to establish Permit by Rule standards for applicable fiberglass molding and forming operations, which must meet the following conditions to operate under the Permit by Rule. During any 12 consecutive months, annual facility material usage (i.e., the combined weight of polyester resin and gel coat) is limited to 89,000 pounds for any combination of hand and spray lay-up operations or 120,000 pounds for spray lay-up operations only. Monitoring and record keeping requirements include maintaining a log of the combined monthly usage of polyester resin and gel coat.

—*Rule 391–3–1–.03(11)(b)11:* A new subsection, (b)11, is added to establish Permit by Rule standards for applicable peanut/nut shelling operations, which must meet the following conditions to operate under the Permit by Rule. During any 12 consecutive months, facility process input is limited to 130,000 tons of unshelled nuts and annual hours of operation shall not exceed 5,000 hours. Monitoring and record keeping requirements include maintaining a log of the monthly unshelled peanuts/nuts processed.

II. Final Action

The EPA is approving the aforementioned changes to the Georgia SIP because they are consistent with Agency policy and the Clean Air Act as amended in 1990. The EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective May 12, 2000 without further notice unless the Agency receives adverse comments by April 12, 2000.

If the EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on May 12, 2000.

III. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies 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.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). For the same reason, this rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This 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. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988), by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. section 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. section 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 12, 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 52

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: February 14, 2000.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

Accordingly, for the reasons set forth in the preamble, Part 52 of chapter I, title 40, Code of Federal Regulations, is amended as follows:

PART 52—[AMENDED]

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

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

Subpart—L—Georgia

§ 52.570 [AMENDED]

2. In § 52.570, a. Adding in numerical order an entry for ''391–3–1–.03(11)'' to the table in paragraph (c).

b. Revising the entries for ''391–3–1–.02(3)'', and ''391–3–1–.02(6)'' in the table to paragraph (c).

§ 52.570 Identification of plan.

* * * * *

(c)

EPA APPROVED GEORGIA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
391–3–1–.02(3)	Sampling	12/25/97	3/13/00	
*	*	*	*	*
391–3–1–.02(6)	Source Monitoring	12/25/97	3/13/00	
*	*	*	*	*
391–3–1–.03(11)	Permit by Rule	12/25/97	3/13/00	
*	*	*	*	*

[FR Doc. 00–5386 Filed 3–10–00; 8:45 am]
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD–FRL–6549–3]

RIN 2060–AF92

Standards of Performance for New Stationary Sources: Industrial-Commercial-Institutional Steam Generating Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; corrections.

SUMMARY: On February 12, 1999 (64 FR 7458), we promulgated final rule amendments to reduce unnecessary reporting and recordkeeping burdens due to regulations implementing the Clean Air Act (CAA). These final rule corrections relating to standards of performance for industrial-commercial-institutional steam generating units serve to correct an error in the final rule amendments as promulgated on February 12, 1999.

EFFECTIVE DATE: March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Fred L. Porter, Combustion Group, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–5251, facsimile: (919) 541–5450, electronic mail address: *porter.fred@epa.gov.*

SUPPLEMENTARY INFORMATION: Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because we are merely redesignating one paragraph and then inserting another paragraph which had been deleted unintentionally. Thus, notice and public procedures are unnecessary, and we find that this constitutes good cause under 5 U.S.C. 553(b)(B).

I. What Is the Background for the Correction?

On February 12, 1999 (64 FR 7458), we promulgated a number of amendments to rules under 40 CFR parts 51, 60, 61, and 63, to reduce unnecessary recordkeeping and reporting burdens due to regulations implementing the CAA. One of these amendments was to add paragraph (s) to § 60.49b, Reporting and Recordkeeping Requirements, Subpart Db—Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units. As a paragraph (s) already existed, the amendment unintentionally replaced the existing paragraph (s) with a new paragraph (s).

The existing paragraph (s) provided a facility specific nitrogen oxides standard for the C.AOG incinerator at the Cytec Industries, Fortier plant in Westwego, Louisiana. By unintentionally replacing the existing paragraph (s) with a new paragraph (s), this facility specific nitrogen oxides standard was mistakenly deleted.

To have avoided this error, we should have designated the new paragraph (s) as a new paragraph (w). Today's corrections accomplish this as follows.

First, we amend the new paragraph (s) by replacing it with the old paragraph (s). This corrects the unintentional deletion of the facility specific nitrogen oxides standard for the C.AOG incinerator at the Cytec Industries Fortier plant in Westwego.

Second, we amend § 60.49b, Reporting and Recordkeeping Requirements, by adding a new paragraph (w). This new paragraph (w) is nothing more than the paragraph (s) which was included in the February 12, 1999 action. By adding it as paragraph (w), we correctly implement the February 12, 1999 action to reduce the reporting and recordkeeping burden.

II. What Are the Impacts Associated With the Corrections?

This action consists of a correction of our intent at the time of promulgation of the February 12, 1999 amendments to 40 CFR parts 51, 60, 61, and 63. The correction has no impact.

III. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is, therefore, not subject to review by the Office of Management and Budget. Because we have made a ''good cause'' finding that this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA. This rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This 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).

This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant. This action does not involve technical standards; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule also does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994).

In issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996). The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The EPA's compliance with these statutes and Executive Orders for the underlying rule is discussed in the March 29, 1996 **Federal Register** document (61 FR 14029).

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. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the Congressional Review Act if the agency makes a good cause

finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement (5 U.S.C. 808(2)).

As stated previously, we have made such a good cause finding, including the reasons therefore, and established an effective date of March 13, 2000. The 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 action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Nitrogen oxides, Recordkeeping and reporting requirements.

Dated: March 2, 2000.

Robert Perciasepe,

Assistant Administrator, Office of Air and Radiation.

For the reasons set out in the preamble, title 40, chapter I, part 60, of the Code of Federal Regulations is amended as follows:

PART 60—[AMENDED]

1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401–7601.

Subpart Db—Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units

2. Section 60.49b is amended by revising paragraph (s) and adding paragraph (w) to read as follows:

§ 60.49b Reporting and recordkeeping requirements.

* * * * *

(s) Facility specific nitrogen oxides standard for Cytec Industries Fortier Plant's C.AOG incinerator located in Westwego, Louisiana:

(1) *Definitions.*

Oxidation zone is defined as the portion of the C.AOG incinerator that extends from the inlet of the oxidizing zone combustion air to the outlet gas stack.

Reducing zone is defined as the portion of the C.AOG incinerator that extends from the burner section to the inlet of the oxidizing zone combustion air.

Total inlet air is defined as the total amount of air introduced into the C.AOG incinerator for combustion of natural gas and chemical by-product waste and is equal to the sum of the air flow into the reducing zone and the air flow into the oxidation zone.

(2) *Standard for nitrogen oxides.* (i) When fossil fuel alone is combusted, the nitrogen oxides emission limit for fossil fuel in § 60.44b(a) applies.

(ii) When natural gas and chemical by-product waste are simultaneously combusted, the nitrogen oxides emission limit is 289 ng/J (0.67 lb/million Btu) and a maximum of 81 percent of the total inlet air provided for combustion shall be provided to the reducing zone of the C.AOG incinerator.

(3) *Emission monitoring.* (i) The percent of total inlet air provided to the reducing zone shall be determined at least every 15 minutes by measuring the air flow of all the air entering the reducing zone and the air flow of all the air entering the oxidation zone, and compliance with the percentage of total inlet air that is provided to the reducing zone shall be determined on a 3-hour average basis.

(ii) The nitrogen oxides emission limit shall be determined by the compliance and performance test methods and procedures for nitrogen oxides in § 60.46b(i).

(iii) The monitoring of the nitrogen oxides emission limit shall be performed in accordance with § 60.48b.

(4) *Reporting and recordkeeping requirements.* (i) The owner or operator of the C.AOG incinerator shall submit a report on any excursions from the limits required by paragraph (a)(2) of this section to the Administrator with the quarterly report required by paragraph (i) of this section.

(ii) The owner or operator of the C.AOG incinerator shall keep records of the monitoring required by paragraph (a)(3) of this section for a period of 2 years following the date of such record.

(iii) The owner of operator of the C.AOG incinerator shall perform all the applicable reporting and recordkeeping requirements of this section.

* * * * *

(w) The reporting period for the reports required under this subpart is each 6 month period. All reports shall be submitted to the Administrator and shall be postmarked by the 30th day following the end of the reporting period.

[FR Doc. 00–5797 Filed 3–10–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 68

[FRL–6550–1]

RIN 2050–AE74

Amendments to the List of Regulated Substances and Thresholds for Accidental Release Prevention; Flammable Substances Used as Fuel or Held for Sale as Fuel at Retail Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is modifying its chemical accident prevention regulations to conform to the fuels provision of the recently enacted Chemical Safety Information, Site Security and Fuels Regulatory Relief Act (Pub. L. 106–40). In accordance with the new law, today's rule revises the list of regulated flammable substances to exclude those substances when used as a fuel or held for sale as a fuel at a retail facility. EPA is also announcing there will be no further action on a previous proposal concerning flammable substances, since the new law resolves the issue addressed by the proposal.

DATES: Effective March 13, 2000.

ADDRESSES: Docket. Supporting material used in developing the final rule is contained in Docket No. A–99–36. The docket is available for public inspection and copying between 8:00 am and 5:30 pm, Monday through Friday (except government holidays) at EPA's Air Docket, Room 1500, Waterside Mall, 401 M Street, SW, Washington, DC 20460; phone number: 202–260–7548. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Breeda Reilly, Chemical Emergency Preparedness and Prevention Office, Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Ave, NW (5104), Washington, DC 20460, (202) 260–0716.

SUPPLEMENTARY INFORMATION:

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I. Introduction and Background

A. Statutory Authority

This rule is being issued under section 112(r) of the Clean Air Act (CAA) as amended by the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act (the Act), which President Clinton signed into law on August 5, 1999. Section 2 of the Act immediately removed EPA's authority to ''list a flammable substance when used as a fuel or held for sale as a fuel at a retail facility * * * solely because of the explosive or flammable properties of the substance, unless a fire or explosion caused by the substance will result in acute adverse health effects from human exposure to the substance, including the unburned fuel or its combustion byproducts, other than those caused by the heat of the fire or impact of the explosion.''

The Act defines ''retail facility'' as ''a stationary source at which more than one-half of the income is obtained from direct sales to end users or at which more than one-half of the fuel sold, by volume, is sold through a cylinder exchange program.''

B. Background on Chemical Accident Prevention Regulations

CAA section 112(r) contains requirements for the prevention and mitigation of accidental chemical releases. The focus is on those chemicals that pose the greatest risk to public health and the environment in the event of an accidental release. Section 112(r)(3) mandates that EPA identify at least 100 such chemicals and promulgate a list of ''regulated substances'' with threshold quantities. Section 112(r)(7) directs EPA to issue regulations requiring stationary sources that contain more than a threshold quantity of a regulated substance to develop and implement a risk management program and submit a risk management plan (RMP).

EPA promulgated the initial list of regulated substances on January 31, 1994 (59 FR 4478) (the ''List Rule''). The Agency identified two categories of regulated substances—toxic and flammable—and listed substances accordingly. EPA included 77 chemicals on the toxic substances list based on each chemical's acute toxicity and several other factors—the chemical's physical state, physical/chemical properties and accident history—relevant to the likelihood that an accidental release of the chemical would lead to significant offsite consequences. The Agency also placed 63 substances on the flammable substances list, including vinyl chloride, a substance mandated for listing by Congress. EPA selected chemicals for the flammable substances list based on their flammability rating and the other factors related to likelihood of significant offsite consequences.

Of the originally listed substances, 14 met the criteria for both toxic and flammable substances (arsine, cyanogen chloride, diborane, ethylene oxide, formaldehyde, furan, hydrocyanic acid, hydrogen selenide, hydrogen sulfide, methyl chloride, methyl mercaptan, phosphine, propyleneimine, and propylene oxide). EPA placed these 14 substances on only the toxic substances list, because their toxicity poses the greater threat to human health and the environment.

Following promulgation of the List Rule, EPA issued a rule establishing the accidental release prevention requirements on June 20, 1996 (61 FR 31668) (''the RMP Rule''). Together these rules are codified at 40 CFR part 68.

In accordance with section 112(r)(7), the RMP rule requires that any stationary source with more than a threshold quantity of a regulated substance in a process develop and implement a risk management program and submit an RMP describing the source's program as well as its five-year accident history and potential offsite consequences. The rule further provides that RMPs be submitted by June 21, 1999 for sources with more than a threshold quantity of a regulated substance in a process by that date, or within a specified time of the source first exceeding the applicable threshold.

EPA has amended the List and RMP Rules several times. On August 25, 1997 (62 FR 45132), EPA amended the List Rule to change the listed concentration of hydrochloric acid. On January 6, 1998 (63 FR 640), EPA again amended the List Rule to delist Division 1.1 explosives (classified by the Department of Transportation (DOT)), to clarify certain provisions related to regulated flammable substances, and to clarify the transportation exemption. EPA amended the RMP Rule on January 6, 1999 (64 FR 964) to add several mandatory and optional RMP data elements, to establish procedures for protecting confidential business information, to adopt a new industry classification system and to make technical corrections and clarifications. EPA also amended the RMP Rule on May 26, 1999 (64 FR 28696) to modify the requirements for conducting worst case release scenario analyses for flammable substances and to clarify its interpretation of CAA sections 112(1) and 112(r)(11) as they relate to DOT requirements under the Federal Hazardous Transportation Law.

II. Discussion of Modification

A. Affected Substances

The new Act provides that EPA shall not list a flammable substance when used as a fuel,[1] or held for sale as a fuel at a retail facility solely because of its explosive or flammable properties, except under certain circumstances. The purpose of today's rule is to revise the List Rule as needed to conform to the Act.

As described above, the List Rule currently contains two lists—one of toxic substances and one of flammable substances. The toxic substances list contains those chemicals that meet the criteria listing as toxic substances, even if they also meet the criteria for listing as flammable substances. Accordingly, every chemical on the toxic substances list was listed for its toxicity at least and not solely because of its explosive or flammable properties. The substances on the toxics list are thus not affected by the new Act.

The substances on the flammables list, on the other hand, are listed ''solely'' because they meet a certain flammability rating, taking other risk factors into account. In deciding what flammable substances to list, EPA concentrated on those substances that have the potential to result in significant offsite consequences. Accidents involving flammable substances may lead to vapor cloud explosions, vapor cloud fires, boiling liquid expanding vapor explosions (BLEVEs), pool fires, and jet fires, depending on the type of substance involved and the

[1] EPA has received a number of questions as to whether the fuel use exclusion is available only to retail facilities. EPA believes that the statute and legislative history are clear that the fuel use exclusion is available to any facility that uses a flammable substance as a fuel.

circumstances of the accident. Historically, flammable substance accidents having significant offsite impacts involved either vapor cloud explosions at refineries and chemical plants, or BLEVEs at sources storing large quantities of flammable substances. Vapor cloud explosions produce blast waves that potentially can cause offsite damage and kill or injure people. High overpressure levels can cause death or injury as a direct result of an a explosion; such effects generally occur close to the site of an explosion. People can also be killed or injured because of indirect effects of the blast (*e.g.,* collapse of buildings, flying glass or debris); these effects can occur farther from the site of the blast.

By contrast, the effects of vapor cloud fires, in which the vapor cloud burns but does not explode, are limited primarily to the area covered by the burning cloud. BLEVEs, which generally involve the rupture of a container, can cause container fragments to be thrown substantial distances; such fragments have the potential to cause damage and injury.

Thermal radiation is the primary hazard of pool and jet fires. The potential effects of thermal radiation generally do not extend for as great a distance as those of blast waves and are related to the duration of exposure; people at some distance from a fire would likely be able to escape.

Based on this analysis and available accident history data, the Agency concluded that vapor cloud explosions and BLEVEs pose the greatest potential hazard from flammable substances to the public and environment. For purposes of the List Rule, EPA consequently focused on those chemicals with the potential to result in vapor cloud explosions or BLEVEs in the event of an accidental release. The Agency determined that chemicals meeting the highest flammability rating of the National Fire Protection Agency (NFPA) had this potential and used that rating as the principal criterion for including chemicals on the flammable substances list.

The other factors EPA considered in listing flammable substances—physical state, physical/chemical properties and accident history—all relate to a chemical's potential to be accidentally released in a way that could lead to a vapor cloud explosion or BLEVE. In short, the Agency included chemicals on the flammable substances list ''solely'' because of their explosive potential, a basis now disallowed by the new Act for flammable substances when used as a fuel or held for sale as a fuel at a retail facility.

The new Act nevertheless allows EPA to list a flammable substance when used as a fuel, or held for sale as a fuel where a fire or explosion caused by the substance will result in acute adverse health effects from human exposure to the substance or its combustion byproducts. EPA believes, however, that no listed substances on the flammable substances list is a candidate for this exception. As noted above, flammable substances that meet the listing criteria for toxic substances are on the toxic substances list only. Therefore, none of the chemicals on the flammable substances list will qualify for the exception based on acute health effects from exposure to the substance itself.

Further, combustion byproducts are generally not relevant to listing flammable substances. For hydrocarbons, including the listed flammable substances commonly used as fuels, typical combustion products include water vapor, carbon dioxide, carbon monoxide, and relatively small amounts of other oxidized inorganic substances and do not meet the listing criteria for toxic substances. Several other listed flammable substances may result in combustion byproducts that meet the listing criteria for toxic substances, but these substances are not commonly used as fuels. Further, any toxic combustion byproducts will be a fraction of the total mass and not likely to exceed the applicable threshold for coverage by the RMP rule. Quantities below the threshold are unlikely to have significant offsite consequences.

For these reasons, EPA believes that none of the listed flammable substances meet the new statute's test for listing fuels. Consequently, all of the listed flammable substances are potentially affected by the Act.

B. Use or Sale as a Fuel

The Act prohibits the listing of flammable substances ''when used as a fuel or held for sale as a fuel at a retail facility.'' In limiting EPA's authority to list flammable substances used as a fuel, or sold as a fuel at retail facilities, Congress sought greater consistency between the RMP program and the Process Safety Management (PSM) Standard implemented by the Occupational Health and Safety Administration (OSHA). OSHA's PSM Standard is the workplace counterpart of EPA's RMP program. PSM requirements protect workers from accidental releases of highly hazardous substances in the workplace, while the RMP rule protects the public and environment from the offsite consequences of those releases.

The PSM and RMP programs are similar in many ways, covering mostly the same chemicals. Establishments subject to the PSM Standard must comply with the prevention program requirements which are the same as the RMP rule's Program 3 requirements (subpart D of the Part 68 regulations). However, OSHA provides an exemption from the PSM Standard for hydrocarbon fuels used solely for workplace consumption as a fuel (*e.g.,* propane used for comfort heating), if such fuels are not part of a process containing another highly hazardous chemical covered by the standard. It also exempts such substances when sold by retail facilities.

The two prongs of the limitation on EPA's authority to list flammable substances (*i.e.,* use as a fuel or held for sale as a fuel by a retail facility) largely follow the OSHA exemptions relating to fuel. EPA will therefore look to OSHA precedent and coordinate with OSHA in interpreting and applying the limitations to the extent they parallel OSHA's exemptions. For example, the new Act does not define the term ''fuel,'' but OSHA has given ''fuel'' its ordinary meaning in applying the PSM fuel-related exemptions. Webster's Ninth New Collegiate Dictionary (1990) defines fuel as ''a material used to produce heat or power by burning,'' and EPA has no reason to believe that ''fuel'' as used by the new Act should be defined differently.

Using the ordinary meaning of fuel, EPA reviewed the chemicals on its flammable substances list to determine which are used as fuel. Several of the listed substances are typically used as fuel, including propane, liquified petroleum gas (propane and/or butane often with small amounts of propylene and butylene); hydrogen; and gaseous natural gas (methane). EPA is aware of the possibility of other flammable substances being used as a fuel in particular circumstances. The following is a list of regulated flammable substances that EPA believes have been used as a fuel.

TABLE 1.—LIST OF COMMON FUELS

Chemical name	CAS No.
Acetylene [Ethyne]	74–86–2
Butane	106–97–8
1-Butene	106–98–9
2-Butene	107–01–7
Butene	25167–67–3
2-Butene-cis	590–18–1
2-Butene-trans [2-Butene, (E)]	624–64–6
Ethane	74–84–0
Ethylene [Ethene]	74–85–1
Hydrogen	1333–74–0

TABLE 1.—LIST OF COMMON FUELS—Continued

Chemical name	CAS No.
Isobutane [Propane, 2-methyl-]	75–28–5
Isopentane [Butane, 2-methyl-]	78–78–4
Methane	74–82–8
Pentane	109–66–0
1-Pentene	109–67–1
2-Pentene, (E)-	646–04–8
2-Pentene, (Z)-	627–20–3
Propane	74–98–6
Propylene	115–07–1

At the same time, all of the substances listed above are sometimes used as feedstock chemicals instead of fuel. Further, every listed flammable substance has the potential to be used as fuel, since it may be burned to create heat or power. Consequently, the List Rule cannot be conformed to the new law by deleting particular chemicals from the flammable substances list. Instead, EPA has added a provision to part 68, Subpart F (listing regulated substances) that excludes flammable substances when used as a fuel, or held for sale as a fuel at a retail facility from the list of regulated substances. The Agency has also annotated both versions of the flammable substances list (one version lists the substances alphabetically, the other by Chemical Abstract Service (CAS) number) to indicate that any flammable substance, when used as a fuel, or held for sale as a fuel at a retail facility, is excluded from the list.

As previously mentioned, the Act defines a ''retail facility'' as a stationary source at which more than one-half of the income is obtained from direct sales to end users or at which more than one-half of the fuel sold, by volume, is sold through a cylinder exchange program. The income test portion of the definition follows the definition of ''retail facility'' used by the OSHA in enforcing its PSM Standard (OSHA Directive CPL2–2.45A CH–1-Process Safety Management of Highly Hazardous Chemicals—Compliance Guidelines and Enforcement Procedures): ''an establishment that would otherwise be subject to the PSM standard at which more than half of the income is obtained from direct sales to end users.''

The effect of the income test portion of the new Act's retail facility definition is to provide relief to the same facilities that qualify for OSHA's retail facility exemption, and conversely, to require facilities that do not quality for OSHA's exemption, and thus are subject to the PSM program, to also be subject to the RMP program, provided no other exemption applies. EPA will consequently coordinate its interpretation and application of the income test portion of the retail facility definition with OSHA.

The second portion of the retail facility definition—concerning cylinder exchange programs—goes beyond that developed by OSHA and so provides greater relief than the OSHA retail facility exemption. In general, cylinder exchange programs represent a link between major retailers (for example, hardware stores, home centers and convenience stores) and propane distributors. The retailer typically provides space outdoors and manages transactions with end users such as homeowners; the propane distributor typically provides racks, filled cylinders, promotional materials, and training to the retailer's employees. Propane distributors may have several markets, including cylinder exchange; temporary heat during construction; commercial cooking, heating, and water heating; fuel to power vehicles, forklifts, and tractors; agricultural drying and heating; and others.

For propane or other fuel distributors which meet the definition of retail facility through either direct sales to end users or a cylinder exchange program, the fuel they hold is no longer covered by the RMP rule. For propane or other fuel distributors that do not meet the definition, the fuel they hold is *not* exempted from the RMP rule by the new law or today's action. EPA has added to part 68 a definition of ''retail facility'' that mirrors the statutory definition.

III. Previous Actions Related to Fuels

A. Previous Proposed Rule and Administrative Stay

After promulgating the RMP rule, EPA became aware that a significant number of small, commercial sources use regulated flammable substances, particularly propane, as fuel in quantities in excess of the applicable threshold quantity (10,000 lbs in a process). As a result, these small sources, including farms, restaurants, hotels, and other commercial operations, were covered by the RMP requirements. Many of these sources are in rural locations where accidental releases are less likely to have significant offsite consequences. In light of the purpose of section 112(r)—to focus comprehensive accident prevention requirements on the most potentially dangerous sources—EPA reexamined whether farms and other small fuel users should be covered by the RMP rule.

On May 28, 1999, EPA issued a proposed amendment to the List Rule to create an exemption from threshold quantity determinations for processes containing 67,000 pounds or less of a listed flammable hydrocarbon fuel (64 FR 29171). EPA estimated that the proposed amendment, if promulgated, would reduce the universe of regulated sources from 69,485 to 50,300. At the same time (64 FR 29167), EPA published a temporary stay of the effectiveness of the RMP rule for those sources that would be exempted under the proposal. This stay, which expired on December 21, 1999, was in addition to, and did not affect, a stay of the rule for propane processes entered by the U.S. Court of Appeals for the D.C. Circuit (See Litigation and Court Stay).

While EPA was seeking comment on the proposed rule, Congress also studied the fuel issue and considered ways to provide regulatory relief to fuel users and retailers. Congress was concerned that the RMP rule placed a significant regulatory burden on facilities that were not previously covered by the OSHA PSM Standard. Congress decided to amend section 112(r) of the CAA to remove EPA's authority to list any flammable substance when used as a fuel, or held for sale as a fuel at a retail facility, except under specified circumstances.

While the new law and EPA's proposed rule and temporary stay all offer regulatory relief with respect to fuels, the new law reaches farther than EPA's actions. The new law provides relief for all fuels, not just hydrocarbon fuels. It also removes fuels from the RMP program regardless of the amount a stationary source uses or holds for retail sale, whereas EPA's proposal and stay only affects sources having no more than 67,000 lbs of fuel in a process. The new law does limit relief for fuel sellers to fuel retailers, whereas EPA's stay does not distinguish between types of fuel sellers. However, EPA believes that virtually no fuel wholesaler qualifies for the Agency's stay because wholesalers typically hold fuel in quantities far greater than 67,000 lbs. Even if a few wholesalers would have benefitted from EPA's proposed rule, the Agency believes that Congress has addressed the issue of how to provide regulatory relief to fuel users and sellers, and that EPA should thus implement Congress' approach without making exceptions to it.

Therefore, EPA is today withdrawing the proposed rule as it takes final action to amend the List Rule to conform to the new law. As previously mentioned, EPA's temporary stay of effectiveness expired on December 21, 1999.

B. Litigation and Court Stay

Following promulgation of the RMP rule in 1996, several petitions for judicial review of the rule were filed, including one by the National Propane Gas Association (NPGA). At NPGA's request, the U.S. Court of Appeals for the District of Columbia Circuit entered a temporary stay of the RMP rule as it applies to propane (Chlorine Institute v. Environmental Protection Agency, No. 96–1279, and consolidated cases (Nos. 96–1284, 96–1288, and 96–1290), Order of April 27, 1999). The judicial stay meant that any stationary source, or process at a stationary source, subject to the RMP rule only by virtue of propane was not subject to the RMP rule requirements, including those calling for a hazard assessment, accident prevention program, emergency response planning, and submission of (or inclusion in) an RMP by June 21, 1999.

On Jan. 5, 2000, the Court lifted its temporary stay in response to a joint motion by EPA and NPGA to dismiss the case and lift the stay. As of that date, part 68, as revised by the Act, is in effect with respect to any facility having more than the 10,000 pounds of propane in a process unless the facility uses the propane as a fuel or sells the propane as a retail facility. Facilities that use propane in their manufacturing processes or hold propane for purposes other than on-site fuel use at a non-retail facility must immediately come into compliance with Section 112(r) of the CAA.

IV. RMP's Submitted Prior to Today's Action

EPA has received about 1,966 RMP's that address one or more of the 19 listed flammable substances that EPA has identified as likely to be used as a fuel. EPA cannot unilaterally delete any of the RMP's submitted for flammable substances from the RMP database, however, because the determination of whether a facility is eligible for the exclusion is based on information which is not reported to EPA, namely, whether a facility uses the flammable substance as a fuel or holds it for retail sale. Instead, EPA plans to send a letter to each of the 1,966 facilities to notify them of the exclusion, to ask them to evaluate their eligibility for the exclusion, and to describe the process the facilities should use to request a withdrawal of or to update these RMP's.

For about 950 of the 1,966 RMP's that reported a potential flammable fuel, only one chemical is reported. For these cases, the facilities will be asked to evaluate whether they qualify for the exclusion based on use or retail sales. If they determine that they do not qualify, no further action is required. If they determine that they do qualify, they may request that EPA withdraw their submission and EPA will delete it from the RMP database. Facilities will have the option of using the form that EPA developed to facilitate the withdrawal or simply stating their request in a letter. Alternatively, facilities can leave the RMP as a voluntary submission in the database and need not take further action.

The balance of the RMP's reported more than one substance. About 200 RMP's reported a toxic chemical substance in addition to the potential flammable fuel. For these cases, the facilities will be asked to evaluate whether their flammable substance qualifies for the exclusion based on use or retail sales. If they determine that they do not qualify, no further action is required. If they determine that they do qualify, they may resubmit their RMP, reporting only on the toxic substances. Alternatively, facilities can leave the original RMP including the flammable fuel submission in the database and need not take further action.

About 745 RMP's reported multiple flammable substances. For these cases, the facilities will be asked to evaluate whether each reported flammable substance qualifies for the exclusion based on use or retail sales. If they determine that none of their reported flammable substances qualify, no further action is required. If they determine that all of the reported substances qualify, they may request that EPA withdraw their submission and EPA will delete it from the RMP database. Facilities will have the option of using the formal withdrawal process or simply sending a letter. Alternatively, facilities can leave the RMP as a voluntary submission in the database and need not take further action. If they determine that only some of the flammable substances reported qualify, they will need to check their flammable worst case scenario and off-site consequence analysis (OCA). If their original worst case analysis is based on a flammable substance that is excluded, the facility should revise their RMP to provide appropriate OCA. Within its enforcement discretion, EPA plans to treat this similarly to the existing requirement to revise RMP's within 6 months of a process change, giving facilities 6 months to revise their RMP's. If their original worst case analysis is based on a flammable substance that is not excluded, the facility won't need to update their RMP, except as part of the regular reporting cycle.

V. Rationale for Issuance of Rule Without Prior Notice

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment.

EPA is taking this action without prior notice and opportunity to comment. As previously mentioned, section 2 of the new Act, which took effect on August 5, 1999, immediately removed EPA's authority to list flammable substances when used as a fuel, or held for sale as a fuel at a retail facility. Consequently, EPA's regulation containing the list of regulated substances subject to the RMP rule needs to be modified to reflect the new law.

EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because the Agency is codifying legislation which focuses clearly on a particular set of regulations and requires little interpretation by the Agency. In addition, EPA believes it is in the public interest to issue the revised list as soon as possible, to avoid confusion about the coverage of the RMP rule. As of August 5, 1999, there is no statutory basis for extending the RMP rule to listed flammable substances when used as a fuel, or held for sale as a fuel at a retail facility, except under certain circumstances. The Agency's rule should therefore be revised to reflect the change in authority as soon as possible. A comment period is unnecessary because today's action is nondiscretionary. A comment period would also be contrary to the public interest because the resulting delay would contribute to confusion about the coverage of the RMP rule. Thus, notice and public procedure are unnecessary and contrary to the public interest. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

The Agency is also issuing this rule with an immediate effective date. Since its effect is to relieve a restriction (*i.e.,* the requirement to comply with the RMP rule), EPA may make it effective upon promulgation. Further, EPA believes it is in the public interest to make it immediately effective, for the same reasons given above for dispensing with prior notice and comment.

VI. Summary of Revisions to Rule

This section summarizes the changes to the rule.

Section 68.3, Definitions, has been revised to add a definition of retail facility, as defined in the new law.

Section 68.126 has been added to create an exclusion for regulated flammable substances used as fuel or held for sale as fuel at retail facilities. The exclusion is derived from the new law.

In Section 68.130, footnotes have been added to Tables 3 and 4. These two tables list the regulated flammable substances and their threshold quantities. Table 3 lists the regulated flammable substances in alphabetical order while Table 4 lists them in CAS number order. The footnotes remind the reader of the exclusion for regulated flammable substances. The reference to each footnote appears as an asterisk following the term ''flammable substance'' in the titles of Tables 3 and 4.

VII. Administrative Requirements

A. Docket

The docket is an organized and complete file of all the information considered by the EPA in the development of this rulemaking. The docket is a dynamic file, because it allows members of the public and industries involved to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the proposed and promulgated rules and their preambles, the contents of the docket serve as the record in the case of judicial review. (See section 307(d)(7)(A) of the CAA.) The official record for this rulemaking has been established under Docket A–99–36, and is available for inspection from 8:00 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located at the address in **ADDRESSES** at the beginning of this document.

B. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

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

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

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

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

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

C. Executive Order 13045

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.

EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under Section 5–501 of the Order has the potential to influence the regulation.

This action is not subject to this Executive Order because it is not economically significant as defined in E.O. 12866, and because it does not establish an environmental standard intended to mitigate 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 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. This action reduces burden on flammable fuel users, which may include some sources owned or operated by Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

E. Executive Order 13132

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 Section 6 of 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 does not have federalism implications. It 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. Today's rule reduces the burden for those state, local,

or tribal governments that may own or operate sources that use flammable fuels. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

Under the Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601, *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the Agency is required to give special consideration to the effect of Federal regulations on small entities and to consider regulatory options that might mitigate any such impacts. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

Today's final rule is not subject to RFA, which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. The rule is subject to the APA, but as described in Section IV of this preamble, the Agency has invoked the ''good cause'' exemption under APA Section 553(b), which does not require notice and comment. Although this final rule is not subject to the RFA, EPA nonetheless has assessed the potential of this rule to adversely impact small entities subject to the rule. EPA does not believe the rule will adversely impact small entities. This action excludes flammable substances when used as a fuel, or held for sale as a fuel at a retail facility from the list of substances regulated by 40 CFR part 68, which will reduce burden on many small entities that otherwise would be covered by these requirements.

G. Paperwork Reduction Act

This action does not impose any new information collection burden. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations 40 CFR part 68 under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0144 (EPA ICR No.1656.06). EPA estimates a burden hour reduction of 70,400 hours.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15.

H. 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 their 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 regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives 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.

Because the Agency has made a ''good cause'' finding that this action is not subject to notice-and-comment requirements under the Administrative Procedures Act or any or any other statute (see Section IV of this preamble), it is not subject to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

Pursuant to Section 203 of UMRA, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. This rule does not contain any additional requirements, rather it reduces the burden on small governement sources that use flammable substances as fuel.

I. National Technology Transfer and Advancement Act

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) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

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). It takes effect today.

List of Subjects in 40 CFR Part 68

Environmental protection, Chemicals, Chemical accident prevention.

Dated: March 3, 2000.

Carol M. Browner,

Administrator.

For the reasons stated in the preamble, EPA amends 40 CFR part 68 as follows:

PART 68—[AMENDED]

1. The authority section for part 68 is revised to read as follows:

Authority: 42 U.S.C 7412(r), 7601 (a) (1).

Subpart A—[Amended]

2. Section 68.3 is amended to add the following definition in alphabetical order:

§ 68.3 Definitions.

* * * * *

Retail facility means a stationary source at which more than one-half of the income is obtained from direct sales to end users or at which more than one-half of the fuel sold, by volume, is sold through a cylinder exchange program.

* * * * *

Subpart F—[Amended]

3. Section 68.126 is added to subpart F to read as follows:

§ 68.126 Exclusion.

Flammable Substances Used as Fuel or Held for Sale as Fuel at Retail Facilities. A flammable substance listed in Tables 3 and 4 of § 68.130 is nevertheless excluded from all provisions of this part when the substance is used as a fuel or held for sale as a fuel at a retail facility.

4. Section 68.130 is amended by:

A. Revising the heading of Table 3;

B. Revising the notes to Table 3 and adding a new footnote 1;

C. Revising the heading to Table 4; and

D. Revising the notes to Table 4 and adding a new footnote 1.

The revisions and additions read as follows:

§ 68.130 List of substances.

* * * * *

TABLE 3 TO § 68.130.—LIST OF REGULATED FLAMMABLE SUBSTANCES [1] AND THRESHOLD QUANTITIES FOR ACCIDENTAL RELEASE PREVENTION

[Alphabetical Order–63 Substances]

*	*	*	*	*

[1] A flammable substance when used as a fuel or held for sale as a fuel at a retail facility is excluded from all provisions of this part (see § 68.126).

Note: Basis for Listing:
[a] Mandated for listing by Congress.
[f] Flammable gas.
[g] Volatile flammable liquid.

TABLE 4 TO § 68.130.—LIST OF REGULATED FLAMMABLE SUBSTANCES [1] AND THRESHOLD QUANTITIES FOR ACCIDENTAL RELEASE PREVENTION

[CAS Number Order–63 Substances]

*	*	*	*	*

[1] A flammable substance when used as a fuel or held for sale as a fuel at a retail facility is excluded from all provisions of this part (see § 68.126).

Note: Basis for Listing:
[a] Mandated for listing by Congress.
[f] Flammable gas.
[g] Volatile flammable liquid.

[FR Doc. 00–5935 Filed 3–10–00; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA No. 00–494, MM Docket No. 99–256; RM–9527]

Radio Broadcasting Services; Refugio and Taft, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 293C2 for Channel 291C3 at Refugio, Texas, reallots Channel 293C2 from Refugio, Texas, to Taft, Texas, and modifies the license for Station KTKY(FM) to specify operation on Channel 293C2 at Taft in response to a petition filed by Pacific Broadcasting of Missouri, L.L.C. *See* 64 FR 39963, July 23, 1999. The coordinates for Channel 293C2 at Taft are 27–52–00 and 97–13–08. We shall also allot Channel 291A to Refugio, Texas, at coordinates 28–21–58 and 97–19–11. Mexican concurrence has been received for the allotments at Refugio and Taft, Texas. With this action, this proceeding is terminated.

EFFECTIVE DATE: April 17, 2000.

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. 99–256, adopted February 23, 2000, and released March 3, 2000. 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

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 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Channel 291C3 and adding Channel 291A at Refugio and adding Taft, Channel 293C2.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 00–6052 Filed 3–10–00; 8:45 am]

BILLING CODE 6712–01–U

Proposed Rules

Federal Register
Vol. 65, No. 49
Monday, March 13, 2000

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 HOUSING AND URBAN DVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR Part 1750

RIN 2550–AA02

Risk-Based Capital

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Proposed rule; solicitation of reply comments.

SUMMARY: On April 13, 1999, the Office of Federal Housing Enterprise Oversight (OFHEO) published a notice of proposed rulemaking (NPR) entitled ''Risk-Based Capital'' in the **Federal Register** (64 FR 18083). That notice, known as NPR 2, is the second such proposal related to the development of a regulation to establish risk-based capital standards for the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal National Mortgage Association (Fannie Mae). NPR 2 sets forth the specifications for the risk-based capital stress test, completing OFHEO's risk-based capital proposal. OFHEO has requested electronic copies of the comments on NPR2 and will post all NPR2 comments on our web site www.ofheo.gov, as soon as practicable.

In today's notice, OFHEO is soliciting reply comments in response to comments addressing the proposed rule that were submitted by the March 10, 2000, deadline. OFHEO requests that such reply comments only respond to the submitted comments, and not repeat the initial comments at length. This decision to solicit reply comments will insure that all interested parties have ample opportunity to participate in the rulemaking process by providing meaningful comment on the various technical and policy issues involved in the development of the risk-based capital regulation.

DATES: Reply comments are due on or before April 14, 2000.

ADDRESSES: Send written comments to Alfred M. Pollard, General Counsel, Office of General Counsel, Office of Federal Housing Enterprise Oversight, 1700 G Street, NW., Fourth Floor, Washington, DC 20552. Written comments may also be sent by electronic mail to RegComments@OFHEO.gov.

FOR FURTHER INFORMATION CONTACT: Patrick J. Lawler, Associate Director of Policy Analysis and Research; Eric Bruskin, Deputy Associate Director of Risk Analysis and Model Development; or David A. Felt, Associate General Counsel, Office of Federal Housing Enterprise Oversight, 1700 G Street, NW., Fourth Floor, Washington, DC 20552, telephone (202) 414–3800 (not a toll-free number). The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

Dated: March 7, 2000.

Armando Falcon, Jr.,

Director, Office of Federal Housing Enterprise Oversight.

[FR Doc. 00–6065 Filed 3–10–00; 8:45 am]

BILLING CODE 4220–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–SW–65–AD]

Airworthiness Directives; Eurocopter Deutschland GMBH Model BO–105CB–5 and BO–105CBS–5 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to Eurocopter Deutschland GMBH (ECD) Model BO–105CB–5 and BO–105CBS–5 helicopters. That AD currently requires, before further flight, creating a component log card or equivalent record and determining the calendar age and number of flights on each tension-torsion (TT) strap. This action would establish a life limit for certain main rotor TT straps. This proposal is prompted by a need to establish a life limit for certain TT straps because of an accident in which a main rotor blade (blade) separated from an ECD Model MBB–BK 117 helicopter due to fatigue failure of a TT strap. The same part-numbered TT strap is used on the ECD Model BO–105 helicopters. The actions specified by this AD are intended to prevent fatigue failure, loss of a blade, and subsequent loss of control of the helicopter.

DATES: Comments must be received on or before May 12, 2000.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 99–SW–65–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (972) 641–3460, fax (972) 641–3527. This information may be examined at the FAA, Office of the Regional Counsel, Southwest Region, Room 663, Fort Worth, Texas.

FOR FURTHER INFORMATION CONTACT: Charles Harrison, Aerospace Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0110, telephone (817) 222–5128, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report

summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 99–SW–65–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 99–SW–65–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Discussion

On November 10, 1999, the FAA issued AD 99–24–05, Amendment 39–11429 (64 FR 62973, November 18, 1999), applicable to ECD Model BO–105CB–5 and BO–105CBS–5 helicopters. That AD currently requires, before further flight, creating a component log card or equivalent record and determining the calendar age and number of flights on each tension-torsion (TT) strap. AD 99–24–05 also requires inspecting and removing, as necessary, certain unairworthy TT straps. That action was prompted by an accident in which a blade separated from an ECD Model MBB–BK 117 helicopter due to fatigue failure of a TT strap. The same part numbered TT strap is also used on the ECD Model BO–105CB–5 and BO–105CBS–5 helicopters. The requirements of that AD are intended to prevent failure of a TT strap, loss of a blade, and subsequent loss of control of the helicopter.

Since the issuance of that AD, the FAA has determined the need to establish a life limit for the TT strap. ECD has issued Alert Service Bulletin BO 105 No. ASB–BO 105–10–113, Revision 1, dated August 31, 1999 (ASB), which specifies establishing a life limit. The ASB specifies that part number (P/N) 2604067 be renumbered as 117–14110 and P/N J17322–1 be renumbered as 117–14111. The ASB also specifies replacing TT strap, part number (P/N) 117–14110 and 117–14111, at intervals not to exceed 120 months after initial installation on any ECD Model BO–105CB–5, BO–105CBS–5, or MBB–BK 117 helicopter or every 25,000 flights, whichever occurs first. The LBA classified this ASB as mandatory and issued AD 1999–289/2, dated September 1, 1999, to ensure the continued airworthiness of these helicopters in the Federal Republic of Germany.

Since an unsafe condition has been identified on the MBB–BK–117 that is likely to exist or develop on the ECD Model BO–105CB–5 and BO–105CBS–5 helicopters, registered in the United States, the proposed AD would require establishing a life limit effective January 1, 2001, for the TT straps of 120 months or 25,000 flights, whichever occurs first.

The FAA estimates that 200 helicopters of U.S. registry would be affected by this proposed AD, that it would take approximately 16 work hours per helicopter to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $10,400 per helicopter. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $2,272,200.

The regulations proposed herein would 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. Therefore, it is determined that this proposal does not have federalism implications under Executive Order 13132.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–11429 (64 FR 62973, November 18, 1999), and by adding a new airworthiness directive (AD), to read as follows:

Eurocopter Deutschland GMBH: Docket No. 99–SW–65–AD. Supersedes AD 99–24–05, Amendment 39–11429, Docket No. 99–SW–58–AD.

Applicability: Model BO–105CB–5 and BO–105CBS–5 helicopters, certificated in any category.

Note 1: This AD applies to each helicopter identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For helicopters that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (e) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent fatigue failure of a TT strap, loss of a main rotor blade (blade), and subsequent loss of control of the helicopter, accomplish the following:

(a) On or before January 1, 2001, remove any TT strap, part number (P/N) 117–14110 or 117–14111, that has been in service 120 months since initial installation or accumulated 25,000 flights (a flight is a takeoff and a landing), on any Model BO–105CB–5, BO–105CBS–5, or MBB–BK–117 helicopter, and replace the TT strap with an airworthy TT strap.

(b) Before further flight,

(1) Create a component log card or equivalent record for each TT strap, P/N 2604067 or J17322–1, by:

(i) Reviewing the history of each helicopter and TT strap.

(ii) Determining the age since initial installation on any helicopter (age) and the number of flights on each TT strap.

(A) To determine the initial number of flights on a TT strap if the time-in-service (TIS) is known and if the number of flights is unknown, multiply the total number of hours TIS by 5 to obtain the number of flights.

(B) If a TT strap has been previously used at any time on Model BO–105 helicopters not affected by this AD, multiply the number of flights accumulated on those other models by a factor of 0.625 and add that result to the number of flights accumulated on the Model BO–105CB–5 and BO–105CBS–5 helicopters.

(iii) Entering both the age and the number of flights on the component log card or equivalent record.

(2) Remove any TT strap from service if:

(i) The total hours TIS or number of flights and age cannot be determined, or

(ii) The TT strap has either accumulated 25,000 or more flights or has an age equal to or greater than 120 months.

(3) Inspect any TT strap with an age less than 120 months that has accumulated less than 25,000 flights in accordance with paragraph 2.B.2 of the ''Accomplishment Instructions,'' of Eurocopter Deutschland GMBH Alert Service Bulletin BO 105 No. ASB–BO 105–10–113, Revision 1, dated August 31, 1999 (ASB).

(i) If a defect is found, remove the TT strap from service.

(ii) If no defect is found, reidentify TT strap P/N 2604067 or J17322–1 before installing in accordance with the ''Accomplishment Instructions,'' paragraph 2.B.1.2., of the ASB.

(c) When any TT strap is replaced because of age, usage, or defect, before further flight, reidentify the main rotor head and TT straps in accordance with the ''Accomplishment Instructions,'' paragraph 2.B.1.2., of the ASB.

(d) This AD revises the Airworthiness Limitations Section of the maintenance manual by establishing a life limit for the TT strap of 120 months or 25,000 flights, whichever occurs first.

(e) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Regulations Group, Rotorcraft Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Regulations Group.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Regulations Group.

(f) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the helicopter to a location where the requirements of this AD can be accomplished.

Note 3: The subject of this AD is addressed in the Luftfahrt Bundesamt (Federal Republic of Germany) AD 1999–289/2, dated September 1, 1999.

Issued in Fort Worth, Texas, on March 6, 2000.

Henry A. Armstrong,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 00–6037 Filed 3–10–00; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF STATE

22 CFR Part 22

[Public Notice 3248]

Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates

AGENCY: Bureau of Consular Affairs, State Department.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the Schedule of Fees for Consular Services. Specifically, it establishes a fee for the review of the Affidavit of Support, form I–864, when submitted in support of an application for immigration to the United States.

DATES: Written comments must be received on or before April 12, 2000.

ADDRESSES: Interested persons are invited to submit comments in duplicate to: Office of the Executive Director, Bureau of Consular Affairs, Department of State, Washington, D.C. 20520–4818; telefax (202) 647–3677.

FOR FURTHER INFORMATION CONTACT: Alcy Frelick, Office of the Executive Director, Bureau of Consular Affairs, Department of State; telefax (202) 647–3677; email address frelickar@state.gov.

SUPPLEMENTARY INFORMATION:

Background Authority To Assess Fees

Public Law 106–113, enacted November 29, 1999, authorizes the Secretary of State to charge and retain a fee for the processing of a sponsor's Affidavit of Support (I–864). The Secretary of State is also authorized under E.O. 10718 of June 27, 1957, to exercise the President's authority under 22 U.S.C. 4219 to prescribe the fees to be charged for official services performed by the Department of State. This authority has been delegated to the Undersecretary for Management. The Schedule of Fees for Consular Services is set forth in 22 CFR 22.1, as amended on December 1, 1999 (64 FR 66769). After an initial review of the costs, the fee for processing has been set initially at $50 per sponsor filing an Affidavit of Support, form I–864.

The Affidavit of Support Processing Fee

This rule amends the Schedule of Fees for Consular Services by adding a new item 61. ''Affidavit of Support Processing Fee.'' It establishes a fee for document review and for providing processing assistance for the Affidavit of Support form, I–864, to any sponsor or joint sponsor who provides an Affidavit of Support under section 213A of the Immigration and Nationality Act (8 U.S.C. 1183a) for an immigrant visa applicant to cover the estimated cost of its services. This fee will be used by the Department of State in assisting sponsors to properly complete such affidavit before it is forwarded to a consular post for adjudication by a consular officer in connection with an application for an immigrant visa. This fee will be in addition to, and separate from, any fee imposed for immigrant visa application processing and issuance. The new fee, which will be reviewed in light of experience, will recover only the costs of services related to assisting the sponsor or joint sponsor in completing the Affidavit of Support and in reviewing the documents for technical completeness; those costs are not recovered by the immigrant visa application processing and issuance fees.

This new fee will be charged only once to a sponsor or joint sponsor who files essentially duplicative Affidavits of Support in connection with immigrant visa applications for the spouse, parents and children of a petitioner who is required by the Immigration and Nationality Act to petition separately for them. No new fee will be assessed for essentially duplicative Affidavits of Support filed in support of additional members of one family, made up of parents and minor unmarried children, even if each member of the family is being processed individually for immigration to the United States or if the family member may have had a separate immigrant visa petition filed on his/her behalf.

The Department will assess one fee for each distinct Affidavit of Support (I–864) filed, whether it is filed by the primary sponsor or by a joint sponsor. If more than one Affidavit of Support is needed to fulfil the requirements of the law, the Department will assess one fee for each separate Affidavit of Support. A new fee will be assessed if a new Affidavit of Support is required in support of any application for immigration. (For example, if an additional Affidavit of Support would be needed from a joint sponsor for an application which has been rejected due to Section 212(a)(4), inability to qualify under the public charge provision of the Immigration Act). The fee is non-refundable as it is a processing fee.

The Department does not consider this rule to be a major rule for purposes of E.O. 12291. These changes to the regulations are hereby certified as not expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act, 5 U.S.C. 605(b). In addition, pursuant to the Small

Business Regulatory Fairness Act (U.S.C. Chapter 8), the Department has screened the Rule and determines that it is not a ''major rule,'' as defined in 5 U.S.C. 804(2). This rule does not impose information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C., Chapter 35. In accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Nor does the rule have federalism implications warranting the application of Executive Order No. 12372 and No.13132. This rule is exempt from E.O. 12866, but the Department has reviewed the rule to ensure consistency with the objectives of the Executive Order, as well as with E.O. 12988, and the Office of Management and Budget has determined this rule would not constitute a significant regulatory action under E.O. 12866. This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*) and Executive Order 12875.

This amendment is proposed to take effect June 1, 2000.

Proposed Rule

List of Subjects in 22 CFR Part 22

Passports and visas, Schedule of Consular Fees.

Accordingly, this rule proposes to amend 22 CFR part 22 as follows:

PART 22—[AMENDED]

1. The authority citation for part 22 continues to read as follows:

Authority: 8 U.S.C. 1153 note, 1351, 1351 note; 10 U.S.C. 214, 2504(a), 4201, 4206, 4215, 4219; 31 U.S.C. 9701; E.O. 10718, 22 FR 4632, 3 CFR, 1954–1958 Comp., p.382; E.O. 11295, 31 FR 10603, 3 CFR, 1966–1970 Comp., p. 570.

2. In Section 22.1, by adding item 61. to read as follows:

§ 22.1 Schedule of fees.

Item No.	Fee
* * * * *	
61. Affidavit of Support Processing Fee:	$50.000
* * * * *	

Dated: March 6, 2000.

Bonnie R. Cohen,

Under Secretary for Management.

[FR Doc. 00–6100 Filed 3–10–00; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. S–777]

RIN 1218–AB36

Ergonomics Program

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Proposed rule; additional information on informal public hearing.

SUMMARY: OSHA is announcing the final locations of the informal public hearing for its proposed Ergonomics Program standard which was published on November 23, 1999 (64 FR 65768).

DATES: The hearing will begin on Monday, March 13, 2000, in Washington, D.C. The hearing in Washington will run for 4 weeks through April 7. The hearing will resume on April 11, in Chicago, Illinois, and will continue there until April 21. The hearing will then resume in Portland, Oregon, on April 24 and run until May 3. The final week of the hearing will be May 8 through 12 in Washington, D.C. The hearing will begin at 9:30 a.m. on March 13; on subsequent days, the starting time will be 8:30 a.m. The hearing will ordinarily conclude by 6:00 p.m. each day; however, in order to assure orderly development of the record on any particular day, the Administrative Law Judge may extend the hearing that day. All questioning of public participants will be completed on the day the participants testify.

ADDRESSES: The March 13 through April 7 hearing in Washington will be in the Frances Perkins Building Auditorium in the U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. The hearing in Chicago will be held at the State of Illinois Building, James R. Thompson Center (Assembly Hall), 100 W. Randolph Street, in Chicago, Illinois. The hearing in Portland will be held at the Mark Hatfield Federal Court House, Courtroom #16, 1000 Southwest 3rd Avenue, in Portland, Oregon. The conclusion of the hearing from May 8 through 12 in Washington will be in the Frances Perkins Building, Room N–3437 A–D, 200 Constitution Avenue, NW, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: OSHA's Ergonomics Team at (202) 693–2116, or visit the OSHA Homepage at www.osha.gov.

Authority: This document was prepared under the direction of Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. It is issued under sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), Secretary of Labor's Order No. 6–96 (62 FR 111), and 29 CFR part 1911.

Signed at Washington, DC, this 8th day of March, 2000.

Charles N. Jeffress,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 00–6103 Filed 3–10–00; 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AJ51

Revised Criteria for Monetary Allowance for an Individual Born With Spina Bifida Whose Biological Father or Mother is a Vietnam Veteran

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the evaluation criteria that the Department of Veterans Affairs (VA) uses to determine the amount of the monthly monetary allowance that it pays to an individual born with spina bifida whose biological father or mother is a Vietnam veteran. The intended effect of this proposed amendment is to clarify the criteria to ensure that they are applied consistently and to add a provision allowing the Director of the Compensation and Pension Service to adjust the payment level for individuals with disabling impairments due to spina bifida that are not addressed in the evaluation criteria.

DATES: Comments must be received on or before May 12, 2000.

ADDRESSES: Mail or hand-deliver written comments to: Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1154, Washington, DC 20420; or fax comments to: (202) 273–9289; or e-mail comments to ''OGCRegulations@mail.va.gov''. Comments should indicate that they are

in response to ''RIN 2900–AJ51.'' All comments received will be available for public inspection at the above address in the Office of Regulations Management, Room 1158, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays).

FOR FURTHER INFORMATION CONTACT: Caroll McBrine, M.D., Consultant, Policy and Regulations Staff (211B), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 273–7230.

SUPPLEMENTARY INFORMATION: Section 421 of Public Law 104–204 authorized VA to provide certain benefits, including a monthly monetary allowance, to children suffering from spina bifida who are the natural children of Vietnam veterans. To implement the provisions of section 421, VA published final regulations, codified at 38 CFR 3.814, in the **Federal Register** on September 30, 1997 (62 FR 51274–281).

38 CFR 3.814(d) provides evaluation criteria for determining which of three levels of monthly monetary allowance an eligible individual will receive for disability due to spina bifida. The evaluation criteria are based not only on the presence of medical impairments due to spina bifida, but also on the disabling effects of those impairments on ordinary day-to-day activities, including activities outside the home, such as holding a job, attending school, traveling, etc. The disabling effects vary significantly from person to person depending on the basic severity of the impairment itself and the extent to which the effects of the impairment can be modified or controlled through mechanical means, medication, surgery, etc. In January 1998, VA reviewed a sample of adjudicated spina bifida claims and, based on actual medical evidence used to adjudicate these claims, assessed the effectiveness of the evaluation criteria and the manner in which they were applied. Based on that assessment, a further review of the medical literature, and suggestions from several service organizations, we propose to amend the evaluation criteria as discussed below.

Under current criteria, the effects of lower extremity impairment are evaluated as follows: Level I (the least severe level) if the child is ''able to walk without braces or other external support (although gait may be impaired)''; Level II if the child is ''ambulatory, but only with braces or other external support''; and Level III if the child is ''unable to ambulate.'' We found from our review that rating specialists applied the criteria inconsistently to individuals who occasionally use braces or a wheelchair, or who use them only outside the home. We propose to clarify the criteria so that the assessment is based on whichever mode of ambulation represents the individual's primary means of mobility in the community. Although some individuals may be able to move about their homes without braces or wheelchairs, in our view their primary means of mobility outside of the home is the best indicator of the extent to which their ability to engage in ordinary day-to-day activities is impaired. Furthermore, the change would assure that there is a clearly defined and uniform basis for assessing the effects of lower extremity impairment.

The effects of bowel and bladder impairment are currently evaluated as follows: Level I if the child ''is continent of urine and feces''; Level II if the child ''requires drugs or intermittent catheterization or other mechanical means to maintain proper urinary bladder function, or mechanisms for proper bowel function''; and Level III if the child ''has complete urinary or fecal incontinence.'' In reviewing adjudicated claims, we noted that the terms ''proper urinary bladder function'' and ''proper bowel function'' were interpreted differently by different raters. While many individuals with spina bifida do not have normal bowel or bladder function, neither are they completely incontinent of bowel or bladder. We propose to revise the criteria for evaluating the effects of bowel and bladder impairment to more clearly define the three levels and ensure that the criteria are consistently applied.

We propose to evaluate the extent to which bladder impairment affects the ability of the individual to engage in ordinary day-to-day activities based on the length of time the individual is usually able to remain dry during waking hours, and whether or not the individual requires the use of medication or some other means to achieve that level of control. Specifically, we propose to pay an individual who requires medication or other means to control the effects of urinary bladder impairment, and who, no more than two times per week, is unable to remain dry for at least three hours at a time during waking hours at Level II, and an individual who, despite the use of medication or other means to control the effects of urinary bladder impairment, at least three times per week is unable to remain dry for three hours at a time during waking hours at Level III.

The length of time that an individual is able to remain dry is an objective measure of the extent to which his or her ability to engage in ordinary day-to-day activities, such as working or attending school, is limited. Predictable three-hour intervals during waking hours that the individual can rely on remaining dry represent reasonable periods around which an individual can plan to conduct activities such as working, or attending school or social events, etc. At least one major study used a three-hour period in assessing whether conservative therapy could lessen or control incontinence (''The Chances of a Spina Bifida Patient Becoming Continent/Socially Dry By Conservative Therapy'' (M. Knoll and H Madersbacher, *Paraplegia*, 1993, Jan; 31 (1): 22–27)). We propose to specify the frequency of inability to remain dry for at least three hours at a time during waking hours—no more than two times per week for Level II, and at least three times per week for Level III—to take into account the fact that individuals who are ordinarily able to remain dry for three hours may occasionally have an accidental involuntary release of urine due to reasons such as an acute illness, miscalculations in controlling fluid intake, etc. Basing evaluations on the frequency of inability to remain dry for at least three hours at a time during waking hours will assure that individuals with bladder impairment are consistently evaluated.

One service organization recommended that we evaluate impairment of bowel and bladder function based on whether the individual has voluntary control of those functions. This organization suggested that doing otherwise punishes children with spina bifida for receiving appropriate treatment and rehabilitation because they are still, in fact, incontinent. Rather than punishing individuals who are able to alleviate urinary incontinence by treatment, the criteria recognize that the ability to alleviate incontinence improves the individual's ability to engage in ordinary day-to-day activities. Thus, we do not propose to adopt this recommendation.

The same organization pointed out that procedures necessary to treat or compensate for loss of voluntary control are intrusive, unpleasant, and time consuming. Although we will continue to evaluate the disabling effects of bowel or bladder impairment by evaluating the ability of an individual to engage in ordinary day-to-day activities, we will provide for special review consideration

where treatment procedures for spina bifida result in disability of equivalent severity to the effects specified under Levels II and III.

The same organization has recommended that we use the results of cystometry with urodynamic testing, a method of directly measuring certain bladder functions, such as muscle tone and bladder capacity, when evaluating bladder impairment. The main value of urodynamic testing is to determine the most appropriate treatment and to evaluate the effectiveness of the treatment. Urodynamic testing does not address the individual's ability to engage in ordinary day-to-day activities, which is the basis of the evaluation criteria. Furthermore, requiring claimants to undergo these additional tests if they are not available from their private medical records would be unnecessarily intrusive and would not add to the evaluation process. Accordingly, we do not propose to incorporate urodynamic testing into the criteria.

The effects of bowel impairment may include difficulty emptying the bowel, fecal leakage, or both. We propose to evaluate the effects of bowel impairment based on the extent and frequency of fecal leakage and the degree to which the individual is able to control or modify the effects of impairment through bowel management techniques or other treatment (which would include suppositories, enemas, medication, biofeedback, behavior modification, diet, manual evacuation, etc.). We propose to determine the severity of fecal leakage based partly on whether or not the individual must wear absorbent materials on a daily basis. We propose that an individual who requires bowel management techniques or other treatment to control the effects of bowel impairment, but has only occasional or minimal fecal leakage, and does not need to wear absorbent materials every day, be evaluated at Level II. On the other hand, we propose that an individual who, despite the use of bowel management techniques or other treatment to control the effects of bowel impairment, has fecal leakage of such severity or frequency that he or she must wear absorbent materials every day, be evaluated at Level III. We also propose that an individual who regularly requires manual evacuation or digital stimulation to empty the bowel be evaluated at Level III, since these procedures may significantly interfere with ordinary day-to-day activities. We propose to substitute these criteria for the current requirement at Level III that there be ''complete fecal incontinence.'' The proposed criteria would take into account the extent to which fecal leakage limits the individual's ability to engage in ordinary day-to-day activities, and would enable raters to consistently and objectively evaluate individuals who, although neither totally continent nor incontinent, have partial control of the effects of bowel or bladder impairment.

One organization has stated that, under VA's Schedule for Rating Disabilities, evaluations of disability of the bowel or bladder are based on the actual loss of function and control without regard to the use of auxiliary means and that it is self-evident that VA should use the same criteria for individuals with spina bifida to avoid rating inconsistencies. Section 1155 of title 38, United States Code, the statutory authority for VA's Schedule for Rating Disabilities, provides that evaluations of disabled veterans be based, as far as practicable, upon average impairment of earning capacity, and be at one of ten grades in 10 percent increments. Section 1805(b) of title 38, United States Code, on the other hand, authorizes VA to pay a monetary allowance to an eligible child with spina bifida at one of three levels based on the degree of disability as determined in accordance with a schedule for rating such disabilities ''to be prescribed by the Secretary.'' By codifying the requirement elsewhere than 38 U.S.C. 1155, by requiring evaluations at three levels rather than 10, and by not directing that evaluations be based on average impairment of earning capacity or be expressed in percentages, we believe that Congress expected that we would not use the rating schedule for evaluating disabilities resulting from spina bifida.

At the urging of a number of service organizations, we considered using neurocognitive testing in lieu of standard IQ testing to measure the effects of intellectual impairment. However, we found no medical literature describing or assessing a standard method of neurocognitive screening to assess the effects of spina bifida. Major studies of disability due to spina bifida, such as ''Disability in Children with Myelomeningocele'' (J.H. Hagelsteen, J. Lagergren, H.R. Lie, F. Rasmussen, M.C. Borjeson, B. Lagerkvist, M. Muttilainen, K. Taudorf, and L. Kohler, *Acta Paediatrica Scandinavica,* 1989, 78 (5): 721–7), ''Long-term Outcome in Surgically Treated Spina Bifida Cystica''; (Isao Date, M.D., Yasunori Yagyu, M.D., Shoji Asari, M.D., and Takshi Ohmoto, M.D., *Surg. Neurol.* 1993, 40:471–5), and ''Open spina bifida: a complete cohort reviewed 25 years after closure'' (Urology Department, Addenbrooke's Hospital, Cambridge, UK *Dev Med Child Neurol* 1995 Jan;37(1):19–29) used IQ test results to measure intellectual impairment. These documents did not mention neurocognitive testing. Furthermore, neurocognitive testing is a complex and time-consuming process, involves many testing variables, and is neither as widely available nor as standardized as IQ testing. Therefore, in our judgment, it is not feasible to use neurocognitive testing to measure the effects of intellectual impairment due to spina bifida.

A number of sources have suggested that verbal and performance IQ subscores are a better measure of impaired intellect than the overall IQ score, but offered no evidence to support that contention. The three studies referred to above relied on the overall IQ score rather than the subscores to measure intellectual impairment in individuals with spina bifida. We conducted a further search of the medical literature, but found no evidence that IQ subscores are a better measure of intellectual impairment than the overall IQ score. We therefore propose to continue using overall IQ scores to evaluate intellectual impairment.

Although the evaluation criteria are based on the disabling effects of the most common, indeed nearly universal, medical impairments that result from spina bifida, individuals may have other disabilities that result from spina bifida. Several organizations have expressed concern that individuals with conditions such as blindness or seizures resulting from spina bifida might be underpaid under the current criteria. We therefore propose to allow the Director of the Compensation and Pension Service to increase the payment level of an individual who would otherwise be paid at Level I or II and has one or more disabilities, such as blindness, uncontrolled seizures, or renal failure that result either from spina bifida or from treatment procedures for spina bifida, to the level that, in his or her judgment, best represents the extent to which the disabilities limit the individual's ability to engage in ordinary day-to-day activities, including activities outside the home. This provision would allow the Director to award an increase in the level of payment to Level II or Level III for any type of disability resulting from spina bifida or treatment procedures for spina bifida, if the effects of a disability are of equivalent severity to the effects specified under Level II or III. Therefore, should the results of neurocognitive testing or other special examinations,

for example, be submitted, they could be considered, along with all other medical information, in determining whether the level of payment should be increased.

Since only a very limited number of individuals are eligible for the monthly monetary allowance for spina bifida, reserving the authority to increase payments based on disabilities not addressed in the evaluation criteria to the Director of the Compensation and Pension Service is feasible. Further, this procedure will assure that the Compensation and Pension Service is aware of any conditions occurring frequently enough to warrant further revisions of the criteria.

Although the current regulation uses the terms ''child'' and ''children,'' many of those entitled to this benefit are now adolescents or adults. Therefore, we propose to change the words ''child'' or ''children'' to ''individual'' or ''individuals'' throughout § 3.814. We also propose to define the term ''individual'' in § 3.814(c)(2). This definition will make it clear that this regulation applies to eligible individuals regardless of age.

We also propose to amend the regulations to provide that, when VA is required to reassess an individual's level of disability for purposes of the monetary allowance, VA will pay the individual at Level I in the absence of evidence adequate to support a higher level of disability or if the individual fails to report, ''without good cause'' for a scheduled examination, and to provide examples of good cause. This provision is similar to 38 CFR 3.655(a), ''Failure to report for Department of Veterans Affairs examination,'' as applied to other VA claimants.

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. This amendment would not directly affect any small entities. Only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

This regulatory amendment has been reviewed by the Office of Management and Budget under the provisions of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993.

The Catalog of Federal Domestic Assistance program numbers are 64.104 and 64.109.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: November 18, 1999.

Togo D. West, Jr.,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 3 is proposed to be amended as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A, continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.814, the heading for the section and paragraphs (a), (c)(2), and (d) are revised to read as follows:

§ 3.814 Monetary allowance under 38 U.S.C. 1805 for an individual suffering from spina bifida whose biological father or mother is or was a Vietnam veteran.

(a) VA will pay a monthly allowance based upon the level of disability determined under the provisions of paragraph (d) of this section to or for an individual who it has determined is suffering from spina bifida and whose biological father or mother is or was a Vietnam veteran. Receipt of this allowance will not affect the right of the individual or any other related individual to receive any other benefit to which he or she may be entitled under any law administered by VA. An individual suffering from spina bifida is entitled to only one monthly allowance under this section, even if the individual's biological father and mother are or were both Vietnam veterans.

* * * * *

(c) * * *

(2) *Individual.* For the purposes of this section, the term ''individual'' means a person, regardless of age or marital status, whose biological father or mother is or was a Vietnam veteran and who was conceived after the date on which the veteran first served in the Republic of Vietnam during the Vietnam era. Notwithstanding the provisions of § 3.204(a)(1), VA shall require the types of evidence specified in §§ 3.209 and 3.210 sufficient to establish in the judgment of the Secretary that an individual's biological father or mother is or was a Vietnam veteran.

(d) (1) Except as otherwise specified in this paragraph, VA will determine the level of payment as follows:

(i) *Level I.* The individual walks without braces or other external support as his or her primary means of mobility in the community, has no sensory or motor impairment of the upper extremities, has an IQ of 90 or higher, and is continent of urine and feces without the use of medication or other means to control incontinence.

(ii) *Level II.* Provided that none of the disabilities is severe enough to warrant payment at Level III, and the individual: walks with braces or other external support as his or her primary means of mobility in the community; or, has sensory or motor impairment of the upper extremities, but is able to grasp pen, feed self, and perform self care; or, has an IQ of at least 70 but less than 90; or, requires medication or other means to control the effects of urinary bladder impairment and is unable no more than two times per week to remain dry for at least three hours at a time during waking hours; or, requires bowel management techniques or other treatment to control the effects of bowel impairment but does not have fecal leakage severe or frequent enough to require daily wearing of absorbent materials.

(iii) *Level III.* The individual uses a wheelchair as his or her primary means of mobility in the community; or, has sensory or motor impairment of the upper extremities severe enough to prevent grasping a pen, feeding self, and performing self care; or, has an IQ of 69 or less; or, despite the use of medication or other means to control the effects of urinary bladder impairment, at least three times per week is unable to remain dry for three hours at a time during waking hours; or, despite bowel management techniques or other treatment to control the effects of bowel impairment, has fecal leakage severe or frequent enough to require daily wearing of absorbent materials; or regularly requires manual evacuation or digital stimulation to empty the bowel.

(2) If an individual who would otherwise be paid at Level I or II has one or more disabilities, such as blindness, uncontrolled seizures, or renal failure that result either from spina bifida, or from treatment procedures for spina bifida, the Director of the Compensation and Pension Service may increase the monthly payment to the level that, in his or her judgment, best represents the extent to which the disabilities resulting from spina bifida limit the individual's ability to engage in ordinary day-to-day activities, including activities outside the home. A Level II or Level III

payment will be awarded depending on whether the effects of a disability are of equivalent severity to the effects specified under Level II or Level III.

(3) VA may accept statements from private physicians, or examination reports from government or private institutions, for the purpose of rating spina bifida claims without further examination, provided the statements or reports are adequate for assessing the level of disability due to spina bifida under the provisions of paragraph (d)(1) of this section. In the absence of adequate medical information, VA will schedule an examination for the purpose of assessing the level of disability.

(4) VA will pay an individual eligible for a monetary allowance due to spina bifida at Level I unless or until it receives medical evidence supporting a higher payment. When required to reassess the level of disability under paragraph (d)(5) or (d)(6) of this section, VA will pay an individual eligible for this monetary allowance at Level I in the absence of evidence adequate to support a higher level of disability or if the individual fails to report, without good cause, for a scheduled examination. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant, death of an immediate family member, etc.

(5) VA will pay individuals under the age of one year at Level I unless a pediatric neurologist or a pediatric neurosurgeon certifies that, in his or her medical judgment, there is a neurological deficit that will prevent the individual from ambulating, grasping a pen, feeding himself or herself, performing self care, or from achieving urinary or fecal continence. If any of those deficits are present, VA will pay the individual at Level III. In either case, VA will reassess the level of disability when the individual reaches the age of one year.

(6) VA will reassess the level of payment whenever it receives medical evidence indicating that a change is warranted. For individuals between the ages of one and twenty-one, however, it must reassess the level of payment at least every five years.

(Authority: 38 U.S.C. 501, 1805)

[FR Doc. 00–6066 Filed 3–10–00; 8:45 am]

BILLING CODE 8320–01–P

POSTAL SERVICE

39 CFR Part 111

Delivery of Mail to a Commercial Mail Receiving Agency

AGENCY: Postal Service.

ACTION: Proposed rule with request for comments.

SUMMARY: The purpose of this proposal is to amend section D042.2.6(e) of the Domestic Mail Manual (DMM) to revise the requirements for delivery of an addressee's mail to a commercial mail receiving agency. The proposal provides an additional optional secondary address designation element that may be used in the delivery address of holders of private mailboxes.

DATES: Comments must be received on or before April 12, 2000.

ADDRESSES: Written comments should be mailed to Manager, Delivery, U.S. Postal Service, 475 L'Enfant Plaza SW Room 7142, Washington, DC 20260–2802. Copies of all written comments will be available for inspection and photocopying between 9:00 a.m. and 4:00 p.m., Monday through Friday, at the above address.

FOR FURTHER INFORMATION CONTACT: Roy E. Gamble, (202) 268–3197.

SUPPLEMENTARY INFORMATION: On March 25, 1999, the Postal Service published a final rule in the **Federal Register** adopting revised regulations governing the operation of commercial mail receiving agencies (CMRAs) with an effective date of April 26, 1999 (64 FR 14385). One of the revised rules, Domestic Mail Manual (DMM) D042.2.6(e), required the use of ''PMB'' (private mailbox) in the complete mailing address of all CMRA customers. The Postal Service believes the required use of ''PMB'' in the CMRA customer's private mailbox address will provide CMRA mailbox holders' correspondents with the true identity of the mailing address of the mailbox holder. Under previous standards, many CMRA mailbox holders used addresses bearing secondary address indicators such as ''Suite,'' ''Apartment,'' or other designator indicating a physical presence at that street address. The Postal Service adopted the ''PMB'' designation to ensure that the public would be aware that the address is not a physical location and thereby discourage fraudulent or deceptive practices that might adversely affect senior citizens and other consumers, businesses, and even federal, state, and local governments.

This proposal to amend DMM D042.2.6(e) is an outgrowth of meetings the Postal Service conducted after publication of the revised rules with various groups representing the CMRA industry, small businesses, the self-employed, small and home office (SOHO) operators, and government organizations. Some of these participants asserted, as had commentors during the rulemaking, that the use of the ''PMB'' designation would have a negative effect on the businesses of CMRA mailbox holders. That is, they asserted that some consumers might be discouraged from doing business with CMRA mailbox holders due to perceptions that those businesses are somehow ''unsavory.'' Although the Postal Service, as discussed in the March 25 rulemaking, is not convinced that this would happen, it nonetheless wishes to ensure that this unintended consequence does not occur. During the discussions referenced above, some of the participants proposed a modification that would allow private mailbox holders the alternative to use the ''#'' sign in lieu of ''PMB'' in their mailing addresses at a CMRA. Although the Postal Service believes that the rule adopted on March 25, 1999, best serves the consumer protection needs of the American public, it nevertheless wishes to balance this goal with the concerns of the small business community. The Postal Service believes that the proposal outlined herein balances these interests.

Summary of Proposed Change

Proposed DMM section D042.2.6(e) provides that the CMRA delivery address designation for customer's mail must contain specific address elements identifying it as the location to which a mailpiece is delivered. Unlike the current rule, the proposed rule would permit use of the ''#'' sign as an alternative to the ''PMB'' designation, the only authorized secondary designation that may be used in the delivery address under the rules published on March 25, 1999. As with that rule, the mailbox holder would not be permitted to use ''Suite,'' ''Apartment,'' or any other designator indicating a physical presence at the address. Instead, it would require the use of the designation ''PMB'' or the alternate ''#'' designation, along with the appropriate unique number assigned to the mailbox holder by the CMRA.

Current standards specify that a four-line format should be used for CMRA customer addresses. Domestic Mail Manual section D042.2.6(e) remains the preferred format. Nevertheless, CMRA customers will be permitted an option to use a three-line format, if the sender of the mailpiece is unable to provide the four-line format due to computer

software or storage limitations, with the exceptions discussed below. Examples of acceptable three-line format addresses are:

JOE DOE
10 MAIN ST PMB 234
HERNDON VA 22071–2716
or
JOE DOE
10 MAIN ST #234
HERNDON VA 22071–2716
or
JOE DOE
10 MAIN ST STE 11 PMB 234
HERNDON VA 22071–2716

The CMRA customer must not use the # sign in the three-line format when the physical address of the CMRA contains a secondary address element on the delivery address line; for example, ''Rural Route Box Number,'' ''Suite,'' ''Floor,'' ''Building,'' ''Unit,'' ''#,'' or other term. For example, the use of the # sign in a three-line format address of a CMRA customer is not permitted in the following addresses:

JOE DOE
10 MAIN ST STE 11 PMB 234
HERNDON VA 22071–2716
or
Joe Doe
RR 1 BOX 12 PMB 234
HERNDON VA 22071–2716

In this case, the following must be used:

JOE DOE
#234
10 MAIN ST STE 11
HERNDON VA 22071–2716
or
JOE DOE
#234
RR 1 BOX 12
HERNDON VA 22071–2716

Note: It is also impermissible to combine the secondary address element of the physical location of the CMRA address and the CMRA customer private mailbox number (*e.g.,* 10 MAIN ST STE 11–234). In CMRA physical addresses which contain a secondary address element on the delivery address line, the addition of the # sign and the private mailbox number of a CMRA customer on the delivery address line will likely cause operational problems. The problems are related to automation misreading the address, leading to returned or misdirected mail, service delays, and increased costs in processing and delivering the mail. Accordingly, where the CMRA address contains a secondary address element, the CMRA customer must not use the # sign in the address in the three-line format. The four-line format currently set forth in DMM section D042.2.6(e) must be used.

The public would be provided the means to know that an address bearing the ''#'' designation is located at a CMRA, although in some instances attainment of this knowledge would require a step in addition to reading the address on the mailpiece. An address bearing the ''PMB'' designation would always be located at a CMRA. However, an address bearing the ''#'' designation may or may not be at a CMRA; the Postal Service will maintain a toll-free number which will allow individuals to ascertain whether the ''#'' designation address is located at a CMRA. The Postal Service will also engage in an information campaign to educate the public on the ''PMB'' and ''#'' designations and the availability of the toll-free number. Under the rules published by the Postal Service on March 25, 1999, and subsequent extensions, mail addressed to private mailboxes was to include the ''PMB'' designation by April 26, 2000. Due to the time required for the public comment period and the issuance of the final rule for this proposal, the April 26, 2000, deadline is extended to August 26, 2000.

Although exempt from the notice and comment requirements of the Administrative Procedures Act (5 U.S.C. of 553(b), (c)) regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service invites public comment on the following proposed revision to the Domestic Mail Manual, incorporated by reference in the Code of Federal Regulations. See 39 CFR 111.1.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

For the reasons discussed above, the Postal Service proposes to adopt the following amendments to the Domestic Mail Manual, which is incorporated by reference in the Code of Federal Regulations (39 CFR part 111):

PART 111—[AMENDED]

1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 3001–3011, 3201–3219, 3403–3406, 3621, 5001.

2. Section D042.2.0 of the Domestic Mail Manual (DMM) is amended by revising subsection D042.2.6 (e) to read as follows:

D DEPOSIT, COLLECTION, AND DELIVERY

D000 Basic Information

* * * * *

D040 Delivery of Mail

* * * * *

D042 Conditions of Delivery

* * * * *

2.0 DELIVERY TO ADDRESSEE'S AGENT

* * * * *

2.6 Delivery to CMRA

* * * * *

e. A CMRA must represent its delivery address designations for the intended addressees by the use of private mailbox (PMB) or the alternative (#) sign. The CMRA delivery address designations must specify the location to which a mailpiece is delivered. Mailpieces must bear a delivery address that contains the following elements, in this order:

Preferred Format

(Line 1) Intended addressee's name or other identification. Examples: JOE DOE or ABC CO.

(Line 2) PMB and number or the alternative # sign and number. Example: PMB 234 or #234.

(Line 3) Street number and name or post office box number or rural route designation and number. Examples: 10 MAIN ST or PO BOX 34 or RR 1 BOX 12.

(Line 4) City, state, and ZIP Code (5-digit or ZIP+4).

Example: HERNDON VA 22071–2716.

Examples of acceptable four-line format addresses are:

JOE DOE
PMB 234
RR 1 BOX 12
HERNDON VA 22071–2716
or
JOE DOE
#234
10 MAIN ST STE 11
HERNDON VA 22071–2716

Alternate Format

(Line 1) Intended addressee's name or other identification.

Examples: JOE DOE or ABC CO.

(Line 2) Street number and name or post office box number and PMB and number or the alternative # sign and number.

Examples: 10 MAIN ST PMB 234 or #234 or PO BOX 34 PMB 234 or #234.

(Line 3) City, state, and ZIP Code (5-digit or ZIP+4).

Example: HERNDON VA 22071–2716.

The CMRA customer must not use the # sign in the three-line format when the physical address of the CMRA contains a secondary address element on the delivery address line; for example, ''Rural Route Box Number,'' ''Suite,'' ''Floor,'' ''Building,'' Unit,'' ''#,'' or other term. For example, the use of the

sign in a three-line format address of a CMRA customer is not permitted in the following addresses:

JOE DOE
10 MAIN ST STE 11 #234
HERNDON VA 22071–2716
or
Joe Doe
RR 12 BOX 512 #234
Herndon VA 22071–2716

In this case, the following must be used:

JOE DOE
10 MAIN ST STE 11 PMB 234
HERNDON VA 22071–2716
or
JOE DOE
#234
10 MAIN ST STE 11
HERNDON VA 22071–2716
or
JOE DOE
RR 12 Box 512 PMB 234
HERNDON VA 22071–2716
or
JOE DOE
#234
RR 12 Box 512
HERNDON VA 22071–2716

It is also impermissible to combine the secondary address element of the physical location of the CMRA address and the CMRA customer private mailbox number, e.g., 10 MAIN ST STE 11–234. In CMRA physical addresses which contain a secondary address element on the delivery address line, the addition of the # sign and the private mailbox number of a CMRA customer on the delivery address line will likely cause operational problems. The problems are related to automation misreading the address, leading to returned or misdirected mail, service delays, and increased costs in processing and delivering the mail. Accordingly, where the CMRA address contains a secondary address element, the CMRA customer must not use the # sign in the address in the three-line format. The CMRA must write the complete CMRA delivery address used to deliver mail to each individual addressee or firm on the Form 1583 (block 3). The Postal Service may return mail without a proper address to the sender endorsed ''Undeliverable as Addressed, Missing PMB or # Sign.''

* * * * *

An appropriate amendment to 39 CFR 111.3 to reflect this change will be published if the proposal is adopted.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 00–6050 Filed 3–10–00; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[GA44 & GA36–9948b; FRL–6547–3]

Approval and Promulgation of Revisions to the Georgia State Implementation Plan

AGENCY: Environmental Protection Agency (EPA)

ACTION: Proposed rule.

SUMMARY: The EPA proposes to approve the State Implementation Plan (SIP) revisions submitted by the State of Georgia on February 11, 1998, and November 19, 1998. The February 11, 1998, revisions update references to the August 15, 1997, version of Georgia's ''Procedures for Testing and Monitoring Sources of Air Pollutants'' manual. The November 19, 1998, revisions adopt new Permit by Rule provisions for several, small source categories, including: certain types of fuel-burning equipment, on-site power generation, concrete mixing plants, hot mix asphalt plants, cotton ginning operations, coating and/or gluing operations, printing operations, non-reactive mixing operations, fiberglass molding and forming operations, and peanut/nut shelling operations. For these categories of sources that operate below the major source threshold, the rules may negate the need to file for a Part 70 Permit (also known as a ''Title V Permit'') or a synthetic minor permit. In the Final Rules Section of this **Federal Register**, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

DATES: Written comments must be received on or before April 12, 2000.

ADDRESSES: All comments should be addressed to: Michele Notarianni, Air Planning Branch, Air, Pesticides, and Toxics Management Division, EPA Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303.

FOR FURTHER INFORMATION CONTACT: Michele Notarianni at 404/562–9031 (or by e-mail at: notarianni.michele@epa.gov).

SUPPLEMENTARY INFORMATION: For additional information, see the direct final rule which is published in the Final Rules Section of this **Federal Register**.

Dated: February 14, 2000.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 00–5387 Filed 3–10–00; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 00–496; MM Docket No. 99–188; RM–9591]

Radio Broadcasting Services; Bruneau, ID

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; denial.

SUMMARY: This document denies a petition for rule making filed by Mountain West Broadcasting proposing the allotment of FM Channel 273C1 to Bruneau, Idaho, as a first local aural transmission service, for failure to establish that locality is a *bona fide* community for allotment purposes. See 64 FR 30293 June 7, 1999. With this action, this proceeding is terminated.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

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. 99–188, adopted February 23, 2000, and released March 3, 2000. 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, D.C. 20036, (202) 857–3800.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 00–6055 Filed 3–10–00; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 00–495; MM Docket No. 99–187; RM–9590]

Radio Broadcasting Services; Summit City, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; denial.

SUMMARY: This document denies a petition for rule making filed by Mountain West Broadcasting proposing the allotment of FM Channel 221A to Summit City, California, as a first local aural transmission service, for failure to establish that locality is a *bona fide* community for allotment purposes. See 64 FR 30293, June 7, 1999. With this action, this proceeding is terminated.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

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. 99–187, adopted February 23, 2000, and released March 3, 2000. 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, D.C. 20036, (202) 857–3800.

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. 00–6053 Filed 3–10–00; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA No. 00–481, MM Docket No. 00–37, RM–9749]

Radio Broadcasting Services; New Richmond, WI and Coon Rapids & Moose Lake, MN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a Petition for Rule Making filed by Smith Broadcasting Company, Inc. proposing the substitution of Channel 296C2 for Channel 296C3 at New Richmond, Wisconsin, reallotment of Channel 296C2 to Coon Rapids, Minnesota, and modification of the license for Station WIXK–FM to specify operation on Channel 296C2 at Coon Rapids. The coordinates for Channel 296C2 at Coon Rapids are 45–11–42 and 93–05–14. To accommodate the allotment at Coon Rapids, we shall propose the substitution of Channel 249A for Channel 296A at Moose Lake, Minnesota, and modification of the construction permit for Station KBFH to specify operation on Channel 249A. The coordinates for Channel 249A are 46–27–10 and 92–45–47. Canadian concurrence will be requested for the allotment at Moose Lake. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 296C2 at Coon Rapids.

DATES: Comments must be filed on or before April 24, 2000, and reply comments on or before May 9, 2000.

ADDRESSES: Federal Communications Commission, Washington, DC. 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Mark N. Lipp, Scott C. Cinnamon, Shook, Hardy & Bacon, 600 14th Street, N.W., Suite 800, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 00–37, adopted February 13, 2000, and released March 3, 2000. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Public Reference Center, 445 Twelfth Street, S.W., 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.

Provisions of the Regulatory Flexibility Act of 980 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* contact.

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. 00–6054 Filed 3–10–00; 8:45 am]

BILLING CODE 6712–01–U

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST–99–6578]

RIN 2105–AC49

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Notice of agenda for public meeting.

SUMMARY: The U.S. Department of Transportation (DOT) scheduled three public listening sessions on its notice of proposed rulemaking (NPRM) to revise the Department's drug and alcohol testing procedures, published in the **Federal Register** on December 9, 1999 (64 FR 69076). In the meeting notice, published in the **Federal Register** on January 18, 2000 (65 FR 2573), the Department included tentative agendas for the meetings to be held in Los Angeles, California, and Dallas, Texas. However, the Department did not include such an agenda for the meeting to be held in Washington DC. This notice provides the agenda for the Washington DC meeting, which will include a roundtable discussion on the

proposed public interest exclusion (PIE) provisions of the NPRM.

DATES AND ADDRESSES: The public meetings will be held on March 20 and 21, 2000, at the Ronald Reagan Building and International Trade Center, 1300 Pennsylvania Avenue, NW., Washington, DC 20004; on March 28, 2000, at the Hilton Los Angeles Airport, 5711 West Century Boulevard, Los Angeles, CA 90045, telephone number (310) 410–4000, fax (310) 410–6177; and on March 30, 2000, at the Crowne Plaza, Dallas Market Center, 7050 Stemmons Freeway, Dallas, TX 75247, telephone number (214) 630–8500, fax (214) 630–0037.

FOR FURTHER INFORMATION CONTACT: For general meeting information and to register for one of the meetings, contact the DOT contractor, Marti Bludworth, Transportation Safety Institute (TSI), Special Programs Division, DTI–100, 4400 Will Rogers Parkway, Suite 205, Oklahoma City, OK 73108–2057, telephone number (800) 862–4832, extension 323, fax number (405) 946–4268, or e-mail marti bludworth@tsi.jccbi.gov.

SUPPLEMENTARY INFORMATION:

A. Purpose

The purpose of the meetings is to provide all segments of the transportation industry and the general public with an opportunity to make statements, which have not already been made previously, to the docket. These meetings would also give DOT the opportunity to ask questions and ensure that the public comments are clearly understood by the Department. It may also give the Department the opportunity to clarify issues related to comments that had already been submitted to the docket during the early days of the formal comment period. Questions by commenters and other attendees to the DOT will be permitted as time allows. Registration and meeting procedures were specified in the January 18, 2000, notice.

B. Agenda for the Washington, DC, Meeting

The meeting in Washington, DC will be held for a day and a half to provide ample opportunity for attendees to make comments and for DOT to have additional time, if needed, to ask follow up questions. This geographic location will also provide added opportunity for additional DOT staff and industry representatives from the Capital area to attend the meeting.

The following is a tentative agenda that may be modified as needed to accommodate the needs of commenters and to ensure adequate coverage of the subject matter. We call your attention particularly to the ''Roundtable Discussion'' on the second day of the meeting concerning the service agent accountability provisions of the proposed rules, known as the public interest exclusion (PIE) proposal. This proposal has generated considerable interest among interested parties, and we believe that it could be useful to schedule an open, interactive discussion among attendees about it. This discussion will be in addition to the opportunity for speakers to address this proposal in their regular statements. As time permits, the Department intends to hold similar discussions as part of the Los Angeles and Dallas meetings as well.

Agenda—DOT Public Meeting, Ronald Reagan and International Trade Center, Atrium Ballroom A

March 20–21, 2000 Washington, DC

Monday, March 20, 2000

09:00–09:15 Introduction and Administrative Items

09:15–09:55 Overview of the Notice of Proposed Rulemaking

10:00–11:10 Collection Issues

11:15–11:30 Laboratory Issues

11:30–12:00 Q&A and Public Comments

01:00–01:50 Labor/Employer/Employee Issues

02:00–03:45 Medical Review Officer Issues

03:50–04:10 Substance Abuse Professional Issues

04:10–05:00 Questions and Answers and Additional Public Comments

Tuesday, March 21, 2000

09:00–10:10 Service Agents/Public Interest Exclusion

10:30–01:30 Public Interest Exclusion Round Table Discussion

Issued this 7th day of March 2000, at Washington, DC.

Mary Bernstein,

Director, Office of Drug and Alcohol Policy and Compliance, Department of Transportation.

[FR Doc. 00–6190 Filed 3–9–00; 12:09 pm]

BILLING CODE 4910–62–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AF95

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Steller's Eider

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the Alaska-breeding population of the Steller's eider (*Polysticta stelleri*), a threatened species pursuant to the Endangered Species Act of 1973, as amended (Act). Proposed designation of critical habitat for the Steller's eider includes areas on the North Slope of Alaska, the Yukon-Kuskokwim Delta (Y–K Delta), and seven marine areas in southwest and south coastal Alaska. These areas total 65,858 square kilometers (km^2) (25,428 square miles (mi^2)). The marine units include 14,458 kilometers (km) (8,984 mi) of coastline.

If this proposal is made final, section 7(a)(2) of the Act requires that Federal agencies ensure that actions they fund, permit, or carry out are not likely to result in the ''destruction or adverse modification'' of critical habitat. ''Destruction or adverse modification'' of critical habitat is defined as an alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Therefore, designation of critical habitat does not restrict human activity or development unless the impact to habitat is so significant that it impairs the survival or recovery potential of the listed taxon as a whole. Furthermore, the regulatory impact of critical habitat designation does not extend beyond those activities funded, permitted, or conducted by Federal agencies. Exclusively State or private actions are not affected.

Section 4 of the Act requires us to consider economic and other impacts of specifying any particular area as critical habitat. We solicit data and comments from the public on all aspects of this proposal, including data on the economic and other impacts of the designation. We may revise this proposal to incorporate or address comments and other information received during the comment period.

DATES: The public comment period for this proposal closes on May 12, 2000. Requests for public hearings must be

received in writing at the address below by April 27, 2000. We will publish the dates and locations of any public hearings in the **Federal Register** and appropriate local newspapers at least 15 days prior to the first hearing.

ADDRESSES: You may inspect the complete file for this rule at the U.S. Fish and Wildlife Service, Northern Alaska Ecological Services, 101 12th Ave., Rm 110, Fairbanks, AK 99701, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Ted Swem, Endangered Species Branch, Northern Alaska Ecological Services, at the above address (telephone 907/456–0203; facsimile 907/456–0208).

SUPPLEMENTARY INFORMATION:

Background

Description

The Steller's eider was first described by Peter Simon Pallas in 1769 (Bent 1925), and given the scientific name *Anas stelleri* Pallas. After seven name changes, it was grouped with other eiders as *Somateria stelleri*. Now it is considered distinct from the other eiders, and is the only species in the genus *Polysticta* (American Ornithologists' Union 1983). This genus is grouped with the other seaducks under the Tribe Mergini (eiders, scoters, mergansers, and allies), the Subfamily Anatinae (ducks), and the Family Anatidae (swans, geese, and ducks).

It is the smallest of four eider species; both sexes are approximately 45 centimeters (17–18 inches) long (Bellrose 1980). The plumage of the breeding adult male is white, black, and chestnut. The head is white with black eye patches and light green tinging on the forehead, lores (space between bill and eye), and below the eye. The chin and throat are black, separated from a broad black collar around the lower neck by a white ring. The shoulders and back are also black and each tertial (inner wing) feather is bicolored longitudinally, with the inner half being white and the outer half being bluish-black, giving the back a striped appearance when the wing is folded. The speculum (patch of colored feathers on the wing) is dark blue and the breast and belly are chestnut shading to black posteriorly. A black spot is present on each side of the breast. The flanks, rump, and under-tail coverts (feathers) are black, and the wedge-shaped tail is dark brown. Males in eclipse plumage (dull plumage assumed prior to molt) during late summer and fall are entirely mottled brown except the wings are like the adult breeding male's and the upper wing-coverts are white. Females and juveniles year-round are mottled brown, and the female adult has a blue speculum bordered in white.

Geographic Range

Three breeding populations of Steller's eiders are recognized, two in Arctic Russia and one in Alaska. The majority of Steller's eiders breed in Russia and are identified by separate breeding and wintering distributions (Nygard et al. 1995). The Russian Atlantic population nests west of the Khatanga River and winters in the Barents and Baltic seas. The Russian Pacific population nests east from the mouth of the Khatanga River and winters in the southern Bering Sea and northern Pacific Ocean, where it presumably intermixes with the Alaska-breeding population. Neither Russia-breeding population is listed as threatened or endangered; only Steller's eiders that nest in Alaska are listed as threatened under the Act.

This proposal for critical habitat addresses the Alaska-breeding population of Steller's eiders, the only population listed under the Act, but the Alaska-breeding population is visually indistinguishable from the unlisted Russian Pacific population. During the autumn molt, winter, and spring migration staging periods, the listed Alaska-breeding population intermixes with the more numerous and unlisted Russia-breeding population in marine waters of southwest Alaska. During these times, it is unknown whether the Alaska-breeding population concentrates in distinct areas or disperses throughout the species' marine range.

The exact historical breeding range of the Alaska-breeding population of Steller's eiders is not clear. The historical range may have extended discontinuously from the eastern Aleutian Islands to the western and northern Alaska coasts, possibly as far east as the Canadian border. In more recent times, breeding occurred in two general areas, the Arctic Coastal Plain on the North Slope, and western Alaska, primarily on the Y–K Delta. Today, Steller's eiders breed on the western Arctic Coastal Plain in northern Alaska, from approximately Point Lay east to Prudhoe Bay, and in extremely low numbers on the Y–K Delta.

On the North Slope, anecdotal historical records indicate that the species occurred from Wainwright east, nearly to the Alaska-Canada border (Anderson 1913; Brooks 1915). There are few historical records from the eastern North Slope, however, so it is unknown whether the species was abundant there or whether sightings were uncommon. Today, the species predominantly breeds on the western North Slope, in the northern half of the National Petroleum Reserve—Alaska (NPR–A). The majority of sightings in the last decade have occurred east of the mouth of the Utukok River, west of the Colville River, and within 90 km (56 mi) of the coast. Within this extensive area, Steller's eiders generally breed at very low densities.

The Steller's eider was considered a locally ''common'' breeder in the intertidal, central Y–K Delta by naturalists early in the 1900s (Murie 1924; Conover 1926; Gillham 1941; Brandt 1943), but the bird was reported to breed in only a few locations. By the 1960s or 70s, the species had become extremely rare on the Y–K Delta, and only six nests have been found in the 1990s (Flint and Herzog 1999). Given the paucity of early recorded observations, only subjective estimates can be made of the Steller's eider's historical abundance or distribution on the Y–K Delta.

A few Steller's eiders were reportedly found nesting in other locations in western Alaska, including the Aleutian Islands in the 1870s and 80s (Gabrielson and Lincoln 1959), Alaska Peninsula in the 1880s or 90s (Murie and Scheffer 1959), Seward Peninsula in the 1870s (Portenko 1989), and on Saint Lawrence Island as recently as the 1950s (Fay and Cade 1959). Nesting Steller's eiders are no longer found at these western Alaska sites.

After breeding, Steller's eiders move to the Alaska Peninsula where they undergo a flightless molt for about 3 weeks. Most birds molt in four areas—Izembek Lagoon (Metzner 1993; Dau 1999a; Laubhan and Metzner 1999), Nelson Lagoon, Herendeen Bay, and Port Moller (Gill *et al.* 1981; Petersen 1981; Dau 1999a). Additionally, Steller's eiders are known or thought to molt in a number of other locations along the northwestern Alaska coast, around islands in the Bering Sea, and along the coast of Bristol Bay (Swarth 1934; Dick and Dick 1971; Petersen and Sigman 1977; Wilk *et al.* 1986; Dau 1987; Petersen *et al.* 1991; Day *et al.* 1995; Dau 1999a). The breeding derivation of molting Steller's eiders in the Russian Far-East, primarily Kamchatka, is undetermined.

Recoveries of banded Steller's eiders suggest that the Alaska-breeding population of Steller's eiders intermixes with Russian Pacific-breeders in southwest Alaska during molt. Steller's eiders banded during molt at Izembek and Nelson lagoons have been found during the breeding season near Barrow (Jones 1965; Service, U.S. Geological

Survey, and North Slope Borough, unpubl. data) as well as in a number of locations in Russia (Jones 1965). However, it is unknown if Alaska-breeding Steller's eiders molt in locations other than Izembek and Nelson lagoons.

In general, wintering Steller's eiders occupy shallow, near-shore marine waters in much of southwest and south coastal Alaska. They are found around islands and along the coast of the Bering Sea and north Pacific Ocean from the Aleutian Islands, along the Alaska Peninsula and Kodiak Archipelago, east to lower Cook Inlet. Along open coastline, Steller's eiders usually remain within about 400 meters (m) (400 yards (yd)) of shore normally in water less than 10 m (30 feet (ft)) deep (C. Dau, Service, pers. comm. 1999) but can be found well offshore in shallow bays and lagoons or near reefs (C. Dau, pers. comm. 1999; D. Zwiefelhofer, Service, pers. comm. 1999). An unknown number of Steller's eiders winter along the Russian and Japanese coasts. They have been reported from the Anadyr Gulf (Konyukhov 1990), Komandor (Commander) and Kuril islands in Russia (Kistchinski 1973; Palmer 1976), and near Hokkaido Island in northern Japan (Brazil 1991).

Prior to spring migration, thousands to tens of thousands of Steller's eiders stage at a series of locations along the north side of the Alaska Peninsula, including several of the areas used during molt and winter such as Port Heiden, Port Moller, Nelson Lagoon, and Izembek Lagoon (Larned *et al.* 1994; Larned 1998). From there, they cross Bristol Bay, and it is thought that virtually the entire Alaska-wintering adult population spends days or weeks feeding and resting in northern Kuskokwim Bay and in smaller bays along its perimeter (W. Larned, Service, pers. comm. 1999). The number seen there varies among years, presumably because lingering sea ice may slow northward migration in some years. An estimated 42,000 have concentrated in early May in Kuskokwim Bay when ice has delayed northward migration (Larned *et al.* 1994). Steller's eiders also concentrate along the southwest coast of the Y–K Delta and southern coast of Nunivak Island during spring migration (Larned *et al.* 1994; R. King, Service, unpublished data).

Steller's eiders move north through the Bering Strait between mid-May and early June (Bailey 1943; Kessel 1989). Subadults may remain in wintering areas or along the migration route during the summer breeding season, as they have been noted in Nelson Lagoon in July (M. Petersen, U.S. Geological Survey, pers. comm. 1999), around Nunivak Island from July to October (B. McCaffery, Service, pers. comm. 1999) and offshore and along the lagoons of St. Lawrence Island in summer (Fay 1961). Steller's eiders have been seen in lagoons along the northwest coast of Alaska in late July, and these also may be subadults (Johnson *et al.* 1992; Day *et al.* 1995).

Fall migration is protracted, with Steller's eiders moving south through the Bering Strait from late July through October (Kessel 1989), depending on age and sex of individuals and whether migration takes place before or after wing molt (Jones 1965). Fall migration routes are poorly understood but groups have been seen passing near shore at Nunivak Island (Dau 1987) and Cape Romanzof (McCaffery and Harwood 1997).

Population Status

Determining population trends for Steller's eiders is difficult; however, the Steller's eider's breeding range in Alaska appears to have contracted substantially, with the species disappearing from much of its historical range in western Alaska (Kertell 1991) and possibly a portion of its range on the North Slope. In areas where the species still occurs in Alaska, the frequency of occurrence (the proportion of years in which the species is present) and the frequency of breeding (the proportion of years in which the species attempts to nest) have both apparently declined in recent decades (Quakenbush *et al.* in prep.).

We do not know whether the species' breeding population on the North Slope is currently declining, stable, or improving. Although Steller's eiders are counted there during extensive aerial waterfowl and eider surveys, few are seen in most years because the species occurs at very low density and the surveys sample only a small proportion of the suitable breeding habitat. Based on observations at Barrow, we have found that breeding population size and breeding effort vary considerably among years, therefore, detecting statistically significant population trends or precisely estimating population size is difficult.

Despite the difficulty in detecting statistically significant trends with North Slope aerial survey data, these data can be used to derive an estimate of breeding population size. Several dozen Steller's eiders are usually detected during aerial breeding-pair waterfowl surveys on the North Slope each year (Service unpublished data). These surveys sample 2–3 percent of the suitable waterfowl breeding habitat annually. When extrapolated to the entire study area, the number of sightings suggests that hundreds or low thousands (point estimates range from 534 to 2,543 in 1989–1998) of Steller's eiders would be detected if the entire region were surveyed each year. Actual population size is probably higher. Based on these observations, it seems reasonable to estimate that hundreds or thousands of Steller's eiders occur on the North Slope. Similar aerial surveys are conducted on the Y–K Delta, but no Steller's eiders were detected using this technique so population size and trends cannot be estimated; however, it is obvious that a drastic reduction in the species' abundance has occurred (Kertell 1991).

Previous Federal Action

In December 1990, James G. King of Juneau, Alaska, petitioned us to list the Steller's eider under the Act. In May 1992, we determined that listing was warranted but precluded by higher listing priorities elsewhere. In 1993, a status review of the species concluded that listing of the Alaska-breeding population as threatened was warranted, although the available information did not support listing the species worldwide (57 FR 19852). A proposed rule to list the Alaska-breeding population of Steller's eiders as threatened was published in the **Federal Register** on July 14, 1994 (59 FR 35896). Appropriate Federal and State agencies; borough, city, and village governments; scientific and environmental organizations; and other interested parties were contacted and encouraged to comment. Shortly thereafter, a new Service policy (59 FR 34270) was implemented requiring that listing proposals be reviewed by at least three independent specialists. The comment period was reopened in June 1995 to seek peer review, and appropriate parties were again contacted and encouraged to comment. A final determination on whether listing was warranted was further delayed by a national moratorium on listing (Public Law 104–6) implemented in April 1995, which prevented final determination on listing actions for the remainder of the fiscal year; that moratorium was later extended until April 1996.

We received comments on listing Steller's eiders from a total of nine parties during the two comment periods. Of the comments, four supported listing, four were neutral, and one, the Alaska Department of Fish and Game, opposed listing. We also received peer review from five recognized experts on eider or seaduck population monitoring, modeling, or management;

all five supported listing the Alaska-breeding population of Steller's eiders as threatened or endangered. Two environmental organizations (The Wilderness Society and Greenpeace) recommended designating critical habitat in current and historical breeding habitat, wintering habitat along the Alaska Peninsula, and other marine areas. The North Slope Borough supported listing but, although not specifically mentioning ''critical habitat,'' recommended against additional special protection near the village of Barrow. Of the five independent experts who provided peer review, four commented on critical habitat designation. One suggested studies of breeding ecology to identify critical habitat requirements, one recommended designating critical habitat near Barrow, one suggested ''absolute protection'' for Steller's eiders nesting anywhere in Alaska, and one mentioned that protecting ''coastal molting and wintering range'' was perhaps more important than breeding habitat.

On June 11, 1997, we listed the Alaska breeding population of Steller's eiders (62 FR 31748) as threatened. That decision included a determination that designation of critical habitat was not prudent at that time. Service regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent if designation would not be beneficial to the species. Section 7(a)(2) of the Act requires Federal agencies to ensure, in consultation with the Service, that activities they fund, authorize, or carry out are not likely to jeopardize the continued existence of listed species. At the time of our determination, we stated that critical habitat designation would provide no additional benefit to Steller's eiders because protection of the species' habitat would be ensured through section 7 consultations, the recovery process, and, as appropriate, through the section 10 habitat conservation planning process.

On March 10, 1999, the Southwest Center for Biological Diversity, Center for Biological Diversity, and Christians Caring for Creation filed a lawsuit in Federal District Court in the Northern District of California against the Secretary of the Department of the Interior for failure to designate critical habitat for five species in California and two in Alaska. These species include the Alameda whipsnake (*Masticophis lateralis euryxanthus*), the zayante band-winged grasshopper (*Trimerotropis infantilis*), the Morro shoulderband snail (*Helmintholglypta walkeriana*), the Arroyo southwestern toad (*Bufo microscaphus californicus*), the San Bernardino kangaroo rat (*Dipodomys merriami parvus*), the spectacled eider (*Somateria fischeri*), and the Steller's eider. Subsequently, the Federal Government entered into a settlement agreement with the plaintiffs, by which the Service agreed to readdress the prudency of designating critical habitat for Steller's eiders by March 1, 2000, and propose critical habitat if prudent. If, upon consideration of all available information and comments, we determine that designating critical habitat is prudent, we have agreed to send a final rule to the **Federal Register** by January 5, 2001. If we determine that designation of critical habitat is not prudent, we have agreed to send a notice of this finding to the **Federal Register** by August 1, 2000.

In the last few years, a series of court decisions have overturned Service determinations regarding a variety of species that designation of critical habitat would not be prudent (e.g., *Natural Resources Defense Council* v. *U.S. Department of the Interior* 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii* v. *Babbitt,* 2 F. Supp. 2d 1280 (D. Hawaii 1998)). Based on the standards applied in those judicial opinions and the availability of some new information concerning the species' habitat needs, we recognized the value in reexamining the question of whether critical habitat for Steller's eider would be prudent. This proposal is the product of this reexamination and reflects our best interpretation of the recent judicial opinions on critical habitat designation. If additional information becomes available on the biology and distribution of the species, we may reevaluate our critical habitat designation, including proposing additional critical habitat or proposing deletion or boundary refinement of existing critical habitat.

Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as (i) the specific areas within the geographic area occupied by the species on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management consideration or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' is defined in section 3(3) of the Act as the use of all methods and procedures necessary to bring endangered or threatened species to the point at which listing under the Act is no longer necessary.

Section 4(b)(2) of the Act requires that we base critical habitat proposals upon the best scientific and commercial data available, after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude any area from critical habitat designation if the benefits of such exclusion outweigh the benefits of including such area as part of the critical habitat, provided the exclusion will not result in the extinction of the species (section 4(b)(2) of the Act). Critical habitat is not to be designated in foreign countries or outside the jurisdiction of the United States (50 CFR 424.12(h)).

The designation of critical habitat does not, in and of itself, restrict human activities or development, nor does it mandate specific management or recovery actions. Critical habitat designation contributes to species conservation primarily by identifying important habitat for the species and by describing the habitat features that are thought to be essential for the species. This action can alert public and private entities to the area's importance and result in cooperative strategies for conserving the habitat and its primary constituent elements. The only regulatory impact of critical habitat designation is through the provisions of section 7 of the Act, and these provisions apply only to actions with a Federal ''nexus'' (i.e., actions authorized, funded, or conducted by any Federal agency) and do not affect exclusively State or private activities on non-Federal land.

Section 7(a)(2) of the Act requires Federal agencies to ensure that actions they authorize, fund, or conduct do not jeopardize the continued existence of listed species. Activities that jeopardize listed species are defined as actions that ''directly or indirectly, reduce appreciably the likelihood of both the survival and recovery of a listed species'' (50 CFR 402.02). Thus, Federal agencies cannot jeopardize listed species through their actions, regardless of whether critical habitat has been designated for the species. Where critical habitat is designated, section 7 also requires Federal agencies to ensure that activities they authorize, fund, or conduct do not result in the destruction or adverse modification of designated critical habitat. Activities that destroy or adversely modify critical habitat are defined as those actions that ''appreciably diminish the value of critical habitat for both the survival and recovery of the species'' (50 CFR 402.02). Common to the definitions of both ''jeopardy'' and ''destruction or

adverse modification of critical habitat'' is the concept that the likelihood of both survival and recovery of the species are appreciably reduced by the action. Because of this common threshold, actions that are likely to destroy or adversely modify critical habitat are also likely to jeopardize the species. Therefore, the protection provided by critical habitat designation generally duplicates that provided under the section 7 jeopardy provision.

Clearly identifying the areas and habitat features important to listed species assists Federal agencies and potential permit applicants in identifying where and under what circumstances section 7 consultations are required. More importantly, drawing attention to the species' plight and habitat requirements may increase the consideration given to the species during project planning and land management decisions.

Prudency Finding

In the absence of a finding that critical habitat would increase threats to a species, if critical habitat designation would provide any benefits to the species, then a prudent finding is warranted. In the case of this species, designation of critical habitat may provide some benefits. While a critical habitat designation for habitat currently occupied by this species would not be likely to change the section 7 consultation outcome because an action that destroys or adversely modifies such critical habitat would also be likely to result in jeopardy to the species, there may be instances where section 7 consultation would be triggered only if critical habitat is designated. An example could include occupied habitat that may become unoccupied in the future. Raising the profile of the lands and waters within our proposed critical habitat boundary may also be beneficial to the species because it may increase the degree to which Federal agencies fulfill their responsibilities under section 7(a)(1) of the Act (to use their authorities to carry out programs for the conservation of listed species). Designating critical habitat may also provide some educational or informational benefits.

We do not have specific evidence of taking, vandalism, collection, or trade in this species that might be exacerbated by the publication of critical habitat maps and further dissemination of locational information. Consequently, consistent with applicable regulations (50 CFR 424.12(a)(1)(i)) and recent case law, we do not expect that the identification of critical habitat will increase the degree of threat to this species of taking or other human activity. Therefore, we propose that designating critical habitat is prudent for the Steller's eider.

After reviewing the best scientific and commercial data available, we propose to withdraw the previous finding that designation of critical habitat for the Steller's eider is not prudent, and we propose to designate critical habitat on the North Slope of Alaska, the Y–K Delta, and seven marine areas in southwest and southcoastal Alaska.

Methods

Critical habitat is defined as (1) the specific areas within the geographical area currently occupied by the species on which are found those physical and biological features that are essential for the conservation of the species and that may require special management considerations or protection, and (2) specific areas outside the geographical area occupied by a species at the time it is listed upon determination by the Secretary that such areas are essential for the conservation of the species (50 CFR 424.02(d)). All the geographic areas we propose to designate as critical habitat are within what we believe to be the current range of the species based on available information. To determine which of the occupied areas meet this definition, we reviewed all available information on the distribution, diet, and habitat associations of, and threats to, Steller's eiders. Information reviewed included published and unpublished accounts from early historical investigations and more recent aerial, boat, and ground-based surveys and studies.

Two factors complicate evaluating which areas and habitat features are essential for the conservation of the Alaska-breeding population of the Steller's eider. First, information is inadequate on the distribution of the listed, Alaska-breeding population during the nonbreeding season. The Alaska-breeding population, which likely numbers in the hundreds or low thousands, is thought to molt and winter in the same broad region as the much more numerous Russian Pacific population. If the Alaska-breeding population is distributed proportionately across the species' extensive nonbreeding range, the listed population is greatly diluted in any given location by members of the nonlisted breeding population. In contrast, if the Alaska-breeding population concentrates in specific portions of the species' molting and wintering ranges, the habitat within those geographic areas would be more disproportionately essential for recovery of the listed population. Currently, information to determine which scenario most closely applies is insufficient.

The second factor complicating critical habitat designation for the Steller's eider is that recovery, which is the objective of endangered species conservation, has yet to be defined for Alaska-breeding Steller's eiders. The Steller's Eider Recovery Team is currently working to develop a recovery plan for the species, but has not yet set numerical criteria for recovery, either in terms of population size or distribution. In the absence of clearly defined recovery objectives or criteria, determining which physical and biological features are essential for recovery is difficult. After considering these complicating factors, we believe it is essential to the recovery of the species to maintain the existing population on the North Slope and allow for recovery of the greatly depressed population on the Y–K Delta. Therefore, we believe that the following three components are essential for the conservation of the Alaska-breeding population of Steller's eiders:

(1) The North Slope breeding subpopulation and its habitat must be maintained sufficiently to sustain healthy reproduction and allow for potential population growth;

(2) The Y–K Delta subpopulation must be increased in abundance to decrease the Alaska-breeding population's vulnerability to extirpation; and

(3) Molting, wintering, and spring staging habitat in the marine environment must be maintained to ensure adequate survival during the nonbreeding season.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining what areas to propose as critical habitat, we consider those physical and biological habitat features that are essential to the conservation of the species and that may require special management considerations or protection. These include, but are not limited to, the following:

Space for individual and population growth, and for normal behavior;

Food, water, air, light, minerals, or other nutritional or physiological requirements;

Cover or shelter;

Sites for breeding, reproduction, or rearing offspring; and, generally

Habitats that are protected from disturbance or are representative of the

historical geographical and ecological distributions of the species.

The primary constituent elements for Steller's eiders vary by season, depending on the habitat occupied. As a result, the primary constituent elements for Steller's eiders are different in proposed terrestrial and marine units; elaboration is provided in the Proposed Critical Habitat section, below.

Proposed Critical Habitat

After reviewing the best scientific and commercial data available, we propose to designate critical habitat for the Alaska-breeding population of the Steller's eider, including breeding habitat on the North Slope and Y–K Delta, and seven marine units in southwest and southern coastal Alaska where the birds molt, winter, or stage during spring migration. The approximate area of proposed critical habitat by land ownership is shown in Table 1. Lands proposed as critical habitat are under private, State, Native, and Federal ownership. Estimates reflect the total area within critical habitat unit boundaries, without regard to the presence of primary constituent elements. The area actually proposed as critical habitat is therefore less than that indicated in Table 1. Given the large area being proposed, estimates made for the proposal could differ significantly from estimates in any final designation due to changes in the information available and improved calculation methods.

TABLE 1.—ESTIMATED HECTARES OF LAND AND MARINE WATERS PROPOSED AS CRITICAL HABITAT, WHICH ARE OCCUPIED BY THE STELLER'S EIDER, SUMMARIZED BY PRIVATE, STATE, FEDERAL AND NATIVE GOVERNMENT OWNERSHIP

Location	Federal		State		Native		Other Private		Total
	Hectares	%	Hectares	%	Hectares	%	Hectares	%	
North Slope (land)	3,652,400	89	132,300	3	303,700	7	.....	.....	4,088,400
Y–K Delta (land)	202,500	65	.....	.....	108,600	35	300	<1	311,400
Nunivak Island (marine)	20,500	100	.....	.....	.....	.....	.....	.....	20,500
Kuskokwim Bay (marine)	.....	.....	1,285,200	100	.....	.....	.....	.....	1,285,200
N. Side Alaska Peninsula (marine)	.....	.....	200,700	100	.....	.....	.....	.....	200,700
Eastern Aleutians (marine)	4,500	5	84,600	95	.....	.....	.....	.....	89,100
S. Side Alaska Peninsula (marine)	4,800	1	337,100	99	.....	.....	.....	.....	341,900
Kachemak Bay/Ninilchik (marine)	.....	.....	114,200	100	.....	.....	.....	.....	114,200
Kodiak (marine)	27,900	21	106,500	79	.....	.....	.....	.....	134,400
Total	3,912,600	59	2,260,600	34	412,300	6	300	<1	6,585,800

Unit 1: North Slope Nesting Unit

The historical distribution of Steller's eiders on Alaska's North Slope encompasses a broad area, from the Chukchi Sea coast to the Canadian border. The North Slope comprises two major ecological regions—the Arctic Coastal Plain, along the northern edge of the North Slope, and the Arctic Foothills, which form the transition between the coastal plain and the mountains of the Brooks Range to the south. The coastal plain is poorly drained and treeless, and underlain by thick permafrost. Lakes and ponds cover 20–50 percent of the land surface. Another 20 percent is classified as wet or flooded tundra, categories in which water cover varies from 10–50 percent (Ducks Unlimited 1998). These abundant shallow water habitats and their associated aquatic invertebrate fauna are important features of Steller's eider nesting habitat. Aquatic emergent vegetation (*Carex aquatilus* or *Arctophila fulva*) is of particular importance for feeding and escape cover, and comprises approximately 5 percent of the Arctic Coastal Plain (Ducks Unlimited 1998). Relative to the coastal plain, the Arctic Foothills zone is characterized by rolling hills and plateaus, better defined drainage patterns, and fewer lakes and ponds (Gallant *et al.* 1995). Steller's eiders are rare or absent from the foothills as a breeding species. Comparison of recent and historical data (late 1800s on) suggests that this species may be withdrawing from the eastern portion of the Arctic Coastal Plain, although it may always have been more common to the west (Quakenbush *et al.* in prep.).

In the North Slope nesting unit the primary constituent elements for Steller's eiders are those habitat components that are essential for the primary biological needs of foraging, nesting, rearing of young, roosting, sheltering, and dispersal. The primary constituent elements include: small ponds and shallow water habitats (particularly those with emergent vegetation), moist tundra within 100 m (326 ft) of permanent surface waters including lakes, ponds, and pools, the associated aquatic invertebrate fauna, and adjacent nesting habitats. During the nesting season, small ponds with emergent vegetation provide for foraging and brood-rearing, the aquatic invertebrate prey upon which Steller's eiders depend, and adjacent moist tundra for nest sites. On the breeding grounds in northern Alaska, Steller's eiders feed primarily by dabbling in shallow ponds (Quakenbush *et al.* 1995). Both adult and juvenile Steller's eiders on the breeding grounds forage mostly on aquatic insect larvae and freshwater crustaceans, including (but probably not limited to) the following taxa: Midges (Chironomidae), craneflies (Tipulidae), caddisflies (Trichoptera), water fleas (Amphipoda), isopods (Isopoda), fairy shrimp (Anostraca), and tadpole shrimp (Notostraca) (Dement'ev and Gladkov 1967; Portenko 1989; Quakenbush *et al.* 1995; M. Myres, *in litt.* 1999).

Steller's eiders generally nest on slightly elevated areas near ponds (Murie 1924; Brandt 1943; Bee 1958; Cramp *et al.* 1977). In the Barrow area, most nests occur on the rims of low-centered polygons, mostly within partially drained lake-basins that contain a mosaic of shallow ponds with emergent water sedges (*C. aquatilis*) and pendant grasses (*A. fulva*) (Service, unpublished data). Most are within 100 m (326 ft) of permanent water (Service, unpublished data). Steller's eiders rear broods in the same habitats used for nesting (Solovieva 1997; Service, unpublished data), usually within 650 m (2,100 ft) of their nest sites. Near Barrow, monitored broods were found using waterbodies with emergent *A. fulva* 80 percent of the time, ponds with emergent *C. aquatilis* 15 percent of the time, and dry tundra between ponds the remaining 5 percent of the time (Service, unpublished data). Broods used *A. fulva* as escape cover from

predators and other disturbances. Broods move to lakes or marine habitats in early September, after the smaller tundra ponds freeze (Service, unpublished data; R.S. Suydam, unpublished data).

The best unbiased representation of Steller's eider's breeding distribution across the North Slope is provided by observations obtained from two broad-scale aerial surveys conducted annually by the Service. One survey is designed to determine numbers and distribution of waterfowl in general and has been conducted in late June/early July each year since 1989. The other survey specifically targets numbers and distribution of spectacled eiders and has been conducted in mid-June each year since 1992. The two surveys differ in area sampled but, in combination, include the best waterfowl breeding habitat over 63,210 km^2 (24,400 mi^2), from the Chukchi Sea coast to the U.S. and Canada border. Only 136 records of Steller's eiders have been obtained over the 11-year survey record (excluding observations of lone females, which are generally not included in aerial waterfowl survey data, and observations made off systematic transects). The low number of records reflects—(1) the scarcity of the species; (2) the low intensity of the surveys, neither of which cover more than 4 percent of the area in any given year; and (3) the presumably large (but unknown) fraction of the birds actually present at the time of the survey but not detected from the air. The aerial survey results show that Steller's eiders currently occur across the western Arctic Coastal Plain, with the vast majority occurring in the northern NPR–A. Within the surveyed area, there is little evidence that density is related to distance from the coast. Aerial survey observations show, however, that a notable concentration occurs within 10 mi of the village of Barrow. Ground surveys conducted in June 1999 over 180 km^2 (69.5 mi^2) surrounding Barrow located approximately 250 Steller's eiders representing 125 to 134 pairs (some Steller's eiders spotted were not in pairs). Although intensive ground surveys have been conducted in a few other areas on the North Slope, the concentrations seen near Barrow have not been found elsewhere.

The proposed North Slope unit extends across the North Slope of Alaska, from the mouth of the Ututok River on the Chukchi Sea coast, to the Colville River delta on the Beaufort Sea coast, encompassing approximately 96 percent of the aerial survey observations (both in terms of locations and numbers of individuals). The boundaries of the proposed unit were based on the distribution of aerial survey observations, but also the distribution of suitable wetland habitat. All townships containing aerial survey observations were included in the proposed unit, with the exception of observations considered outliers, which are explained below. Intervening townships were also included, even if there were no associated aerial survey observations, provided that they contained a similar density of lakes and wetlands, as indicated on USGS 1:250,000 scale maps. For some of those townships, Steller's eider observations exist from other data sources (*e.g.,* Service, unpublished data; Quakenbush *et al.* in prep.). In any case, the resolution of the data is not sufficient to rule out the existence of undetected locations of concentrated use by nesting eiders, which in aggregate could represent a significant portion of the population. Consistent with the distribution of wetlands noted above, the proposed unit is contained almost entirely within the Arctic Coastal Plain ecoregion or the transition zone between the Arctic Coastal Plain and Arctic Foothills ecoregions, extending into the Foothills zone only at locations where there were actual observations (Gallant *et al.* 1995).

Two records south of Point Lay near the Chukchi Sea coast and three records east of the Colville River were considered outliers because they were disjunct from the other observations. Although Steller's eiders historically occurred east of the Colville River (Quakenbush *et al.* in prep.) and still may be observed occasionally in this region (D. Troy, Troy Ecological Research Associates, *in litt.* 1999), this area currently is peripheral for nesting. There is only one breeding record for Steller's eiders in the Prudhoe Bay area since 1970, despite the most intense ornithological scrutiny of any portion of northern Alaska (D. Troy, pers. comm. 1999; Hohenberger *et al.* 1994; Quakenbush *et al.* in prep.). The decision to exclude likely areas of former occupation east of the Colville River is based on our understanding of current distribution and the assumption that the current breeding range is adequate to support recovery.

The proposed North Slope nesting unit encompasses approximately 40,884 km^2 (15,785 mi^2), 89 percent of which lies within the NPR–A, managed by the Bureau of Land Management. Other major landowners include Native Village and Regional Corporations and the State of Alaska. Excluding NPR–A, minor portions of the area are managed by Federal agencies (including U.S. Department of Defense, Service, and the Bureau of Land Management). Excluding Native Corporations, very little land is owned privately.

Nearly the entire listed population currently nests within the proposed boundaries of the proposed North Slope Nesting Unit, thus the survival and recovery of the species is dependent on the habitat within this area. We do not have sufficient information to identify any subset of this area as sufficient to support recovery of the species to the point where it may be removed from the endangered species list. We therefore consider this area to contain the physical and biological features essential to the conservation of the species.

It is difficult to identify obstacles to recovery, because the importance of current threats and the causes of decline are largely unknown. Although it is unclear whether changes in the suitability of breeding habitat contributed to the decline, we can identify factors that would potentially reduce the capacity of the breeding habitat to support recovery. Almost the entire proposed North Slope Nesting Unit (91 percent) is contained within the NPR–A, managed by the Bureau of Land Management. The NPR–A is managed under the authority of the Naval Petroleum Reserves Production Act of 1976, as amended, which encourages oil and gas leasing, while requiring protection of important surface resources and uses (U.S. Department of the Interior 1998). An oil and gas lease sale was conducted in 1999 for the NPR–A's northeast planning area, which overlaps the eastern 40 percent of this proposed unit. Depending on the outcome of exploration and the potential ensuing development, leasing on other portions of the proposed unit may occur. Other existing or potential uses of NPR–A lands include mineral development, subsistence hunting and fishing, and a variety of recreational uses.

Unit 2: Yukon-Kuskokwim Delta Nesting Unit

The Y–K Delta sites at which Steller's eiders were considered common in the mid-1900s were located within 30 km (18 mi) of the coast, between Kokechik Bay and Nelson Island. Published accounts provide little information regarding habitat requirements on the Y–K Delta breeding grounds. Brandt (1943; p. 267) described Steller's eiders near Kokechik Bay ''feeding along the margins of the shallow pools, tipping up like Mallards.'' Nest sites were found near ponds, and females flushed from nests were reported to use ponds as escape cover (Murie 1924, Brandt 1943).

Steller's eider nest sites have been located in habitat similar to that which is used by spectacled eiders on the Y–K Delta (Conover 1924, Flint and Herzog 1999). This zone of high-density nesting by eiders and other waterfowl is identified as the ''vegetated intertidal zone'' (King and Dau 1981, Kertell 1991) and is described as the area between the outer edge of vascular plant cover and the line of driftwood cast up by high tides, generally within 40 km (25 mi) of the coast. The drift line results from occasional spring and fall storm surges, which inundate the tundra well beyond the normal high tide line. Vegetation in this zone is predominately sedge/grass marsh.

Primary constituent elements for the Y–K Delta nesting unit are assumed to be similar to those described for the North Slope: small ponds and shallow water habitats (particularly those with emergent vegetation), moist tundra within 100 m (326 ft) of permanent surface waters including lakes, ponds, and pools, the associated aquatic invertebrate fauna, and adjacent nesting habitats.

The proposed Y–K Delta Nesting Unit covers approximately 3,114 km^2 (1,202 mi^2) on the outer coastal zone of the central Y–K Delta. The proposed unit is located within 30 km (19 mi) of the coast, bounded by Kokechik Bay and the Askinuk Mountains to the north, and extending south to include Kigigak Island and the north end of Nelson Island. This area represents what we believe likely to be the current range of Steller's eider on the Y–K Delta. It encompasses the core concentration of historical (pre-1970s) occupancy in western Alaska (Kertell 1991; Quakenbush *et al.* in prep.), as well as nests located from 1991–1998 (Flint and Herzog 1999). Although Kertell (1991) suggested that Steller's eiders were extirpated as a breeding species from the Y–K Delta, recent breeding records suggest continued occupancy, at a density below that which is reliably detectable given the level of survey effort (ground or air) of the last 2 decades (Flint and Herzog 1999). We used the locations of historical nesting sites as a partial basis for determining boundaries of the proposed unit, including all central Y–K Delta townships that contained breeding sites recorded in the 1900s. We expanded beyond these townships because it is likely that recent nest sites have gone undetected, given the rarity of the species and the difficulty of detection. Therefore, we also included nearby townships that contain comparable wetland habitat and a high density of spectacled eiders, which are known to utilize the same habitat for nesting on the Y–K Delta (Conover 1924; Kertell 1991; Flint and Herzog 1999). In summary, the proposed unit contains sites where historical and current breeding records exist, and other areas of suitable habitat in which we believe that Steller's eiders persist.

We excluded St. Lawrence Island and most of Nelson Island because breeding status is in doubt in these locations. Breeding has been recorded on Saint Lawrence Island in 1881 and in 1954, and Steller's eiders have been seen there in summer in recent years (Fay and Cade 1959, S. Stephensen, Service, pers. comm., in Quakenbush *et al.* in prep.), but documented historical use is not comparable to the Y–K Delta, and there are no recent breeding records. On the basis of reports provided by local Natives in 1924, Murie and Scheffer (1959) stated that Steller's eiders bred at Nelson Island, but no specific locations were provided. There is likely suitable habitat on both the north and south end of Nelson Island (the central region is upland); however, the northern portion is more contiguous with other historically used habitat, and pairs have been seen on neighboring Kigigak Island in most recent years (Quakenbush *et al.* in prep.). Therefore, we consider the northern end to be part of the present range of the species and propose to designate it as critical habitat. We also exclude areas not known to have been in use for over a century, including the Alaska Peninsula, Nunivak Island, inland Y–K Delta, Saint Michael (northern Y–K Delta), and Point Clarence on the western Seward Peninsula (Quakenbush *et al.* in prep.). We may propose revisions to these boundaries in the future if we obtain new information on the suitability of habitat or the presence of Steller's eiders.

Definitive population trend information was lacking at the time this species was listed (62 FR 31748), but population decline was inferred from an apparent contraction of range, particularly in western Alaska. The recovery plan, including recovery goals, is still in preparation. It is reasonable, however, to predict that re-establishment of a viable breeding population on the Y–K Delta will be an element of the plan, given that the decision to list the species was based, to a large extent, on its near-disappearance from the Y–K Delta. Therefore, we consider the habitat contained within this unit essential to the conservation of the species.

Approximately 65 percent of the proposed Y–K Delta Nesting Unit is located within the Yukon Delta National Wildlife Refuge, although a portion (up to 10 percent) is subject to selection by Native Village or Regional Corporations, under the terms of the Alaska Native Claims Settlement Act of 1971. The remainder of the proposed unit (approximately 35 percent) has been conveyed to Native Village or Regional Corporations. Waterfowl management is a high priority for the Yukon Delta National Wildlife Refuge, and outreach efforts highlight the conservation issues for this species to the Native community.

Marine Units

Steller's eiders occur in marine habitats except during the breeding season. In fall, they congregate primarily in lagoons, bays, and estuaries on the north side of the Alaska Peninsula to molt. Densities can be extremely high; tens of thousands may concentrate in a few square miles in Izembek and Nelson lagoons during the peak of molt in August and September, although use of these areas can vary considerably among years (Petersen 1981). After molt, many disperse to the Aleutian Islands, the south side of the Alaska Peninsula, Kodiak Island, and as far east as Kachemak Bay, although thousands may remain in the lagoons in which they molt unless freezing conditions force them to move to warmer or more protected areas (Metzner 1993). In March or April, Steller's eiders begin to gradually move northward, again congregating on the north side of the Alaska Peninsula and in Bristol and Kuskokwim bays. Nearly 140,000 have been counted in this region during spring migration (Larned *et al.* 1994).

Important molting areas such as Izembek and Nelson lagoons have been repeatedly surveyed for waterfowl in recent decades, but waterfowl surveys in other nearshore marine areas in southwest and southcoastal Alaska have been much more sporadic. Some areas have rarely been surveyed, while others, such as portions of the Kodiak Archipelago's northwest side, have never been surveyed specifically for seaducks. Furthermore, the indication that winter distribution varies considerably in response to changing weather and sea ice conditions suggests that an area must be surveyed several times in different years before its importance to Steller's eiders is determined. Failure to detect Steller's eiders during one or a few surveys is not sufficient to rule out use at other times. Thus, we assume that sites that share similar habitat to that of sites with documented use by Steller's eiders, and for which we cannot rule out based on other current information, are within

the current range of Steller's eiders. Our proposal includes these areas as we believe molting, wintering, and spring staging habitat in marine environments must be maintained to ensure adequate survival during the nonbreeding season.

Most of what is known of the marine ecology of Steller's eider is derived from studies in the shallow bays and lagoons along the Alaska Peninsula. In Izembek and Kinzarof Lagoons, Steller's eiders feed on fauna associated with the extensive eelgrass (*Zostera marina*) beds, eating a variety of crustaceans, bivalves, gastropods, and polychaete worms (Metzner 1993). In Nelson Lagoon, Steller's eiders feed by diving and head dipping in waters less than 6 m (20 ft) deep for invertebrates, with blue mussels (*Mytilus edulis*) and amphipods (*Anisogammarus pugettensis*) being particularly important (Petersen 1980, 1981). The importance of these shallow bays and lagoons to Steller's eiders cannot be overemphasized. They are used by tens of thousands or more during molt, winter, and spring staging, and over a thousand subadults may remain in Nelson Lagoon through the summer in some years (Petersen 1980, 1981; Metzner 1993). These areas must be highly productive to support the huge flocks of Steller's eiders. Petersen (1981) estimated that Steller's eiders may consume 7.3 metric tons (8 tons) of blue mussels per day during molt in Nelson Lagoon.

In addition to these important shallow bays and lagoons, Steller's eiders also winter in several deeper bays and along a massive expanse of open coastline. Much less is known of their ecology in these habitats. Metzner (1993) found that the number of Steller's eiders in Cold Bay on the south side of the Alaska Peninsula increased as waters in Izembek Lagoon froze and the number wintering there decreased. In the deeper waters of Cold Bay, where food-rich eelgrass beds were absent, Steller's eiders foraged by diving close to shore for sessile invertebrates on and in the seafloor and more mobile invertebrates in the water column (Metzner 1993). The propensity for Steller's eiders to use shallow waters and stay nearshore in deeper areas is supported by C. Dau (pers. comm. 1999), who notes that Steller's eiders generally stay within ''a quarter of a mile'' of shore and in waters less than 10 m (30 ft) deep. Results from aerial survey transects arrayed parallel to, and at various distances from, the north shore of the Alaska Peninsula are consistent with Dau's (1999) observation. Of the four transect lines surveyed throughout the winter, Steller's eiders were seen only on the transect within 400 m (¼ mi) of shore (Troy and Johnson 1987). Beyond these few observations, the habitat requirements of Steller's eiders over much of their vast winter range are unknown.

Based on this information, we identify the primary constituent elements for Steller's eiders in marine habitat as marine waters up to 10 m (30 ft) deep and the underlying substrate, the associated invertebrate fauna in the water column and in and on the underlying substrate, and, where present, eelgrass beds and associated flora and fauna.

We do not propose critical habitat for several marine areas in which Steller's eiders occur. We excluded wintering areas for which recent replicated surveys indicated that Steller's eiders are of rare and/or irregular occurrence, including the Pribilof Islands (A. Sowls, Service, pers. comm. 1999), south side of the Kenai Peninsula (U.S. Fish and Wildlife Service 1998; R. Day, ABR Inc., *in litt.* 1999), and Prince William Sound (Service 1998; Lance *et al.* 1999; R. Day *in litt.* 1999). We also excluded the central and western Aleutian islands, wintering areas for which a consistent historical record indicates scarcity and/or irregular use (Dau 1999b).

In proposing Kuskokwim Bay, and other Bristol Bay areas known to be used for spring staging, we intend to include portions of the migration corridors known to receive sustained use by large numbers of Steller's eiders. Other than spring staging areas, migration routes are ill-defined, and migration may be dispersed over large sections of the Bering and Chukchi Seas, with little sustained use of any given section. Therefore, we do not propose units for general migration corridors.

We do not propose critical habitat at sites that are used exclusively in the summer by nonbreeding birds. For example, subadults and nonbreeding males have been observed on St. Lawrence Island in summer (Fay and Cade 1959, Fay 1961), however, information on this life-history stage is too limited to place observations such as these into a general context that would permit description of features essential to the conservation of Steller's eiders.

We propose marine waters within the following areas as critical habitat. See the accompanying maps for further clarification of proposed unit boundaries.

Unit 3: Nunivak Island

The nearshore areas around this island are used by scattered flocks of hundreds of Steller's eiders during molt (Dau 1999a) and by thousands for staging prior to spring migration (Larned *et al.* 1994; Larned 1998). Large numbers have also been noted passing Cape Etolin on the northeast side of the island during early August (Swarth 1934; Dau 1999a). It is also possible that Steller's eiders may mix with large flocks of common and king eiders (*Somateria mollissima* and *Somateria spectabilis,* respectively) in openings in sea ice along the south side of the island during winter (Dau 1999b). This unit includes the marine waters around Nunivak to a distance of 400 m (¼ mi) offshore, which includes an area of approximately 205 km^2 (79 mi^2) and approximately 600 km (380 mi) of coastline.

Unit 4: Kuskokwim Bay

Aerial surveys during spring migration indicate that virtually all Steller's eiders that winter in Alaska move from the Alaska Peninsula, cross Bristol Bay, and stage in Kuskokwim Bay for days or weeks before resuming their northward migration to their breeding grounds (Petersen and Sigman 1977; Larned *et al.* 1994; Larned 1998; W. Larned, pers. comm. 1999). During this time, flocks of hundreds or thousands are seen along the southeast coast of Kuskokwim Bay from Cape Peirce to Jacksmith Bay and west of the mouth of the Kuskokwim River from Kwigillingok to Kinak Bay (Larned *et al.* 1994; Larned 1998; W. Larned, pers. comm. 1999). Steller's eiders also concentrate in protected bays along the coast including Nanvak, Chagvan, and Goodnews Bays (W. Larned, pers. comm. 1999). Hundreds to thousands have also been observed in the region from Cape Avinof and Pingurbek Island south to Cape Peirce during molt and autumn migration (Dau 1987; Dick and Dick 1971; Petersen and Sigman 1977; Petersen *et al.* 1991), but it is the huge concentrations in spring migration that identify the importance of Kuskokwim Bay to Steller's eiders.

We propose to designate marine waters on the north side of Kuskokwim Bay (from the mouth of the Kolavinarak River to the village of Kwigillingok), to a distance of 40 km (25 mi) offshore. We also propose marine waters on the south side of Kuskokwim Bay (from the mouth of the Kanektok River to Cape Peirce), to a distance of 40 km (25 mi) offshore. In addition, marine waters from Cape Peirce to Tongue Point are proposed, to a distance of 0.8 km (½ mile). The proposed unit includes an area of approximately 12,852 km^2 (4,962 mi^2), and approximately 700 km (450 mi) of shoreline.

Unit 5: North Side of the Alaska Peninsula

A number of bays, lagoons, and nearshore areas between Egegik Bay and Bechevin Bay on the north side of the Alaska Peninsula are used by large numbers of Steller's eiders during molt, winter, or spring staging. Observers surveying this region have recorded hundreds to over a hundred thousand birds (Arneson 1980; Boden 1994; Larned *et al.* 1994; Larned 1998; Dau 1999). Some areas, such as Izembek Lagoon and the Nelson Lagoon/Herendeen Bay/Port Moller complex, are particularly important, and may harbor tens of thousands during molt and winter (Jones 1965; Petersen 1981; Metzner 1993; Laubhan and Metzner 1999). Port Heiden is used by thousands during autumn molt (Arneson 1980) and again during spring staging (Larned *et al.* 1994), and may support Steller's eiders in winter until the shallow waters freeze (Dau 1999b). Besides those previously mentioned, other areas on the north side of the Alaska Peninsula have been identified as supporting significant numbers of Steller's eiders during spring staging, such as Egegik and Ugashik Bays, Cinder River estuary, Port Heiden, Seal Islands, Cape Seniavin, and Bechevin Bay where hundreds to thousands have been observed in March (Boden 1994) and April and May (Arneson 1980; Larned *et al.* 1994; Larned 1998). The Cinder River estuary has been reported to be used by hundreds to low thousands of Steller's eiders during molt (Wilk *et al.* 1986), as has Port Heiden (Arneson 1980), Seal Islands (Arneson 1980; Dau 1999a), and Bechevin Bay (Arneson 1980). Based on aerial surveys and other available data, the following bays, lagoons, and shoal areas have been identified as important habitat for Steller's eiders and are proposed for designation as critical habitat, in their entirety—Egegik Bay, Ugashik Bay, Cinder River Estuary, Port Heiden, Seal Islands, Cape Seniavin, Nelson Lagoon, Herendeen Bay, Port Moller, Izembek Lagoon, and Bechevin Bay. This proposed unit includes an area of approximately 2,007 km^2 (775 mi^2) and 1,050 km (650 mi) of coastline.

Unit 6: Eastern Aleutians

This is probably a major concentration area for wintering Steller's eiders, particularly when bays and lagoons on the Alaska Peninsula freeze (Metzner 1993; Dau 1999b; Laubhan and Metzner 1999). Although survey coverage has been sporadic and is incomplete, thousands have been seen around Unimak Island in late winter (Arneson 1980; Larned *et al.* 1994); hundreds are seen around Unalaska Island during the National Audubon Society's annual Christmas Bird Counts (summarized in Service 1998); and waterbird surveys in Dutch Harbor recorded Steller's eiders as the most abundant species observed in 1995 (Fairchild and Heer 1997). Over 1,400 Steller's eiders were recorded on winter (February-March) boat surveys of the Krenitzin Islands (Herter 1991). In an aerial survey of the eastern Aleutians from Unimak Island through Samalga Island conducted only in mid-winter, up to low hundreds of Steller's eiders were observed at each of five locations throughout the study area, with greatest densities around Samalga Island (Arneson 1980). We propose to designate all marine waters within 400 m (¼ mi) of mean high water from Unimak Island, west to Samalga Pass, to include Samalga, Umnak, Unalaska and Unimak Islands, and all other associated islands, islets, offshore rocks, reefs, and spires. The proposed unit includes an area of approximately 891 km^2 (344 mi^2), and 2,400 km (1,500 mi) of coastline.

Unit 7: South Side of the Alaska Peninsula

Information on Steller's eiders on the south side of the Alaska Peninsula is limited compared to that on the north side. There are no reports of molting Steller's eiders anywhere along the south side of the Alaska Peninsula between False Pass and lower Cook Inlet, although wintering birds have been observed in scattered locations throughout this huge area. Thousands of wintering Steller's eiders have been reported during aerial surveys in the Sanak Islands (Dau and Chase 1995) and between Cold Bay and Puale Bay (Boden 1994). After completion of molt, Steller's eiders increased in Cold Bay and Kinzarof Lagoon concurrent with a decline in numbers in Izembek Lagoon (Laubhan and Metzner 1999; Metzner 1993). When the birds are excluded from protected waters on the north side of the Alaska Peninsula by encroaching ice, they may be exposed to harsher weather conditions, forcing them into less preferred feeding areas on the south side of the Alaska Peninsula and up to lower Cook Inlet. Aerial and boat surveys of marine birds and mammals conducted in lower Cook Inlet in winter reported hundreds of Steller's eiders in nearshore areas of Kamishak Bay up to the Iniskin Peninsula (Arneson 1980; Agler *et al.* 1995).

We propose to designate all marine waters within 400 m (¼ mi) of mean high water from Isanotski Strait (at False Pass) east to the lower end of west Cook Inlet, as far north as Kamishak Bay. This applies to the Shumagin and Semidi Islands, Chirikof Island, and all other associated islands, islets, offshore rocks, reefs, and spires. We also include waters within 8 km (5 mi) of the south side, and 1.6 km (1 mi) of the north side, of the Sanak Islands and within 1.6 km (1 mi) of the mainland shore of Kamishak Bay. We include the following areas in their entirety, including waters beyond 400 m (¼ mi) offshore—Morzhovoi Bay (northern portion only), Cold Bay, Ivanof Bay, Chignik Lagoon, and Wide Bay. This unit includes an area of approximately 3,419 km^2 (1,320 mi^2), and 5,300 km (3,300 mi) of coastline.

Unit 8: Kachemak Bay/Ninilchik

Available information indicates that Steller's eiders consistently occur in Kachemak Bay in winter. Tens or hundreds frequently occur near Homer and Homer Spit (Christmas Bird Count in Service 1998; Russ Oates, Service, *in litt.* 1997; Agler *et al.* 1998), and flocks of tens were found along transects that sampled offshore waters east of Homer (Rosenberg and Petrula 1998). Hundreds have been observed on the south side of the Bay, particularly along shore between China Poot Bay and Point Bede (Agler *et al.* 1995). Hundreds also apparently winter along the shore south of Ninilchik, where 650 were observed in January 1997 (Russ Oates, *in litt.* 1997).

We propose to designate all marine waters of Kachemak Bay east of a line extending from Point Bede (west of English Bay and Port Graham) north to Anchor Point. In addition, we propose to designate all marine waters within 1.6 km (1 mi) of the mean high water line, from Anchor Point north to the mouth of Deep Creek (near Ninilchik). This unit includes an area of approximately 1,142 km^2 (441 mi^2), and 450 km (300 mi) of coastline.

Unit 9: Kodiak

Steller's eiders are considered a common winter resident in the Kodiak Archipelago. Aerial surveys in nearshore areas of eastern and southern Kodiak Island and in the Trinity Islands located 2,892 Steller's eiders in 1992, 4,032 in 1993, and 5,349 in 1994 (Larned and Zwiefelhofer 1995). Flocks of hundreds were seen, particularly in lagoons and eelgrass beds. In surveys around Sitkalidak, Kodiak, and southern Afognak Islands, Steller's eiders were reported to be present in estimates of low thousands (Forsell and Gould 1980). Steller's eiders are also regularly recorded during annual winter boat surveys in the archipelago (D.

Zwiefelhofer, *in litt.* 1999), and hundreds to low thousands are counted during the Christmas Bird Count in Kodiak (Service 1998). Because of the consistent and extensive use of the areas that have been surveyed in the Kodiak area, we propose to designate all marine waters within 400 m (¼ mi) of Kodiak and Afognak Islands, and all other associated islands, islets, offshore rocks, reefs, and spires. This parcel includes an area of approximately 1,344 km^2 (519 mi^2) and 3,900 km (2,450 mi) of coastline.

Although this proposal is based on the best available information, we recognize that the information on Steller's eiders is incomplete. In particular, better information on Steller's eider distribution and the threats facing the species would improve our ability to identify those areas essential for its conservation. Our ability to identify essential areas is also likely to improve as recovery objectives and criteria are established. As new information becomes available and the recovery planning process develops, we may reevaluate critical habitat designations and propose to add, delete, or modify existing critical habitat.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing promotes conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against certain activities involving listed species are discussed, in part, below.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated or proposed. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act and regulations at 50 CFR 402.10 require Federal agencies to confer with the Service on any action that is likely to result in destruction or adverse modification of proposed critical habitat. These conferences, which consist of informal discussions, are intended to assist responsible agencies and the applicant in identifying and resolving potential conflicts.

If this proposal culminates in the designation of critical habitat, section 7(a)(2) of the Act will require Federal agencies to enter into consultation with us on actions that may affect listed species or destroy or adversely modify critical habitat. Thus, activities on Federal lands that may affect the Steller's eider or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, or a section 402 permit from the Environmental Protection Agency, will also be subject to the section 7 consultation process. Federal actions not affecting the species or its critical habitat, as well as actions on non-Federal lands that are not federally funded or permitted, will not require section 7 consultation.

Section 4(b)(8) of the Act requires us to describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to the extent that the value of critical habitat for both the survival and recovery of the species is appreciably diminished. We note that such activities are also almost certain to jeopardize the species (see discussion in Critical Habitat section, above). Activities that have the potential to destroy or adversely modify critical habitat for Steller's eiders include, but are not limited to:

(1) Draining, filling, or contaminating wetlands and associated surface waters;

(2) Filling, dredging, or pipeline construction in marine waters;

(3) Commercial fisheries that harvest or damage the benthic or planktonic flora or fauna in marine waters;

(4) Spilling or discharging petroleum or other hazardous substances; or

(5) Discharge of sediment or toxic substances into freshwater systems that drain into adjacent nearshore marine waters.

Previous Consultations

Since Steller's eiders were listed in 1997, we have consulted with several Federal agencies on a variety of actions to evaluate impacts to the species. In most cases, our consultations with other Federal agencies have determined that the proposed activities would not adversely affect Steller's eiders. One or both of the following reasons precipitated these findings—(1) the proposed activity would occur during seasons when Steller's eiders are absent and would have no permanent impact to habitat (e.g., winter seismic work); and (2) the proposed activity affected a minimal amount of habitat in an area where Steller's eiders occur at extremely low density. In three exceptions, the proposed action would occur in an area where Steller's eiders concentrate or would have affected a considerable amount of habitat. In each of these cases, we determined that the proposed action may adversely affect the species, which triggered a more involved, formal consultation. A brief summary of these consultations follows:

(1) NPR–A Northeast Planning Area Integrated Activity Plan. A management plan for this 4.6 million-acre area was developed that allowed for oil and gas leasing but also addressed recreational activities, aircraft use, hazardous- and solid-material removal and remediation, and seismic activities. Steller's eiders nest in this region and may be affected by disturbance or habitat alteration.

(2) Community expansion in Barrow. The North Slope Borough proposed to expand an existing housing subdivision into an area historically used by nesting Steller's eiders.

(3) Northstar Development project. This consultation addressed the possible effects of an offshore oil development project in the Beaufort Sea and adjacent terrestrial area. Steller's eiders occur at extremely low density in the project area, so direct, local effects were thought to be unlikely. The primary concern arose from possible marine oil spills from a subsea pipeline that could be transported by wind and currents westward to areas where Steller's eiders are more likely to occur.

In each of these three consultations, we determined that the project was not likely to jeopardize the continued existence of Steller's eiders. Following that determination, our biological opinions provided mandatory reasonable and prudent measures designed to minimize the effects of the proposed projects on the species. In each case, our evaluations addressed effects of habitat alteration on Steller's eiders.

TABLE 2. ACTIVITIES POTENTIALLY AFFECTED BY STELLER'S EIDER LISTING AND CRITICAL HABITAT DESIGNATION

Categories of activities	Activities involving a federal action potentially affected by species listing only [1]	Additional activities involving a federal action potentially affected by critical habitat designation [2]
Federal Activities Potentially Affected [3]	Activities that the Federal Government carries out, such as scientific research, land surveys, law enforcement, oil spill response, resource management, and construction/expansion of physical facilities.	None.
Private Activities Potentially Affected [4]	Activities that also require a Federal action (permit, authorization, or funding), such as scientific research, commercial fishing, sport and subsistence hunting, shipping and transport of fuel oil and gasoline to villages, and village maintenance, construction and expansion.	None.

[1] This column represents impacts of the final rule listing the Steller's eider (June 11, 1997) (62 FR 31748) under the Endangered Species Act.
[2] This column represents the impacts of the critical habitat designation above and beyond those impacts resulting from listing the species.
[3] Activities initiated by a Federal agency.
[4] Activities initiated by a private entity that may need Federal authorization or funding.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is designated subsequent to consultation. Consequently, some Federal agencies may request conferencing with us on actions for which formal consultation has been completed, in anticipation of the need to reinitiate consultation if this proposal becomes finalized.

If you have questions regarding whether specific activities will constitute adverse modification of critical habitat, have inquiries about prohibitions and permits, or would like copies of the regulations on listed wildlife, contact the Endangered Species Branch, Northern Alaska Ecological Services (see **ADDRESSES** section) (telephone 907/456–0203, facsimile 907/456–0208).

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial data available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species. Although we could not identify any incremental effects of this proposed critical habitat designation above those impacts of listing, we will conduct an economic analysis to further evaluate this finding. We will conduct the economic analysis for this proposal prior to a final determination. When the draft economic analysis is completed, we will announce its availability with a notice in the **Federal Register**, and we will reopen the comment period for 30 days at that time to accept comments on the economic analysis or further comment on the proposed rule.

Public Comments Solicited

We intend that any final action resulting from this proposal be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why any area should or should not be determined to be critical habitat as provided by section 4 of the Act;

(2) Specific information on the abundance and distribution of Steller's eiders and their habitat;

(3) What areas are essential for the conservation of Steller's eiders and may require special management protection or consideration;

(4) Current or planned activities in proposed critical habitat units and their possible impacts on proposed critical habitat; and

(5) Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat.

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand including answers to questions such as the following: (1) Are the requirements in the document clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the proposed rule in the ''Supplementary Information'' section of the preamble helpful in understanding the document? (5) What else could we do to make the proposed rule easier to understand?

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 record, which we will honor to the extent allowable by law. In certain circumstances, we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this request 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.

In accordance with our policy published on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure listing decisions are based on scientifically sound data, assumptions, and analyses. The peer reviewers will be invited to comment during the public comment period on the proposal and our interpretation of the available information in regard to critical habitat.

We will consider all comments and information received during the 60-day comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. We intend to schedule three public hearings on this proposal. We will announce the dates, times, and places of those hearings in local newspapers at least 15 days prior to the first hearing.

Required Determinations

1. Regulatory Planning and Review

This document is a significant rule and has been reviewed by the Office of Management and Budget (OMB), under Executive Order 12866.

a. This rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. The Steller's eider was listed as a threatened species in 1997. Between the Fiscal Years 1997–2000, we have conducted 141 section 7 consultations with other Federal agencies to ensure that their actions would not jeopardize the continued existence of the Steller's eider. The areas proposed for critical habitat are currently occupied by the Steller's eider. Under the Endangered Species Act, critical habitat may not be adversely modified by a Federal agency action; the Act does not impose any restrictions on non-Federal entities unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency. Section 7 requires Federal agencies to ensure that they do not jeopardize the continued existence of the species. Based upon our experience with the species and its needs, we conclude that any Federal action or authorized action that could potentially cause an adverse modification of the proposed critical habitat would currently be considered as ''jeopardy'' under Act. Accordingly, the designation of currently occupied areas as critical habitat does not have any incremental impacts on what actions may or may not be conducted by Federal agencies or non-Federal persons that receive Federal authorization or funding. Non-Federal persons that do not have a Federal ''sponsorship'' of their actions are not restricted by the designation of critical habitat (however, they continue to be bound by the provisions of the Act concerning ''take'' of the species).

b. This rule will not create inconsistencies with other agencies' actions. As discussed above, Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of the Steller's eider since the listing in 1997. The prohibition against adverse modification of critical habitat is not expected to impose any additional restrictions to those that currently exist because all proposed critical habitat is occupied. Because of the potential for impacts on other Federal agency actions, we will continue to review this proposed action for any inconsistencies with other Federal agency actions.

c. This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Federal agencies are currently required to ensure that their activities do not jeopardize the continued existence of the species, and as discussed above, we do not anticipate that the adverse modification prohibition (from critical habitat designations) will have any incremental effects because all proposed critical habitat is occupied.

d. The proposed rule follows the requirements for determining critical habitat contained in the Endangered Species Act.

2. Regulatory Flexibility Act

In the economic analysis, we will determine whether designation of critical habitat will have a significant effect on a substantial number of small entities. As discussed in section 1 above, this rule is not expected to result in any restrictions in addition to those currently in existence. As indicated in Table 1 above (see Proposed Critical Habitat section), we have proposed land and marine waters that are occupied by the Steller's eider. Within these areas, activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for both the survival and recovery of the Steller's eider is appreciably reduced. We note that such activities are also likely to jeopardize the continued existence of the species. Such activities that have the potential to destroy or adversely modify critical habitat for Steller's eiders include, but are not limited to: (1) Draining, filling, or contaminating wetlands and associated surface waters; (2) Filling, dredging, or pipeline construction in marine waters; (3) Commercial fisheries that harvest or damage the benthic or planktonic flora or fauna in marine waters; (4) Spilling or discharging petroleum or other hazardous substances; or (5) Discharge of sediment or toxic substances into freshwater systems that drain into adjacent nearshore marine waters. Many of these activities sponsored by Federal agencies within the proposed critical habitat areas are carried out by small entities (as defined by the Regulatory Flexibility Act) through contract, grant, permit, or other Federal authorization. As discussed in section 1 above, these actions are currently required to comply with the listing protections of the Act, and the designation of critical habitat is not anticipated to have any additional effects on these activities. For actions on non-Federal property that do not have a Federal connection (such as funding or authorization), the current restrictions concerning take of the species remain in effect, and this rule has no additional restrictions (see Table 2 in the Previous Consultations section above).

3. Small Business Regulatory Enforcement Fairness Act

In the economic analysis, we will determine whether designation of critical habitat will cause (a) any effect on the economy of $100 million or more, (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions in the economic analysis, or any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises

4. Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

a. This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. Small governments will be affected only to the extent that any programs using Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat. However, as discussed in section 1, these actions are currently subject to equivalent restrictions through the listing protections of the species, and no further restrictions are anticipated.

b. This rule will not produce a Federal mandate of $100 million or greater in any year, i.e., it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments.

5. Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. As discussed above, the designation of critical habitat affects only Federal agency actions. The rule will not increase or decrease the current restrictions on private property concerning take of the Steller's eider. Due to the prohibition against take of the species both within and outside of the designated areas, and the fact that critical habitat provides no incremental restrictions, we do not anticipate that property values will be affected by the critical habitat designation. Additionally, critical habitat designation does not preclude development of habitat conservation plans and issuance of incidental take permits. Landowners in areas that are included in the designated critical habitat will continue to have opportunity to utilize their property in ways consistent with the survival of the Steller's eider.

6. Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. The designation of critical habitat in areas currently occupied by the Steller's eider imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas protected are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur). In keeping with Department of the Interior and Department of Commerce policy, the Service requested information from the Alaska Department of Fish and Game. In addition, the State has a representative on our recovery team for this species. As the Steller's eider critical habitat listing process proceeds, we will coordinate with the appropriate State agencies.

7. Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We designate critical habitat in accordance with the provisions of the Endangered Species Act and plan public hearings on the proposed designation during the comment period. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the Steller's eider.

8. Paperwork Reduction Act

This rule does not contain any information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act is required.

9. National Environmental Policy Act

We have determined that we do not need to prepare Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969 (NEPA), in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** in October 1983 (48 FR 49244).

10. Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951) and 512 DM 2: We understand that we must relate to federally recognized Tribes on a Government-to-Government basis. Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act,'' states that ''Critical habitat shall not be designated in such areas [an area that may impact Tribal trust resources] unless it is determined essential to conserve a listed species. In designating critical habitat, the Service shall evaluate and document the extent to which the conservation needs of a listed species can be achieved by limiting the designation to other lands.'' While this Order does not apply to the State of Alaska, we recognize our responsibility to inform affected Native Corporations and regional Native governments of this proposal. Subsequent to this proposal, we will coordinate with the Native communities and analyze the need to designate critical habitat on Native lands and consult with other bureaus and offices of the Department about the potential effects of this rule on Native Corporations and regional Native governments.

References Cited

A complete list of all references cited in this proposed rule is available upon request from the Endangered Species Branch, Northern Alaska Ecological Services (see **ADDRESSES** section).

Author

The primary authors of this document are Ted Swem, Cathy Donaldson, and Philip Martin (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

For the reasons given in the preamble, we propose to amend 50 CFR part 17 as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544: 16 U.S.C. 4201–4245: Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. In § 17.11 (h) revise the entry for Steller's eider under ''BIRDS'' to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
BIRDS							

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	*
Eider, Steller's	*Polysticta stelleri*	USA (AK); Russia, winters to Scandanavia.	U.S.A. (AK breeding population only).	T	616	17.95 (b) ..	NA
*	*	*	*	*	*	*	*

3. In § 17.95 add critical habitat for the Steller's eider (*Polysticta stelleri*) under paragraph (b) in the same alphabetical order as this species occurs in § 17.11 (h) to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) *Birds.*

* * * * *

STELLER'S EIDER (*Polysticta stelleri*)

1. Critical habitat units are depicted for the North Slope, Yukon-Kuskokwim Delta, and southwest and southcoastal Alaska, on the maps below. The maps are for reference only; the areas in critical habitat are legally described below.

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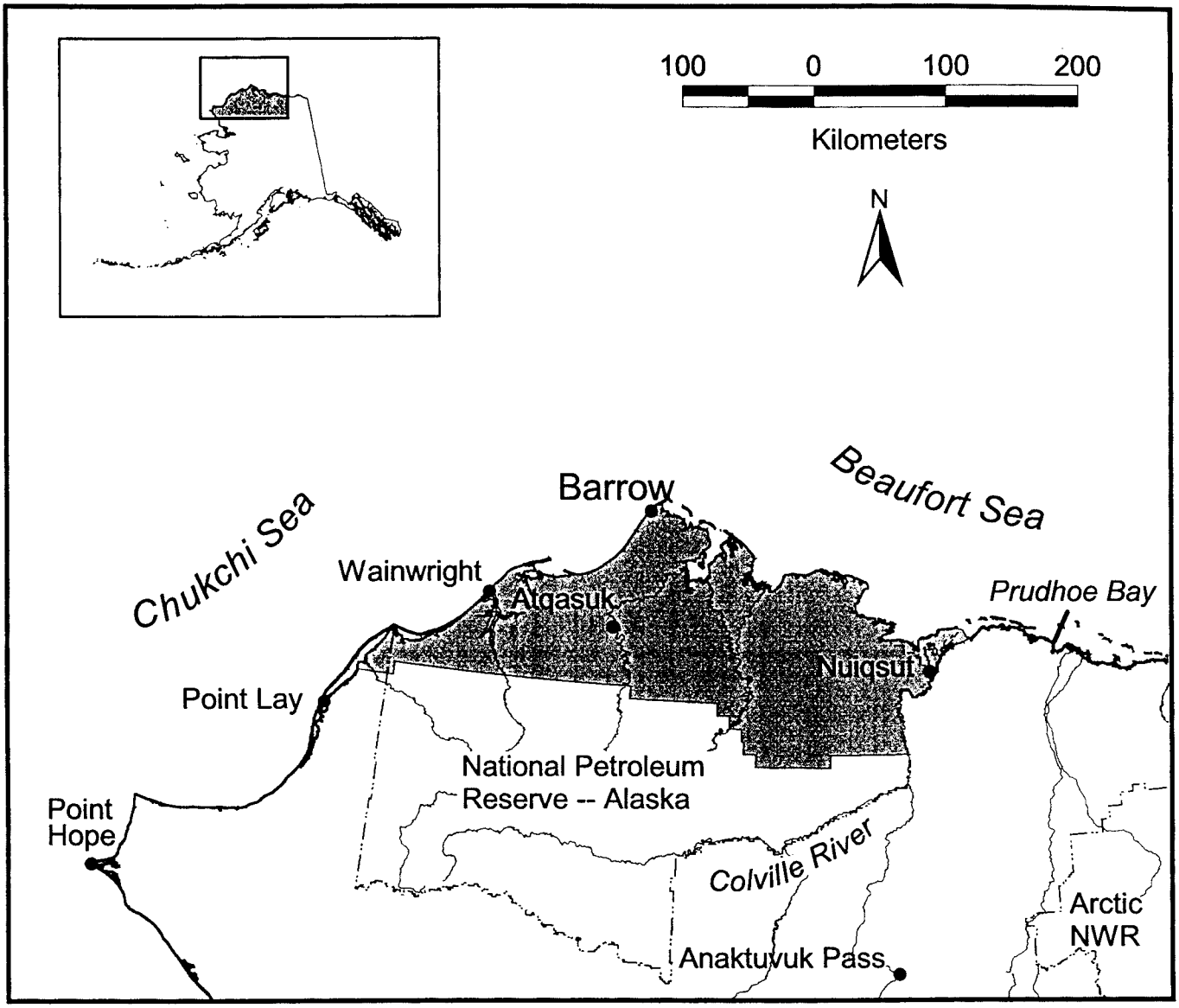


2. Within these areas, the primary constituent elements are those habitat components that are essential for the primary biological needs of feeding, nesting, brood rearing, roosting, molting, and wintering. In terrestrial critical habitat (North Slope and

Yukon-Kuskokwim Delta Units), the primary constituent elements are small ponds and shallow water habitats (particularly those with emergent vegetation), moist tundra within 100 meters (326 ft) of permanent surface waters including lakes, ponds, and pools, the associated aquatic invertebrate fauna, and adjacent nesting habitats. In marine critical habitat (all other units), the primary constituent elements include the marine waters up to 10 m (30 ft) deep and the underlying substrate, the associated invertebrate fauna in the water column and in and on the underlying substrate, and, where present, eelgrass beds and their associated flora and fauna.

3. Critical habitat does not include existing human structures.

Unit 1. North Slope Nesting Unit

All Umiat Meridian, Alaska

Beginning at a point of land on the line of mean high tide of the Chukchi Sea known as Icy Cape at approximate Latitude 70° 19′ 50″ North, Longitude 161° 53′ 00″ West, within Township 11 North, Range 39 West, Umiat Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE in a southwesterly direction with the line of mean high tide along the ocean side of the barrier islands and sand spits approximately 30 miles to the meander corner for the line dividing Townships 7 and 8 North, Range 43 West;

THENCE east with the line dividing Townships 7 and 8 North approximately 22 miles to the corner common to Townships 7 and 8 North, Ranges 39 and 40 West;

THENCE north with the line dividing Ranges 39 and 40 West approximately 6 miles to the line dividing Townships 8 and 9 North;

THENCE east with the line dividing Townships 8 and 9 North approximately 112 miles to the line dividing Township 8 North, Ranges 20 and 21 West;

THENCE south with the line dividing Ranges 20 and 21 West approximately 6 miles to the corner common to Townships 7 and 8 North, Ranges 20 and 21 West;

THENCE east with the line dividing Townships 7 and 8 North approximately 42 miles to the corner common to Townships 7 and 8 North, Ranges 13 and 14 West;

THENCE south with the line dividing Ranges 13 and 14 West approximately 6 miles to the corner common to Townships 6 and 7 North, Ranges 13 and 14 West;

THENCE east with the line dividing Townships 6 and 7 North approximately 6 miles to the corner common to Townships 6 and 7 North, Ranges 12 and 13 West;

THENCE south with the line dividing Ranges 12 and 13 West approximately 6 miles to the corner common to Townships 5 and 6 North, Ranges 12 and 13 West;

THENCE east with the line dividing Townships 5 and 6 North approximately 6 miles to the corner common to Townships 5 and 6 North, Ranges 11 and 12 West;

THENCE south with the line dividing Ranges 11 and 12 West approximately 6 miles to the line dividing Townships 4 and 5 North;

THENCE east with the line dividing Townships 4 and 5 North approximately 1 mile to the line dividing Township 4 North, Ranges 11 and 12 West;

THENCE south with the line dividing Ranges 11 and 12 West approximately 6 miles to the corner common to Townships 3 and 4 North, Ranges 11 and 12 West;

THENCE east with the line dividing Townships 3 and 4 North approximately 6 miles to the corner common to Townships 3 and 4 North, Ranges 10 and 11 West;

THENCE south with the line dividing Ranges 10 and 11 West approximately 6 miles to the corner common to Townships 2 and 3 North, Ranges 10 and 11 West;

THENCE east with the line dividing Townships 2 and 3 North approximately 36 miles to the corner common to Townships 2 and 3 North, Ranges 4 and 5 West;

THENCE north with the line dividing Ranges 4 and 5 West approximately 6 miles to the corner common to Townships 3 and 4 North, Ranges 4 and 5 West;

THENCE east with the line dividing Townships 3 and 4 North approximately 37 miles to the line of mean high water on the eastern (right) bank of the Colville River within Section 31 of Township 4 North, Range 3 East;

THENCE in a north and northeasterly direction downstream with the line of mean high water on the eastern (right) bank of the Colville River, following the eastern banks of the easternmost sloughs approximately 100 miles along the line of mean high tide of the Arctic Ocean to the meander corner common to Section 36 of Township 13 North, Range 7 East and Section 31 of Township 13 North, Range 8 East;

THENCE in a northwesterly, westerly, and southwesterly direction with the outer perimeter of the Colville River Delta at the line of mean high tide of the Arctic Ocean, including all islands and bars, approximately 30 miles to the boundary of the National Petroleum Reserve-Alaska within Section 32 of Township 13 North, Range 4 East;

THENCE in a northwesterly and southwesterly direction with the highest highwater mark of the Arctic Ocean and the Chukchi Sea, common with the boundary of the National Petroleum Reserve-Alaska as withdrawn by Executive Order 3797–A on February 27, 1923, approximately 400 miles to Icy Cape within Township 11 North, Range 39 West, Umiat Meridian, Alaska, the TRUE POINT OF BEGINNING.

Unit 2. Yukon-Kuskokwim Nesting Unit

All Seward Meridian

Beginning at the U.S. Coast and Geodetic Survey monument ''Kokechik South Base'' at Latitude 61°38′13.11″ North, Longitude 166°10′16.12″ West (NAD 83), within Section 21 of Township 18 North, Range 93 West, Seward Meridian, Alaska, the TRUE POINT OF BEGINNING of the lands to be described.

THENCE west approximately 150 feet to the line of mean high tide of the Bering Sea;

THENCE southerly and southeasterly with the line of mean high tide of the Bering Sea, common with the boundary of the Yukon Delta and Alaska Maritime National Wildlife Refuges as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, to the meander corner common to Sections 10 and 11 of Township 16 North, Range 94 West;

THENCE southeasterly with said refuge boundaries, closing the mouth of Hooper Bay to include all islands within Hooper Bay, approximately 7¾ miles to the meander corner common to Sections 2 and 3 of Township 15 North, Range 93 West;

THENCE continuing southeasterly with said refuge boundaries, closing the mouths of all inlets, rivers, and straits, along the line of mean high tide of the Bering Sea to the mouth of the Kashunuk River at the northern meander corner common to Sections 28 and 29 of Township 14 North, Range 91 West;

THENCE southerly with said refuge boundaries approximately 4,200 feet to the south bank of the mouth of the Kashunuk River at the southern meander corner common to Sections 28 and 29 of Township 14 North, Range 91 West;

THENCE continuing southerly with said refuge boundaries along the line of mean high tide of the Bering Sea approximately 20 miles to the easternmost point of a headland at the west side of Hazen Bay within Section 1 of Township 11 North, Range 91 West;

THENCE continuing with said refuge boundaries on an approximate forward bearing of South 38° East approximately 8 miles across the mouth of Hazen Bay to a point on the headland at approximate Latitude 60°59′00″ North, Longitude 165°12′00″ West, within Section 2 of Township 10 North, Range 90 West;

THENCE continuing with said refuge boundaries southerly and southeasterly along the line of mean high tide of the Bering Sea approximately 8 miles to a point on the Naskonat Peninsula at the meander corner common to Sections 2 and 3 of Township 9 North, Range 89 West;

THENCE continuing with said refuge boundaries on an approximate forward bearing of South 21° West approximately 3½ miles to the most northerly tip of Nunivachak Island within Section 21 of Township 9 North, Range 89 West;

THENCE continuing with said refuge boundaries southwesterly along the line of mean high tide of Hazen Bay of the Bering Sea on the seaward side of Nunivachak Island approximately ½ mile to the most southerly tip of Nunivachak Island within Section 21 of Township 9 North, Range 89 West;

THENCE continuing with said refuge boundaries on an approximate forward bearing of South 22° West approximately 4 miles to the most northwesterly tip of Nelson Island within Section 11 of Township 8 North, Range 90 West;

THENCE continuing with said refuge boundaries southeasterly along the line of mean high tide of Hazen Bay of the Bering Sea approximately 4½ miles to the line dividing Townships 7 and 8 North, Range 89 West;

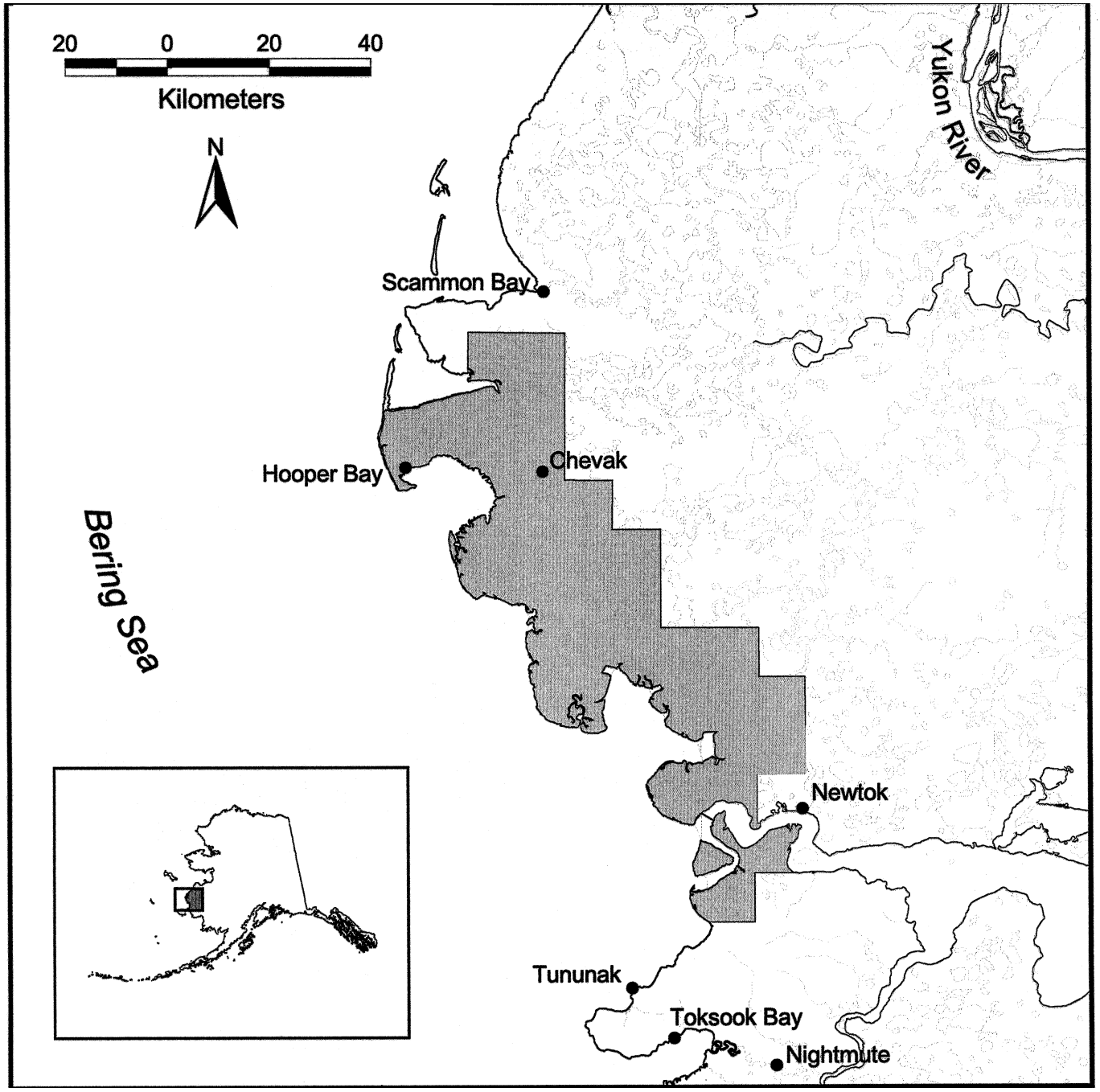
THENCE east with the line dividing Townships 7 and 8 North approximately 6 miles to the corner common to Townships 7 and 8 North, Ranges 88 and 89 West;

THENCE north with the line dividing Ranges 88 and 89 West approximately 6 miles to the line dividing Townships 8 and 9 North;

THENCE east with the line dividing Townships 8 and 9 North approximately 6

miles to the line dividing Township 9 North, Ranges 86 and 87 West;

THENCE north with the line dividing Ranges 86 and 87 West approximately 6 miles to a point in the waters of the Ninglick River on the line dividing Townships 9 and 10 North;



THENCE west with the line dividing Townships 9 and 10 North approximately 6 miles to the corner common to Townships 9 and 10 North, Ranges 87 and 88 West;

THENCE north with the line dividing Ranges 87 and 88 West approximately 6 miles to the corner common to Townships 10 and 11 North, Ranges 87 and 88 West;

THENCE east with the line dividing Townships 10 and 11 North approximately 6 miles to the corner common to Townships 10 and 11 North, Ranges 86 and 87 West;

THENCE north with the line dividing Ranges 86 and 87 West approximately 12 miles to the line dividing Townships 12 and 13 North;

THENCE west with the line dividing Townships 12 and 13 North approximately 6 miles to the line dividing Township 13 North, Ranges 86 and 87 West;

THENCE north with the line dividing Ranges 86 and 87 West approximately 6 miles to the corner common to Townships 13 and 14 North, Ranges 86 and 87 West;

THENCE west with the line dividing Townships 13 and 14 North approximately 12 miles to the corner common to Townships 13 and 14 North, Ranges 88 and 89 West;

THENCE north with the line dividing Ranges 88 and 89 West approximately 12 miles to the corner common to Townships 15 and 16 North, Ranges 88 and 89 West;

THENCE west with the line dividing Townships 15 and 16 North approximately 6 miles to the corner common to Townships 15 and 16 North, Ranges 89 and 90 West;

THENCE north with the line dividing Ranges 89 and 90 West approximately 6 miles to the line dividing Townships 16 and 17 North;

THENCE west with the line dividing Townships 16 and 17 North approximately 6 miles to the line dividing Township 17 North, Ranges 89 and 90 West;

THENCE north with the line dividing Ranges 89 and 90 West approximately 18 miles to the corner common to Townships 19 and 20 North, Ranges 89 and 90 West;

THENCE west with the line dividing Townships 19 and 20 North approximately 12 miles to the corner common to Townships 19 and 20 North, Ranges 91 and 92 West;

THENCE south with the line dividing Ranges 91 and 92 West approximately 5 miles to the line of mean high tide of Kokechik Bay of the Bering Sea at the meander corner common to Section 31 of Township 19 North, Range 91 West and Sections 36 of Township 19 North, Range 92 West;

THENCE southeasterly approximately ¼ mile, closing the mouth of the Lithkealik River, to a point on the line of mean high tide of Kokechik Bay of the Bering Sea within Section 31 of Township 19 North, Range 91 West;

THENCE with the said line of mean high tide southerly and easterly approximately 4¼ miles to the most-western point at the mouth of the Kolomak River within Section 3 of Township 18 North, Range 91 West;

THENCE southerly approximately ½ mile to the said line of mean high tide on the south bank of the Kokechik River within Section 3 of Township 18 North, Range 91 West;

THENCE in a southwesterly direction with the said line of mean high tide approximately 13 miles to the southernmost point of Kokechik Bay within Section 22 of Township 18 North, Range 93 West;

THENCE south approximately 500 feet to the base of the bluff within the same section and township;

THENCE northwesterly parallel to the base of said bluff approximately 1 mile to USC&GS monument ''Kokechik South Base'' within Section 21 of Township 18 North, Range 93 West, Seward Meridian, Alaska, the TRUE POINT OF BEGINNING.

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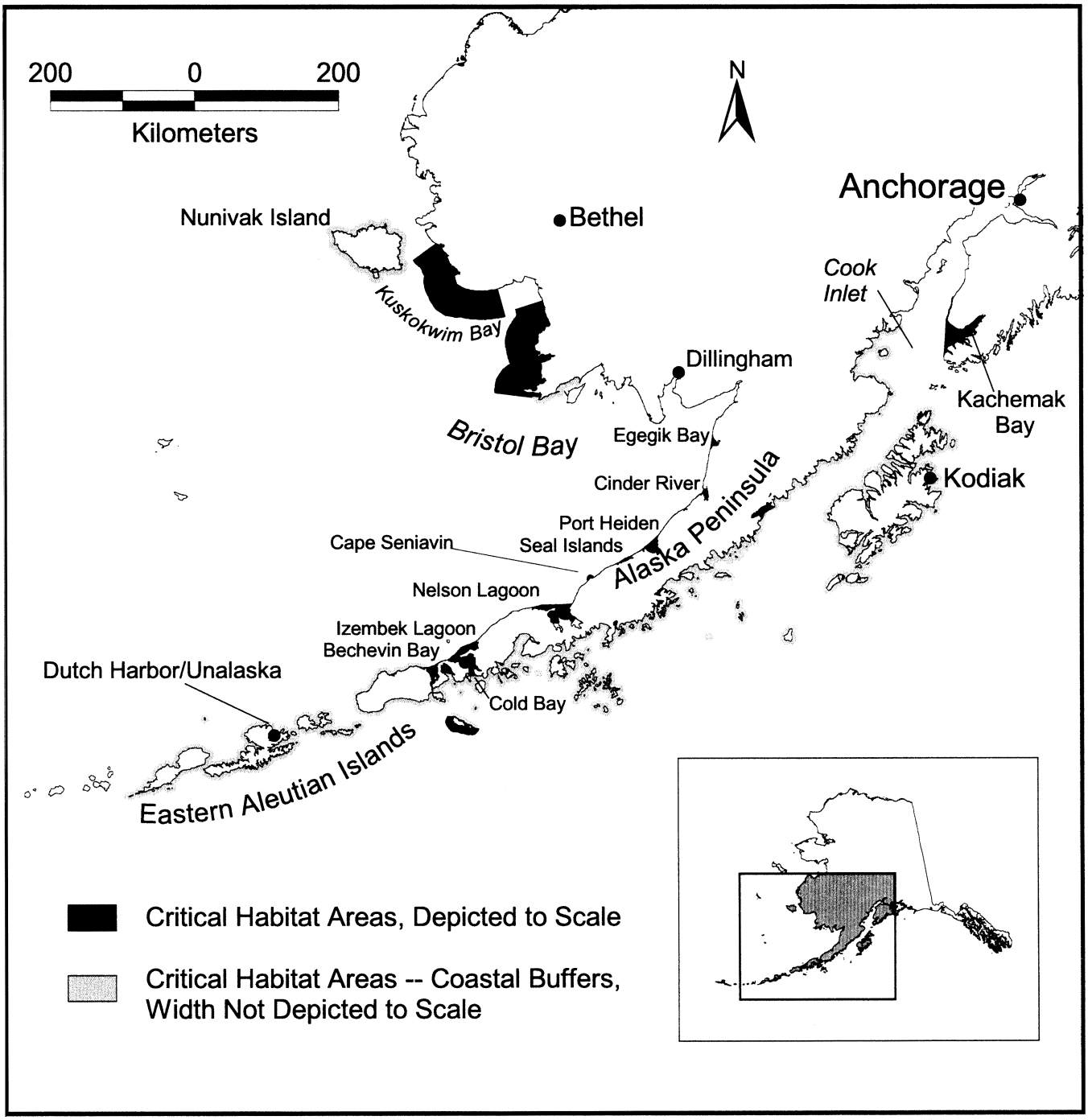

Unit 3. Nunivak Island

Those marine waters immediately surrounding Nunivak Island, Bering Sea, Alaska.

The Nunivak Island Unit consists of the water column from the line of mean high tide of said island to a distance of 1/4 mile (400 meters) seaward for the entire coastline, including the waters surrounding offshore islets, rocks, and reefs. Said unit lies entirely within the boundary of the Yukon Delta National Wildlife Refuge as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980.

Unit 4. Kuskokwim Bay

Northern Subunit

All Seward Meridian

Beginning at a point of land on the line of mean high tide of Etolin Strait of the Bering Sea at a meander corner common to Section 6 of Township 2 North, Range 89 West, and Section 1 of Township 2 North, Range 90 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE easterly and southeasterly with the line of mean high tide of Etolin Strait, closing the mouth of the Kolavinarak River, approximately 8 miles to the meander corner common to Section 19 of Township 2 North, Range 88 West, and Section 24 of Township 2 North, Range 89 West;

THENCE southeasterly and easterly with the line of mean high tide of the Bering Sea, common with the boundary of the Yukon Delta and Alaska Maritime National Wildlife Refuges as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, approximately 70 miles to the meander corner common to Section 6 of Township 4 South, Range 80 West, and Section 1 of Township 1 South, Range 81 West;

THENCE southeasterly, perpendicular to the coastline for a distance of 25 miles (40 kilometers) to a point in the waters of the Bering Sea;

THENCE southwesterly, westerly, and northwesterly, parallel to the coastline of the Bering Sea and Etolin Strait for approximately 80 miles, to a point in the waters of Etolin Strait 25 miles (40 kilometers) southwest of the meander corner common to Section 6 of Township 2 North, Range 89 West, and Section 1 of Township 2 North, Range 90 West;

THENCE northeast 25 miles (40 kilometers) to the line of mean high tide of Etolin Strait at the aforementioned meander corner and the TRUE POINT OF BEGINNING.

Southern Subunit

All Seward Meridian

Beginning at a point of land on the line of mean high tide of Kuskokwim Bay of the Bering Sea at the meander corner common to Section 35 of Township 4 South, Range 74 West, and Section 1 of Township 5 South, Range 74 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE southerly with the line of mean high tide of Kuskokwim Bay, common with the boundary of the Yukon Delta, Togiak, and Alaska Maritime National Wildlife Refuges as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, approximately 120 miles to the meander corner common to Sections 15 and 22 of Township 15 South, Range 75 West;

THENCE continuing with the line of mean high tide of Kuskokwim and Bristol Bays in a southerly, westerly, and easterly direction, inside the boundary of the Togiak National Wildlife Refuge, for approximately 60 miles to the meander corner common to Sections 9 and 10 of Township 18 South, Range 74 West;

THENCE easterly with the line of mean high tide of Bristol Bay and Hagemeister Strait, common with the boundary of the Togiak and Alaska Maritime National Wildlife Refuges, approximately 40 miles to Tongue Point within Section 9 of Township 16 South, Range 69 West;

THENCE south ½ mile (0.8 kilometers) to a point in the waters of Bristol Bay of Hagemeister Strait;

THENCE southwesterly and northerly, parallel to the coastline of Hagemeister Strait and Bristol Bay approximately 60 miles to a point in the waters of Bristol Bay ½ mile west of the meander corner common to Section 36 of Township 18 South, Range 76 West and Section 1 of Township 19 South, Range 76 West;

THENCE due west 24½ miles;

THENCE in a general westerly, easterly, and northerly direction, parallel to the coastline of Bristol and Kuskokwim Bays of the Bering Sea for approximately 100 miles, to a point in the waters of Kuskokwim Bay 25 miles (40 kilometers) southwest of the meander corner common to Section 35 of Township 4 South, Range 74 West, and Section 1 of Township 5 South, Range 75 West;

THENCE northeast 25 miles (40 kilometers) to the line of mean high tide of Kuskokwim Bay at the aforementioned meander corner and the TRUE POINT OF BEGINNING.

Unit 5. North Side of the Alaska Peninsula

Egegik Bay Unit

All Seward Meridian

Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Bristol Bay of the Bering Sea at a meander corner common to Section 36 of Township 21 South, Range 51 West, and Section 1 of Township 22 South, Range 51 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE southeasterly and northeasterly with the line of mean high tide of the Bering Sea, common with the boundary of the Alaska Maritime National Wildlife Refuge as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, approximately 8 miles to the meander corner common to Section 35 of Township 22 South, Range 50 West and Section 2 of Township 23 South, Range 50 West;

THENCE east with the line dividing Townships 22 and 23 South approximately 1 ½ miles to a point in the waters of Egegik Bay immediately north of the village of Egegik on the line dividing Ranges 49 and 50 West;

THENCE with the line dividing Ranges 49 and 50 West approximately ¼ mile to the line of mean high tide of Egegik Bay on the boundary of the Alaska Maritime National Wildlife Refuge;

THENCE continuing with said line of mean high tide and refuge boundary in a southwesterly, northerly, and southwesterly direction for approximately 14 miles to the meander corner common to Section 35 of Township 23 South, Range 51 West and Section 2 of Township 24 South, Range 51 West;

THENCE northerly through the waters of Bristol Bay, closing Egegik Bay, to the aforementioned meander corner, the TRUE POINT OF BEGINNING.

Ugashik Bay Unit

All Seward Meridian

Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Bristol Bay of the Bering Sea at a meander corner common to Section 34 of Township 29 South, Range 52 West, and Section 3 of Township 30 South, Range 52 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE southeasterly with the line of mean high tide of Bristol and Ugashik Bays, common with the boundary of the Alaska Maritime National Wildlife Refuge as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, approximately 11½ miles to the meander corner common to Sections 17 and 20 of Township 31 South, Range 51 West;

THENCE on the line dividing Sections 18 and 19 of Township 31 South, Range 51 West approximately 1 mile to the headland at the confluence of the Ugashik and King Salmon Rivers;

THENCE westerly with the headland, continuing with said refuge boundary on the line of mean high tide of Ugashik Bay approximately ½ mile to the meander corner common to Sections 13 and 24 of Township 31 South, Range 52 West;

THENCE west, continuing with said refuge boundary on the line dividing Sections 13 and 24 of Township 31 South, Range 52 West to the meander corner common to Sections 14 and 23 of the same township;

THENCE continuing west with the section line dividing the north and south halves of Township 31 South, Ranges 52 and 53 West approximately 8 miles to the line of mean high tide of Bristol Bay at the meander corner common to Sections 16 and 21 of Township 31 South, Range 53 West;

THENCE northwesterly, perpendicular to the coastline for or a distance of ¼ mile (400 meters) to a point in the waters of Bristol Bay of the Bering Sea;

THENCE in a northeasterly direction, parallel to the coastline of Bristol Bay and closing the entrance to Ugashik Bay, for approximately 11 miles to a point in the waters of Bristol Bay ¼ mile (400 meters) southwest of the meander corner common to Section 34 of Township 29 South, Range 52 West, and Section 3 of Township 30 South, Range 52 West;

THENCE northeast ¼ mile to the aforementioned meander corner, the TRUE POINT OF BEGINNING.

Cinder River Unit

All Seward Meridian

Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Bristol Bay of the Bering Sea at a meander corner common to Sections 21 and 28 of Township 32 South, Range 54 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE in a general southwesterly direction with the line of mean high tide of Bristol Bay, common with the boundary of the Alaska Maritime National Wildlife Refuge as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980 approximately 3½ miles to the southernmost point of Section 3 of Township 33 South, Range 55 West;

THENCE continuing with the line of mean high tide northeasterly, southwesterly, and northeasterly to encompass the Cinder River/Mud Creek tidal flats area, closing the mouths of the Cinder River and Mud Creek, approximately 15 miles to the northernmost point of Section 4 of Township 33 South, Range 55 West;

THENCE southwest with the said line of mean high tide, common with said refuge boundary, approximately 3 miles to the meander corner common to Section 18 of Township 33 South, Range 55 West, and Section 13 of Township 33 South, Range 56 West;

THENCE northwest, perpendicular to the coastline for a distance of ¼ mile (400 meters) to a point in the waters of Bristol Bay;

THENCE in a northeasterly direction, parallel to the coastline of Bristol Bay, closing the entrance to the Cinder River/Mud Creek tidal flats area, for approximately 6½ miles to a point in the waters of Bristol Bay ¼ mile (400 meters) northwest of the

meander corner common to Sections 21 and 28 of Township 32 South, Range 54 West;

THENCE southeast ¼ mile to the aforementioned meander corner, the TRUE POINT OF BEGINNING.

Port Heiden Unit

All Seward Meridian

Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Bristol Bay of the Bering Sea at the meander corner common to Section 31 of Township 36 South, Range 58 West, and Section 3 of Township 37 South, Range 59 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE southwesterly, with the line of mean high tide of Bristol Bay, common with the boundary of the Alaska Maritime National Wildlife Refuge as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, approximately 8½ miles to the southernmost point of Section 17 of Township 38 South, Range 59 West;

THENCE in a general southeasterly direction with said refuge boundary along the line of mean high tide of Port Heiden and the right bank of the Meshik River upstream approximately 12 miles to the line dividing Sections 35 and 36 of Township 39 South, Range 59 West;

THENCE south with said Section line approximately ¼ mile to the line dividing Townships 39 and 40 South;

THENCE west with said township line approximately ½ mile to the left bank of the Meshik River;

THENCE northwesterly with said refuge boundary along the left bank of the Meshik River approximately 3 ½ miles to the westernmost point of the mouth of said river at the line of mean high tide of Port Heiden within Section 20 of Township 39 South, Range 59 West;

THENCE westerly, southwesterly, and northeasterly with said refuge boundary at the line of mean high tide of Port Heiden approximately 30 miles to Strogonof Point in Section 17 of Township 38 South, Range 60 West;

THENCE southwest with the said line of mean high tide, common with said refuge boundary, approximately 10 miles to the meander corner common to Section 18 of Township 39 South, Range 61 West, and Section 13 of Township 33 South, Range 62 West;

THENCE northwest, perpendicular to the coastline for a distance of ¼ mile (400 meters) to a point in the waters of Bristol Bay;

THENCE in a northeasterly direction, parallel to the coastline of Bristol Bay, closing the entrance to Port Heiden and parallel to the ocean side of Chistiakof Island, for approximately 20 miles to a point in the waters of Bristol Bay ¼ mile (400 meters) northwest of the meander corner common to Section 31 of Township 36 South, Range 58 West, and Section 3 of Township 37 South, Range 59 West;

THENCE southeast ¼ mile to the aforementioned meander corner, the TRUE POINT OF BEGINNING.

Seal Islands Unit

All Seward Meridian

Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Bristol Bay of the Bering Sea at the meander corner common to Section 32 of Township 39 South, Range 62 West, and Section 5 of Township 40 South, Range 62 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE southwesterly, with the line of mean high tide of Bristol Bay, common with the boundary of the Alaska Maritime National Wildlife Refuge as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, approximately 4½ miles to the southernmost point of Section 15 of Township 40 South, Range 63 West;

THENCE continuing with the line of mean high tide and said refuge boundary northeasterly, southwesterly, and northeasterly to encompass the Seal Islands lagoon and Ilnik Lake areas, approximately 45 miles to the northernmost point of Section 1 of Township 41 South, Range 65 West;

THENCE southwest with the said line of mean high tide and refuge boundary, approximately 7 miles to the meander corner common to Section 19 of Township 41 South, Range 65 West, and Section 24 of Township 41 South, Range 66 West;

THENCE northwest, perpendicular to the coastline for a distance of ¼ mile (400 meters) to a point in the waters of Bristol Bay;

THENCE in a northeasterly direction, parallel to the coastline of Bristol Bay and the ocean side of the Seal Islands, closing the entrance to the Seal Islands lagoon, for approximately 18 miles to a point in the waters of Bristol Bay ¼ mile (400 meters) northwest of the meander corner common to Section 32 of Township 39 South, Range 62 West, and Section 5 of Township 40 South, Range 62 West;

THENCE southeast ¼ mile to the aforementioned meander corner common, the TRUE POINT OF BEGINNING.

Cape Seniavin Unit

Those marine waters of the Bering Sea immediately fronting Cape Seniavin, Alaska Peninsula, Alaska.

The Cape Seniavin Unit consists of the water column from the line of mean high tide of the Bering Sea. The radius of the Unit is 3 miles (5 kilometers), the center of which is the Cape Seniavin Light, located at Latitude 56° 23′ 57.64″ North, Longitude 160° 08′ 47.67″ West, within Section 4 of Township 44 South, Range 69 West, Seward Meridian, Alaska.

Nelson Lagoon/Herendeen Bay/Port Moller Unit

Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Bristol Bay of the Bering Sea at the meander corner common to Section 33 of Township 47 South, Range 72 West, and Section 4 of Township 48 South, Range 72 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE southwesterly, with the line of mean high tide of Bristol Bay, common with the boundary of the Alaska Maritime National Wildlife Refuge as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, approximately 23 miles to the meander corner common to Section 34 of Township 49 South, Range 72 West and Section 3 of Township 50 South, Range 72 West;

THENCE southwesterly, leaving said refuge boundary, across the waters of Port Moller approximately 7 miles to the meander corner common to Section 31 of Township 50 South, Range 72 West and Section 6 of Township 51 South, Range 72 West;

THENCE northerly, westerly, and southerly with the line of mean high tide of Port Moller and Herendeen Bay common with said refuge boundary approximately 26 miles to the meander corner common to Section 32 of Township 50 South, Range 74 West and Section 6 of Township 51 South, Range 74 West;

THENCE west with the line dividing Townships 50 and 51 South, crossing Herendeen Bay, approximately 5½ miles to the meander corner common to Section 32 of Township 50 South, Range 75 West and Section 5 of Township 51 South, Range 75 West;

THENCE northerly, westerly, and northeasterly with the line of mean high tide of Herendeen Bay and Nelson Lagoon, common with said refuge boundary, approximately 55 miles to Lagoon Point within Section 22 of Township 48 South, Range 76 West;

THENCE southwesterly with the line of mean high tide of the Bering Sea, common with said refuge boundary, approximately 8 miles to the meander corner common to Section 6 of Township 49 South, Range 78 West and Section 1 of Township 49 South, Range 79 West;

THENCE northwest, perpendicular to the coastline for a distance of ¼ mile (400 meters) to a point in the waters of Bristol Bay;

THENCE in a northeasterly direction, parallel to the coastline of Bristol Bay and the ocean side of the Kudobin Islands, closing the entrance to the Hague Channel, for approximately 40 miles to a point in the waters of Bristol Bay ¼ mile (400 meters) northwest of the meander corner common to Section 33 of Township 47 South, Range 72 West, and Section 4 of Township 48 South, Range 72 West;

THENCE southeast ¼ mile to the aforementioned meander corner common, the TRUE POINT OF BEGINNING.

Izembek Lagoon Unit

Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Bristol Bay of the Bering Sea at the meander corner common to Section 18 of Township 54 South, Range 86 West, and Section 13 of Township 54 South, Range 87 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE southwesterly, with the line of mean high tide of Bristol Bay, common with the boundary of the Alaska Maritime National Wildlife Refuge as established by the Alaska National Interest Lands

Conservation Act (Public Law 96–487) on December 2, 1980, approximately 4 miles to Moffet Point within Section 4 of Township 55 South, Range 87 West;

THENCE continuing with the line of mean high tide, inside the boundary of the Izembek National Wildlife Refuge, northeasterly, southwesterly, and northeasterly to encompass Moffet and Izembek Lagoons, Applegate Cove, and Norma Bay, approximately 55 miles to Cape Glazenap within Section 18 of Township 57 South, Range 90 West;

THENCE southwest with the line of mean high tide of Bristol Bay, common to the Alaska Maritime refuge boundary, approximately 14 miles to the meander corner common to Section 31 of Township 58 South, Range 92 West, and Section 36 of Township 58 South, Range 93 West;

THENCE northwest, perpendicular to the coastline for a distance of ¼ mile (400 meters) to a point in the waters of Bristol Bay;

THENCE in a northeasterly direction, parallel to the coastline of Bristol Bay and the ocean side of the Kudiakof Islands, closing the entrances to Izembek Lagoon, for approximately 30 miles to a point in the waters of Bristol Bay ¼ mile (400 meters) northwest of the meander corner common to Section 18 of Township 54 South, Range 86 West, and Section 13 of Township 54 South, Range 87 West;

THENCE southeast ¼ mile to the aforementioned meander corner common, the TRUE POINT OF BEGINNING.

Bechevin Bay Unit

Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Bristol Bay of the Bering Sea at the meander corner common to Section 31 of Township 58 South, Range 92 West, and Section 36 of Township 58 South, Range 93 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE southwesterly, with the line of mean high tide of Bristol Bay, common with the boundary of the Alaska Maritime National Wildlife Refuge as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, approximately 6 miles to Cape Krenitzin at the meander corner common to Sections 17 and 20 of Township 59 South, Range 93 West;

THENCE southerly, northeasterly, and southerly with the line of mean high tide of Bechevin Bay and Isanotski Strait, common with said refuge boundary except to include Hot Springs Bay and Traders Cove, which lie inside the Alaska Peninsula refuge boundary, approximately 50 miles to Palisade Cliffs at the meander corner common to Section 18 of Township 62 South, Range 93 West, and Section 13 of Township 62 South, Range 94 West;

THENCE south with the line dividing Ranges 93 and 94 West, across Ikatan Bay of the Pacific Ocean approximately 3½ miles to a point of land on the Ikatan Peninsula of Unimak Island on the line of mean high tide of Ikatan Bay at the meander corner common to Section 6 of Township 63 South, Range 93 West, and Section 1 of Township 63 South, Range 94 West;

THENCE northwesterly, easterly, and westerly on the shore of Unimak Island with the line of mean high tide of Ikatan Bay, Isanotski Strait, Bechevin Bay, and Bristol Bay, to the meander corner common to Section 30 of Township 59 South, Range 94 West, and Section 25 of Township 59 South, Range 95 West;

THENCE north, perpendicular to the coastline for a distance of ¼ mile (400 meters) to a point in the waters of Bristol Bay;

THENCE in a northeasterly direction, parallel to the coastline of Bristol Bay, closing the entrance to Bechevin Lagoon, for approximately 14 miles to a point in the waters of Bristol Bay ¼ mile (400 meters) northwest of the meander corner common to Sections 17 and 20 of Township 59 South, Range 93 West;

THENCE southeast ¼ mile to the aforementioned meander corner common, the TRUE POINT OF BEGINNING.

Unit 6. Eastern Aleutians

Those marine waters of the Bering Sea and Pacific Ocean immediately fronting Unimak Island (excluding the Bechevin Bay Unit), the Krenitzin Islands (Ugamak and Unalga group), Unalaska Island, Umnak Island, and Samalga Island, Alaska.

The Eastern Aleutians Unit consists of the water column from the line of mean high tide of the Bering Sea and Pacific Ocean to a distance of ¼ mile (400 meters) seaward for the entire coastline lying between the Bechevin Bay Unit on the east and Samalga Pass on the west. Included within the Unit are the waters within ¼ mile (400 meters) of all associated islands and offshore islets, rocks, and reefs.

Unit 7. South Side of the Alaska Peninsula

All Seward Meridian

Those marine waters of the Pacific Ocean immediately fronting the south side of the Alaska Peninsula, Alaska.

The Alaska Peninsula Unit consists of the water column from the line of mean high tide of the Pacific Ocean to a distance of ¼ mile (400 meters) seaward for the entire coastline lying between Ikatan Bay on the west and Cook Inlet on the east. Said boundary points are more particularly described as follows:

West Boundary: a point of land on the Alaska Peninsula at Palisade Cliffs on the line of mean high tide of Ikatan Bay of the Pacific Ocean at the meander corner common to Section 18 of Township 62 South, Range 93 West, and Section 13 of Township 62 South, Range 94 West, Seward Meridian, Alaska.

East Boundary: a point of land on the Iniskin Peninsula of the Alaska Peninsula known as Chinitna Point on the line of mean high tide of Cook Inlet of the Pacific Ocean within Section 5 of Township 6 South, Range 22 West, Seward Meridian, Alaska.

Included within the Unit are the waters within ¼ mile (400 meters) of all associated islands including the Sanak, Shumagin, and Semidi island groups, Chirikof Island, and all offshore islets, rocks, and reefs. Excluded from the Unit are the waters surrounding the Trinity, Kodiak, and Afognak island groups.

Areas of the Unit that are exceptions to the ¼ mile (400 meters) seaward water column are described as follows:

Morzhovoi Bay: Those marine waters of northern Morzhovoi Bay, including Big and Middle lagoons, lying between Boiler Point on the west and Reynolds Head on the east, and to include Littlejohn Lagoon, east of Reynolds Head. The boundary line connecting said points are more particularly described as follows:

West Boundary: A point of land on the Alaska Peninsula known as Boiler Point on the line of mean high tide of Morzhovoi Bay of the Pacific Ocean within Section 6 of Township 60 South, Range 91 West, Seward Meridian, Alaska. Said point is approximately 850 feet northeast of USC&GS monument ''Slope'' which is at Latitude 55° 00′ 41.69″ North, Longitude 163° 08′ 57.57″ West (NAD 83).

East Boundary: A point of land on the Alaska Peninsula known as Reynolds Head on the line of mean high tide of Morzhovoi Bay of the Pacific Ocean within Section 5 of Township 60 South, Range 90 West, Seward Meridian, Alaska. Said point is the most northwestern point of land within Section 5 of said township.

Cold Bay: Those marine waters of Cold Bay, including Old Mans Lagoon, Lenard Harbor, Mortensons Lagoon, and Kinzarof Lagoon, lying north of a boundary line closing the mouth of Cold Bay. The points on the boundary line closing the mouth of Cold Bay are more particularly described as follows:

West Boundary: A point of land on the Alaska Peninsula on the line of mean high tide of Cold Bay at the meander corner common to Section 36 of Township 59 South, Range 88 West, and Section 1 of Township 60 South, Range 88 West Seward Meridian, Alaska.

East Boundary: A point of land on the Alaska Peninsula known as Vodapoini Point on the line of mean high tide of Cold Bay within Section 36 of Township 59 South, Range 87 West, Seward Meridian, Alaska. Said point is the most western point of land within Section 36 of said township.

Sanak Islands: Those marine waters of the Pacific Ocean surrounding the Sanak Island group, said waters being divided into north and south portions lying between Point Petrof on the west and Lookout Point on the east. These portions are defined as the water column from the line of mean high tide of the Pacific Ocean extending to a distance of 5 miles (8 kilometers) seaward for the southern portion and a distance of 1 mile (1.6 kilometers) seaward for the northern portion.

Said southern portion extends 5 miles from the southern coastlines of Point Petrof, Rabbit Island, Sanak Island, Long Island, Clifford Island, Elma Island, and Caton Island.

Said northern portion extends 1 mile from the northern coastlines of Point Petrof, Sanak Island, Finneys Island, and Caton Island.

Those westernmost and easternmost points that divide the southern and northern portions are more particularly described as follows:

West Boundary: A point of land known as Point Petrof on a small island on the northwest side of Sanak Harbor of the Pacific

Ocean on the line of mean high tide of the Pacific Ocean within Section 3 of Township 66 South, Range 91 West, Seward Meridian, Alaska. Said point is approximately 500 feet west of USC&GS monument ''Petrof,'' which is at Latitude 54° 29′ 37.62″ North, Longitude 162° 49′ 49.37″ West (NAD 83).

East Boundary: A point of land on Caton Island known as Lookout Point on the line of mean high tide of the Pacific Ocean within Section 11 of Township 67 South, Range 88 West, Seward Meridian, Alaska. Said point is the most eastern point of land within Section 11 of said township.

Ivanof Bay: Those marine waters of Ivanof Bay of the Pacific Ocean lying north of a boundary line closing the mouth of said bay. Said boundary line is common with the boundaries of the Alaska Peninsula and Alaska Maritime National Wildlife Refuges as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980. The points on the boundary line closing the mouth of Ivanof Bay are more particularly described as follows:

West Boundary: A point of land on the Alaska Peninsula on the line of mean high tide of Ivanof Bay at the meander corner common to Sections 9 and 16 of Township 51 South, Range 66 West, Seward Meridian, Alaska.

East Boundary: A point of land on the Alaska Peninsula known as Alexander Point on the line of mean high tide of Ivanof Bay within Section 1 of Township 51 South, Range 66 West, Seward Meridian, Alaska. Said point is the most southern point of land within Section 1 of said township.

Chignik Lagoon: Those marine waters of Chignik Lagoon including Mallard Duck Bay and Schooner Cove, lying west of the line dividing Township 44 South, Ranges 58 and 59 West, Seward Meridian, Alaska. The western extent of Chignik Lagoon is described as follows:

Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Chignik Lagoon and the Chignik River at the meander corner common to Sections 15 and 16 of Township 45 South, Range 60 West; THENCE south with the section line across the Chignik River approximately ¼ mile to the meander corner common to Sections 21 and 22 of the same township.

Wide Bay: Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Shelikof Strait of the Pacific Ocean at the meander corner common to Section 35 of Township 33 South, Range 44 West, and Section 2 of Township 34 South, Range 44 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE northerly, southwesterly, and northeasterly with the line of mean high tide of Shelikof Strait and Wide Bay approximately 60 miles to Cape Igvak at the southernmost portion of the Alaska Peninsula in Section 12 of Township 32 South, Range 42 West;

THENCE south, perpendicular to the coastline for a distance of 1 mile (1.6 kilometers) to a point in the waters of Shelikof Strait;

THENCE in a southwesterly direction, parallel to the coastline of the Alaska Peninsula, closing the entrance to Wide Bay, and paralleling the ocean side of all islands fronting Wide Bay, for approximately 17 miles to a point in the waters of Shelikof Strait 1 mile east of the meander corner common to Section 35 of Township 33 South, Range 44 West, and Section 2 of Township 34 South, Range 44 West;

THENCE west 1 mile to the aforementioned meander corner common, the TRUE POINT OF BEGINNING.

Kamishak Bay: Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Kamishak Bay of the Pacific Ocean at the meander corner common to Section 7 of Township 14 South, Range 25 West, and Section 12 of Township 14 South, Range 26 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE northwesterly and northeasterly with the line of mean high tide of Kamishak Bay, including all associated bays and coves, approximately 190 miles to a point on the Iniskin Peninsula known as Chinitna Point on the line of mean high tide of Cook Inlet of the Pacific Ocean within Section 5 of Township 6 South, Range 22 West, Seward Meridian, Alaska;

THENCE south, perpendicular to the coastline for a distance of 1 mile (1.6 kilometers) to a point in the waters of Cook Inlet;

THENCE in a southwesterly direction, parallel to the coastline of the Alaska Peninsula, for approximately 150 miles to a point in the waters of Kamishak Bay 1 mile north of the meander corner common to Section 7 of Township 14 South, Range 25 West, and Section 12 of Township 14 South, Range 26 West;

THENCE south 1 mile to the aforementioned meander corner common, the TRUE POINT OF BEGINNING.

Unit 8. Kachemak Bay/Ninilchik

Beginning at a point of land on the Kenai Peninsula on the line of mean high tide of Cook Inlet of the Gulf of Alaska of the Pacific Ocean at the meander corner common to Section 33 of Township 1 South, Range 14 West, and Section 4 of Township 2 South, Range 14 West, Seward Meridian, Alaska, and the TRUE POINT OF BEGINNING of the lands to be described.

THENCE southwesterly, southeasterly, northeasterly, and southwesterly with the line of mean high tide of Cook Inlet, Kachemak Bay, and all associated bays and coves, common with the boundary of the Alaska Maritime National Wildlife Refuge as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, approximately 210 miles to a point on the Kenai Peninsula known as Point Bede at the western most extent of Section 16 of Township 10 South, Range 16 West;

THENCE northerly across the mouth of Kachemak Bay, approximately 29 miles to a point in the waters of Cook Inlet 1 mile (1.6 kilometers) northwest of the meander corner common to Section 33 of Township 4 South, Range 15 West, and Section 5 of Township 5 South, Range 15 West;

THENCE in a northeasterly direction, parallel to the coastline of the Kenai Peninsula, approximately 18 miles to a point in the waters of Cook Inlet 1 mile northwest of the meander corner common to Section 33 of Township 1 South, Range 14 West, and Section 4 of Township 2 South, Range 14 West;

THENCE southeast 1 mile to the aforementioned meander corner common, the TRUE POINT OF BEGINNING.

Unit 9. Kodiak

Those marine waters immediately surrounding the islands of the Kodiak Archipelago, Gulf of Alaska, Pacific Ocean, Alaska.

The Kodiak/Afognak Island Unit consists of the water column from the line of mean high tide of Kodiak and Afognak islands to a distance of ¼ mile (400 meters) seaward. Said water column is reserved for all islands of the Kodiak Archipelago, including the waters within ¼ mile (400 m) of the Trinity Islands, Marmot Island, Shuyak Island, and all other offshore islets, rocks, and reefs.

* * * * *

Dated: February 29, 2000.

Donald J. Barry,

Assistant Secretary for Fish and Wildlife and Parks.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No.000218046–0046–01; I.D. 121599F]

RIN 0648–AN42

Antarctic Marine Living Resources; Harvesting and Dealer Permits, and Catch Documentation

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to revise permit requirements for U.S. vessels harvesting, or transshipping catch of, *Dissostichus eleginoides* (Patagonian toothfish) and *Dissostichus mawsoni* (Antarctic toothfish) harvested in all waters, including those under the jurisdiction of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). These regulations would also govern U.S. receivers, importers and exporters of toothfish, wherever caught. Persons receiving, importing or re-exporting toothfish would be required to validate and submit *Dissostichus* Catch Documents to

NMFS. This rule is intended to implement U.S. obligations as a Contracting Party of CCAMLR and to conserve Antarctic and Patagonian toothfish by preventing or otherwise discouraging unlawful harvest and trade in these species.

DATES: Comments must be received no later than 5:00 p.m., eastern standard time, on April 7, 2000.

ADDRESSES: Comments on the proposed rule should be submitted to Dean Swanson, International Fisheries Division, Office of Sustainable Fisheries, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. For copies of the draft Environmental Assessment/Regulatory Impact Review/Regulatory Flexibility Analysis (EA/RIR/RFA), call 301–713–2276 or write to Dean Swanson. Comments also may be sent via facsimile (fax) to 301–713–2313. Comments will not be accepted if submitted via e-mail or Internet. Send comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule to Dean Swanson and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503 (Attention: NOAA Desk Officer).

FOR FURTHER INFORMATION CONTACT: Dean Swanson or Angela Somma at 301-713-2276, fax: 301–713–2313.

SUPPLEMENTARY INFORMATION: The Antarctic fisheries are managed under the authority of the Antarctic Marine Living Resources Convention Act of 1984 (Act) codified at 16 U.S.C. 2431 *et seq.* NMFS implements CCAMLR conservation measures by regulations at 50 CFR part 300, subpart G. Changes to the existing regulations are necessary to incorporate new conservation measures and to revise procedures to facilitate enforcement.

Toothfish Catch Documentation

Due to the scale of illegal, unregulated or unreported fishing for Patagonian toothfish (*Dissostichus eleginoides*) and Antarctic toothfish (*Dissostichus mawsoni*) in and beyond the Convention for the Conservation of Antarctic Marine Living Resources (Convention) waters, CCAMLR has adopted a number of conservation measures in the last several years. These measures have included flag state licensing of fishing vessels, catch quotas, vessel monitoring systems, port inspections of landings and transshipments, and identification of vessels and fishing gear.

Despite increased inspections and sanctions in recent years, the amount of illegal, unregulated or unreported harvest of toothfish has been estimated at 90,000 metric tons, about twice the level of the CCAMLR regulated fisheries. Consequently CCAMLR adopted a catch documentation scheme for toothfish at its eighteenth regular meeting in November, 1999. (64 FR 71165, December 20, 1999). A copy of the proposed CCAMLR *Dissostichus* Catch Document (DCD) and of the CCAMLR Conservation Measure specifying the operation of the catch documentation scheme can be obtained from NMFS (see **ADDRESSES**).

The purposes of the catch documentation scheme are to: monitor international trade; identify the origins of imports; determine if imports caught in the Convention Area were caught consistent with CCAMLR conservation measures; and gather catch data for stock assessment. The documentation scheme requires that CCAMLR Contracting Parties provide a uniquely numbered DCD to each vessel under its jurisdiction that is authorized to harvest toothfish. Upon completion of the document, each DCD accompanies the toothfish as it enters into commerce and/or international trade and documents the chain of custody. This proposed rule would provide a 60-day exception for toothfish harvested prior to the implementation of the DCD by NMFS.

As specified in the CCAMLR conservation measure, a flag state would issue non-transferrable DCDs that are uniquely identified for a vessel. The master of the harvesting vessel would be required to record the catch information specified on the DCD and convey such catch information to the flag state prior to offloading to obtain a confirmation. Upon transshipment of *Dissostichus* species, the master of the harvesting vessel would be required to obtain the signature of the master of the vessel to which the catch is transferred. Upon landing *Dissostichus* species, the master of the harvesting vessel or the transshipment vessel would be required to obtain the signature of a responsible official and the individual that receives the catch at the port of landing. For U.S. vessels, the responsible official would be designated by NMFS in the harvesting permit. After signing the DCD, the master of the harvesting or transshipment vessel would be required to provide a copy to each recipient of the catch and to the flag state.

Any person who exports *Dissostichus* species would be required to complete the DCD(s) by indicating the amount, by net weight, from the original offloading listed on that DCD that is exported in the particular shipment, the name of the importer and point of import, and the exporter's name, address and permit number. The exporter would then be required to sign the DCD and obtain validation by a government authority. The original DCD would be transmitted with the export shipment.

Any person who imports *Dissostichus* species would be required to obtain the DCD(s) that accompany the import shipment and mail or fax the DCD(s) to NMFS. If *Dissostichus* species are re-exported, an exporter would be required to complete a re-export document by indicating the amount from the original DCD(s) that is re-exported in the particular export shipment, the number of the original DCD(s), the name of the importer and point of import, and the exporter's name, address and permit number. The exporter would then be required to sign the re-export document and obtain validation by an authority designated by NMFS. The original re-export document and copies of the original DCD(s) as applicable to that shipment would be transmitted with the export shipment.

Harvesting Permits

To facilitate implementation of the *Dissostichus* catch documentation scheme, permit requirements would be revised to include transshipment vessels. Any vessel subject to the jurisdiction of the United States that receives or attempts to receive *Dissostichus* species from a harvesting vessel at sea would be required to obtain a permit from NMFS.

Dealer Permits

NMFS would revise other permit requirements as well. The import permit requirements would be revised to require a dealer permit for either the import or re-export of *Dissostichus* species whether harvested within or outside of Convention waters. In addition, first receivers from vessels harvesting toothfish and re-exporters of *Dissostichus* would be required to obtain a permit and to maintain reports and records accurately and to make such reports and records available for inspection. NMFS is also adding *Electorna carlsgeri* and *Lepidonothon kempi* to the list of Antarctic living marine resource finish because they are managed by CCAMLR.

Classification

This proposed rule is published under the authority of the Antarctic Marine Living Resources Convention Act of 1984, codified at 16 U.S.C. 2431 *et seq.*

NMFS prepared an EA/RIR/RFA for this proposed rule (see **ADDRESSES**).

NMFS has concluded that this proposed rule to require permits and

catch documentation for the harvest and importation of certain Antarctic marine living resources (AMLRs) would not have a significant economic impact on a substantial number of small entities. The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would prohibit the importation of toothfish unless accompanied by a DCD and would require vessel and dealer permits for the harvest and import of all AMLRs and for the transshipment and re-export of toothfish. This proposed rule entails only the application for permits and the collection, photocopying and submission of forms to NMFS. The principal burden would be the time required to fill out application forms, keep records, obtain certifications and submit DCDs and import tickets. Approximately 30 importers and up to 10 additional re-exporters will be affected. The required information is readily available to importers. Therefore, no incremental investments in information processing technologies would be needed. Accordingly, these proposed actions, considered separately or in aggregate, are not expected to have a significant economic impact and an initial regulatory flexibility analysis was not prepared. The EA/RIR/RFA further discusses the economic effects of the proposed rule.

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

The proposed action would revise existing and impose new reporting and record-keeping requirements on vessel operators, importers and exporters. Harvesting permits, dealer permits, catch documentation forms, and import tickets applicable to the ALMRs fisheries are subject to approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). These requirements have been submitted to OMB for approval.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

OMB has approved CCAMLR harvesting and import permits under 0648–0194. Revisions to these requirements would require that transshipment vessels also obtain a permit and that a broader range of dealers be subject to the permit requirement. Under the proposed rule, the estimate of 30 minutes per occurrence for the dealer permit to import would not change. The application for a dealer permit to re-export is estimated to take 30 minutes per occurrence and the application for a harvest permit authorizing transshipment is estimated to take 12 minutes per occurrence. Completion and submission of an import ticket is estimated to take no more than 15 minutes per occurrence.

A new reporting and record-keeping requirement on vessel operators, importers and exporters would require that all harvesters, transshipers, importers and exporters obtain, validate and submit DCD forms to NMFS. It is estimated that completion and submission of DCDs would require three minutes for each submission by importers, ten minutes for each submission by re-exporters and fifteen minutes for each submission by harvesting vessels and transshipers. The logbook requirement in § 300.107(a) is not subject to the PRA because it is a requirement imposed by an international organization rather than NMFS.

Public comment is sought regarding whether these proposed new or revised collections-of-information are necessary for the proper performance of the functions of NMFS in meeting pending U.S. obligations to CCAMLR, including whether the information has practical utility; the accuracy of the burden estimates; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS, Office of Sustainable Fisheries and OMB (see **ADDRESSES**).

List of Subjects in 50 CFR Part 300

Fisheries, Fishing, Fishing vessels, Foreign relations, Reporting and recordkeeping requirements, Statistics, Treaties.

Dated: March 3, 2000.

Gary C. Matlock

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 300 subpart G is proposed to be amended as follows:

PART 300--INTERNATIONAL FISHERIES REGULATIONS

Subpart G—Antarctic Marine Living Resources

1. The authority citation for part 300, subpart G continues to read as follows:

Authority: 16 U.S.C. 2431 *et seq.*

2. In § 300.101, the definition of ''Antarctic finfishes'' is amended by adding entries in the table for ''Antarctic toothfish'' and ''Lanternfish'' immediately following the existing entry for ''Patagonian toothfish,'' and an entry for ''Striped-eyed rockcod'' immediately following the existing entry for ''Grey rockcod.'' The definition of ''Antarctic marine living resources or AMLR(s)'' is revised, and the definitions for ''Dealer'', ''Dissostichus catch document (DCD)'', ''Dissostichus species'' and ''Transship'' are added in alphabetical order to read as follows:

§ 300.101 Definitions.

* * * * *

Antarctic finfishes include the following:

Scientific name	Common name
* * * * *	
Lepidonothon kempi	Striped-eyed rockcod
* * * * *	
Dissostichus mawsoni	Antarctic toothfish
Electrona carlsgergi	Lanternfish
* * * * *	

* * * * *

Antarctic marine living resources or AMLR(s) means the populations of finfish, mollusks, crustaceans, and all other species of living organisms, including birds, found south of the Antarctic Convergence, and with respect to all species of *Dissostichus*, wherever found, and their parts or products.

* * * * *

Dealer means the person who first receives AMLRs from a harvesting vessel or transshipment vessel, or who imports AMLRs into, or re-exports AMLRs from the customs territory of the United States.

* * * * *

Dissostichus catch document (DCD) means the uniquely numbered catch documentation form approved by the Commission and issued by a flag state to its vessels authorized to harvest and/or transship *Dissostichus* species.

Dissostichus species means Patagonian toothfish and/or Antarctic toothfish and their parts or products.

* * * * *

Transship means offloading, onloading, otherwise transferring or transporting fish or fish products.

* * * * *

3. Section 300.107 is revised to read as follows:

§ 300.107 Reporting and recordkeeping requirements.

(a) *Vessels.* The operator of any vessel required to have a permit under this subpart must:

(1) Accurately maintain on board the vessel a fishing logbook and all other reports and records required by its permit.

(2) Make such reports and records available for inspection upon the request of an authorized officer or CCAMLR inspector.

(3) Within the time specified in the permit, submit a copy of such reports and records to NMFS at an address designated by NMFS.

(b) *Dealers.* Dealers of AMLRs required to have a permit under this subpart must:

(1) Accurately maintain all reports and records required by its permit.

(2) Make such reports and records available for inspection upon the request of an authorized officer or CCAMLR inspector.

(3) Within the time specified in the permit, submit a copy of such reports and records to NMFS at an address designated by NMFS.

(c) *Catch documentation.* No shipment of *Dissostichus* species shall be released for entry into the customs territory of the United States unless accompanied by a complete and validated CCAMLR DCD, except as provided in paragraph (c)(6) of this section. The CCAMLR DCD must accompany all shipments of *Dissostichus* species as follows:

(1) *Harvesting vessels.* In addition to any harvesting permit or authorization previously issued, a U.S. vessel harvesting or attempting to harvest *Dissostichus* species must have been issued by NMFS a DCD that is uniquely identified for that vessel and is non-transferrable. The master of the harvesting vessel must ensure that the catch information specified on the DCD is accurately recorded. Prior to offloading the master must convey such catch information to NMFS by the most rapid electronic means possible, and must record on the DCD a confirmation number received from NMFS. Upon transshipment or landing *Dissostichus* species, the master of the harvesting vessel must obtain on the DCD, or copies thereof, either the signature(s) of the master of the vessel(s) to which the catch is transferred or the signature of a responsible official(s) designated by NMFS in the harvesting permit and the dealer(s) that receives the catch at the port(s) of landing. The master of the harvesting vessel shall sign the DCD, or copies thereof, convey each copy to NMFS by the most rapid electronic means possible, and provide a copy to each recipient of the catch. The master of the harvesting vessel must submit the original DCD, or copies thereof with original signatures by the master and recipient(s), to NMFS at an address designated by NMFS no later than 30 days after the end of the fishing season as authorized for that vessel on its harvesting permit.

(2) *Transshipment vessels.* The master of a U.S. vessel issued a permit to receive *Dissostichus* species at sea must, upon receipt of *Dissostichus* species at sea, sign each DCD provided by the master of the harvesting vessel and retain a copy for a period of 2 years. Upon landing *Dissostichus* species received at sea, the master of the receiving vessel must obtain on each DCD, or copies thereof, the signature of a responsible official(s) designated by NMFS in the permit and the person/dealer(s) that receives the catch at the port(s) of landing. The master of the receiving vessel must sign each DCD, or copies thereof, convey each copy to NMFS and to the flag state(s) of the harvesting vessel(s) by the most rapid electronic means possible and provide a copy to each recipient of the catch. The master of the receiving vessel must submit a copy of each DCD with original signatures by the master of the receiving vessel and recipient(s) of the landed catch to NMFS at an address designated by NMFS no later than 30 days after offloading in port.

(3) *Receivers upon landing.* Any dealer who receives *Dissostichus* species from a harvesting vessel or from a transshipment vessel must sign the DCD(s) provided by the master of the vessel.

(4) *Import.* Any dealer who imports *Dissostichus* species must obtain the DCD(s) that accompany the import shipment, mail or fax the DCD(s) to NMFS at an address designated by NMFS within 24 hours of the release from customs custody, retain a copy for his/her records and provide copies to exporters as needed. Dealers must retain at their place of business a copy of the DCD for a period of 2 years from the date on the DCD.

(5) *Re-export.* Any dealer who re-exports *Dissostichus* species must complete a *Dissostichus* re-export document by indicating the amount from the original DCD(s) that is exported in the particular export shipment, the number of the original DCD(s), the name of the importer and point of import, and the exporter's name, address and permit number. The dealer must then sign the re-export document and obtain validation by an authority designated by NMFS. The original validated *Dissostichus* re-export document and copies of the original DCD(s)must accompany the export shipment. The dealer must retain a copy of the re-export document and copies of the DCD(s). Dealers must retain at their place of business a copy of the DCD for a period of 2 years from the date on the DCD.

(6) *Exception. Dissostichus* species harvested prior to the effective date of this rule may be imported during the first 60 days following the effective date of this rule, provided that the date of the harvest are corroborated on the dealer permit.

4. In § 300.112, paragraph (k) is added to read as follows:

§ 300.112 Harvesting permits.

* * * * *

(k) *Transshipment vessels.* Any vessel subject to the jurisdiction of the United States that receives or attempts to receive *Dissostichus* species from a harvesting vessel at sea, regardless of whether such transshipment occurs in waters under the jurisdiction of CCAMLR, must obtain from NMFS a harvesting permit authorizing transshipment. Transshipment vessels must comply with the permitting provisions of this section with respect to harvesting vessels.

5. Section 300.113 is revised to read as follows:

§ 300.113 Dealer permits.

(a) *General.* (1) A dealer must obtain an AMLRs dealer permit from NMFS. Only those specific activities stipulated by the permit are authorized for the permit holder.

(2) An AMLR may be imported into the United States if its harvest has been authorized by a U.S.-issued individual permit or a harvesting permit or its importation has been authorized by a U.S.-issued dealer permit issued pursuant to § 300.112 or paragraph (a) of this section. The harvesting permit, or the individual permit, a NMFS issued dealer permit, or a copy thereof, must accompany the import.

(3) In addition to any applicable catch documentation required under § 300.107, the dealer is required to complete and return to NMFS, no later than 24 hours after the date of the importation, an import ticket reporting the importation. Import tickets will be attached to the permit. Additional

import tickets are available from NMFS. In no event may a marine mammal be imported into the United States unless authorized and accompanied by an import permit issued under the Marine Mammal Protection Act and/or the Endangered Species Act.

(4) A dealer permit issued under this section does not authorize the harvest or transshipment of any AMLR by or to a vessel of the United States.

(b) *Application.* Application forms for AMLR dealer permits are available from NMFS at an address designated by NMFS. A fully completed and accurate application must be submitted for each permit at least 30 days before the anticipated date of the receipt, importation or re-export.

(c) *Issuance.* NMFS may issue a dealer permit if it determines that the activity proposed by the dealer meets the requirements of the Act and that the resources were not or will not be harvested in violation of any conservation measure in force with respect to the United States or in violation of any regulation in this subpart.

(d) *Duration.* A permit issued under this section is valid from its date of issuance to its date of expiration unless it is revoked or suspended.

(e) *Transfer.* A permit issued under this section is not transferable or assignable.

(f) *Changes in information.* (1) Pending applications. Applicants for permits under this section must report in writing to NMFS any change in the information submitted in their permit applications. The processing period for the application will be extended as necessary to review and consider the change.

(2) Issued permits. Any entity issued a permit under this section must report in writing to NMFS any changes in previously submitted information. Any changes that would not result in a change in the receipt or importation authorized by the permit must be reported on the import ticket required to be submitted to NMFS no later than 24 hours after the date of receipt or importation. Any changes that would result in a change in the receipt or importation authorized by the permit, such as harvesting vessel or country of origin, type and quantity of the resource to be received or imported, and Convention statistical subarea from which the resource was harvested, must be proposed in writing to NMFS and may not be undertaken unless authorized by NMFS through issuance of a revised or new permit.

(g) *Revision, suspension, or revocation.* A permit issued under this section may be revised, suspended, or revoked, based upon a violation of the permit, the Act, or this subpart. Failure to report a change in the information contained in a permit application voids the application or permit, as applicable. Title 15 CFR part 904 governs permit sanctions under this subpart.

6. In § 300.115, paragraph (b) is revised and paragraphs (q) and (r) are added to read as follows:

§ 300.115 Prohibitions.

* * * * *

(b) Import into or export from the customs territory of the United States any AMLRs taken by vessels without a permit to harvest those resources as required by § 300.112, or without applicable catch documentation as required by § 300.107, or without a dealer permit receive, import or export to the AMLRs as required by § 300.113.

* * * * *

(q) Fail to complete and sign applicable catch documentation, or provide false information about the harvest, transshipment, landing, import or re-export of applicable species as required by § 300.107.

(r) Receive AMLRs from a vessel without a dealer or harvesting permit issued under this subpart or in violation of the terms and conditions for such receipt as specified on the permit.

7. In § 300.116, paragraph (d) is added to read as follows:

§ 300.116 Facilitation of enforcement and inspection.

* * * * *

(d) *Disposition of resources denied entry.* (1) When AMLRs are offered for entry into the Customs territory of the United States unaccompanied by a permit authorizing import and/or required catch documentation, the importer of record must either:

(i) Abandon the resources;

(ii) Waive claim to the resources; or

(iii) Place the resources into a bonded warehouse and attempt to obtain a permit and/or documentation authorizing their importation.

(2) If, within 60 days of such resources being placed into a bonded warehouse, the District Director of the U.S. Customs Service receives documentation that import of the resources into the United States is authorized by a permit and that required documentation has been submitted to NMFS, the resources will be allowed entry. If a permit or catch documentation is not presented within 60 days, the importer's claim to the resources will be deemed waived.

(3) When resources are abandoned or claim to them is waived, the resources will be delivered to the Administrator of NOAA, or a designee, for storage or disposal as authorized by law. In such case, actual costs of delivery, storage and/or disposal may be assessed against the importer of record.

[FR Doc. 00–5783 Filed 3–8–00; 5:07pm]

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Notices

Federal Register
Vol. 65, No. 49
Monday, March 13, 2000

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 HEALTH AND HUMAN SERVICES

National Institutes of Health

Consensus Development Conference on Osteoporosis Prevention, Diagnosis, and Therapy

Notice is hereby given of the National Institutes of Health (NIH) Consensus Development Conference on ''Osteoporosis Prevention, Diagnosis, and Therapy,'' which will be held March 27–29, 2000, in the NIH's Natcher Conference Center, 9000 Rockville Pike, Bethesda, Maryland 20892. The conference begins at 8:00 am on March 27, at 8:30 am on March 28, and at 9:00 am on March 29 and is open to the public.

The most common bone disease in the United States, osteoporosis affects 10 million people in this country, with 18 million more at increased risk due to low bone mass. Osteoporosis is characterized by low bone mass and structural deterioration of bone tissue, leading to bone fragility and an increased susceptibility to fractures—particularly of the hip, spine, and wrist. Women are four times more likely than men to develop osteoporosis.

The purpose of the 2½-day conference is to clarify, for health care providers and the public, the factors associated with prevention and better diagnosis and treatment of osteoporosis. After 1½ days of presentations and audience discussion of the latest osteoporosis research, an independent, non-Federal consensus development panel will weigh the scientific evidence and draft a statement addressing the following key questions:

What is osteoporosis and what are its consequences?

How do risks vary among different segments of the population?

What factors are involved in building and maintaining skeletal health throughout life?

What is the optimal evaluation and treatment of osteoporosis and fractures?

What are the directions for future research?

On the final day of the conference, the panel's draft statement will be read in public, at which time members of the public are invited to offer comments on the draft.

The primary organizers of this meeting are the National Institute of Arthritis and Musculoskeletal and Skin Diseases and the NIH Office of Medical Applications of Research. Other supporters include the National Institute on Aging; the National Institute of Diabetes and Digestive and Kidney Diseases; the National Institute of Dental and Craniofacial Research; the National Institute of Child Health and Human Development; the National Institute of Nursing Research; the National Institute of Environmental Health Sciences; the National Heart, Lung, and Blood Institute; the NIH Office of Research on Women's Health; and the Agency for Healthcare Research and Quality (formerly the Agency for Health Care Policy and Research).

This is the 111th Consensus Development Conference held by the NIH in the 23-year history of the Consensus Development Program. Advance information about the conference and conference registration materials may be obtained from Prospect Associates of Silver Spring, Maryland, by calling (301) 592–3320 or by sending email to *osteoporosis@prospectassoc.com.* Prospect Associates' address is 10720 Columbia Pike, Suite 500, Silver Spring, Maryland 20901–4437. A conference agenda and registration information is also available on the NIH Consensus Program Web site at *http://consensus.nih.gov.*

Dated: March 2, 2000.

Ruth L. Kirschstein,

Acting Director, NIH.

[FR Doc. 00–6014 Filed 3–10–00; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

National Toxicology Program; National Institute of Environmental Health Sciences (NIEHS), National Institutes of Health (NIH): Notice of Expert Panel Meeting on the Frog Embryo Teratogenesis Assay—Xenopus

SUMMARY: Pursuant to Public Law 103–43, notice is hereby given of a public meeting sponsored by the NIEHS and the National Toxicology Program (NTP), and coordinated by the Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM) and the NTP Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM). The agenda topic is an expert panel assessment on the current validation status of the frog embryo teratogenesis assay (FETAX), an *in vitro* method proposed for evaluating the developmental toxicity potential of chemicals. The meeting will take place at the Sheraton Imperial Hotel and Convention Center, 4700 Emperor Blvd., Durham, NC 27703 on May 16–17, 2000 from 8:00 a.m. to 5:30 p.m. and May 18 from 8:00 a.m. to noon and is open to the public.

Background

ICCVAM, with participation by 14 Federal regulatory and research agencies and programs, was established in 1997 to coordinate issues relating to validation, acceptance, and national/international harmonization of toxicological test methods. ICCVAM seeks to promote the scientific validation and regulatory acceptance of toxicological test methods that will enhance agencies' ability to assess risks and make decisions and that will refine, reduce, and replace animal use whenever possible. NICEATM provides administrative and scientific support of ICCVAM-related activities. NICEATM and ICCVAM collaborate to carry out activities needed to develop, validate, and achieve regulatory acceptance of new and improved test methods applicable to Federal agencies. These activities may include:

Test Method Workshops that are convened, as needed, to evaluate the adequacy of current methods for assessing specific toxicities, to identify

areas in need of improved or new testing methods, and to identify research efforts that may be needed to develop a new test method.

Expert Panel Meetings that are typically convened to evaluate the validation status of a method following the completion of initial development and pre-validation studies. An Expert Panel is asked to recommend additional validation studies, which might be helpful in further characterizing the usefulness of a method, and to identify any additional research and development efforts that might enhance the effectiveness of a method.

Independent Peer Review Panel Meetings that are typically convened following the completion of comprehensive validation studies on a test method. Peer Review Panels are asked to develop scientific consensus on the usefulness and limitations of test methods to generate information for specific human health and/or ecological risk assessment purposes. Following the independent peer review of a test method, ICCVAM forwards recommendations on its usefulness to agencies for their consideration. Federal agencies then determine the regulatory acceptability of a method according to their mandates.

Evaluation of FETAX

ICCVAM and NICEATM are coordinating an Expert Panel Meeting to assess the current validation status of FETAX which is proposed as a screening method for evaluating the developmental toxicity potential of chemicals (Bantle, J.A., 1995, FETAX—A Developmental Toxicity Assay Using Frog Embryos, in: Fundamentals of Aquatic Toxicology, 2nd Ed., (Rand, G.M., ed), Taylor and Francis:USA, pp. 207–230). An ICCVAM Developmental Toxicity Working Group composed of Federal employees determined that the assay may have potential for use in screening and prioritizing compounds for further testing, evaluating complex mixtures and environmental samples, and as supplemental information in a weight-of-evidence evaluation of toxicity hazards. NICEATM has prepared a comprehensive Background Review Document (BRD) summarizing available FETAX data and performance characteristics.

Agenda

During the morning session on the first day of the meeting, May 16, the Expert Panel will meet in a plenary session and then divide into five Breakout Groups that will meet on the afternoon of May 16 and all day on May 17. For these sessions, the Breakout Groups will address potential uses of FETAX and develop recommendations for research, additional test method development, and validation efforts that might be considered to further enhance and/or characterize the usefulness of FETAX. On May 18 in a plenary session, the Breakout Groups will individually present their conclusions and recommendations for consideration and discussion by the entire panel. A final report from the Expert Review Panel will be prepared and made publicly available (see below). The public is invited to attend all sessions of the Expert Panel Meeting, and designated times throughout the meeting will be set aside for presentation of public comments.

Summary minutes for the meeting and the final report from the Expert Panel will be prepared and made available upon request to NICEATM and on the web at http://iccvam.niehs.nih.gov. Copies of the FETAX BRD and supporting materials may be obtained from NICEATM, MD: EC–17, P.O. Box 12233, Research Triangle Park, NC, 27709 (919–541–3398), FAX (919–541–0947), e-mail:

ICCVAM@niehs.nih.gov.

Additionally, the FETAX BRD will be available for viewing Monday through Friday, from noon to 4:00 p.m. EST at: Office of Prevention, Pesticides and Toxic Substances, Non-Confidential Information Center, Room 607B, Northeast Mall, 401 M Street SW, Washington, DC 20406. Thirty days prior to the meeting, a detailed agenda will be available online at: http://iccvam.niehs.nih.gov or by contacting NICEATM.

Public Comment

NICEATM invites the submission of written comments on the FETAX test method and BRD, as well as other available information regarding the usefulness of FETAX including information about completed, ongoing, or planned studies. Written comments and additional information should include name, affiliation, mailing address, phone, fax, e-mail and sponsoring organization (if any). This material should be sent by mail, fax, or e-mail to NICEATM at the address given. Information and comments may be sent at any time prior to the meeting; however, materials should be received by April 15, 2000 in order to ensure adequate review by the Expert Panel. This information will be added to the resource materials assembled on FETAX. Copies of written comments will be available for attendees at the meeting.

The Expert Panel Meeting will be open to the public, and time will be provided for presentation of public oral comments at designated times during the meeting. Speakers will be assigned on a first-come, first-serve basis, and at least seven minutes will be allotted to each speaker. In order to facilitate planning for the meeting, persons requesting time for an oral presentation should notify NICEATM at the address given above no later than May 1, 2000. Persons registering to make comments are asked to provide, if possible, a written copy of their statement by May 1st so copies can be made and distributed to the Expert Panel and ICCVAM representatives and experts for their timely review prior to the meeting. Written statements can supplement and expand the oral presentation, and each speaker is asked to provide his/her name, affiliation, mailing address, phone, fax, e-mail and supporting organization (if any). Registration for making public comments will also be available on-site. If registering on-site to speak and reading oral comments from printed copy, the speaker is asked to bring 50 copies of the text. These copies will be distributed to the Chair and Expert Panel members and supplement the record.

Persons needing special assistance, such as sign language interpretation or other special accommodations should contact NICEATM (contact information given above).

Dated: March 6, 2000.

Samuel H. Wilson,

Deputy Director, National Institute of Environmental Health Sciences.

[FR Doc. 00–6013 Filed 3–10–00; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Discretionary Funds for Projects to Establish Individual Development Accounts for Refugees

AGENCY: Office of Refugee Resettlement (ORR), ACF, DHHS.

ACTION: Notice of Availability of FY 2000 Discretionary Social Service Funds to Public and Private, Non-profit Agencies for Projects to Establish and Manage Individual Development Accounts for Refugees.

SUMMARY: The Office of Refugee Resettlement invites eligible entities to submit competitive grant applications for projects to establish and manage

Individual Development Accounts (IDAs) for low-income refugee [1] participants. Eligible refugee participants who enroll in these projects will open and contribute systematically to IDAs for specified Savings Goals, including homeownership, business capitalization, and post-secondary education. Grantees may use ORR funds to provide matches for the savings in the IDAs up to $2,000 per individual refugee and $4,000 per refugee household. Applications will be screened and evaluated as indicated in this program announcement. Awards will be contingent on the outcome of the competition and the availability of funds.

DATES: The closing date for submission of applications is May 12, 2000. See Part IV of this announcement for more information on submitting applications.

Announcement Availability: The program announcement and the application materials are available on the ORR website at www.acf.dhhs.gov/programs/orr.

FOR FURTHER INFORMATION CONTACT: Henley Portner, Program Specialist, Division of Community Resettlement, Office of Refugee Resettlement, (ACF), (Telephone: (202) 401–5363; Fax: (202) 401–5772; E-mail: HPortner@ACF.DHHS.GOV).

SUPPLEMENTARY INFORMATION: This program announcement consists of four parts:

Part I: Background—program purpose and objectives, legislative authority, funding availability, CFDA Number, definition of terms.

Part II: Project and Applicant Eligibility—eligible applicants, project and budget periods

Part III: The Review Process—intergovernmental review, initial ACF screening, evaluation criteria and competitive review.

Part IV: The Application—application materials, application development, application submission.

Paperwork Reduction Act of 1995 (Pub. L. 104–13): Public reporting burden for this collection of information is estimated to average four hours per response, including the time for reviewing instructions, gathering and maintaining the data needed, and reviewing the collection of information. The following information collection is included in the program announcement: OMB Approval No. 0970–0139, ACF UNIFORM PROJECT DESCRIPTION (UPD), which expires 10/31/2000. 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.

Part I. Background

Program Purpose and Objectives

The Office of Refugee Resettlement invites qualified entities to submit competing grant applications for new projects that will establish, support, and manage Individual Development Accounts (IDAs) for eligible low-income refugee individuals and families. The Refugee IDA Program represents an anti-poverty strategy built on asset accumulation for low-income refugee individuals and families with the goal of promoting refugee economic independence. In particular, the objectives of this program are to: increase the ability of low-income refugees to save; promote their participation in the financial institutions of this country; assist refugees in advancing their education; increase home ownership; and assist refugees in gaining access to capital. These new projects will accomplish these objectives by establishing programs that combine the provision of matched savings accounts with financial training and counseling.

Eligibility for this program is limited to refugees:

- who have earned income and whose household earned income at time of enrollment does not exceed 200 percent of the federal poverty level; and
- whose assets at time of enrollment do not exceed $10,000, excluding the value of a primary residence.

Grantees may target their projects to refugees with lower incomes and net worth than the limits described above. A copy of the HHS Poverty Guidelines is attached to this announcement. The Poverty Guidelines may also be found at http:/aspe.hhs.gov/.

Grantees, in partnership with qualified financial institutions, will create Individual Development Accounts for refugee participants. Refugee participants will systematically contribute to the IDAs in order to purchase specified Savings Goals. Grantees may include any or all of the following Savings Goals in their IDA program:

- Home Purchase or Renovation;
- Post-Secondary Education, Vocational Training, or Recertification;
- Microenterprise Capitalization;
- Purchase of an Automobile;
- Purchase of a Computer.

Additional information on these Savings Goals is provided in the Definition of Terms section of this announcement.

ORR encourages applicants to include in their projects commitments of additional public or private funds for matching IDA deposits, operational overhead, or training. Documentation of additional funds should be provided in the application in writing, executed with the entity providing the non-ORR contribution, on letterhead of the entity, and signed by a person authorized to make a commitment on behalf of the entity.

The grantee will establish a ''Savings Plan Agreement'' with each refugee participant. The Savings Plan Agreement should include:

(1) a proposed schedule of savings deposits by the participant;

(2) the rate at which participant's savings will be matched;

(3) the Savings Goal for which the account is maintained;

(4) any training or counseling which the participant agrees to attend;

(5) agreement that the participant will not withdraw funds except for the specified Savings Goal or for an emergency and only after consultation with the grantee; and

(6) a procedure for amending the Agreement.

Applicants may propose additional provisions to be included in Savings Plan Agreements.

The IDA contains only the refugee participant's deposits and interest earned on those deposits. The grantee will create a parallel account (or parallel accounts), separate from the participants' IDAs, in a qualified financial institution, in which all matching ORR grant funds will be deposited and maintained on behalf of the refugee participants.

Drawdown of the ORR grant funds and deposit of those funds into the parallel account(s) will be permitted no earlier than the time of the refugee's deposit to the IDA. Grantees must draw down ORR funds for matching IDA deposits within three months of the date that the refugee participant makes the deposit.

ORR funds may be used at a matching rate no greater than two-to-one for each dollar deposited in the IDA by the

[1] In addition to persons who meet all requirements of 45 CFR 400.43, eligibility for refugee social services also includes: (1) Cuban and Haitian entrants under section 501 of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422); (2) certain Amerasians from Vietnam who are admitted to the U.S. as immigrants under section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, as included in the FY 1988 Continuing Resolution (Pub. L. 100–202); and (3) certain Amerasians from Vietnam, including U.S. citizens, under Title II of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1989 (Pub. L. 100–461), 1990 (Pub. L. 101–167), and 1991 (Pub. L. 101–513). For convenience, the term ''refugee'' is used in this notice to encompass all such eligible persons.

refugee participant. Grantees may choose to vary the amount of the match by type of Savings Goal and/or by income level of the refugee participants. Over the course of the five-year project period, not more than $2,000 in ORR grant funds may be provided through matching contributions to any one refugee individual and not more than $4,000 may be provided to any one refugee household.

The interest that accrues on the ORR matching funds deposited in the parallel account must be credited to the IDAs of the refugee participants. Interest on the matching funds is not subject to the $2000/$4000 limitation on total match for an individual and a household. The interest on the match funds in the parallel account may not be retained by the grantee for any purpose, including program administration, participant support services, or program data collection.

ORR strongly encourages applicants to incorporate in these projects financial training for the refugee participants. The training may be provided directly by the grantee or the grantee may choose to provide the training through subgrantees or other providers. The types of training provided by a grantee should reflect both the refugee population and the types of Savings Goals to be included in the program. Such training could include budgeting, cash management, savings, investment, and credit counseling. Specialized training and technical assistance should be provided for refugee participants whose Savings Goals are home purchase or microenterprise.

Legislative Authority

Section 412(c)(1)(A) of the Immigration and Nationality Act authorizes the Director ''to make grants to, and enter into contracts with, public or private nonprofit agencies for projects specifically designed—(i) to assist refugees in obtaining skills which are necessary for economic self-sufficiency, including projects for job training, employment services, day care, professional refresher training, and other recertification services; (ii) to provide training in English where necessary (regardless of whether the refugees are employed or receiving cash or other assistance); and (iii) to provide where specific needs have been shown and recognized by the Director, health (including mental health) services, social services, educational and other services.''

Funding Availability

ORR expects to award approximately $3 million in FY 2000 funds for the Refugee IDA Program among approximately eight to twelve grantees. Grants are expected to range from $100,000 to $400,000. Approximately 75–80 percent of the ORR grant funds should be designated for the purpose of providing matches for the refugee IDA accounts. The remaining 20–25 percent of ORR funds may be used for the administrative and operational costs of the project and for financial training, counseling, and technical assistance.

The Director reserves the right to award more or less than the funds described in the absence of worthy applications or such other circumstances as may be deemed to be in the best interest of the government. Applicants may be required to reduce the scope of selected projects based on the amount of the approved grant award.

The Catalog of Federal Domestic Assistance (CFDA) number assigned to this announcement is 93.576. The title of the program is the Refugee Individual Development Account Program.

Applicable Regulations

Applicable U.S. Department of Health and Human Services regulations can be found at 45 CFR Part 74 or Part 92.

Definition of Terms

Individual Development Accounts (IDAs) are leveraged, or matched, savings accounts. IDAs are established in insured accounts in qualified financial institutions; and the funds are intended for the Savings Goals specified in this announcement. Although the refugee participant maintains control of all funds that the participant deposits in the IDA, including all interest that may accrue on the funds, the participant must sign a Savings Plan Agreement with the grantee that specifies that the funds in the account will be used only for the participant's Savings Goal or for an emergency withdrawal. A signed Savings Plan Agreement is required for the refugee participant to be eligible for matching funds.

The *Savings Goals,* as specified below, are the purchases/investments for which the matching funds, and the interest on matching funds, are available when used in conjunction with the savings from the IDAs of refugee participants. The Savings Goal specified by a participant in the Savings Plan Agreement may be for the benefit of the refugee participant or of a refugee dependent of the refugee participant. Savings Goals are defined as follows:

- *Home ownership:* includes costs of a principal residence including the downpayment and closing costs when purchasing a home; also renovation costs of a new home or of an existing primary residence. In the case of acquisition, the purchaser must be a first-time homebuyer.
- *Microenterprise capitalization:* means costs described in a qualified business plan, such as capital, plant, equipment, working capital, and inventory expenses. The business plan must be approved by a financial institution, a microenterprise development organization, or a nonprofit loan fund. The plan must also describe services or goods to be sold and include a marketing plan and projected financial statements. Also included in microenterprise capitalization are expenditures for a business expansion.
- *Post-secondary Education, Vocational Training, and Recertification:* Tuition or fees, professional recertification fees, books, supplies, and equipment related to the enrollment or attendance of a refugee student at an educational institution.
- *Purchase of an Automobile:* if necessary for the purpose of maintaining or upgrading employment.
- *Purchase of a Computer:* including hardware and software, to support a refugee student's enrollment in an educational, vocational, or recertification institution or for a microenterprise.
- *Qualified financial institution* means a Federally insured bank, credit union, or savings and loan institution or a State-insured bank, credit union, or savings and loan institution if no Federally insured bank, credit union, or savings and loan institution is available.
- *A parallel account* is an insured account (or accounts) opened by the grantee in a qualified financial institution for the purpose of depositing the matching funds for the savings deposited by refugee participants in their individual IDAs. Interest earned on the matching funds must remain in the parallel account and be credited to the refugee participants. Both the matching funds and the interest earned on those funds must be made available to the refugee participant at the time that the participant purchases the Savings Goal. The matching funds and the interest on the matching funds in the parallel account are not available to the refugee participant except for the Savings Goals defined in this announcement.
- An *emergency withdrawal* is a withdrawal of funds, or a portion of funds, deposited by the refugee participant in his/her Individual Development Account. The withdrawal may also include any of the interest that may have accrued to the participant's savings in the account. Such a withdrawal must be approved by the

project grantee and be consistent with the terms of the Savings Plan Agreement between the grantee and the refugee participant. Causes for emergency withdrawals include, but are not limited to, medical expenses, payments to prevent eviction or foreclosure, or payments for necessary living expenses. If funds withdrawn for emergency purposes are not repaid within 12 months, the refugee participant forfeits the match on those funds. Emergency withdrawals may never be authorized from the parallel account(s).

Part II. Project and Applicant Eligibility

Eligible Applicants

To be eligible for funding under this announcement, projects must meet the following requirements. Eligible applicants for these funds include States and private, non-profit organizations. Applicants may request funding to administer a refugee IDA project directly with refugee participants or as an intermediary agency which will administer multiple projects through participating community-based organizations. Private, non-profit agency applicants must provide documentation of their 501(c)(3) tax-exempt status at the time of the application submission.

Applicants must also provide documentation of participation of a qualified financial institution(s) in the project. This documentation must be in writing, on letterhead of the financial institution, and signed by a person authorized to make the commitment on behalf of the financial institution. The documentation must include a commitment by the financial institution to establish IDAs for the refugee participants, to establish a parallel account (or accounts) for the matching funds, and to provide the grantee with account activity data on the IDAs and the parallel account(s) in a timely manner.

Project and Budget Periods

This announcement invites applications for project periods up to five years. Awards, on a competitive basis, will be for a one-year budget period. Applications for continuation grants funded under these awards beyond the first one-year budget period but within the five-year project period will be entertained in subsequent years on a noncompetitive basis, subject to availability of funds, satisfactory progress of the grantee, and a determination that continued funding would be in the best interest of the Government.

Under these projects, grantees should schedule their account activities so that all IDA accounts reach their maximum savings, and refugee participants have purchased their Savings Goal, within the five-year project period. Applicants should include in their applications their proposal for handling accounts in the event that any refugee participant has not completed the Savings Goal purchase by the end of the five-year project period. (For instance, applicants may consider creating an escrow account for each participant's matching funds.)

Part III. The Review Process

A. Intergovernmental Review

This program is covered under Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' and 45 CFR Part 100, ''Intergovernmental Review of Department of Health and Human Services Programs and Activities.'' Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of November 20, 1998, the following jurisdictions have elected not to participate in the Executive Order process. Applicants from these jurisdictions need take no action in regard to E.O. 12372: Alabama, Alaska, American Samoa, Colorado, Connecticut, Kansas, Hawaii, Idaho, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, Ohio, Oklahoma, Oregon, Palau, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, and Washington.

Although the jurisdictions listed above no longer participate in the process, entities which have met the eligibility criteria of the program may still apply for a grant even if a State, Territory, Commonwealth, etc., does not have a Single Point of Contact (SPOC). All remaining jurisdictions participate in the Executive Order process and have established SPOCs. Applicants from participating jurisdictions should contact their SPOCs as soon as possible to alert them of the prospective applications and receive instructions. Applicants must submit any required material to the SPOCs as soon as possible so that the program office can obtain and review SPOC comments as part of the award process. The applicant must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2), a SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards. SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to differentiate clearly between mere advisory comments and those official State process recommendations, which may trigger the ''accommodate or explain'' rule.

When comments are submitted directly to ACF, they should be addressed to: Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement, Attention: Daphne Weeden, ORR Grants Officer, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447.

A list of the Single Points of Contact for each State and Territory is included with the application materials for this program announcement.

B. Initial ACF Screening

Each application submitted under this program announcement will undergo a pre-review to determine that (1) the application was received by the closing date and submitted in accordance with the instructions in this announcement; and (2) the applicant is eligible for funding.

C. Competitive Review and Evaluation Criteria

Applications that pass the initial ACF screening will be evaluated and rated by an independent review panel on the basis of specific evaluation criteria. The evaluation criteria were designed to assess the quality of a proposed project and to determine the likelihood of its success. The evaluation criteria are closely related and are considered as a whole in judging the overall quality of an application. Points are awarded only to applications that are responsive to the evaluation criteria within the context of this program announcement. Proposed projects will be reviewed using the following evaluation criteria:

1. Objectives and Need for Assistance

The application identifies the refugee population to be assisted by this project and describes the need for assistance of this population. Indicators of the need for assistance include low rates of: use of financial institutions, home ownership, education, and access to capital; and high rates of: reliance on public assistance and incomes below 200 percent of the Federal poverty level. (15 points)

2. Approach

The application provides a clear explanation of a feasible, appropriate, and complete plan for establishing and

managing IDAs for the refugee participants. The plan clearly describes the structure, uses, requirements, and management of the IDAs and includes procedures for: managing the parallel account(s); ensuring that interest on the matches is correctly credited to individual refugee participants; and providing financial training appropriate to the refugee population and to the Savings Goals included in the project. (25 points)

3. Organizational Profiles

Applicant organization and staff and partner organizations have demonstrated capability to implement and manage new programs and to recruit and work with the refugee population. The applicant has developed a partnership with a financial institution(s) to implement the IDAs. (25 points)

4. Results or Benefits Expected

The outcomes and benefits proposed are reasonable and reflect the objectives of this announcement. The methodology proposed for collecting outcome data is reasonable. (20 points)

5. Budget and Budget Justification

The budget is reasonable and clearly justified. The methodologies for estimating the number of refugee participants and amount of matching funds are reasonable. (15 points)

Part IV. The Application

A. Application Development

In order to be considered for a grant under this program announcement, an application must be submitted on the Standard Form 424 and in the manner prescribed by ACF. Application materials including forms and instructions are available from the contact named under the **FOR FURTHER INFORMATION, CONTACT** section in the preamble of this announcement.

General Guidelines for Preparing a Project Description

Purpose: The project description provides a major means by which an application is evaluated and ranked to compete with other applications for available assistance. The project description should be concise and complete and should address the activity for which Federal funds are being requested. Supporting documents should be included where they can present information clearly and succinctly. Applicants are encouraged to provide information on their organizational structure, staff, related experience, and other information considered to be relevant. Awarding offices use this and other information to determine whether the applicant has the capability and resources necessary to carry out the proposed project. It is important, therefore, that this information be included in the application. However, in the narrative, the applicant must distinguish between resources directly related to the proposed project from those that will not be used in support of the specific project for which funds are requested.

General Instructions: Cross-referencing should be used rather than repetition. ACF is particularly interested in specific factual information and statements of measurable goals in quantitative terms. Project descriptions are evaluated on the basis of substance, not length. Extensive exhibits are not required. (Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant-funded activity should be placed in an appendix.) Pages should be numbered and a table of contents should be included for easy reference.

Project Summary/Abstract: Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance: Clearly identify the economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/beneficiary information, as needed. In developing the project description, the applicant may volunteer, or be requested to provide, information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Results or Benefits Expected: Identify the results and benefits to be derived from this project. ORR is particularly interested in the projected outcomes for the refugee groups, including the number of IDAs opened, rate of growth in savings, number and size of withdrawals for each of the Savings Goals, and the impact of the purchase of the Savings Goal on the participant's movement toward self-sufficiency.

Approach: Outline a plan of action that describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors which might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement. Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of IDAs to be opened. When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates. Identify the kinds of data to be collected, maintained, and/or disseminated. Note that clearance from the U.S. Office of Management and Budget might be needed prior to a ''collection of information'' that is ''conducted or sponsored'' by ACF. List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Geographic Location: Describe the precise location of the project and boundaries of the area to be served by the proposed project. Maps or other graphic aids may be attached.

Additional Information: Following is a description of additional information that should be placed in the appendix to the application.

Staff and Position Data: Provide a biographical sketch for each key person appointed and a job description for each vacant key position. A biographical sketch will also be required for new key staff as appointed.

Organization Profiles: Provide information on the applicant organization(s) and cooperating partners such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information. Any non-profit organization submitting an application must submit proof of its non-profit status in its application at the

time of submission. The non-profit agency can accomplish this by providing a copy of the applicant's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in Section 501(c)(3) of the IRS code *or* by providing a copy of the currently valid IRS tax exemption certificate *or* by providing a copy of the articles of incorporation bearing the seal of the State in which the corporation or association is domiciled.

Third-Party Agreements: Include written agreements between grantees and subgrantees or subcontractors or other cooperating entities. These agreements must detail scope of work to be performed, work schedules, remuneration, and other terms and conditions that structure or define the relationship.

Letters of Support: Provide statements from community, public, and commercial leaders that support the project proposed for funding.

Budget and Budget Justification

Provide line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. The detailed budget must also include a breakout by the funding sources identified in Block 15 of the SF–424. Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

General

The following guidelines are for preparing the budget and budget justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. For purposes of preparing the budget and budget justification, ''Federal resources'' refers only to the ACF grant for which you are applying. Non-Federal resources are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: first column, object class categories; second column, Federal budget; next column(s), non-Federal budget(s), and last column, total budget. The budget justification should be a narrative.

Personnel

Description: Costs of employee salaries and wages.

Justification: Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time equivalent), annual salary, grant salary, wage rates, etc. Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits

Description: Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

Justification: Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel

Description: Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

Justification: For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ORR-sponsored conferences should be detailed in the budget.

Equipment

Description: Costs of tangible, non-expendable, personal property, having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. However, an applicant may use its own definition of equipment provided that such equipment would at least include all equipment defined above.

Justification: For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy or section of its policy which includes the equipment definition.

Supplies

Description: Costs of all tangible personal property other than that included under the Equipment category.

Justification: Specify general categories of supplies and their costs. Show computations and provide other information, which supports the amount requested.

Other

Enter the total of all other costs. Such costs, where applicable and appropriate, may include but are not limited to insurance, food, medical and dental costs (noncontractual), professional services costs, space and equipment rentals, printing and publication, computer use, training costs, such as tuition and stipends, staff development costs, and administrative costs.

Justification: Provide computations, a narrative description and a justification for each cost under this category.

Indirect Costs

Description: Total amount of indirect costs. This category should be used only when the applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

Justification: An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, it should immediately upon notification that an award will be made, develop a tentative indirect cost rate proposal based on its most recently completed fiscal year in accordance with the principles set forth in the cognizant agency's guidelines for establishing indirect cost rates, and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. It should be noted that when an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgment that the applicant is accepting a lower rate than allowed.

Program Income

Description: The estimated amount of income, if any, expected to be generated from this project.

Justification: Describe the nature, source and anticipated use of program income in the budget or refer to the pages in the application, which contain this information.

Non-Federal Resources

Description: Amounts of non-Federal resources that will be used to support the project as identified in Block 15 of the SF–424.

Justification: The firm commitment of these resources must be documented

and submitted with the application in order to be given credit in the review process. A detailed budget must be prepared for each funding source.

Total Direct Charges, Total Indirect Charges, Total Project Costs

Self-explanatory

B. Application Submission

1. Mailed applications postmarked after the closing date will be classified as late.

2. *Deadline.* Mailed applications shall be considered as meeting an announced deadline if they are either received on or before the deadline date or sent on or before the deadline date and received by ACF in time for the independent review to: U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement, Attention: Daphne Weeden, ORR Grants Officer, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447. Applicants must ensure that a legibly dated U.S. Postal Service postmark or a legibly dated, machine produced postmark of a commercial mail service is affixed to the envelope/package containing the application(s). To be acceptable as proof of timely mailing, a postmark from a commercial mail service must include the logo/emblem of the commercial mail service company and must reflect the date the package was received by the commercial mail service company from the applicant. Private metered postmarks shall not be acceptable as proof of timely mailing. (Applicants are cautioned that express/overnight mail services do not always deliver as agreed.) Applications handcarried by applicants, applicant couriers, or by other representatives of the applicant shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8:00 a.m. and 4:30 p.m., EST, at the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement, ACF Mailroom, Second Floor (near loading dock), Aerospace Center, 901 D Street, S.W., Washington, D.C. 20024, between Monday and Friday (excluding Federal holidays). The address must appear on the envelope/package containing the application with the note ''Attention: Daphne Weeden, ORR Grants Officer.'' ACF cannot accommodate transmission of applications by fax or through other electronic media. Therefore, applications transmitted to ACF electronically will not be accepted regardless of date or time of submission and time of receipt.

3. *Late applications.* Applications that do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

4. *Extension of deadlines.* ACF may extend an application deadline when circumstances such as acts of God (floods, hurricanes, etc.) occur, or when there is widespread disruption of the mail service, or in other rare cases. Determinations to extend or waive deadline requirements rest with ACF's Chief Grants Management Officer.

Reporting Requirements

Grantees under this program announcement will be required to provide quarterly program narrative reports, describing outcomes and activities under the grant. Grantees will also be required to submit semi-annual financial reports using the Financial Status Report (SF–269). A final financial and narrative report shall be due 90 days after the end of the Grant Project Period (i.e., after the final budget period).

Dated: March 7, 2000.

Lavinia Limon,

Director, Office of Refugee Resettlement.

[FR Doc. 00–6078 Filed 3–10–00; 8:45 am]

BILLING CODE 4148–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

North American Wetlands Conservation Council; Standard Grant Application Instructions

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: Instructions for applying for standard grants under the U.S. North American Wetlands Conservation Act. This notice focuses on proposals for grants of $51,000 to $1,000,000 for the acquisition, restoration, and enhancement of wetlands. We will issue a separate notice for grant proposals requesting up to $50,000 for these purposes.

DATES: Proposals may be submitted at any time. To ensure adequate review time prior to upcoming North American Wetlands Conservation Council (Council) meetings, the Council Coordinator must *receive* proposals by the last Friday in March (3/31/00) and July (7/28/00). The electronic mail copy of the Proposal Summary is due 1 week earlier (3/24/00 and 7/21/00).

ADDRESSES: For detailed application instructions, sample proposal information, frequently asked questions, and summaries of recently approved proposals, visit the North American Wetlands Conservation Act (NAWCA) web site at *http://northamerican.fws.gov/nawcahp.html.* If you cannot access the web site, request computer disk or paper copies of the web site material from the Council Coordinator, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 110, Arlington, VA 22203. Send proposals to the Council Coordinator at the above address. If you choose to submit the Proposal Summary by electronic mail (versus computer disk), send to *bettina__sparrowe@fws.gov.* Mail one original and two copies of the proposal to the Council Coordinator. Also, mail an electronic copy of the Proposal Summary on computer disk with the rest of the proposal or send an electronic copy by electronic mail to *bettina__sparrowe@fws.gov.* Send a copy of the proposal to your U.S. North American Waterfowl Management Plan Coordinator.

FOR FURTHER INFORMATION CONTACT: North American Wetlands Conservation Council Coordinator at (703) 358–1784, *r9arw__nawwo@fws.gov* or *bettina__sparrowe@fws.gov* or an NAWMP Joint Venture Coordinator (Coordinator) at the numbers given below. Coordinators can give you advice about developing a proposal and about proposal ranking and can provide compliance requirements for the National Environmental Policy Act, National Historic Preservation Act, and contaminant surveys. Even though all areas of all States are not in a Joint Venture, each Coordinator is available to provide information to NAWCA applicants. To determine which Coordinator to call, consult the following Joint Venture list, but note that some States are in more than one Joint Venture and may be listed more than once. To determine exactly which Joint Venture you are in, consult the NAWMP Joint Venture map at *http://northamerican.fws.gov/nawmphp.html.*

Atlantic Coast (AL, CT, DC, DE, FL, GA, MA, MD, ME, NC, NH, NJ, NY, PA, Puerto Rico, RI, SC, VA, Virgin Islands, VT, WV) 413–253–8269

Central Valley (CA) 916–414–6459

Gulf Coast (AL, LA, MS, TX) 505–248–6876

Intermountain West (AZ, CA, CO, ID, MT, NM, NV, OR, UT, WA, WY) 801–524–5110

Lower Mississippi Valley (AL, AR, KY, LA, MS, OK, TN, TX) 601–629–6600

Pacific Coast (AK, Am. Samoa, CA, Com. of N. Mariana Islands, Guam, HI, OR, WA) 360–696–7630
Playa Lakes (CO, KS, NM, OK, TX) 505–248–6877
Prairie Pothole (IA, MN, MT, ND, SD) 303–236–8145 extension 605
Rainwater Basin (KS, NE) 308–382–8112
Upper Mississippi River-Great Lakes (IA, IL, IN, KS, MI, MN, MO, NE, OH, WI) 612–713–5433

SUPPLEMENTARY INFORMATION: The Council has two U.S. conservation grants programs for acquisition, restoration, and enhancement of wetlands. Any individual or organization who has a long-term, partner-based project with matching funds can apply. The focus of this notice is standard grant proposals for requests from $51,000 to $1,000,000 per proposal. A separate notice will be issued sometime this year for small grant proposals for requests up to $50,000 per proposal.

This notice provides general instructions to develop and submit a NAWCA standard grant proposal. In order to complete a proposal correctly, consult the web site at *http://northamerican.fws.gov/nawcahp.html* for detailed instructions. If you cannot access the web site or want a printed version of the complete instructions or a personal computer disk that contains proposal forms, contact the Council Coordinator.

We prepare the instructions to assist partners in developing proposals that comply with NAWCA. The NAWCA established the Council, a Federal-State-private body that recommends projects to the Migratory Bird Conservation Commission (MBCC) for final approval and requires that proposals contain a minimum 1:1 ratio of non-Federal matching funds to grant funds. ''Match'' (as referred to throughout this document) can be cash, in-kind services, or land acquired/title donated for wetlands conservation purposes.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501), the Office of Management and Budget has assigned clearance number 1018–0100 to this information collection authorized by the North American Wetlands Conservation Act of 1989, as amended (16 U.S.C. 4401 *et seq.*). The information collection solicited is necessary to gain a benefit in the form of a grant, as determined by the Council and MBCC, is necessary to determine the eligibility and relative value of wetland projects, results in an approximate paperwork burden of 400 hours per application, and does not carry a premise of confidentiality. Your response is voluntary. 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 public is invited to submit comments on the accuracy of the estimated average burden hours for application preparation and to suggest ways in which the burden may be reduced. Comments may be submitted to: Information Collection Clearance Officer, Mail Stop 224 ARLSQ, U.S. Fish and Wildlife Service, Washington, D.C. 20240 and/or Desk Officer for Interior Department (1018–0100), Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, D.C. 20503.

Standard Grant Instructions

Detailed instructions are available at the NAWCA web site at *http://northamerican.fws.gov/nawcahp.html.*

Proposal Definition. A proposal is a 4-year plan of action supported by a NAWCA grant and matching partner funds to conserve wetlands and wetlands-dependent fish and wildlife through acquisition (including easements and land title donations), restoration, and/or enhancement (including creation). Match must be non-Federal and at least equal the grant request (referred to as a 1:1 match). Match is eligible up to 2 years prior to the due date year the proposal is submitted, and grant and match funds are eligible during the 2-year future Grant Agreement period.

Proposal Format. The 2-page Proposal Summary has a specific format. The rest of the proposal should be no more than 10 pages (not including the budget table, maps, and partner letters), and each page should be no larger than 8.5 by 11 inches. It is suggested, but not required, that maps be in color. Neither the original nor copies should be permanently bound. A proposal contains the following sections: Cover Page; Summary; Purpose; Scope of Work; Budget Table; Budget Narrative; Matching Contributions Plan (optional); Technical Assessment Questions; Funding Commitment Letters; Location Information; Standard Form 424 and Attachments.

Proposal Cover Page. The Cover Page contains the following sections: Proposal Title and State(s); Date Submitted; Future Proposals; Project Officer Information; Project Officer's Checklist; and Comments on the NAWCA Program. The Project Officer administers the Grant Agreement and is ultimately responsible for complying with Federal regulations. Correspondence is sent only to the Project Officer. Each proposal can have only one Project Officer, who must belong to the grant recipient's organization.

Proposal Summary. The Summary is a digest of information that is detailed in the rest of the proposal. The Summary is the only narrative material provided to the Council and MBCC, so it must be descriptive and succinct. The Summary contains the following sections: Proposal Title and States; Counties and Congressional Districts; Costs and Acres Summary; Purpose and Scope of Work Summary; and Wetland Values Summary.

Proposal Purpose. Use the Purpose to provide a description of how all the pieces of the proposal fit together to form a solid wetlands and migratory bird conservation proposal that should be funded under the NAWCA.

Proposal Scope of Work. The Scope of Work describes the purpose, need, kinds of work to be done, habitats, and associated wildlife (especially wetland associated migratory birds) and explains how the proposal meets objectives of the NAWMP Joint Ventures, Partners in Flight neotropical bird regional plans, the U.S. Shorebird Plan, the Colonial Waterbird Plan, and other migratory birds and wetlands conservation plans (including water quality management plans). If the proposal is part of a larger multiphase or landscape level project, explain how it fits into the larger effort.

Proposal Budget Table. The Budget Table displays activities and costs broken out by grant funding and partner funding according to cost elements (personnel and travel, appraisals, fee title acquired, fee title donated, easements and leases acquired and donated, materials and equipment, contracts, management agreements acquired and donated).

Proposal Budget Narrative. The Budget Narrative contains the justification for a grant request over $1,000,000 and detailed tract/project information. The tract/project design for this section is optional; however, if you use another format, be sure to include all required information and be sure that the reader can easily compare figures in the Budget Narrative and Budget Table. A sample Budget Narrative is available on the web site. In general, the following information is required for each tract or project within the proposal: (1) Costs and acres broken out by grant funding and individual partner funding for each activity and cost element; (2) Designation of grant and match tracts on map in proposal; (3) Acres of wetlands, wetlands-associated

uplands, and other habitat types; (4) Migratory bird values and wetlands values; (5) Title holder after proposal is completed; (6) Summary of acquired property rights; (7) Matching Contributions Plan information; (8) Explanation of property donations; (9) Justification for match affiliated with wetlands mitigation banks; and (10) Milestones and completion dates.

Matching Contributions Plan. If you have contributions made in the early phases of a multiphase project and sufficient NAWCA proposals cannot be submitted before the match is more than 2 years old, you may request approval to use the match in the future by submitting a Matching Contributions Plan (Match Plan) with a proposal. A Match Plan must include match that is eligible at the time the proposal is submitted, be submitted with a proposal, may be approved only (in writing) if the proposal with which it is submitted is funded, should not be more than one page long, and should show use of the match over a period no greater than 5 years.

Technical Assessment Questions. The Council uses seven Technical Assessment Questions to evaluate proposals. The questions, subparts, and point values follow. Questions 1 and 2 include priority lists of species, so you need to refer to the web site or the Council Coordinator's office to complete a proposal. Answer the questions for the completed proposal and all tracts in the proposal (grant and match).

1. How does the proposal contribute to the conservation of waterfowl habitat (high-priority species, other priority species, other waterfowl)? 15 points

2. How does the proposal contribute to the conservation of other wetland-dependent or wetland-associated migratory birds (breeding and wintering priority species, in-transit migrants of concern, other wetland-dependent species)? 15 points

3. How does the proposal benefit the North American Waterfowl Management Plan and contribute to sites that have been recognized for wetland values (Joint Ventures, Waterfowl Habitat Areas of Concern, specially recognized areas)? 15 points

4. How does the proposal relate to the National status and trends of wetlands types (acres of decreasing, stable, and increasing wetlands types; acres of uplands)? 10 points

5. How does the proposal contribute to long-term conservation of wetlands and associated habitats (acres accruing benefits in perpetuity, for 26–99 years, for 10–25 years, and for less than 10 years)? 15 points

6. How does the proposal contribute to the conservation of habitat for Federally listed, proposed and candidate endangered species, State-listed species, and other wetland-dependent fish and wildlife (Federal species, State species, other wetland-dependent fish and wildlife)? 10 points

7. How does the proposal satisfy the partnership purpose of the North American Wetlands Conservation Act (ratio of the non-Federal match to the grant request, non-Federal partners who contribute 10 percent of the grant request, partner categories, important partnership aspects)? 20 points

Funding Commitment Letters. Send signed commitment letters from all match partners, including the grant recipient and private landowners (if providing funds or land as match), by the proposal due date. The proposal will be returned if the 1:1 match is not documented by partner letters. Letters must document the exact contribution level identified in the proposal and whether the contribution is in cash, goods, services, or land; the partner's responsibility in the proposal's implementation, including land donations; how the partner was involved in proposal planning; and that the partner is fully aware of how the contribution will be spent.

Location Information. State a central point location for the proposal in terms of latitude and longitude and provide 8.5 by 11-inch color (preferred) maps that give the following information: (1) Location of the tracts within State(s) and counties where grant and match funds will be spent and location of land matches; (2) Location of acquisition priority areas if specific tracts cannot be given; (3) Location of major water control structures and other restoration/enhancement features; (4) Location of natural features, such as rivers or lakes, to show how the proposal fits into the natural landscape; and if applicable, (5) Show where the proposal is in relation to a larger wetlands conservation project.

Standard Form 424 ''Application for Federal Assistance'' and Assurances Forms B ''Non-construction'' and D ''Construction.'' All applicants, except the U.S. Fish and Wildlife Service, must send an SF 424 and the B, D, or both Assurances forms with the proposal. All applicants must comply with the laws listed on the Assurances forms. The forms are available via the Internet at *http://www.gsa.gov/forms/* or from the Council Coordinator.

Exhibits and Examples. Examples of various sections of a proposal, a list of eligible and ineligible activities and costs, general information about the NAWCA program, and a directory are available via the web site or from the Council Coordinator and should be consulted at some time in the proposal development process.

Blank Proposal Forms. The following forms are available from the web site for you to download and use to develop a proposal: A blank proposal form developed using Microsoft Word, a blank proposal form using Word Perfect, and a blank Budget Table using Microsoft Excel.

Dated: March 6, 2000.

Jamie Rappaport Clark,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 00–6024 Filed 3–10–00; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given of the current list of 556 tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes. This notice is published pursuant to Section 104 of the Act of November 2, 1994 (Pub. L. 103–454; 108 Stat. 4791, 4792).

FOR FURTHER INFORMATION CONTACT: Daisy West, Bureau of Indian Affairs, Division of Tribal Government Services, MS–4631–MIB, 1849 C Street, NW, Washington, D.C. 20240. Telephone number: (202) 208–2475.

SUPPLEMENTARY INFORMATION: This notice is published in exercise of authority delegated to the Assistant Secretary—Indian Affairs under 25 U.S.C. 2 and 9 and 209 DM 8.

Published below are lists of federally acknowledged tribes in the contiguous 48 states and in Alaska. The list is updated from the one published on December 30, 1998 (63 FR 71941), to include name changes or corrections, and two additional tribal entities that were acknowledged under 25 CFR Part 83. Those tribal entities are the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, and the Snoqualmie Tribe. The final determinations for federal acknowledgment became effective on

August 23, 1999, and October 6, 1999, respectively.

The listed entities are acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. We have continued the practice of listing the Alaska Native entities separately solely for the purpose of facilitating identification of them and reference to them given the large number of complex Native names.

Dated: March 3, 2000.

Kevin Gover,

Assistant Secretary, Indian Affairs.

Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs

Absentee-Shawnee Tribe of Indians of Oklahoma
Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California
Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona
Alabama-Coushatta Tribes of Texas
Alabama-Quassarte Tribal Town, Oklahoma
Alturas Indian Rancheria, California
Apache Tribe of Oklahoma
Arapahoe Tribe of the Wind River Reservation, Wyoming
Aroostook Band of Micmac Indians of Maine
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana
Augustine Band of Cahuilla Mission Indians of the Augustine Reservation, California
Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin
Bay Mills Indian Community of the Sault Ste. Marie Band of Chippewa Indians, Bay Mills Reservation, Michigan
Bear River Band of the Rohnerville Rancheria, California
Berry Creek Rancheria of Maidu Indians of California
Big Lagoon Rancheria, California
Big Pine Band of Owens Valley Paiute Shoshone Indians of the Big Pine Reservation, California
Big Sandy Rancheria of Mono Indians of California
Big Valley Band of Pomo Indians of the Big Valley Rancheria, California
Blackfeet Tribe of the Blackfeet Indian Reservation of Montana
Blue Lake Rancheria, California
Bridgeport Paiute Indian Colony of California
Buena Vista Rancheria of Me-Wuk Indians of California
Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon
Cabazon Band of Cahuilla Mission Indians of the Cabazon Reservation, California
Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California
Caddo Indian Tribe of Oklahoma
Cahuilla Band of Mission Indians of the Cahuilla Reservation, California
Cahto Indian Tribe of the Laytonville Rancheria, California
Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California
Capitan Grande Band of Diegueno Mission Indians of California:
Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California
Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California
Catawba Indian Nation (aka Catawba Tribe of South Carolina)
Cayuga Nation of New York
Cedarville Rancheria, California
Chemehuevi Indian Tribe of the Chemehuevi Reservation, California
Cher-Ae Heights Indian Community of the Trinidad Rancheria, California
Cherokee Nation, Oklahoma
Cheyenne-Arapaho Tribes of Oklahoma
Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota
Chickasaw Nation, Oklahoma
Chicken Ranch Rancheria of Me-Wuk Indians of California
Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana
Chitimacha Tribe of Louisiana
Choctaw Nation of Oklahoma
Citizen Potawatomi Nation, Oklahoma
Cloverdale Rancheria of Pomo Indians of California
Cocopah Tribe of Arizona
Coeur D'Alene Tribe of the Coeur D'Alene Reservation, Idaho
Cold Springs Rancheria of Mono Indians of California
Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California
Comanche Indian Tribe, Oklahoma
Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana
Confederated Tribes of the Chehalis Reservation, Washington
Confederated Tribes of the Colville Reservation, Washington
Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon
Confederated Tribes of the Goshute Reservation, Nevada and Utah
Confederated Tribes of the Grand Ronde Community of Oregon
Confederated Tribes of the Siletz Reservation, Oregon
Confederated Tribes of the Umatilla Reservation, Oregon
Confederated Tribes of the Warm Springs Reservation of Oregon
Confederated Tribes and Bands of the Yakama Indian Nation of the Yakama Reservation, Washington
Coquille Tribe of Oregon
Cortina Indian Rancheria of Wintun Indians of California
Coushatta Tribe of Louisiana
Cow Creek Band of Umpqua Indians of Oregon
Coyote Valley Band of Pomo Indians of California
Crow Tribe of Montana
Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota
Cuyapaipe Community of Diegueno Mission Indians of the Cuyapaipe Reservation, California
Death Valley Timbi-Sha Shoshone Band of California
Delaware Nation, Oklahoma (formerly Delaware Tribe of Western Oklahoma)
Delaware Tribe of Indians, Oklahoma
Dry Creek Rancheria of Pomo Indians of California
Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada
Eastern Band of Cherokee Indians of North Carolina
Eastern Shawnee Tribe of Oklahoma
Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, California
Elk Valley Rancheria, California
Ely Shoshone Tribe of Nevada
Enterprise Rancheria of Maidu Indians of California
Flandreau Santee Sioux Tribe of South Dakota
Forest County Potawatomi Community of Wisconsin Potawatomi Indians, Wisconsin
Fort Belknap Indian Community of the Fort Belknap Reservation of Montana
Fort Bidwell Indian Community of the Fort Bidwell Reservation of California
Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation, California
Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation, Nevada and Oregon
Fort McDowell Mohave-Apache Community of the Fort McDowell Indian Reservation, Arizona
Fort Mojave Indian Tribe of Arizona, California & Nevada
Fort Sill Apache Tribe of Oklahoma
Gila River Indian Community of the Gila River Indian Reservation, Arizona

Grand Traverse Band of Ottawa & Chippewa Indians of Michigan
Greenville Rancheria of Maidu Indians of California
Grindstone Indian Rancheria of Wintun-Wailaki Indians of California
Guidiville Rancheria of California
Hannahville Indian Community of Wisconsin Potawatomie Indians of Michigan
Havasupai Tribe of the Havasupai Reservation, Arizona
Ho-Chunk Nation of Wisconsin (formerly known as the Wisconsin Winnebago Tribe)
Hoh Indian Tribe of the Hoh Indian Reservation, Washington
Hoopa Valley Tribe, California
Hopi Tribe of Arizona
Hopland Band of Pomo Indians of the Hopland Rancheria, California
Houlton Band of Maliseet Indians of Maine
Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona
Huron Potawatomi, Inc., Michigan
Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California
Ione Band of Miwok Indians of California
Iowa Tribe of Kansas and Nebraska
Iowa Tribe of Oklahoma
Jackson Rancheria of Me-Wuk Indians of California
Jamestown S'Klallam Tribe of Washington
Jamul Indian Village of California
Jena Band of Choctaw Indians, Louisiana
Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation, New Mexico
Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona
Kalispel Indian Community of the Kalispel Reservation, Washington
Karuk Tribe of California
Kashia Band of Pomo Indians of the Stewarts Point Rancheria, California
Kaw Nation, Oklahoma
Keweenaw Bay Indian Community of L'Anse and Ontonagon Bands of Chippewa Indians of the L'Anse Reservation, Michigan
Kialegee Tribal Town, Oklahoma
Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas
Kickapoo Tribe of Oklahoma
Kickapoo Traditional Tribe of Texas
Kiowa Indian Tribe of Oklahoma
Klamath Indian Tribe of Oregon
Kootenai Tribe of Idaho
La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California
La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California
Lac Courte Oreilles Band of Lake Superior Chippewa Indians of the Lac Courte Oreilles Reservation of Wisconsin
Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin
Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan
Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada
Little River Band of Ottawa Indians of Michigan
Little Traverse Bay Bands of Odawa Indians of Michigan
Los Coyotes Band of Cahuilla Mission Indians of the Los Coyotes Reservation, California
Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada
Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota
Lower Elwha Tribal Community of the Lower Elwha Reservation, Washington
Lower Sioux Indian Community of Minnesota Mdewakanton Sioux Indians of the Lower Sioux Reservation in Minnesota
Lummi Tribe of the Lummi Reservation, Washington
Lytton Rancheria of California
Makah Indian Tribe of the Makah Indian Reservation, Washington
Manchester Band of Pomo Indians of the Manchester-Point Arena Rancheria, California
Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California
Mashantucket Pequot Tribe of Connecticut
Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan
Mechoopda Indian Tribe of Chico Rancheria, California
Menominee Indian Tribe of Wisconsin
Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California
Mescalero Apache Tribe of the Mescalero Reservation, New Mexico
Miami Tribe of Oklahoma
Miccosukee Tribe of Indians of Florida
Middletown Rancheria of Pomo Indians of California
Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band)
Mississippi Band of Choctaw Indians, Mississippi
Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada
Modoc Tribe of Oklahoma
Mohegan Indian Tribe of Connecticut
Mooretown Rancheria of Maidu Indians of California
Morongo Band of Cahuilla Mission Indians of the Morongo Reservation, California
Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington
Muscogee (Creek) Nation, Oklahoma
Narragansett Indian Tribe of Rhode Island
Navajo Nation, Arizona, New Mexico & Utah
Nez Perce Tribe of Idaho
Nisqually Indian Tribe of the Nisqually Reservation, Washington
Nooksack Indian Tribe of Washington
Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana
Northfork Rancheria of Mono Indians of California
Northwestern Band of Shoshoni Nation of Utah (Washakie)
Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota
Omaha Tribe of Nebraska
Oneida Nation of New York
Oneida Tribe of Wisconsin
Onondaga Nation of New York
Osage Tribe, Oklahoma
Ottawa Tribe of Oklahoma
Otoe-Missouria Tribe of Indians, Oklahoma
Paiute Indian Tribe of Utah
Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California
Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada
Paiute-Shoshone Indians of the Lone Pine Community of the Lone Pine Reservation, California
Pala Band of Luiseno Mission Indians of the Pala Reservation, California
Pascua Yaqui Tribe of Arizona
Paskenta Band of Nomlaki Indians of California
Passamaquoddy Tribe of Maine
Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California
Pawnee Nation of Oklahoma
Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California
Penobscot Tribe of Maine
Peoria Tribe of Indians of Oklahoma
Picayune Rancheria of Chukchansi Indians of California
Pinoleville Rancheria of Pomo Indians of California
Pit River Tribe, California (includes Big Bend, Lookout, Montgomery Creek & Roaring Creek Rancherias & XL Ranch)
Poarch Band of Creek Indians of Alabama
Pokagon Band of Potawatomi Indians of Michigan

Ponca Tribe of Indians of Oklahoma
Ponca Tribe of Nebraska
Port Gamble Indian Community of the Port Gamble Reservation, Washington
Potter Valley Rancheria of Pomo Indians of California
Prairie Band of Potawatomi Indians, Kansas
Prairie Island Indian Community of Minnesota Mdewakanton Sioux Indians of the Prairie Island Reservation, Minnesota
Pueblo of Acoma, New Mexico
Pueblo of Cochiti, New Mexico
Pueblo of Jemez, New Mexico
Pueblo of Isleta, New Mexico
Pueblo of Laguna, New Mexico
Pueblo of Nambe, New Mexico
Pueblo of Picuris, New Mexico
Pueblo of Pojoaque, New Mexico
Pueblo of San Felipe, New Mexico
Pueblo of San Juan, New Mexico
Pueblo of San Ildefonso, New Mexico
Pueblo of Sandia, New Mexico
Pueblo of Santa Ana, New Mexico
Pueblo of Santa Clara, New Mexico
Pueblo of Santo Domingo, New Mexico
Pueblo of Taos, New Mexico
Pueblo of Tesuque, New Mexico
Pueblo of Zia, New Mexico
Puyallup Tribe of the Puyallup Reservation, Washington
Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, Nevada
Quapaw Tribe of Indians, Oklahoma
Quartz Valley Indian Community of the Quartz Valley Reservation of California
Quechan Tribe of the Fort Yuma Indian Reservation, California & Arizona
Quileute Tribe of the Quileute Reservation, Washington
Quinault Tribe of the Quinault Reservation, Washington
Ramona Band or Village of Cahuilla Mission Indians of California
Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin
Red Lake Band of Chippewa Indians of the Red Lake Reservation, Minnesota
Redding Rancheria, California
Redwood Valley Rancheria of Pomo Indians of California
Reno-Sparks Indian Colony, Nevada
Resighini Rancheria, California (formerly known as the Coast Indian Community of Yurok Indians of the Resighini Rancheria)
Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California
Robinson Rancheria of Pomo Indians of California
Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota
Round Valley Indian Tribes of the Round Valley Reservation, California (formerly known as the Covelo Indian Community)
Rumsey Indian Rancheria of Wintun Indians of California
Sac & Fox Tribe of the Mississippi in Iowa
Sac & Fox Nation of Missouri in Kansas and Nebraska
Sac & Fox Nation, Oklahoma
Saginaw Chippewa Indian Tribe of Michigan, Isabella Reservation
Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona
Samish Indian Tribe, Washington
San Carlos Apache Tribe of the San Carlos Reservation, Arizona
San Juan Southern Paiute Tribe of Arizona
San Manual Band of Serrano Mission Indians of the San Manual Reservation, California
San Pasqual Band of Diegueno Mission Indians of California
Santa Rosa Indian Community of the Santa Rosa Rancheria, California
Santa Rosa Band of Cahuilla Mission Indians of the Santa Rosa Reservation, California
Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California
Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California
Santee Sioux Tribe of the Santee Reservation of Nebraska
Sauk-Suiattle Indian Tribe of Washington
Sault Ste. Marie Tribe of Chippewa Indians of Michigan
Scotts Valley Band of Pomo Indians of California
Seminole Nation of Oklahoma
Seminole Tribe of Florida, Dania, Big Cypress, Brighton, Hollywood & Tampa Reservations
Seneca Nation of New York
Seneca-Cayuga Tribe of Oklahoma
Shakopee Mdewakanton Sioux Community of Minnesota (Prior Lake)
Sheep Ranch Rancheria of Me-Wuk Indians of California
Sherwood Valley Rancheria of Pomo Indians of California
Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California
Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation, Washington
Shoshone Tribe of the Wind River Reservation, Wyoming
Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho
Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada
Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation, South Dakota
Skokomish Indian Tribe of the Skokomish Reservation, Washington
Skull Valley Band of Goshute Indians of Utah
Smith River Rancheria, California
Snoqualmie Tribe, Washington
Soboba Band of Luiseno Mission Indians of the Soboba Reservation, California
Sokaogon Chippewa Community of the Mole Lake Band of Chippewa Indians, Wisconsin
Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado
Spirit Lake Tribe, North Dakota (formerly known as the Devils Lake Sioux Tribe)
Spokane Tribe of the Spokane Reservation, Washington
Squaxin Island Tribe of the Squaxin Island Reservation, Washington
St. Croix Chippewa Indians of Wisconsin, St. Croix Reservation
St. Regis Band of Mohawk Indians of New York
Standing Rock Sioux Tribe of North & South Dakota
Stockbridge-Munsee Community of Mohican Indians of Wisconsin
Stillaguamish Tribe of Washington
Summit Lake Paiute Tribe of Nevada
Suquamish Indian Tribe of the Port Madison Reservation, Washington
Susanville Indian Rancheria, California
Swinomish Indians of the Swinomish Reservation, Washington
Sycuan Band of Diegueno Mission Indians of California
Table Bluff Reservation—Wiyot Tribe, California
Table Mountain Rancheria of California
Te-Moak Tribes of Western Shoshone Indians of Nevada (Four constituent bands: Battle Mountain Band; Elko Band; South Fork Band and Wells Band)
Thlopthlocco Tribal Town, Oklahoma
Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota
Tohono O'odham Nation of Arizona
Tonawanda Band of Seneca Indians of New York
Tonkawa Tribe of Indians of Oklahoma
Tonto Apache Tribe of Arizona
Torres-Martinez Band of Cahuilla Mission Indians of California
Tule River Indian Tribe of the Tule River Reservation, California
Tulalip Tribes of the Tulalip Reservation, Washington
Tunica-Biloxi Indian Tribe of Louisiana
Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California
Turtle Mountain Band of Chippewa Indians of North Dakota
Tuscarora Nation of New York
Twenty-Nine Palms Band of Luiseno Mission Indians of California
United Auburn Indian Community of the Auburn Rancheria of California
United Keetoowah Band of Cherokee Indians of Oklahoma

Upper Lake Band of Pomo Indians of Upper Lake Rancheria of California
Upper Sioux Indian Community of the Upper Sioux Reservation, Minnesota
Upper Skagit Indian Tribe of Washington
Ute Indian Tribe of the Uintah & Ouray Reservation, Utah
Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah
Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation, California
Walker River Paiute Tribe of the Walker River Reservation, Nevada
Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts
Washoe Tribe of Nevada & California (Carson Colony, Dresslerville Colony, Woodfords Community, Stewart Community, & Washoe Ranches)
White Mountain Apache Tribe of the Fort Apache Reservation, Arizona
Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie), Oklahoma
Winnebago Tribe of Nebraska
Winnemucca Indian Colony of Nevada
Wyandotte Tribe of Oklahoma
Yankton Sioux Tribe of South Dakota
Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona
Yavapai-Prescott Tribe of the Yavapai Reservation, Arizona
Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada
Yomba Shoshone Tribe of the Yomba Reservation, Nevada
Ysleta Del Sur Pueblo of Texas
Yurok Tribe of the Yurok Reservation, California
Zuni Tribe of the Zuni Reservation, New Mexico

Native Entities Within the State of Alaska Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs

Village of Afognak
Native Village of Akhiok
Akiachak Native Community
Akiak Native Community
Native Village of Akutan
Village of Alakanuk
Alatna Village
Native Village of Aleknagik
Algaaciq Native Village (St. Mary's)
Allakaket Village
Native Village of Ambler
Village of Anaktuvuk Pass
Yupiit of Andreafski
Angoon Community Association
Village of Aniak
Anvik Village
Arctic Village (See Native Village of Venetie Tribal Government)
Native Village of Atka
Asa'carsarmiut Tribe (formerly Native Village of Mountain Village)
Atqasuk Village (Atkasook)
Village of Atmautluak
Native Village of Barrow Inupiat Traditional Government (formerly Native Village of Barrow)
Beaver Village
Native Village of Belkofski
Village of Bill Moore's Slough
Birch Creek Tribe (formerly listed as Birch Creek Village)
Native Village of Brevig Mission
Native Village of Buckland
Native Village of Cantwell
Native Village of Chanega (aka Chenega)
Chalkyitsik Village
Village of Chefornak
Chevak Native Village
Chickaloon Native Village
Native Village of Chignik
Native Village of Chignik Lagoon
Chignik Lake Village
Chilkat Indian Village (Klukwan)
Chilkoot Indian Association (Haines)
Chinik Eskimo Community (Golovin)
Native Village of Chistochina
Native Village of Chitina
Native Village of Chuathbaluk (Russian Mission, Kuskokwim)
Chuloonawick Native Village
Circle Native Community
Village of Clark's Point
Native Village of Council
Craig Community Association
Village of Crooked Creek
Curyung Tribal Council (formerly Native Village of Dillingham)
Native Village of Deering
Native Village of Diomede (aka Inalik)
Village of Dot Lake
Douglas Indian Association
Native Village of Eagle
Native Village of Eek
Egegik Village
Eklutna Native Village
Native Village of Ekuk
Ekwok Village
Native Village of Elim
Emmonak Village
Evansville Village (aka Bettles Field)
Native Village of Eyak (Cordova)
Native Village of False Pass
Native Village of Fort Yukon
Native Village of Gakona
Galena Village (aka Louden Village)
Native Village of Gambell
Native Village of Georgetown
Native Village of Goodnews Bay
Organized Village of Grayling (aka Holikachuk)
Gulkana Village
Native Village of Hamilton
Healy Lake Village
Holy Cross Village
Hoonah Indian Association
Native Village of Hooper Bay
Hughes Village
Huslia Village
Hydaburg Cooperative Association
Igiugig Village
Village of Iliamna
Inupiat Community of the Arctic Slope
Iqurmuit Traditional Council (formerly Native Village of Russian Mission)
Ivanoff Bay Village
Kaguyak Village
Organized Village of Kake
Kaktovik Village (aka Barter Island)
Village of Kalskag
Village of Kaltag
Native Village of Kanatak
Native Village of Karluk
Organized Village of Kasaan
Native Village of Kasigluk
Kenaitze Indian Tribe
Ketchikan Indian Corporation
Native Village of Kiana
Agdaagux Tribe of King Cove
King Island Native Community
Native Village of Kipnuk
Native Village of Kivalina
Klawock Cooperative Association
Native Village of Kluti Kaah (aka Copper Center)
Knik Tribe
Native Village of Kobuk
Kokhanok Village
New Koliganek Village Council (formerly Koliganek Village)
Native Village of Kongiganak
Village of Kotlik
Native Village of Kotzebue
Native Village of Koyuk
Koyukuk Native Village
Organized Village of Kwethluk
Native Village of Kwigillingok
Native Village of Kwinhagak (aka Quinhagak)
Native Village of Larsen Bay
Levelock Village
Lesnoi Village (aka Woody Island)
Lime Village
Village of Lower Kalskag
Manley Hot Springs Village
Manokotak Village
Native Village of Marshall (aka Fortuna Ledge)
Native Village of Mary's Igloo
McGrath Native Village
Native Village of Mekoryuk
Mentasta Traditional Council (formerly Mentasta Lake Village)
Metlakatla Indian Community, Annette Island Reserve
Native Village of Minto
Naknek Native Village
Native Village of Nanwalek (aka English Bay)
Native Village of Napaimute
Native Village of Napakiak
Native Village of Napaskiak
Native Village of Nelson Lagoon
Nenana Native Association
New Stuyahok Village
Newhalen Village
Newtok Village
Native Village of Nightmute
Nikolai Village
Native Village of Nikolski

Ninilchik Village
Native Village of Noatak
Nome Eskimo Community
Nondalton Village
Noorvik Native Community
Northway Village
Native Village of Nuiqsut (aka Nooiksut)
Nulato Village
Nunakauyarmiut Tribe (formerly Native Village of Toksook Bay)
Native Village of Nunapitchuk
Village of Ohogamiut
Village of Old Harbor
Orutsararmuit Native Village (aka Bethel)
Oscarville Traditional Village
Native Village of Ouzinkie
Native Village of Paimiut
Pauloff Harbor Village
Pedro Bay Village
Native Village of Perryville
Petersburg Indian Association
Native Village of Pilot Point
Pilot Station Traditional Village
Native Village of Pitka's Point
Platinum Traditional Village
Native Village of Point Hope
Native Village of Point Lay
Native Village of Port Graham
Native Village of Port Heiden
Native Village of Port Lions
Portage Creek Village (aka Ohgsenakale)
Pribilof Islands Aleut Communities of St. Paul & St. George Islands
Qagan Tayagungin Tribe of Sand Point Village
Rampart Village
Village of Red Devil
Native Village of Ruby
Village of Salamatoff
Organized Village of Saxman
Native Village of Savoonga
Saint George Island(See Pribilof Islands Aleut Communities of St. Paul & St. George Islands)
Native Village of Saint Michael
Saint Paul Island (See Pribilof Islands Aleut Communities of St. Paul & St. George Islands)
Native Village of Scammon Bay
Native Village of Selawik
Seldovia Village Tribe
Shageluk Nativeive Village
Native Village of Shaktoolik
Native Village of Sheldon's Point
Native Village of Shishmaref
Native Village of Shungnak
Sitka Tribe of Alaska
Skagway Village
Village of Sleetmute
Village of Solomon
South Naknek Village
Stebbins Community Association
Native Village of Stevens
Village of Stony River
Takotna Village
Native Village of Tanacross
Native Village of Tanana
Native Village of Tatitlek
Native Village of Tazlina
Telida Village
Native Village of Teller
Native Village of Tetlin
Central Council of the Tlingit & Haida Indian Tribes
Traditional Village of Togiak
Tuluksak Native Community
Native Village of Tuntutuliak
Native Village of Tununak
Twin Hills Village
Native Village of Tyonek
Ugashik Village
Umkumiute Native Village
Native Village of Unalakleet
Qawalangin Tribe of Unalaska
Native Village of Unga
Village of Venetie (See Native Village of Venetie Tribal Government)
Native Village of Venetie Tribal Government (Arctic Village and Village of Venetie)
Village of Wainwright
Native Village of Wales
Native Village of White Mountain
Wrangell Cooperative Association
Yakutat Tlingit Tribe

[FR Doc. 00–6064 Filed 3–10–00; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Compact.

SUMMARY: Pursuant to Section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Pub. L. 100–497, 25 U.S.C. § 2710, the Secretary of the Interior shall publish, in the **Federal Register**, notice of approved Tribal-State Compacts for the purpose of engaging in Class III gaming activities on Indian lands. The Assistant Secretary—Indian Affairs, Department of the Interior, through his delegated authority, has approved the Gaming Compact between the Flandreau Santee Sioux Tribe and the State of South Dakota, which was executed on December 27, 1999.

DATES: This action is effective March 13, 2000.

FOR FURTHER INFORMATION CONTACT: George T. Skibine, Director, Office of Indian Gaming Management, Bureau of Indian Affairs, Washington, DC 20240, (202) 219–4066.

Dated: February 18, 2000.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 00–6009 Filed 3–10–00; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–110–0777–30–24–1A; HAG0–0145]

Notice of Availability of Draft Management Plan/Environmental Impact Statement (DEIS) for the Cascade Siskiyou Ecological Emphasis Area

AGENCY: Bureau of Land Management.

ACTION: Notice of Availability of Draft Management Plan/Environmental Impact Statement (DEIS) for the Cascade Siskiyou Ecological Emphasis Area.

SUMMARY: In accordance with Section 202 of the National Environmental Policy Act of 1969 and Section 202 of the Federal Land Policy and Management Act of 1976, a Draft Management Plan/Environmental Impact Statement (DEIS) for the Cascade Siskiyou Ecological Emphasis Area (CSEEA) has been completed for a portion of the Medford District. The DEIS describes and analyzes future options for managing up to 52,407 acres in southern Jackson County, Oregon. The DEIS address boundary issues associated with adjacent BLM administered land in California. Management activity specific to those lands will be addressed by the BLM Redding Field Office.

Decisions generated during this planning process will partially supersede and supplement interim land use allocations and management direction for the CSEEA, which were analyzed in the 1994 Medford Resource Management (RMP) final EIS which was approved in 1995 in the Medford RMP Record of Decision. Major issues which are addressed include ecosystem management direction, potential use of prescribed fire, motorized recreation and possible off-highway-vehicle restrictions, livestock grazing and vegetation management objectives and expansion of existing or potential Areas of critical Environmental Concern.

DATES: Comments will be accepted until June 14, 2000.

ADDRESSES: Comments should be addressed to: Rich Drehobl, Field Manager, Ashland Resource Area, Bureau of Land Management, Medford District Office, 3040 Biddle Road, Medford, Oregon 97504.

Comments, including names and addresses, will be available for public review. Individual respondents may request confidentiality. If you wish to withhold your name and/or address from public review or from disclosure under the Freedom of Information Act,

you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law.

SUPPLEMENTARY INFORMATION: Individual copies of the DEIS may be obtained by contacting Bill Yocum or Lorie List at 541/618–2384. The DEIS is also available on CD–ROM and at *www.or.blm.gov/Medford.*

Copies are also available for inspection at the following locations:

Southern Oregon University Library, Ashland, OR

Jackson County Library, Ashland Branch, OR

Siskiyou County Library, Yreka Branch, CA

The DEIS analyzes five alternatives ranging from emphasis on commodity extraction to emphasis on preservation.

A public meeting will be held on the proposal on Saturday, April 8, 2000, at 1 p.m. in the Arena Room/Stevenson Union at Southern Oregon University. Additional meetings will be considered if there is sufficient interest.

Public participation has occurred throughout the planning process. A Notice of Intent was published in the **Federal Register** on August 27, 1999. Since that time several open houses, public meetings and field tours were conducted to provide information and solicit comments and ideas. Any comments presented throughout the process have been considered.

The notice meets the requirements of 43 CFR 1610.5–5 for plan amendments and 43 CFR 1610.7–2 for designations of Areas of Critical Environmental Concern.

Dated: March 7, 2000.

Rich Drehobl,

Ashland Field Manager, Medford District.

[FR Doc. 00–6032 Filed 3–10–00; 8:45 am]

BILLING CODE 4310–33–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–930–1430–EU; N–61406]

Notice of Reality Action: Non-Competitive Sale of Public Land

AGENCY: Bureau of Land Management.

ACTION: Non-Competitive Sale of Public Land in Lincoln County, Nevada.

SUMMARY: The below listed public land in Ash Springs, Lincoln County, Nevada has been examined and found suitable for sale utilizing non-competitive procedures, at not less than the fair market value. In accordance with Section 7 of the Act of June 28, 1934, as amended, 43 U.S.C. 315f and EO 6910, the described lands are hereby classified as suitable for disposal under the authority of Section 203 and Section 209 of the Act of October 21, 1976; 43 U.S.C. 1713 and 1719.

DATES: On or before April 27, 2000, interested parties may submit comments to the Assistant Field Manager, Non-Renewable Resources.

ADDRESSES: Written comments should be addressed to: Bureau of Land Management, Gene L. Drais, Assistant Field manager, Nonrenewable Resources, HC33, BOX 33500, Ely, NV 89301–9408.

FOR FURTHER INFORMATION CONTACT: Kevin Finn, Realty Specialist, at the above address or telephone (775) 289–1849.

SUPPLEMENTARY INFORMATION: The following described parcel of land, situated in Lincoln County is being offered as a direct sale to Hi—Desert Springs, LLC.

Mount Diablo Meridian, Nevada

T. 6 S., R. 61 E.,
Section 6,
Government Lots 9 and 10
Containing 11.79 acres more or less.

This land is not required for any federal purposes. The sale is consistent with current Bureau planning for this area and would be in the public interest. In the event of a sale, conveyance of the available mineral interests will occur simultaneously with the sale of the land. The mineral interests being offered for conveyance have no known mineral interests. The applicant will be required to pay $50.00 nonreturnable filing fee for the conveyance of the available mineral interests.

The patent, when issued, will contain the following reservations to the United States:

1. All the oil and gas mineral deposits in the land subject to this conveyance, including without limitation, the disposition of these substances under the mineral leasing laws. Its permittee, licensees and lessees, the right to prospect for, mine and remove the minerals owned by the United States under applicable law and such regulations as the Secretary of the Interior may prescribe. This reservation includes all necessary and incidental activities conducted in accordance with the provisions of the mineral leasing laws in effect at the time such activities are undertaken, including, without limitation, necessary access and exit rights, all drilling, underground, or surface mining operation, storage and transportation facilities deemed necessary and authorized under the law and implementing regulations. Unless otherwise provided by separate agreement with surface owner, permittee, licenses of the United States shall reclaim disturbed areas to the extent prescribed by regulations issued by the Secretary of the Interior. All cause of action brought to enforce the rights of the surface owner under the regulations above referred to shall be instituted against permittee, licenses and lessees of the United States, and the United States shall not be liable for the acts or omissions of its permittee, licensees and lessees.

Upon publication of this notice in the Federal Register, the above described land will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except leasing under the mineral leasing laws. This segregation will terminate upon issuance ow a patent or 270 days from the date of this publication, whichever occurs first.

For a period of 45 days from the date of publication of this notice in the **Federal Register,** interested parties may submit comments regarding this action to the Assistant Field Manager, Nonrenewable Resources at the address list above. Any adverse comments will be reviewed by the State Director who may sustain, vacate, or modify the realty action. In absence of any adverse comments, this realty action will become the final determination of the Department of the Interior. The Bureau of Land Management may accept or reject any or all officer, consumption of the sale would not be fully consistent with the Federal Land Management and Policy Act of 1976, or other applicable laws. The lands will not be offered for sale until at least 60 days after publication of this notice in the **Federal Register.**

Dated: March 1, 2000.

Gene A. Kolkman,

Field Manager.

[FR Doc. 00–6056 Filed 3–10–00; 8:45 am]

BILLING CODE 4310–HC–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ–010–2000–1610]

Arizona Strip District Resource Plan: Intent To Amend

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent to amend the Arizona Strip Resource Management Plan, Arizona.

SUMMARY: Pursuant to the BLM Planning Regulations (43 CFR 1600) this notice advises the public that the Arizona Strip Field Office, Bureau of Land Management, is proposing to amend the Arizona Strip Resource Management Plan to establish allowable resource uses on the Lee's Ferry Allotment. This notice supercedes and replaces a previous similar notice published in the **Federal Register** (Vol. 62, No. 247, page 67401) on December 24, 1997. In accordance with 43 CFR part 4100.0–8 ''The authorized officer shall manage livestock grazing on public lands under the principle of multiple use and sustained yield, and in accordance with the applicable land use plans. Land use plans shall establish allowable resource uses (either singly or in combination), related levels of production or use to be maintained, areas of use, * * *''. The Bureau of Land Management, in cooperation with the current holder of the grazing privileges associated with the Lee's Ferry Allotment, desires to retire some or all of the associated grazing privileges in order to enhance wilderness values and to alleviate conflicts between livestock and recreation use in the Paria River Canyon corridor.

The main issues anticipated in this plan amendment are: (1) Potential impacts on recreational opportunities; (2) and potential impacts on the socio-economics of Coconino County, Arizona.

This amendment is limited to the area contained within the Lee's Ferry Allotment on the Arizona Strip.

A land use plan amendment and environmental analysis will be prepared for the subject lands by an interdisciplinary team including range, wildlife, and recreation specialists.

DATES: Interested parties may submit comments to the Field Manager at the address shown below on or before April 12, 2000.

FOR FURTHER INFORMATION CONTACT: Phil Seegmiller, Arizona Strip Field Office, Bureau of Land Management, 345 E. Riverside Drive, St. George, Utah 84790, (435) 688–3222 to obtain additional information regarding this plan amendment. Existing land use plans and maps of the subject area are available for review at the Interagency Office in St. George, Utah.

Roger G. Taylor,

Field Manager.

[FR Doc. 00–6057 Filed 3–10–00; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

National Park Service

Study Recommending a Timbisha Shoshone Tribal Homeland In and Around Death Valley National Park, Inyo County, California and Esmeralda and Nye Counties, Nevada; Notice of Intent To Prepare a Legislative Environmental Impact Statement

SUMMARY: Under the provisions of the National Environmental Policy Act of 1969 (P.L. 91–190) and the California Desert Protection Act (P.L. 103–433, Title VII, § 705), the National Park Service has initiated an environmental impact analysis process for a Secretarial Report to Congress regarding a proposal to establish a permanent Timbisha Shoshone Tribal Homeland in and around Death Valley National Park. Furthermore, regulations created by the Council on Environmental Quality (40 CFR 1508) provide that any ''proposal for legislation'' must be accompanied by an environmental impact statement. (42 U.S.C.A. section 4332(2)c.). A Legislative Environmental Impact Statement (LEIS) is an abbreviated version of an Environmental Impact Statement which may be prepared on an expedited timetable to ensure proper consideration in Congressional hearings and deliberations.

Background

The U.S. Department of the Interior (Department) is considering the transfer of federal lands and acquisition of private lands to be held in trust for the Timbisha Shoshone Tribe. The transfers and acquisitions are for the purposes of creating a tribal homeland in and around Death Valley National Park.

The initial Notice of Scoping was published in the **Federal Register** on April 19, 1999 (V64, N74, PP19193–19194) announcing public meetings and other scoping activities so as to initiate an environmental impact analysis process for the Draft Secretarial Report to Congress. The Secretary of the Interior's draft report, The Timbisha Shoshone Tribal Homeland-A Draft Secretarial Report to Congress to Establish a Permanent Tribal Land Base and Related Cooperative Activities was released for public comment in May 1999.

Over 500 comments were received through July 1999, and the responses addressed a spectrum of regulatory, socio-economic and environmental issues. On September 20, 1999 the Final Scoping Summary Document was released to the public characterizing the nature of public response and comment letters received on the Draft Secretarial Report.

In October 1999, the Department determined that the National Park Service would serve as the lead agency. The Bureau of Land Management, Bureau of Reclamation, Bureau of Indian Affairs, the U.S. Fish and Wildlife Service, and Nye County, Nevada have been cooperators to this project.

Alternatives

In addition to a no-action alternative, the proposed action is primarily to recommend that Congress authorize the transfer of several parcels of lands as identified in the Draft Secretarial Report currently managed by NPS and BLM in California and Nevada. Authorization for the Department to expend appropriated funds for the purchase of several parcels of private land from willing sellers in California and Nevada is also being proposed. All transacted lands would be taken into trust for the Timbisha Shoshone Tribe by the Secretary of the Interior.

For Current Information

Written communications may be addressed to the Superintendent, Death Valley National Park, Post Office Box 579, Death Valley, California 92328. For current information about the ongoing LEIS effort, please contact: Joan DeGraff, Project Manager, (760) 255–8830, or utilize the park website (www.nps.gov/deva).

Approval Process

The Department officials responsible for approval are: the Assistant Secretary Fish, Wildlife and Parks; the Assistant Secretary for Land and Minerals Management; and the Assistant Secretary for Indian Affairs. If approved, the proposal would subsequently be submitted by the Secretary of the Interior to Congress for consideration. If enacted, the National Park Service officials responsible for implementation would be the Superintendent, Death Valley National Park and the Regional Director, Pacific West Region; as well as the State Directors, Bureau of Land Management, Nevada and California; the Assistant Secretary for Indian Affairs; and the Bureau of Indian Affairs, Central California Agency. The draft LEIS is expected to be available for public review in spring, 2000. At this time it is anticipated that the final LEIS will be completed in summer, 2000.

Dated: March 6, 2000.

John J. Reynolds,

Regional Director, Pacific West Region.

[FR Doc. 00–6112 Filed 3–10–00; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

General Management Plan/ Environmental Impact Statement, Glen Echo Park, Maryland; Notice of Intent

In accordance with Section 102(2)(c) of the National Environmental Policy Act of 1969, the National Park Service (NPS) is preparing an Environmental Impact Statement (EIS) to assess the impacts of alternative management strategies for the General Management Plan (GMP) for Glen Echo Park, Maryland, which is a unit within the George Washington Memorial Parkway.

The GMP/EIS will evaluate a range of alternatives which address cultural and natural resources protection, socioeconomic concerns, traffic circulation and visitor use and will incorporate findings from studies prepared on transportation issues and financial aspects of managing the park.

Public involvement will be a key component in preparation of the General Management Plan and Environmental Impact Statement.

NPS held a public scoping meeting/ open house on February 3, 1998 at the Clara Barton Community Center. Through a workshop format, the meeting provided an overview of the planning effort and an opportunity for the public to discuss their concerns with park staff and provide oral and written comments. Those unable to attend submitted their comments through the mail or over the Internet.

The draft GMP and EIS are expected to be completed and available for public review by the winter of 2000. After public and interagency review of the draft document, comments will be considered and a final GMP and EIS will be prepared for release by the summer, 2000, which will be followed by a record of decision. The responsible official is the Regional Director, National Capital Region, National Park Service. Written comments should be submitted to the Superintendent of George Washington Memorial Parkway, c/o Turkey Run Park, McLean, Virginia 22101 or via e-mail at GWMP__Superintendent@nps.gov.

Joseph M. Lawler,

Acting, Regional Director.

[FR Doc. 00–6113 Filed 3–10–00; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF THE INTERIOR

National Park Service

Saratoga National Historical Park, Saratoga County, New York; Notice of Intent to Prepare an Environmental Impact Statement and Notice of Public Meetings

In accordance with the National Environmental Policy Act of 1969 (P. L.91–109 section 102(c)), the National Park Service (NPS) is preparing an Environmental Impact Statement (EIS) for the Saratoga National Historical Park (NHP), located in the towns of Stillwater, and Saratoga, Saratoga County, New York. The purpose of the EIS is to assess the impacts of alternative management strategies that will be described in the general management plan for Saratoga NHP. A range of alternatives will be formulated for natural and cultural resource protection, visitor use and interpretation, facilities development, and operations.

The NPS will hold two (2) public meetings during the week of March 27, 2000 which will provide an opportunity for public input into the scoping for the GMP/EIS. On Tuesday, March 28, 2000 at 4 p.m., a meeting will be held at the Stillwater Community Center, Community Room, 19 Palmer Street in Stillwater, New York. On Wednesday, March 29 at 7:00 PM, a meeting will be held at the Schuylerville School Administration Office, 18 Spring Street (Route 29) in Schuylerville, New York. The purpose of these meetings is to obtain both written and verbal comments concerning the future direction and development of Saratoga NHP. Those persons who wish to comment verbally or in writing or who require further information should contact Doug Lindsay, Superintendent, Saratoga NHP, 648 Route 32, Stillwater, NY 12170, (518) 664–9821.

The draft GMP/EIS is expected to be completed and available for public review in late 2001. After public and interagency review of the draft document comments will be considered, and a final EIS will be prepared, followed by a Record of Decision.

Dated: February 22, 2000.

Douglas Lindsay,

Superintendent, Saratoga National Historical Park.

[FR Doc. 00–6111 Filed 3–10–00; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Bay-Delta Advisory Council's Ecosystem Roundtable Issues Subcommittee Meeting

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of meeting.

SUMMARY: The Bay-Delta Advisory Council's (BDAC) Ecosystem Roundtable will meet to discuss the 2001 proposal solicitation package, water acquisition, and other topics. This meeting is open to the public. Interested persons may make oral statements to the Ecosystem Roundtable or may file written statements for consideration.

DATES: The BDAC's Ecosystem Roundtable meeting will be held from 9:30 am to 12:00 pm on Thursday, March 30, 2000.

ADDRESSES: The Ecosystem Roundtable will meet at the Resources Building, Room 1131, 1416 Ninth Street, Sacramento, CA 95814.

FOR FURTHER INFORMATION CONTACT: Wendy Halverson Martin, CALFED Bay-Delta Program at (916) 657–2666. If reasonable accommodation is needed due to a disability, please contact the Equal Employment Opportunity Office at (916) 653–6952 or TDD (916) 653–6934 at least one week prior to the meeting.

SUPPLEMENTARY INFORMATION: The San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta system) is a critically important part of California's natural environment and economy. In recognition of the serious problems facing the region and the complex resource management decisions that must be made, the state of California and the Federal government are working together to stabilize, protect, restore, and enhance the Bay-Delta system. The State and Federal agencies with management and regulatory responsibilities in the Bay-Delta system are working together as CALFED to provide policy direction and oversight for the process.

One area of Bay-Delta management includes the establishment of a joint State-Federal process to develop long-term solutions to problems in the Bay-Delta system related to fish and wildlife, water supply reliability, natural disasters, and water quality. The intent is to develop a comprehensive and balanced plan which addresses all of the resource problems. This effort, the CALFED Bay-Delta Program (Program), is being carried out under the policy

direction of CALFED. The Program is exploring and developing a long-term solution for a cooperative planning process that will determine the most appropriate strategy and actions necessary to improve water quality, restore health to the Bay-Delta ecosystem, provide for a variety of beneficial uses, and minimize Bay-Delta system vulnerability. A group of citizen advisors representing California's agricultural, environmental, urban, business, fishing, and other interests who have a stake in finding long-term solutions for the problems affecting the Bay-Delta system has been chartered under the Federal Advisory Committee Act (FACA). The BDAC provides advice to CALFED on the program mission, problems to be addressed, and objectives for the Program. BDAC provides a forum to help ensure public participation, and will review reports and other materials prepared by CALFED staff. BDAC has established a subcommittee called the Ecosystem Roundtable to provide input on annual workplans to implement ecosystem restoration projects and programs.

Minutes of the meeting will be maintained by the Program, Suite 1155, 1416 Ninth Street, Sacramento, CA 95814, and will be available for public inspection during regular business hours, Monday through Friday within 30 days following the meeting.

Dated: March 7, 2000.

Kirk Rodgers,

Acting Regional Director, Mid-Pacific Region.

[FR Doc. 00–6038 Filed 3–10–00; 8:45 am]

BILLING CODE 4310–94–M

INTERNATIONAL TRADE COMMISSION

Investigation No. 337–TA–429

Certain Bar Clamps, Bar Clamp Pads, and Related Packaging, Display, and Other Materials; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on February 9, 2000, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of American Tool Companies, Inc. of Hoffman Estates, Illinois, and Petersen Manufacturing Co., Inc., of De Witt, Nebraska. A supplement to the complaint was filed on March 1, 2000. The complaint, as supplemented, alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain bar clamps, bar clamp pads, and related packaging, display, and other materials by reason of (a) infringement of claims 1, 2, 19–23, 37, 38, 40, 42, 46, 48, 67, and 68 of U.S. Letters Patent 5,988,616, (b) infringement of U.S. Trademark Registration Nos. 1,638,906 and 2,063,062 and (c) misappropriation of trade dress, the threat or effect of which is to destroy or substantially injure an industry in the United States. The complaint also alleges that there exists an industry in the United States with respect to the asserted intellectual property.

The complainant requests that the Commission institute an investigation and, after a hearing, issue a permanent exclusion order and permanent cease and desist orders.

ADDRESSES: The complaint, as supplemented, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Room 112, Washington, D.C. 20436, telephone 202–205–2000. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (http://www.usitc.gov).

FOR FURTHER INFORMATION CONTACT: Anne Goalwin, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202–205–2574.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (1998).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on March 6, 2000, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine:

(a) whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain bar clamps, bar clamp pads, and related packaging, display, and other materials by reason of infringement of claims 1, 2, 19–23, 37, 38, 40, 42, 46, 48, 67, or 68 of U.S. Letters Patent 5,988,616, and whether an industry in the United States exists as required by subsection (a)(2) of section 337; or

(b) whether there is a violation of subsection (a)(1)(C) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain bar clamps, bar clamp pads, and related packaging, display, and other materials by reason of infringement of U.S. Trademark Registration Nos. 1,638,906 or 2,063,062, and whether an industry in the United States exists as required by subsection (a)(2) of section 337; or

(c) whether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain bar clamps, bar clamp pads, and related packaging, display, and other materials by reason of misappropriation of trade dress, the threat or effect of which is to destroy or substantially injure an industry in the United States.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are—

American Tool Companies, Inc., 2800 West Higgins Road, Hoffman Estates, Illinois 60195

Petersen Manufacturing Co., Inc., 108 S. Pear St., De Witt, Nebraska 68341

(b) The respondents are the following companies alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Wolfcraft GmbH, Wolff-Straβe, D–56746 Kempenich, Germany

Wolfcraft, Inc., P.O. Box 687, 1222 W. Ardmore Ave., Itasca, IL 60143

(c) Anne Goalwin, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, S.W., Room 401–P, Washington, D.C. 20436, who shall be the Commission investigative attorney, party to this investigation; and

(3) For the investigation so instituted, the Honorable Sidney Harris is designated as the presiding administrative law judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in

accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received no later than 20 days after the date of service by the Commission of the complaint and notice of investigation. Extensions of time for submitting responses to the complaint will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion order or a cease and desist order or both directed against such respondent.

Issued: March 7, 2000.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 00–6081 Filed 3–10–00; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–419]

In the Matter of Certain Excimer Laser Systems for Vision Correction Surgery and Components Thereof and Methods for Performing Such Surgery; Notice of Final Determination

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has found no violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, in the above-referenced investigation.

FOR FURTHER INFORMATION CONTACT: Timothy P. Monaghan, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202–205–3152. General information concerning the Commission may also be obtained by accessing its Internet server (http://www.usitc.gov). Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: This investigation was instituted on March 1, 1999, based on a complaint by VISX, Inc. (''VISX''), 64 FR 10016–17. The respondents named in the investigation are Nidek Co., Ltd., Nidek Inc., and Nidek Technologies, Inc (herein collectively ''Nidek''). Complainant alleges importation and sale of certain excimer laser systems for vision correction surgery that infringe claims of U.S. Letters Patents Nos. 4,718,418 (''the '418 patent'') and 5,711,762 (''the '762 patent''). An evidentiary hearing was held from August 18, 1999, to August 27, 1999.

On December 6, 1999, the presiding administrative law judge (''ALJ'') issued her final initial determination (''ID'') finding that complainant VISX failed to establish the required domestic industry, that there was no infringement of any claim at issue, and that the '762 patent was invalid and unenforceable.

VISX, Nidek, and the Commission investigative attorneys filed petitions for review of the ID on December 17, 1999, and on December 27, 1999, all parties responded to each other's petitions for review of the ID. On February 2, 2000, the Commission determined not to review the ID's findings with respect to the ''418 patent and determined to review all the ID's findings with respect to the '762 patent.

Having examined the record in this investigation, including the briefs and the responses thereto, the Commission determined that there is no violation of section 337. More specifically, the Commission found no infringement of any claim at issue of the '762 patent and no domestic industry with respect to the '762 patent. The Commission determined to take no position on the issues of the validity and enforceability of the '762 patent.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, and sections 210.45–210.51 of the Commission's Rules of Practice and Procedure, 19 CFR 210.45–210.51.

Copies of the public versions of the Commission order and the Commission opinion in support thereof are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street S.W., Washington, D.C. 20436, telephone 202–205–2000.

Issued: March 6, 2000.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 00–6080 Filed 3–10–00; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–388]

Simplification of the Harmonized Tariff Schedule of the United States

AGENCY: United States International Trade Commission.

ACTION: Revised schedule for publication of report for the subject investigation; request for submissions.

EFFECTIVE DATE: March 7, 2000.

FOR FURTHER INFORMATION CONTACT: Eugene A. Rosengarden, Director, Office of Tariff Affairs and Trade Agreements (O/TA&TA) (202–205–2592); Janis L. Summers, Attorney-Advisor (202–205–2605); or Gil Whitson, Special Assistant to the Director (202–205–2602). The O/TA&TA fax number is 202–205–2616. These officials may be reached via Internet e-mail at rosengarden@usitc.gov; jsummers@usitc.gov; or gwhitson@usitc.gov, respectively. Hearing impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on 202–205–1810. Media representatives should contact Margaret O'Laughlin, Public Affairs Officer (202–205–1819). This notice, and other notices published pursuant to section 332(g) of the Tariff Act of 1930, can be obtained from the ITC Internet web server: http://www.usitc.gov.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation, Simplification of the Harmonized Tariff Schedule of the United States, on November 5, 1997, following receipt of a letter of request seeking the Commission's report by July 13, 2000. Subsequently, on February 25, 1998, the Commission issued a revised schedule for the subject investigation; on March 25, 1999, the Commission issued a schedule for public comment in conjunction with the investigation, with a closing date of June 30, 1999, for such submissions. That revised work schedule calls for the publication of the Commission's report in the subject investigation by February 28, 2000, following an evaluation of the comments received.

The Commission has determined that additional time should be devoted to preparing its report. Accordingly, the

Commission is again revising the schedule in this investigation with respect to the publication of its final report, and announces that the report will be issued by June 30, 2000. In addition, after examining the volume and nature of the comments received, and following discussions with the Congressional committees concerned, the Commission has decided that a public hearing in the subject investigation will not be conducted, in order to allow the maximum time for work on its final report. The final report in the investigation will set forth the proposed legal provisions of a simplified tariff schedule; statistical annotations and notes would be separately considered for subsequent addition by the Committee for Statistical Annotation of Tariff Schedules (the so-called ''484(f) Committee'') pursuant to section 484(f) of the Tariff Act of 1930.

In order to assist in that statistical review, the 484(f) Committee requests the submission of written comments regarding the desirability of and possible procedures for ''sunsetting'' 10-digit statistical annotations to the HTS, in particular with respect to an appropriate period of time (such as 5 years) after which each annotation might be reviewed and/or deleted from the schedule. Interested persons or entities are invited to file comments concerning a possible ''sunset'' guideline; such comments should be general in nature, rather than being focused on particular statistical categories. Written statements should be filed as quickly as possible, and follow-up statements are permitted; but all statements must be received at the Commission by the close of business on April 3, 2000, in order to be considered and made part of the record. Commercial or financial information which a submitter desires the Commission to treat as confidential must be submitted on separate sheets of paper, each marked ''Confidential Business Information'' at the top. All submissions requesting confidential treatment must conform with the requirements of section 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). All written submissions, except for confidential business information, will be available for inspection by interested persons. All submissions should be addressed to the Office of the Secretary, United States International Trade Commission, 500 E Street SW., Washington, DC 20436. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means.

Questions regarding the investigation can be directed to the staff members listed above, and documents concerning the subject investigation have been placed on the Commission's web site for inspection and/or downloading. Printed copies of documents and submissions have been placed in the Secretary's docket section for inspection and copying.

By order of the Commission.

Issued: March 7, 2000.

Donna R. Koehnke,

Secretary.

[FR Doc. 00–6082 Filed 3–10–00; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–377 (Review)]

Internal Combustion Industrial Forklift Trucks From Japan

AGENCY: United States International Trade Commission.

ACTION: Revision of the schedule of a full five-year review concerning the antidumping duty order on internal combustion industrial forklift trucks from Japan.

EFFECTIVE DATE: March 7, 2000.

FOR FURTHER INFORMATION CONTACT: Christopher J. Cassise (202–708–5408), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (http://www.usitc.gov).

SUPPLEMENTARY INFORMATION:

Background

On August 27, 1999 (64 FR 46952), the Commission published a notice in the **Federal Register** scheduling a full five-year review concerning the antidumping duty order on internal combustion industrial forklift trucks from Japan. On February 4, 2000 (65 FR 5660), the Commission published a notice in the **Federal Register** revising this schedule. This revised schedule provided for the Commission to make its final release of information on March 9, 2000, and the parties' final comments were due on March 13, 2000. In order to accommodate the late submission of questionnaire data obtained from a domestic producer pursuant to a stipulated order regarding an administrative subpoena issued by the Commission on January 4, 2000, the February 4, 2000, schedule is further revised.

The Commission's new schedule for the review is as follows: The Commission will not collect any additional information after March 10, 2000, and will make its final release of information to the parties on or about March 10, 2000; and final party comments are due on March 15, 2000.

For further information concerning the review, see the Commission's notices cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and F (19 CFR part 207).

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to sections 201.35 and 207.62 of the Commission's rules.

By order of the Commission.

Issued: March 7, 2000.

Donna R. Koehnke,

Secretary.

[FR Doc. 00–6083 Filed 3–10–00; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Anitrust Division

United States of America v. Miller Industries, Inc., Miller Industries Towing Equipment, Inc., and Chevron, Inc., No. 1:00CV00305 (D.D.C., Filed February 17, 2000); Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in United States of America v. Miller Industries, Inc., Miller Industries Towing Equipment, Inc., and Chevron, Inc., No. 1:00CV00305. On February 17, 2000, the United States filed a Complaint alleging that the acquisition by Miller Industries, Inc. on September 2, 1996, of all the issued and outstanding capital stock of its competitor Vulcan Equipment, Inc., a Mississippi corporation, and the acquisition by Miller Industries, Inc. on December 5, 1997, of all the issued and outstanding capital stock of its competitor Chevron, Inc., a

Pennsylvania corporation, violated Section 7 of the Clayton Antitrust Act, as amended, 15 U.S.C. 18. The proposed Final Judgment, filed with a Stipulation at the same time as the Complaint, would require Miller Industries, Inc. and its wholly owned subsidiaries Miller Industries Towing Equipment, Inc., and Chevron, Inc., to grant to anyone requesting it a non-exclusive license, at unit royalties that are not to exceed specified amounts, under any one or more of five towing and recovery vehicle equipment patents, and to notify the Department of Justice prior to future acquisitions of towing and recovery equipment assets or patents having a value that exceeds $5 million. The Stipulation provides for these patent licenses to become available within ten (10) days following the filing of the Stipulation with the Court. Copies of the Complaint, Stipulation, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice in Washington, D.C. in Room 207, 325 Seventh Street, NW, where copies may be obtained upon request and payment of a copying fee, and at the Office of the Clerk of the United States District Court for the District of Columbia.

Public comment is invited within sixty days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Mary Jean Moltenbrey, Chief, Civil Task Force, Antitrust Division, Department of Justice, Suite 300, 325 Seventh Street, NW, Washington, D.C. 20530 (telephone: (202) 616–5935)

Rebecca P. Dick,

Director of Civil Non-Merger Enforcement.

Stipulation

It is stipulated by and between the undersigned parties, by their respective attorneys, as follows:

(1) The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in this Court.

(2) The parties stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

(3) Defendants shall abide by and comply with the provisions of the proposed Final Judgment pending its entry by the Court, or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Stipulation, comply with all the terms and provisions of the proposed Final Judgment as though the same were in full force and effect as an order of the Court. As part of this compliance, defendants shall not assign, transfer interest, or take any action, direct or indirect, that will impede or impair the value or ownership rights of the '737, '147, '509, '609, and '623 Patents (as those terms are defined in the proposed Final Judgment) before the proposed Final Judgment shall be effective.

(4) Pursuant to Section IV of the proposed Final Judgment, Defendants shall offer to any requesting third party a license or licenses, the terms of which shall comply with the terms set forth in the proposed Final Judgment and Exhibits A and B thereof; provided, however, that if the proposed Final Judgment has not been entered because Plaintiff has withdrawn its consent or the time for all appeals of any Court ruling declining entry of the proposed Final Judgment has expired, then the license(s) shall terminate effective upon withdrawal of consent of expiration of time for appeals. As provided in Exhibits A and B, licensees shall have the right to sell at any time products made within 60 days of termination caused by the withdrawal of the Plaintiff's consent or by the Court's declining to enter the proposed Final Judgment.

(5) Within ten (10) days of its filing of the proposed Final Judgment and every thirty days thereafter until entry of the Final Judgment, defendants shall provide Plaintiff an affidavit setting forth the name, address, and telephone number of each person who, at any time after the period covered by the last such report, made an offer to license, expressed an interest in licensing, entered into negotiations to license, or was contacted or made an inquiry about licensing the '737, '147, '509, '609, or '623 Patents, and shall describe in detail each contact with any such person during that period.

(6) This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

(7) In the event Plaintiff withdraws its consent, as provided in paragraph (2) above, or in the event that the Court declines to enter the proposed Final Judgment pursuant to this Stipulation, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

(8) Defendants represent that the licenses ordered in the proposed Final Judgment can and will be made, and that defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the licensing provisions contained therein.

For plaintiff United States of America:
Susan L. Edelheit,
D.C. Bar No. 250 720, Assistant Chief, Civil Task Force Antitrust Division, U.S. Department of Justice, Suite 300, 325 7th Street, NW, Washington, D.C. 20530, (202) 514–5038.
Date Signed: February 16, 2000.

For Miller Industries, Inc., Miller Industries Towing Equipment, Inc., and Chevron, Inc.
C. Loring Jetton, Jr.,
(202) 663–6738, D.C. Bar No. 083766
John Q. Rounsaville, Jr.,
(202) 663–6328, D.C. Bar No. 162305
William F. Adkinson, Jr.,
(202) 663–6530, D.C. Bar No. 411922
Wilmer, Cutler & Pickering, 2445 M Street, NW, Washington, DC 20037.
Date Signed: February 16, 2000.

Frank Madonia,
Executive Vice President and General Counsel, Miller Industries, Inc., 8503 Hilltop Drive, Ooltewah, TN 37363—0120, (423) 238–4171.
Date Signed: February 16, 2000.

Stipulation Approved for Filing:
Ordered this ____ day of _____, 2000.

_____
United States District Judge

Final Judgment

Whereas, Plaintiff, the United States of America (''United States''), having filed its Complaint in this action, and Plaintiff and Defendants, Miller Industries, Inc. and its wholly-owned subsidiaries Miller Industries Towing Equipment, Inc., and Chevron, Inc. (any one or more of which may be referred to as ''Miller Industries''), by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any

party with respect to any issue of law or fact herein;

And Whereas Defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

And Whereas the essence of this Final Judgment is the prompt and certain licensing of specified patents to one or more third parties;

And whereas Defendants, as alleged in the Complaint, as owners of all right, title, and interest in the L-Arm Patent (defined below), acquired all of the capital stock of Vulcan International, Inc., including all right, title, and interest in the Vulcan Improvement Patents (defined below), and thereafter acquired all of the capital stock of Chevron, Inc., including all right, title and interest in the Independent Wheel Lift Patent and the Backsaver Patent (defined below):

And whereas licensing of the specified patents is necessary to remedy the loss of competition resulting from Defendants' acquisition of control of competitors' assets as alleged in the Complaint;

And whereas Plaintiff takes no position as to the validity or enforceability of the patents at issue or as to whether they are or have been infringed by any third parties, and Plaintiff and Defendants agree that this Final Judgment shall have no impact whatsoever on any adjudication concerning the validity or enforceability of the patents at issue or any other patents assigned to or owned by Defendants;

And whereas Defendants have represented to Plaintiff that Miller Industries is the owner of the patents at issue, that the licensing and other terms and conditions ordered herein can and will be accomplished, and that Defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

Now, therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby *ordered, adjudged, and decreed* as follows:

I.

Jurisdiction

This Court has jurisdiction over the subject matter of this action and over each of the parties hereto. The Complaint states a claim upon which relief may be granted against the Defendants, as hereinafter defined, under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II.

Definitions

As used in this Final Judgment:

A. ''Miller Industries'' shall mean one or more of Miller Industries, Inc., a Tennessee corporation headquartered in Ooltewah, TN, and tits wholly-owned subsidiaries Miller Industries Towing Equipment, Inc., a Delaware corporation headquartered in Ooltewah, TN, and Chevron, Inc., a Pennsylvania corporation headquartered in Mercer, PA, and their successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and directors, officers, managers, agents, and employees.

B. ''Produce,'' ''Producing,'' or ''Production'' shall mean to manufacture, make, have made, import into the United States, use, offer to sell, sell or otherwise dispose of

C. ''The '737 Patent'' (commonly referred to as the '' L-Arm Patent'') shall mean United States Patent Number 4,836,737 and all continuations, continuations-in-part, and divisions or reissues thereof, if any.

D. ''The '623 Patent'' shall mean United States Patent Number 4,637,623 and all continuations, continuations-in-part, and divisions or reissues thereof, if any.

E. ''The '509 Patent'' shall mean United States Patent Number 4,798,509 and all continuations, continuations-in-part, and divisions or reissues thereof, if any.

F. ''The '147 Patent'' (commonly referred to as the ''Independent Raise-and-Lower Patent'') shall mean United States Patent Number 5,061,147 and all continuations, continuations-in-part, and divisions or reissues thereof, if any.

G. ''The '609 Patent'' (commonly referred to as the ''Backsaver Patent'') shall mean United States Patent Number 5,628,609 and all continuations, continuations-in-part, and divisions or reissues thereof, if any.

H. The ''Century Design'' shall mean Miller Industries' wheel lift designs depicted in the engineering drawings attached as Exhibit D and E and which are embodied in Century Model Nos. 124002217 and 12400221, currently being marked by Miller Industries in the United States, as well as the wheel lift designs incorporated in the previously marketed Century Model Nos. 124001824 and 124001825.

I. ''The Improvement Patents'' (commonly referred to as the ''Vulcan Improvement Patents,'' covering such items as the horizontal and vertical ''pivot'' L-arm features) shall mean the '623 Patent and the '509 Patent.

J. The ''Licensed Claims of the Improvements Patents'' shall mean Claims 1–3, 6–10, 12, 15, 17, 18, 20 and 22 of the '623 Patent and Claims 1, 4–9, 11–14 and 16–19 of the '509 Patent. The Licensed Claims include such features as the horizontal and vertical ''pivot'' of the L-arm.

K. The ''Unlicensed Claims of the Improvements Patents'' shall mean Claims 4, 5, 11, 13–14, 16, 19 or 21 of the '623 Patent and Claims 2, 3, 10 or 15 of the '509 Patent. The Unlicensed Claims of the Improvement Patents embody the following features of the Improvement Patents: (1) the vertical locking pin device; (2) the elongated curved wheel retainer plate (sometimes referred to as ''the Scoop''); and (3) the wheel lift receiver placed completely above the cross-bar. The act of Producing products containing (a) a horizontal locking pin device, (b) a vertical alignment pin on the receiver used in combination with a horizontal locking pin device, or (c) two flat surfaces joined together to form the wheel retainer plate, or any combination of (a), (b), or (c), by a licensee under the Licensed Claims of the Improvement Patent shall not constitute an infringement of any of the Unlicensed Claims of the Improvement Patents.

III.

Applicability

The provisions of this Final Judgment apply to Miller Industries, its successors and assigns (including any transferee or assignee of any ownership rights to, control of, or ability to license the patents referred to in this Final Judgment), its subsidiaries, affiliates, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

Licensing of Patents

A. Beginning no later than ten (10) business days after the filing pursuant to 15 U.S.C. 16(b) of this Final Judgment, Miller Industries shall offer to any third party a non-exclusive license in the form attached hereto as Exhibit A (with the exception of licenses that include the Improvement Patents) or Exhibit B (for licenses that include the Improvement Patents) under the following patents subject to license fees not to exceed the corresponding stated amount per unit:

Patent(s) to be licensed	Unit license fee not to exceed
'737 Patent	125.00
'147 Patent	150.00
'609 Patent	150.00
Licensed Claims of the Improvement Patents	150.00
'737 Patent & '147 Patent, Together	175.00
'737 Patent & '609 Patent, Together	175.00
'737 Patent & Licensed Claims of the Improvement Patents, Together	175.00

The Maximum Unit License Fee shall be adjusted up or down annually in accordance with the change in the U.S. Department of Labor Producer Price Index for Finished Goods.

B. Such licenses shall be available for the life of the licensed patent. The Maximum Unit License Fee for a license covering more than one patent shall, in the event of the expiration of any covered patent, be modified to reflect the Maximum Unit License Fee for the remaining licensed patent or patents. The terms of Exhibit A or Exhibit B may be modified upon consent of both parties to the license.

C. In accomplishing the licensing ordered by this Section IV, Miller Industries shall retain the services of an Independent Auditor (a certified public accountant from a firm of good standing) who shall collect from each licensee reports and royalty payments as required by each license agreement made pursuant to this Final Judgment. Miller Industries shall instruct the Independent Auditor to provide Miller Industries no more frequently than on a quarterly basis the aggregate dollar amount of royalty payments collected under each category of license set forth in Paragraph A hereof, together with a report stating the name of each licensee making royalty payments and the aggregate number of units of licensed products reported by all licensees for that period. Miller Industries shall instruct the Independent Auditor not to provide or disclose any information or data that would allow Miller Industries to determine the number of units of licensed products produced by any particular licensee, but may permit the Independent Audit to disclose to it facts that constitute grounds for material breach under the terms of the license.

D. Any existing licensee of any one or more of the '147, '509, '609, '623 or '737 Patents may elect to modify its existing license to any such patent by substituting the terms and conditions of the licenses available pursuant to this Section IV on thirty (30) days' written notice to Miller Industries.

In accomplishing the licensing ordered by this Section IV, Miller Industries promptly shall make known, by usual and customary means, the availability of the licenses, including mailing within ten (10) days of filing pursuant to 15 U.S.C. 16(b) of this Final Judgment notices of the available licenses in the form of Exhibit C along with copies of this Final Judgment to all firms known to it that manufacture tow trucks, car carriers, or similar towing and recovery vehicles. Miller Industries shall provide any person making an inquiry regarding a possible license with a copy of this Final Judgment, including all exhibits thereto. At Plaintiff's request, Miller Industries shall furnish to Plaintiff copies of any executed licenses made pursuant to this Section IV.

F. Miller Industries shall retain the services of a Designated Expert, to be selected by Plaintiff in its sole discretion, who shall, at the request of any existing or prospective Licensee of the Improvement Patents (hereafter ''Licensee''), determine whether a proposed design is an ''Approved Proposed Design.'' A proposed design shall be an Approved Proposed Design if it falls within the Licensed Claims of the Improvement Patents and does not fall within the Unlicensed Claims. Miller Industries shall provide the Designated Expert with a copy of this Final Judgment and shall instruct him/her to use his/her best efforts to provide the Licensee with a written determination within 30 days after receipt of engineering drawings and other necessary information. A Licensee has no obligation to request a determination from the Designated Expert, and use of the Designated Expert is at a Licensee's sole discretion.

G. Miller Industries shall be bound by the Designated Expert's determination that a proposed design is an Approved Proposed Design, and shall not challenge as infringement of any Unlicensed Claim the Licensee's Production of products made in accordance with the specifications of an Approved Proposed Design.

H. Miller Industries shall instruct the Designated Expert to keep confidential all submissions and contact with any Licensee seeking a determination, and shall instruct the Designated Expert not to disclose to Miller Industries or any third party, unless required to do so by law, any information concerning the Licensee's request for a determination on any proposed design. However, Miller Industries may instruct the Designated Expert (1) to notify Miller Industries after a proposed design has been approved, of the identity of the firm submitting the design, and (2) after the Licensee has begun selling products made in accordance with an Approved Proposed Design, to provide Miller Industries with a description of the product and its features sufficient to enable Miller Industries to determine whether the product is made in accordance with the specifications of the Approved Proposed Design, subject to the Licensee's confirmation that the description to be disclosed reveals no confidential data or trade secrets.

I. Miller Industries will pay the Designated Expert's fees, up to maximum of five (5) thousand dollars, for his/her services in gaining sufficient familiarity with the licensed patents and the scope of the claims thereof to enable him/her to undertake to determine whether proposed designs are Approved Proposed Designs. The cost of the Designated Expert's determination of whether a given submitted proposed design is an Approved Proposed Design shall be borne by the Licensee.

J. Within fifteen days from the filing pursuant to 15 U.S.C. 16(b) of this Final Judgment, Miller Industries shall provide Plaintiff with the names of three candidates (each with sufficient expertise in patent interpretation to be able to make qualified determinations) who have no affiliation or relationship with Miller Industries or any other towtruck or car carrier manufacturer to serve as the Designated Expert. After reviewing these candidates, Plaintiff may request from Miller Industries the names of additional candidates to serve as Designated Expert, Miller Industries shall provide such additional names within fifteen days from receipt of such request. Should Plaintiff object to all candidates submitted by Miller Industries, Plaintiff may select a Designated Expert of its own choosing.

K. Miller Industries shall not challenge as infringement of its Unlicensed Claims, or of any other claims of any patents owned by or assigned to Miller Industries, the Production of a product embodying the Century Design by a licensee of the '737 Patent and the Licensed Claims of the Improvement Patents. Miller Industries shall also not challenge as infringement of any claims under the Improvement Patents the Production of a product with a wheel lift design made pursuant to the specification in the '609 Patent (the ''Backsaver Design'') by a licensee of the '609 Patent.

V

Limitations

A. Nothing in this Final Judgment shall be construed to restrict Miller Industries' ability to manufacture and sell products pursuant to the '737 Patent, the Improvement Patents, the '147 Patent, or the '609 Patent.

B. Notwithstanding Section IV of this Final Judgment, Miller Industries is not required to grant a license to any person to whom a license was previously granted under this Final Judgment that was terminated for material breach.

VI

Notification

A. Miller Industries shall provide advance notification to the Plaintiff (1) when it directly or indirectly acquires (other than in the ordinary course of business as defined in the HSR regulations) any assets of, or any interest (including any financial, security, loan, equity, or management interest) in, any manufacturer of towtrucks, car carriers, or other towing and recovery equipment, with the exception of any transaction where the total value of the assets or interest being acquired is less than five (5) million dollars; or (2) when it directly or indirectly (i) acquires any exclusive license or (ii) acquires or is assigned any ownership or security interest in a patent or patents relating to the manufacture of towtrucks, car carriers, or other towing and recovery equipment, with the execution of any transaction where the total value of the interest acquired in such patent rights is less than five (5) million dollars. For purpose of this paragraph, total value shall be determined as prescribed in 16 CFR § 801.00. If the transaction is covered by the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the ''HSR Act''), Miller Industries' obligation to provide notification under this Section shall be satisfied by compliance with the HSR Act.

B. Notification under this section shall be provided to the Plaintiff in the same format as, and per the instructions relating to, the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended. Notification shall be provided at least thirty (30) days prior to the acquisition of such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification representatives of the Plaintiff make a written request for additional information, Defendant shall not consummate the proposed transaction or agreement until twenty (20) days after substantial compliance with the request for such additional information. The Plaintiff may, however, grant defendant early termination of the waiting periods prescribed by this Section. This Section shall be broadly construed, and any ambiguity or uncertainty regarding the necessity of filing such notification under this Section shall be resolved in favor of filing notice.

VII

Affidavits

A. Miller Industries shall provide Plaintiff an affidavit within ten (10) days of the filing pursuant to 15 U.S.C. 16(b) of this Final Judgment, and every six (6) months thereafter until the life of each of '147, '509, '609, '623 and the '737 Patents has expired, as to the fact and manner of compliance with Section IV hereof. Each such affidavit shall set forth efforts made to accomplish licensing of the patents contemplated in his Final Judgment and shall include, inter alia, the name, address, and telephone number of each person who, at any time after the period covered by the last such report, made an offer to license, expressed an interest in licensing, entered into negotiations to license, or was contacted or made an inquiry about licensing the patents to be licensed, and shall describe in detail each contact with any such person during that period.

B. Until one year after each of the '147, '509, '609, '623 and the '737 Patents have expired, Miller shall preserve all records of all efforts made to effect the licensing of each such patent.

VIII

Compliance Inspection

For the purpose of determining or securing compliance with this Final Judgment, or determining whether the Final Judgment should be further modified or terminated, and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the United States Department of Justice, upon written request of the Attorney General or the Assistant General in charge of the Antitrust Division, and on reasonable notice to Defendants made to their principal offices, shall be permitted:

1. Access during office hours of Defendants to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Defendants, who may have counsel present, relating to any matters contained in this Final Judgment; and

2. Subject to the reasonable convenience of Defendants and without restraint or interference from them, to interview, either informally or on the record, their officers, employees, and agents, who may have counsel present, regarding any such matters.

B. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, made to Defendants at their principal offices, Defendants shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment.

C. No information nor any documents obtained by the means provided in Sections VII or VIII of this Final Judgment shall be divulged by a representative of the United States to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to Plaintiff, Defendants represent and identify in writing the material in any such information or documents for which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then Plaintiff shall give ten (10) days notice to Defendants prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Defendants are not a party.

IX

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the

enforcement of compliance herewith, and for the punishment of any violation hereof.

X

Termination

Unless this Court grants an extension, this Final Judgment will expire on the tenth anniversary of the date of its entry.

XI

Public Interest

Entry of this Final Judgment is in the public interest.

Dated:_____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

United States District Judge

Exhibit A: License Agreement

[Exhibit A to be used for licensing United States Patent Number 5,061,147 (''The Independent Raise-and-Lower Patent''); United States Number 5,628,609 (''The Backsaver Patent''); United States Patent Number 4,836,737 (''The L-Arm Patent''); or a combination of the '737 Patent and either the '147 or '609 Patents. Please see Exhibit B for licenses relating to United States Patent Number 4, 798,509 & United States Patent Number 4,637,623 (collectively, the ''Improvement Patents'')]

This License Agreement is made by and between _____ (''Licensee'') and MILLER INDUSTRIES, INC., or a designated subsidiary thereof (and its successors and assigns, collectively ''Licensor'').

Whereas, Licensor is the owner of [United States Patent Number 5,061,147; United States Patent Number 5,628,609; and/or United States Patent Number 4,836,737]

And whereas, Licensee desires to obtain a license from Licensor relating to said patent [or patents];

And whereas, Licensor desire to grant Licensee such a license;

Now, therefore, in consideration of the foregoing and of the mutual covenants which follow, the parties hereby agree that:

Article 1—Definitions

As used in this Agreement, the following terms shall have the following meanings:

1.01. ''The '737 Patent'' shall mean United States Patent Number 4,836,737. [''the '147 Patent'' shall mean United States Patent Number 5,061,147; and/or ''the '609 Patent'' shall mean United States Patent Number 5,628,609.]

1.02. ''Royalty Bearing Products'' shall mean products made in accordance with the claims of the '737 Patent [the '147 Patent and/or the '609 Patent].

1.03. ''Independent Auditor'' shall mean a person or persons appointed by Licensor subject to the terms and conditions of Section IV of the Final Judgment in United States v. Miller Industries, Inc., Civ. 1:00CV00305 (D.D.C. 2000).

Article 2—License and Related Terms

2.01. *Patent License.* During the term of this Agreement, subject to the terms and conditions hereof, including, without limitation, the timely payment by Licensee to the Independent Auditor of the license fees provided for in Section 2.02 hereof, Licensor hereby grants to Licensee, and Licensee hereby accepts from Licensor, a non-exclusive, non-transferable (except as specifically provided in Section 5.05 hereof), right and license under the '737 Patent [*the '147 Patent and/or the '609 Patent*] to make, have made, import, use, offer to sell, sell or otherwise dispose of Royalty Bearing Products within the United States.

2.02. *Royalties.* In consideration of the license granted under Section 2.01 hereof, Licensee shall pay Licensor a royalty of $ ____[1] per unit for each Royalty Bearing Product Sold or Otherwise Disposed of by or for Licensee. The term ''Sold or Otherwise Disposed of'' includes Royalty Bearing Products sold, leased, placed in commercial service, or delivered by or on behalf of Licensee within the United States. In no event shall a licensee pay more than one royalty on a single unit of Royalty Bearing Product.

Article 3—Notice Provisions

3.01. Licensee shall make written reports to the Independent Auditor within 30 days of the end of each calendar quarter through the life of the '737 patent [*the '147 Patent and/or the '609 Patent*] stating in each such report the aggregate number of Royalty Bearing Products it has Sold or Otherwise Disposed of within the United States during such calendar quarter and upon which royalty is payable as provided in this Agreement. The first such report shall include all Royalty Bearing Products Licensee has Sold or Otherwise Disposed of between the date of this Agreement and the date of such report. The Independent Auditor shall report to the Licensor only such information as is permitted under Paragraph IV.C of the Final Judgment in United States v. Miller Industries, Inc., et al., Civ. 1;00CV00305 (D.D.C. 2000).

3.02. Concurrently with each report, Licensee shall pay to the Independent Auditor royalties at the rate specified in Article 2.02 of this Agreement on the Royalty Bearing Products included in the report.

3.03. Licensee shall keep accurate books and records in accordance with accepted accounting practices showing the Royalty Bearing Products it made, had made, imported, used, offered for sale, Sold or Otherwise Disposed of during the life of this License Agreement. Such records shall be in sufficient detail to enable the royalties payable to Licensor to be determined.

3.04. The Independent Auditor shall notify Licensor when, in his or her independent judgment, an audit is appropriate, and upon Licensor's approval shall conduct an audit. Upon request of the Independent Auditor, Licensee will permit its books and records pertinent to the determination of the royalties payable to Licensor to be examined to the extent reasonably necessary for the Independent Auditor to verify the reports provided by Licensee. In the event that the Auditor shall have questions that appear not to be answered by such books and records, the Auditor shall have the right to confer with representatives of the Licensee, including but not limited to the Licensee's Chief Financial Officer and Plant Manager. Such examination shall be made at the expense of the Independent Auditor and may be requested no more than once per year. The Independent Auditor, who shall be obligated to confidentiality, shall report to Licensor only the amount of royalty payable for the period under audit based upon a review of the books and records provided. If the Independent Auditor determines that Licensee has underpaid the applicable royalties by less than 5% of the total applicable royalties for the period in question, Licensee shall pay the arrears and interest at a rate of 10% per annum, or the maximum allowable interest rate under the applicable state law, if it is lower. If the Independent Auditor determines that Licensee has underpaid the applicable royalties by greater than 5% of the total applicable royalties for the period in question, Licensee shall pay the cost of the audit, the arrears, and interest at a rate of 10% per annum, or the maximum allowable interest rate under the applicable state law, if it is lower.

3.05. Nothing in this Agreement shall restrict the right of Licensor to seek redress for infringement of the [*patents to be licensed*] by Licensee occurring before the date of execution of this Agreement.

Article 4—Term and Termination

4.01. Subject to the terms and conditions hereof, this Agreement shall become effective upon execution by both parties and shall remain in force for the life of the last licensed patent to expire or upon termination. Licensee may terminate this Agreement by giving Licensor at least 90 days' prior written notice of termination. Licensor may terminate this Agreement immediately, and refuse to grant Licensee a new license, if Licensee commits a material breach, as defined in Section 4.02 below.

4.02. Licensor may treat as a material breach: (i) Licensee's failure to make a report pursuant to Section 3.01 hereof, or to pay corresponding royalties due under such report pursuant to Section 3.02 hereof, provided that such failure is not cured or resolved within 30 days after Licensee received notice thereof; (ii) the Independent Auditor's determination, as a result of an audit conducted pursuant to Section 3.04 above, that Licensee has underpaid the royalties by more than 20% in the applicable period, provided that the underpayment is not cured or resolved within 60 days after Licensee is informed of the determination; (iii) the Independent Auditor's determination in two successive audits conducted pursuant to Section 3.04 above, that Licensee has underpaid the royalties by more than 20% in the applicable period, whether or not such

[1] Royalties shall not exceed the following: '737 Patent: $125.00 per unit; '147 Patent: $150.00 per unit; '609 Patent: $150.00 per unit; '147 and '737 Patents, together: $175.00 per unit; '609 and '737 Patents, together: $175.00 per unit.

These maximum limits on royalties shall be adjusted up or down annually in accordance with the change in the U.S. Department of Labor Producer Price Index for Finished Goods.

underpayment is cured; or (iv) Licensee's failure to re-establish compliance with its obligations to maintain liability insurance under Section 5.10(b) hereof within 60 days of receiving notice from Licensor of its non-compliance. The provisions of Section 5.04 concerning Force Majeure shall apply to the curing or resolution of grounds for a material breach.

4.03. [*To be included only in all licenses granted before entry of the Final Judgment.*] Licensor shall have the option to terminate this Agreement if, in the matter United States v. Miller Industries, Inc. et al., either of the following events occur: (1) Plaintiff withdraws its consent to entry of the proposed Final Judgment, or (2) the Court declines to enter the proposed Final Judgment, and the time has expired for all appeals from any Court ruling declining such entry. Such termination shall be effective 60 days after Licensor notifies Licensee of the occurrence of event (1) or (2) under this Section 4.03.

4.04. In the event of termination, Licensee shall report under Section 3.01 hereof, and pay under Section 3.02 hereof, royalties on all Royalty Bearing Products that it has made or imported prior to termination. A terminated Licensee shall have the right at any time to sell or otherwise dispose of any Royalty Bearing Product on which royalties have been paid. Termination shall not affect Licensee's duty to pay royalty obligations hereunder, and shall not affect Licensor's right to request an audit covering any period during which Licensee has a right hereunder to make or import any product.

Article 5—Miscellaneous Provisions

5.01. *Limitations of Liability and Claims.*

(a) Licensor warrants that is owns the entire right, title, and interest to the [*patent(s) being licensed*] and has the ability to license the [*patent(s) being licensed*] but otherwise neither party makes any representations, extends any warranties of any kind, either express or implied, and each party specifically disclaims any implied warranty of merchantability or fitness for a particular purpose in relation to the teachings of the [*patent(s) being licensed*].

(b) The parties are under no obligation and shall not be required under this Agreement to bring or prosecute actions or suits against any third party for infringement of the [*patent(s) being licensed*].

5.02. *Relationship of the Parties.* The parties shall be independent contractors hereunder and neither party shall have the power or authority to bind the other party with respect to any third party. Except as specifically provided herein, each party shall bear its own costs and expenses.

5.03. *Effect of Agreement.* This Agreement embodies the entire understanding between the parties with respect to the subject matter hereof and supersedes any and all prior understandings and agreements, oral or written, relating thereto. Any amendment hereof must be in writing and signed by both parties.

5.04. *Force Majeure.* Each party's performance hereunder is subject to interruption or delay due to causes beyond its reasonable control such as acts of God, acts of government, war or other hostility, the elements, fire, explosion, power failure, equipment failure, industrial or labor dispute, and the like. In the event of such an interruption or delay, any relevant period of performance of the party affected shall be extended for a period of time equal to the period of the interruption or delay and any obligation of the party whose performance is not affected which corresponds to the interrupted or delayed performance shall be suspended for a period of time equal to the period of the interruption or delay. Any party whose performance hereunder is subject to such interruption or delay shall give prompt notice to the other party of the reason or reasons for the commencement of and of the conclusion of such interruption or delay.

5.05. *Assignment and Successors.* This Agreement shall inure to the benefit of and be binding upon the parties as well as subsidiaries, affiliates, and successors-in-interest of the parties hereto. Neither party nor any subsidiary, affiliate or successor-in-interest shall assign or transfer any of its rights, privileges or obligations hereunder without the prior written consent of the other party, except that Licensor may, without the consent of Licensee, assign this license in connection with the transfer of all or substantially all of its towing equipment manufacturing and distribution business. Nothing in this Agreement grants, or is intended to grant the right or authorization to grant, sublicenses of the [*patent(s) being licensed*]. Upon a permitted assignment of this Agreement, said assignee shall expressly agree in writing to be bound by all of the provisions of this Agreement. However, nothing in this Section shall permit a former licensee of the [patents being licensed] who has been terminated for material breach as defined in Section 4.02 to exercise any rights under this Agreement.

5.06. *Severability.* Should any provision of this Agreement be held to be void, invalid, unenforceable or illegal by a court, the validity and enforceability of the other provisions shall not be affected thereby.

5.07. *Non-Waiver.* Failure of either party to enforce any provision of this Agreement shall not constitute or be construed as a waiver of such provision nor of the right to enforce such provision.

5.08. *Notices.* In order to be effective, all notices, requests, demands, agreements, consents, approvals, permissions and other communications required or permitted hereunder shall be in writing, shall be delivered personally, faxed, transmitted by courier or express service, or mailed, with proper charge prepaid, to the party for whom intended as set forth below, and shall be deemed to be given upon the date of actual receipt:

To Licensee:

To Licensor: President, Miller Industries, Inc., 8503 Hilltop Drive, Ooltewah, TN 37363.

(by other means)

The sending party shall have the burden of proving receipt. Either party may change any address to which notices and other communications are to be directed to it by giving notice of such change to the other party in the manner provided above.

5.09. *Governing Law.* This Agreement shall be governed by and construed under the laws of the State of Tennessee.

5.10. *Insurance.* During the term of this Agreement, Licensee shall maintain broad form general liability insurance, including blanket contractual, products and completed operations liability coverage, in the amount of two (2) million dollars. Within 30 days following execution of this Agreement, Licensee shall deliver to Licensor a Certificate of Insurance and, subsequently, any renewals thereof evidencing the insurance required by this Paragraph.

5.11. *Patent Marking.* Licensee shall mark each Royalty Bearing Product made, used, Sold or Otherwise Disposed of under this license with the following marking:

Manufactured and sold under license of United States Patent Nos. [*Patents(s) being licensed*].

5.12. *Trademarks and Trade Names.* The license herein granted conveys no right to Licensee to use or register any trademarks or trade names of the Licensor.

5.13. *Preservation of Licensor's Rights.* Licensor's grant of rights to License pursuant to this Agreement shall in no way restrict Licensor's right to manufacture and sell products pursuant to the [*patent(s) being licensed*].

In witness whereof, the parties have executed this Agreement by their authorized representatives.

[Licensee]

By__ _____

Its__ _____

Date__ _____

[Licensor]

By__ _____

Its__ _____

Date__ _____

Exhibit B: License Agreement

[Exhibit B to be used for licenses relating to United States Patent Number 4,798,509 and United States Patent Number 4,637,623 (collectively, the ''Improvement Patents''). The ''Alternative'' (in italics) relates to terms for licenses of the Improvement Patents together with the '737 L-Arm Patent.]

This License Agreement is made by and between_____(''Licensee'') and MILLER INDUSTRIES, INC., or a designated subsidiary thereof (and its successors, collectively ''Licensor'');

Whereas, Licensor is the owner of United States Patent Number 4,798,509 and United States Patent Number 4,637,623; [*and United States Patent Number 4,836,737*]

And whereas, Licensee desires to obtain a license from Licensor relating to said patents;

And whereas, Licensor desires to grant Licensee such a license;

Now, therefore, in consideration of the foregoing and of the mutual covenants which follow, the parties hereby agree that:

Article 1—Definitions

As used in this Agreement, the following terms shall have the following meanings:

1.01. ''The '737 Patent'' shall mean United States Patent Number 4,836,737.

1.02. ''The '623 Patent'' and ''the '509 Patent'' shall mean respectively, United States Patent Number 4,637,623 and United

States Patent Number 4,798,509. (Collectively, the ''Improvement Patents'').

1.03. The ''Licensed Claims'' shall mean only Claims 1–3, 6–10, 12, 15, 17, 18, 20 and 22 of the '623 Patent and only Claims 1, 4–9, 11–14 and 16–19 of the '509 Patent. The act of Producing products containing (a) a horizontal locking pin device, (b) a vertical alignment pin on the receiver used in combination with a horizontal locking pin device, or (c) two flat surfaces joined together to form a wheel retainer plate, or any combination of (a), (b), or (c), shall not constitute an infringement of any unlicensed claim of the '623 Patent or the '509 Patent.

1.04. ''Royalty Bearing Products'' shall mean products made in accordance with the Licensed Claims of the '623 Patent or the '509 Patent. [ALTERNATIVE IF LICENSE IS FOR BOTH—ARM AND IMPROVEMENTS: ''Royalty Bearing Products'' shall mean products made in accordance with any claim or claims of the '737 Patent and the Licensed Claims of the '623 Patent or the '509 Patent].

1.05. ''Independent Auditor'' shall mean a person or persons appointed by Licensor subject to the terms and conditions of Section IV of the Final Judgment in *United States* v. *Miller Industries, Inc.,* Civ.1:00 CV00305 (D.D.C. 2000).

1.06. ''Produce,'' ''Producing,'' or ''Production'' means to manufacture, make, have made, import into the United States, use, offer to sell, sell or otherwise dispose of.

Article 2—License and Related Terms

2.01. *Patent License.* During the term of this Agreement, subject to the terms and conditions hereof, including, without limitations, the timely payment by licensee to the Independent Auditor of the license fees provided for in Section 2.02 hereof, Licensor hereby grants to Licensee, and Licensee hereby accepts from Licensor, a non-exclusive, non-transferable (except as specifically provided in Section 5.05 hereof), right and license under the '623 Patent and '509 Patent to make, have made, import, use, offer to sell, sell, or otherwise dispose of Royalty Bearing Products within the United States. This agreement does not provide Licensee with the right to make, have made, import, use, offer to sell, sell, or otherwise dispose of products that are made in accordance with (i) Claims 4, 5, 11, 13–14, 16, 19 or 21 of the '623 Patent; (ii) Claims 2, 3, 10 or 15 of the '509 Patent; or (iii) any claim of the '737 Patent.

2.02. *Royalties.* In consideration of the license granted under Section 2.01 hereof, Licensee shall pay Licensor a royalty of $____ per unit [1] for each Royalty Bearing Product Sold or Otherwise Disposed of by or for Licensee. The term ''Sold or Otherwise Disposed of'' includes Royalty Bearing Products sold, leased, placed in commercial service, or delivered by or on behalf of Licensee within the United States. In no event shall a Licensee pay more than one royalty on a single unit of Royalty Bearing Product.

Article 2—License and Related Terms

[ALTERNATIVE: LICENSE FOR L-ARM PLUS IMPROVEMENT PATENTS]

2.01. *Patent License.* During the term of this Agreement, subject to the terms and conditions hereof, including, without limitations, the timely payment by Licensee to the Independent Auditor of the license fees provided for in Section 2.02 hereof, Licensor hereby grants to Licensee, and Licensee hereby accepts from Licensor, non-exclusive, non-transferable (except as specifically provided in Section 5.05 hereof), right and license under the '737 Patent, '623 Patent and '509 Patent to make, have made, import, use offer to sell, sell, or otherwise dispose of Royalty Bearing Products within the United States. This agreement does not provide Licensee with the right to make, have made, import, use, offer to sell, sell, or otherwise dispose of products that embody or are made in accordance with Claims 4, 5, 11, 13–14, 16, 19 or 21 of the '623 Patent or Claims 2, 3, 10 or 15 of the '509 Patent.

2.02. *Royalties.* In consideration of the license granted under Section 2.01 hereof, Licensee shall pay Licensor a royalty of $____ per unit [2] for each Royalty Bearing Product Sold or Otherwise Disposed of by or for Licensee.. The term ''Sold or Otherwise Disposed of'' includes Royalty Bearing Products sold, leased, placed in commercial service, or delivered by or on behalf of Licensee within the United States. In no event shall a licensee pay more than one royalty on a single unit of Royalty Bearing Product.

Article 3—Notice Provisions

3.01. Licensee shall make written reports to the Independent Auditor within 30 days of the end of each calendar quarter through the life of each patent to be licensed, stating in each such report the aggregate number of Royalty Bearing Products it has Sold or Otherwise Disposed of within the United States during such calendar quarter and upon which royalty is payable as provided in this Agreement. The first such report shall include all Royalty Bearing Products Licensee has Sold or Otherwise Disposed of between the date of this Agreement and the date of such report. The Independent Auditor shall report to the Licensor only such information as is permitted under Paragraph IV.C of the Final Judgment in *United States* v. *Miller Industries, Inc., et al.,* Civ. 1:00 CV00305 (D.D.C. 2000).

3.02. Concurrently with each report, Licensee shall pay to the Independent Auditor royalties as the rate specified in Article 2.02 of this Agreement on the Royalty Bearing Products included in the report.

3.03 Licensee shall keep accurate books and records in accordance with accepted accounting practices showing the Royalty Bearing Products it made, had made, imported, used, offered for sale, Sold or Otherwise Disposed of during the life of this License Agreement. Such records shall be in sufficient detail to enable the royalties payable to Licensor to be determined.

3.04. The Independent Auditor shall notify Licensor when, in his or her independent judgment, an audit is appropriate, and upon Licensor's approval shall conduct an audit. Upon request of the Independent Auditor, Licensee will permit its books and records pertinent to the determination of the royalties payable to Licensor to be examined to the extent reasonably necessary for the Independent Auditor to verify the reports provided by Licensee. In the event that the Auditor shall have questions that appear not to be answered by such books and records, the Auditor shall have the right to confer with representatives of the Licensee, including but not limited to the Licensee's Chief Financial Officer and Plant Manager. Such examination shall be made at the expense of the Independent Auditor and may be requested no more than once per year. The Independent Auditor, who shall be obligated to confidentiality, shall report to Licensor only the amount of royalty payable for the period under audit based upon a review of the books and records provided. If the Independent Auditor determines that Licensee has underpaid the applicable royalties by less than 5% of the total applicable royalties for the period in question, Licensee shall pay the arrears and interest at a rate of 10% per annum, or the maximum allowable interest rate under the applicable state law if it is lower. If the Independent Auditor determines that Licensee has underpaid the applicable royalties by greater than 5% of the total applicable royalties for the period in question, Licensee shall pay the cost of the audit, the arrears, and interest at a rate of 10% per annum. or the maximum allowable interest rate under the applicable state law, if it is lower.

3.05 Nothing in this Agreement shall restrict the right of Licensor to seek redress for infringement of the [patents to be licensed] by licensee occurring before the date of execution of this Agreement.

Article 4—Term and Termination

4.01. Subject to the terms and conditions hereof, this Agreement shall become effective upon execution by both parties and shall remain in force for the life of the last licensed patent to expire or upon termination. Licensee may terminate this Agreement by giving Licensor at least 90 days' prior written notice of termination. Licensor may terminate this Agreement immediately, and refuse to grant Licensee a new license, if Licensee commits a material breach, as defined in Section 4.02 below.

4.02. Licensor may treat as a material breach: (1) Licensee's failure to make a report pursuant to Section 3.01 hereof, or to pay corresponding royalties due under such report pursuant to Section 3.02 hereof, provided that such failure to not cured or resolved within 30 days after Licensee receives notice thereof; (ii) the Independent Auditor's determination, as a result of an audit conducted pursuant to Section 3.04 above, that Licensee has underpaid the royalties by more than 20% in the applicable period, provided that the underpayment is

[1] The royalty shall not exceed $150 per unit, adjusted up or down annually in accordance with the change in the U.S. Department of Labor Producer Price Index for Finished Goods.

[2] The royalty shall not exceed $175 per unit, adjusted up or down annually in accordance with the change in the U.S. Department of Labor Producer Price Index for Finished Goods.

not cured or resolved within 60 days after Licensee is informed of the determination; (iii) the Independent Auditor's determination in two successive audits conducted pursuant to Section 3.04 above, that Licensee has underpaid the royalties by more than 20% in the applicable period whether or not such underpayment is cured; or (iv) Licensee's failure to re-establish compliance with its obligations to maintain liability insurance under Section 5. 10(b) hereof within 60 days of receiving notice from Licensor of its non-compliance. The provisions of Section 5.04 concerning Force Majeure shall apply to the curing or resolution of grounds for a material breach.

4.03. [To be included only in all licenses granted before entry of the Final Judgment.] Licensor shall have the option to terminate this Agreement if, in the matter United States v. Miller Industries, Inc. et al., either of the following events occur: (1) Plaintiff withdraws its consent to entry of the proposed Final Judgment, or (2) the Court declines to enter the proposal Final Judgment, and the time has expired for all appeals from any Court ruling declining such entry. Such termination shall be effective 60 days after Licensor notifies License of the occurrence of event (1) or (2) under this Section 4.03.

4.04. In the event of termination, License shall report under Section 3.01 hereof, and pay under Section 3.02 hereof, royalties on all Royalty Bearing Products that it has made or imported prior to termination. A terminated Licensee shall have the right at any time to sell or otherwise dispose of any Royalty Bearing Product on which royalties have been paid. Termination shall not affect Licensee's duty to pay royalty obligations hereunder, and shall not affect Licensor's right to request an audit covering any period during which Licensee has a right hereunder to make or import any product.

Article 5—Miscellaneous Provisions

5.01. *Limitations of Liability and Claims.*

(a) Licensor warrants that it owns the entire right, title, and interest to the [patent(s) being licensed] and has the ability to license the [patent(s) being licensed] but otherwise neither party makes any representations, extends warranties of any kind, either express or implied, and each party specifically disclaims any implied warranty of merchantability or fitness for a particular purpose in relation to the teachings of the [patent(s) being licensed].

(b) The parties are under no obligation and shall not be required under this Agreement to bring or prosecute actions or suits against any third party for infringement of the [patent(s) being licensed].

(c) Licensor warrants that, should Licensee (in its own discretion) obtain an ''Approved Proposed Design'' from the Designated Expert pursuant to Section IV of the Final Judgment in United States v. Miller Industries, Licensor will not challenge as infringement of any unlicensed claim of the '509 or '623 Patents the Licensee's production of products made in accordance with the specifications of an Approved Proposed Design.

5.02 *Relationship of the Parties.* The parties shall be independent contractors hereunder and neither party shall have the power or authority to bind the other party with respect to any third party. Except as specifically provided herein, each party shall bear its own costs and expenses.

5.03. *Effect Agreement.* This Agreement embodies the entire understanding between the parties with respect to the subject matter hereof and supersedes any and all prior understandings and agreements, oral or written, relating thereto. Any amendment hereof must be in writing and signed by both parties.

5.04. *Force Majeure.* Each party's performance hereunder is subject to interruption or delay due to causes beyond its reasonable control such as acts of God, acts of government, war or other hostility, the elements, fire, explosion, power failure, industrial or labor dispute, and the like. In the event of such an interruption or delay, any relevant period of performance of the party affected shall be extended for a period of time equal to the period of the interruption or delay and any obligation of the party whose performance is not affected which corresponds to the interrupted or delayed performance shall be suspended for a period of time equal to the period of the interruption or delay. Any party whose performance hereunder is subject to interruption or delay shall give prompt notice to the other party of the reason or reasons for the commencement of and of the conclusion of such interruption or delay.

5.05. *Assignment and Successors.* This Agreement shall inure to the benefit of and be binding upon the parties as well as subsidiaries, affiliates, and successors-in-interest of the parties hereto. Neither party nor any subsidiary, affiliate or successor-in-interest shall assign or transfer any of its rights, privileges or obligations hereunder without the prior written consent of the other party, except that Licensor may, without the consent of Licensee, assign this license in connection with the transfer of all or substantially all of its towing equipment manufacturing and distribution business. Nothing in this Agreement grants, or is intended to grant the right or authorization to grant, sublicenses of the [patent(s) being licensed]. Upon a permitted assignment of this Agreement, said assignee shall expressly agree in writing to be bound by all of the provisions of this Agreement. However, nothing in this Section shall permit a former licensee of the [patents being licensed] who has been terminated for material breach as defined in Section 4.02 to exercise any rights under this Agreement.

5.06. *Severability.* Should any provision of this Agreement be held to be void, invalid unenforceable or illegal by a court, the validity and enforceability of the other provisions shall not be affected thereby.

5.07. *Non-Waiver.* Failure of either party to enforce any provision of this Agreement shall not constitute or be construed as a waiver of such provision nor of the right to enforce such provision.

5.08. *Notices.* In order to be effective, all notices, requests, demands, agreements, consents, approvals, permissions and other communications required or permitted hereunder shall be in writing, shall be delivered personally, faxed, transmitted by courier or express service, or mailed, with proper charge prepaid, to the party for whom intended as set forth below, and shall be deemed to be given upon the date of actual receipt:

To Licensee:

To Licensor: President, Miller Industries, Inc., 8503 Hilltop Drive, Ooltewah, TN 37363.

(by other means)

The sending party shall have the burden of proving receipt. Either party may change any address to which notices and other communications are to be directed to it by giving notice of such change to the other party in the manner provided above.

5.09 *Governing Law.* This Agreement shall be governed by and construed under the laws of the State of Tennessee.

5.10. *Insurance.* During the term of this Agreement, Licensee shall maintain broad form general liability insurance, including blanket contractual, products and completed operations liability coverage, in the amount of two (2) million dollars. Within 30 days following execution of this Agreement, Licensee shall deliver to Licensor a Certificate of Insurance and, subsequently, any renewals thereof evidencing the insurance required by this Paragraph.

5.11. *Patent Marking.* Licensee shall mark each Royalty Bearing Product made, used, Sold or Otherwise Disposed of under this license with the following marking:

Manufactured and sold under license of United States Patent Nos. [Patent(s) being licensed].

5.12. *Trademarks and Trade Names.* The license herein granted conveys no right to Licensee to use or register any trademarks or trade names of the Licensor.

5.13. *Preservation of Licensor's Rights.* Licensor's grant of rights to Licensee pursuant to this Agreement shall in no way restrict Licensor's right to manufacture and sell products pursuant to the [patent(s) being licensed].

In witness whereof, the parties have executed this Agreement by their authorized representatives.

[Licensee]

By _____

Its _____

Date _____

[Licensor]

By _____

Its _____

Date _____

Exhibit C: Notification of Available Licenses

Miller Industries, Inc. and Miller Industries Towing Equipment, Inc. (''Miller Industries'') have consented to the entry of the attached proposed Final Judgment to resolve a civil suit brought by the Antitrust Division of the Department of Justice. Under the proposed Final Judgment, Miller Industries is required to offer to any third party a non-exclusive license to make and sell products covered by one or more of the following United States Patents. Terms and maximum unit royalty rates for such licenses are specified below and in greater detail in Exhibit A to the Final Judgment:

No. 4,836,737 (the '737 Patent, also known as the L-Arm Patent): $125.00
No. 5,061,147 (the '147 Patent, also known as the ''Independent Raise-and-Lower Patent''): $150.00
No. 5,628,609 (the '609 Patent, also known as the ''Backsaver'' Patent): $150.00
The L-Arm and the Independent Raise-and-Lower Patents, together: $175.00
The L-Arm and the Backsaver Patents, together: $175.00

The proposed Final Judgment also requires Miller Industries to offer to any third party a non-exclusive license to certain improvements in the L-Arm, wheel lift designs covered by United States Patent Nos. 4,637,623 and 4,798,509 (respectively the '623 and '509 Patents, also known as the ''Improvement Patents''). Miller Industries will license the features under these Improvement Patents that allow the L-Arm wheel lift to pivot horizontally and vertically. Terms and maximum unit royalty rates for such licenses are specified below and in greater detail in Exhibit B to the Final Judgment:

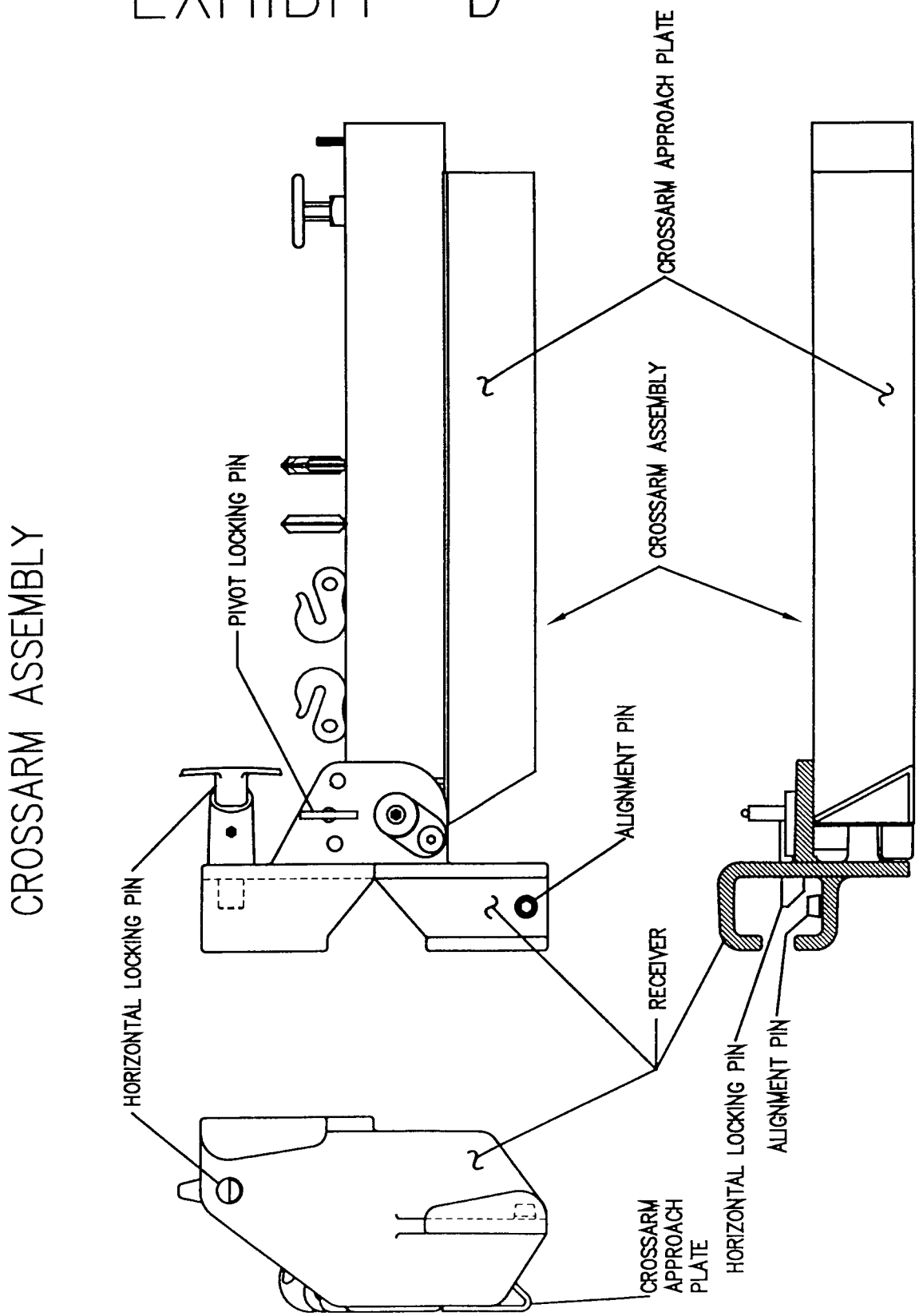
Licensed Claims of the Improvement Patents: $150.00
Licensed Claims of the Improvement Patents and the L-Arm Patent, together: $175.00

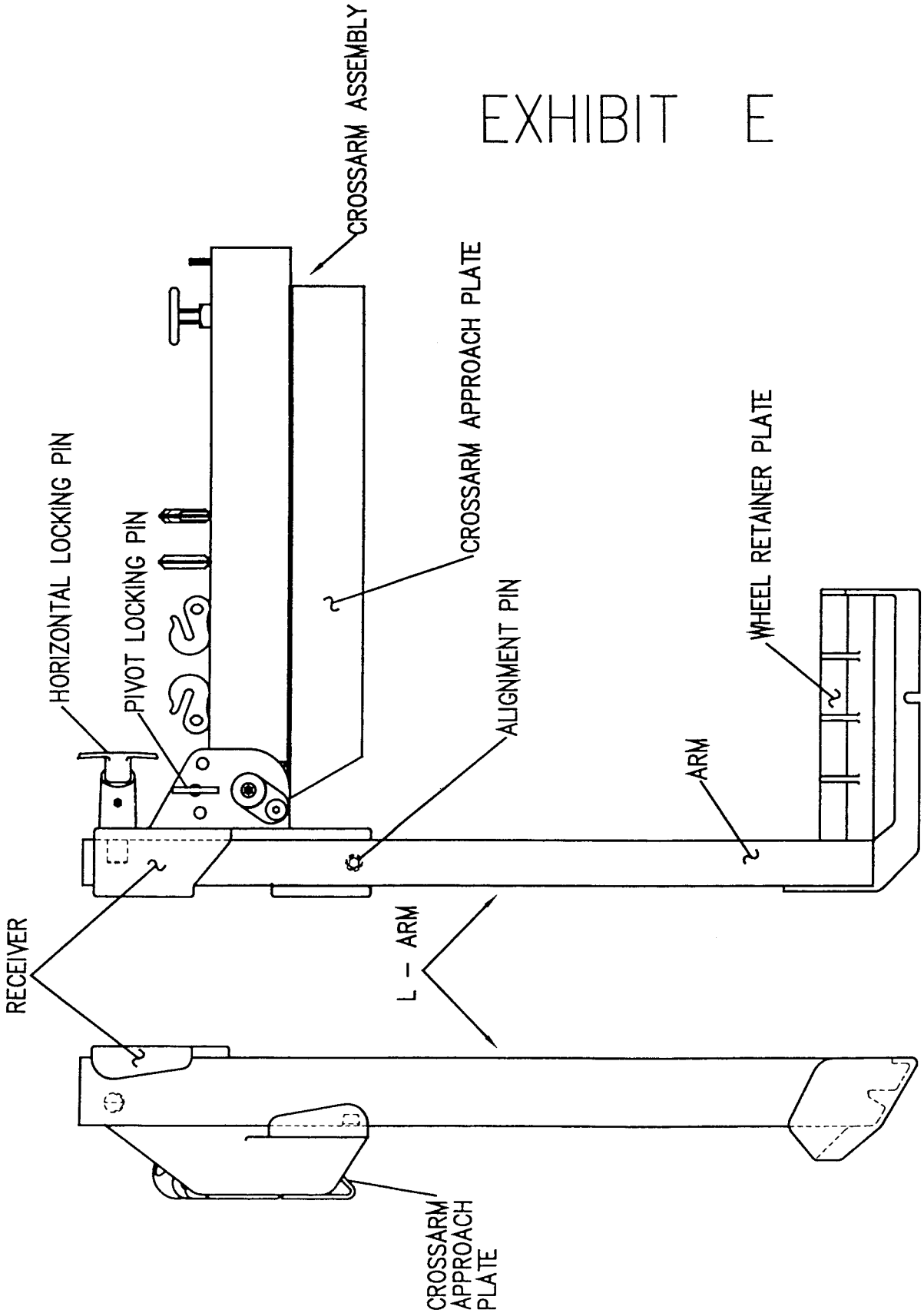
These Improvement Patents ('623 and '509), originally owned by Vulcan International, Inc., embody improvements to the L-Arm wheel lift found on Vulcan products. Under the terms of this license, licensees will be able to use all features covered by the Improvement Patents (such as the horizontal and vertical pivoting of the L-arms) except for three features: (1) The vertical locking pin device, (2) the elongated curved wheel retainer plate, and (3) the wheel lift receiver placed completely above the cross bar.

Licensees under the Licensed Claims of the Improvements Patents will be able to make and sell many wheel lift devices covered by the claims being licensed, including Miller Industries' Century design, drawings of which are attached as Exhibits D and E to the Final Judgment. Licensees under the Licensed Claims of the Improvement Patents may also develop and produce their own independent designs, so long as these do not include the three patented features mentioned above that are not being licensed.

BILLING CODE 4410–11–M

EXHIBIT D


CROSSARM ASSEMBLY
CROSSARM APPROACH PLATE
CROSSARM ASSEMBLY
PIVOT LOCKING PIN
ALIGNMENT PIN
HORIZONTAL LOCKING PIN
RECEIVER
HORIZONTAL LOCKING PIN
ALIGNMENT PIN
CROSSARM APPROACH PLATE



BILLING CODE 4410–11–C

If they want additional assurance that Miller Industries cannot charge their independent designs with infringement of the Unlicensed Claims of the Improvement Patents, licensees may, before marketing a product incorporating their independent design, elect to obtain a determination by an independent expert. Miller Industries will pay for the time that it takes the independent expert to become familiar with the Improvement Patents, and the licensee will pay for the expert's time required, after his/her familiarization, to make the determination. The independent expert's determination that a design is covered by the license under the Improvement Patents will be binding on Miller Industries. The independent expert will be required to keep the licensee's request for a determination, and the design for which the determination is requested, confidential from Miller Industries until the licensee begins selling products based on the design approved by the independent expert.

Section IV of the Final Judgment describes the requirements for these licenses. The licenses are available now and will continue to be available throughout the ten-year life of the Final Judgment. The licenses are uncancelable by Miller Industries during the life of the licensed patents, except on the ground of material breach (for instance, for non-payment of royalties), and in the unanticipated event that the Court declines to enter the proposed Final Judgment. In the event of license cancellation, a licensee will retain the right to sell at any time licensed products manufactured pursuant to the terms of the license.

Please contact Mr./Ms. _____ at Miller Industries [phone number] if you are interested in obtaining a license.

Competitive Impacts Statement

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA''), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On February 17, 2000, the United States filed a civil antitrust Complaint in this Court charging that Defendant Miller Industries, Inc., violated Section 7 of the Clayton Act, 15 U.S.C. 18, when it acquired ownership of two horizontal competitors, Vulcan Equipment, Inc. (''Vulcan'') and Chevron, Inc. (''Chevron''). Miller Industries acquired Vulcan in September 1996 and acquired Chevron in December 1997.

The Complaint charges that these acquisitions substantially lessened competition in the markets for the design, manufacture, and sale of the two major categories of towing and recovery vehicles generally used to service passenger cars and light trucks in the United States: light-duty towtrucks and light-duty car carriers. Prior to their acquisition, Vulcan and Chevron were proven innovators that had patented and successfully marketed key functional improvements in light-duty towtrucks and light-duty car carriers, and were two of the three most significant competitors faced by Miller Industries [1] in these markets. The acquisitions eliminated head-to-head competition that benefitted consumers, establishing Miller Industries as the dominant firm in the light-duty towtruck and light-duty car carrier markets with the ability unilaterally to raise prices or reduce quality. The acquisitions also increased Miller Industries' ownership of valuable patent rights, and reduced the number of firms with the right to offer towing and recovery vehicles incorporating the important technology covered by those patents. Finally, by reducing the number of competitors, these acquisitions increased the likelihood of anticompetitive coordinated behavior to raise prices or reduce quality.

The request for relief in the Complaint seeks: (1) A judgment that the acquisitions violate Section 7 of the Clayton Act; (2) injunctive or other appropriate relief to restore competition; (3) an award of costs to the Government; and (4) such other relief as the Court may deem just proper.

Shortly before the Complaint was filed, the parties reached a proposed settlement that would substantially restore competition in the United States light-duty towtruck and light-duty car carrier markets, primarily by requiring Miller Industries to grant a non-exclusive license to use certain items of important patented technology to any third party that requests such a license.

Along with the Complaint, the parties filed a Stipulation and proposed Final Judgment setting out the terms of the settlement. Pursuant to the obligations imposed in these documents, beginning within ten days of the time that they are filed with the Court, Miller Industries must offer to any third party a non-exclusive license under as many as five different patents. The proposed Final Judgment specifies the maximum unit royalties payable under these compulsory licenses, and also contains model licenses setting forth other terms. Miller Industries is required to continue to offer these licenses during the ten-year life to the proposed Final Judgment. the licenses are not cancelable by Miller Industries during the life of any licensed patent, unless the licensee commits a material breach as defined in the license (*e.g.,* non-payment of royalties), or the proposed Final Judgment is not entered by the Court. The proposed Final Judgment also requires Miller Industries to notify the Government prior to making future acquisitions of competitive assets valued above a certain dollar amount.

The plaintiff and defendants have stipulated that the Court may enter the proposed Final Judgment after compliance with the APPA, unless the plaintiff has theretofore withdrawn its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce provisions of the proposed Final Judgment and punish violations thereof.

II. Description of Events Giving Rise to the Alleged Violation

A. The Defendants and the Illegal Transactions

Defendant Miller Industries, Inc. is a Tennessee corporation. Its wholly owned subsidiary, Miller Industries Towing Equipment, Inc., is a Delaware corporation. Both maintain their principal place of business in Ooltewah, Tennessee. Defendant Chevron, a wholly owned subsidiary of Defendant Miller Industries, Inc., is a Pennsylvania corporation with its principal place of business in Mercer, Pennsylvania.

Miller Industries designs, manufactures, and markets many well known brands of light-duty towtrucks and light-duty car carriers, including those carrying the Century, Vulcan, Chevron, Holmes, Challenger, and Champion brands.

On September 2, 1996, Defendant Miller Industries, Inc., acquired, in exchange for shares of its capital stock having an approximate value of $8.2 million, all of the outstanding capital stock of Vulcan, one of its major competitors in the design, manufacture, and sale of light-duty towtrucks and light-duty car carriers, thereby obtaining control of Vulcan's assets, including several patents of great competitive value in the light-duty towtruck and light-duty car carrier markets. The transaction was not subject to the notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a, (''HSR Act'') because the dollar value of the transaction was below $15 million.

Miller Industries continues to market products under the Vulcan label, but Vulcan's production facilities have been dismantled and its operations integrated with those of Miller Industries. Title to the patents formerly owned by Vulcan has passed to Defendant Miller Industries Towing Equipment, Inc.

[1] When used herein, the term ''Miller Industries'' refer to any one or more of the defendants.

On December 5, 1997, Defendant Miller Industries, Inc. acquired, for $10 million cash, all of the capital stock of Chevron, another of its major competitors in the design, manufacture, and sale of light-duty towtrucks and light-duty car carriers, thereby obtaining control of Chevron's assets, including valuable patents in the light-duty towtruck and light-duty car carrier markets. This transaction also was not subject to the notification requirements of the HSR Act. Although many of Chevron's functions have now been integrated with Miller Industries, Defendant Chevron, Inc. survives as a wholly owned Miller Industries subsidiary and continues as the owner of record of the patents it held before its acquisition.

B. Product and Geographic Markets

Light-duty towtrucks and light-duty car carriers are the principal types of vehicles used by towing companies, garages, and other towing service providers in the United States to recover and transport immobilized or unattended illegally parked passenger cars and light trucks. Manufacturers design, construct, and assemble specialized equipment components, such as booms, winches, and bed-tilting mechanisms, for mounting on standard truck chassis supplied by automotive suppliers such as GM, Ford, Dodge, or Navistar. The installed price of the equipment used to construct a light-duty to towtruck is generally between twelve to fifteen thousand dollars, and between eleven and fourteen thousand dollars for a light-duty car carrier.

Towing and recovery vehicle fleets generally include both light-duty towtrucks and light-duty car carriers because each possesses characteristics that make it more efficient than the other in certain situations. Light-duty towtrucks, which lift a disabled vehicle by its front or back tires to tow it, maneuver better in confined spaces such as parking garages and narrow city streets and are generally more effective in difficult recovery situations. Light-duty car carriers have flat beds that can be titled to permit a disabled vehicle to be winched up onto the truck bed and carried. Light-duty car carriers are preferred for removing vehicles that are particularly susceptible to damage, and are generally more efficient in transporting a disabled vehicle over substantial distances. Also, a light-duty car carrier may be equipped with an ''underlift'' that permits it to tow a second vehicle in addition to the one on its bed, enabling it to remove two disabled vehicles simultaneously.

Removal and recovery of larger disabled vehicles, such as buses, heavy trucks, or construction equipment, requires the service of larger and more powerful vehicles, which also generally have different equipment. These heavier removal and recovery vehicles also cost more to purchase and operate.

Because of the distinct characteristics of light-duty towtrucks and light-duty car carriers, respectively, prospective buyers would not respond to a small but significant increase in the price of either one by substituting the other, or by substituting any other type of towing and recovery vehicle. Light-duty towtrucks and light-duty car carriers each comprises a separate relevant product market and, as there is no significant importation, the United States comprises the relevant geographic market in which the competitive effects of these acquisitions must be assessed.

C. Patent Barriers

Miller Industries owned valuable patented technology prior to its acquisitions of Vulcan and Chevron, and acquired additional important patents when it acquired these two companies. These patent rights relate to: (1) Improved wheel lift design technology, and (2) the ''independent raise and lower'' (''IRL'') technology.

1. The Wheel-Lift Patents

A wheel lift is a device mounted on the rear end of a light-duty towtruck or light-duty car carrier that cradles and supports from beneath the front or back tires of a disabled vehicle in order to apply the lifting power required to raise it into towing position, and to tow it. Nearly a decade ago, Miller Industries acquired the patents rights to a greatly improved wheel lift design called the L-Arm Wheel Lift (U.S. Patent No. 4,836,737) when it acquired Century Wrecking Company. Century had previously granted a paid-up royalty license under this patent to competitor Jerr-Dan Corporation.

Before being acquired by Miller Industries, Vulcan had invented significant improvements to the basic patented L-Arm Wheel Lift, and obtained the ''Vulcan Improvement Patents'' (U.S. Patent Nos. 4,637, 623 and 4,798,509). The key features of these improvements allow the L-Arm device to pivot both horizontally and vertically, providing for easier deployment of the wheel lift. Miller Industries and Vulcan entered into a cross license agreement under which Vulcan obtained a license under Miller Industries' L-Arm patent and Miller Industry obtained a license to use the most significant features of the Vulcan Improvement patents.

There is no established, commercially available alternative to the L-Arm or the Vulcan Improvement Patents. Prior to Miller Industries' acquisition of Vulcan, three competitors (Miller Industries, Jerr-Dan, and Vulcan) had the right to compete with products incorporating the L-Arm wheel lift, and two (Miller Industries and Vulcan) had the right also to compete with products incorporating the most significant features of the Vulcan Improvement Patents. Vulcan reserved for itself the exclusive rights to other features of the improvements, such as the use of a vertical looking pin device and the elongated curved plate.

Chevron, lacking rights to the above-described patents, in an effort to design around them, developed and obtained Patent No. 5,628,609 on the ''Backsaver'' wheel lift. Miller Industries nevertheless sued Chevron and charged that this Backsaver design infringed its L-Arm patent, but Miller Industries acquired Chevron before this issue was adjudicated.

2. The IRL Patent

A light-duty car carrier can be equipped with an ''underlift,'' that is a wheel lift (which can be, but need not be, an L-Arm wheel lift) mounted on its back end that can be used to tow another disabled vehicle once one disabled vehicle has been loaded atop its bed. Prior to its acquisition by Miller Industries, Chevron had developed and patented a greatly improved design for mounting a wheel lift as an underlift on a light-duty car carrier so that it could be raised into towing position, and lowered from it, independently of the tilting truck bed. The right to use this IRL feature (covered by U.S. Patent No. 5,061,147), which significantly facilitates removal and transportation of two vehicles simultaneously by a light-duty car carrier, is a substantial benefit to competitors in the United States light-duty car carrier market. Designing around the patent is difficult, time consuming, and expensive.

D. Harm to Competition as a Consequence of the Merger

Even before it acquired Vulcan and Chevron, Miller Industries was the nation's largest supplier of light-duty towtrucks and the second largest supplier of light-duty car carriers, with 45% and 23% shares of total revenues in those markets, respectively. With these acquisitions, Miller increased its market shares dramatically, so that after the acquisitions it accounted for approximately 73% of total revenues for

U.S. sales of light-duty towtrucks and about 47% of total revenues for U.S. sales of light-duty car carriers, and significantly increased concentration in both markets. As measured by the commonly used Herfindahl-Hirschman Index (HHI),[2] concentration of the light-duty towtruck market, which stood at an HHI of about 2650 before these acquisitions, rose by about 3000 points to an HHI of about 5650 after the acquisitions. Concentration of the light-duty car carrier market, which stood at an HHI of about 2380 before these acquisitions, rose by about 1200 points to an HHI of about 3580 after the acquisitions.

Miller Industries' acquisitions of Vulcan and Chevron also eliminated two significant and effective competitors, both of which had successfully developed and marketed valuable innovations in product design that had provided Miller Industries' products with important competition, and both of which would likely have continued to innovate had they remained independent. The acquisitions also reduced the number of firms able to offer products incorporating the L-Arm wheel lift and the most competitively significant features of the Vulcan Improvement Patents, and substantially increased Miller Industries' ownership of patent rights important for effective competition in the light-duty towtruck and light-duty car carrier markets. Miller Industries now faces competition in these markets from only one large competitor and a number of small firms.

As a result of the acquisitions, Miller Industries became the dominant firm in the light-duty towtruck and light-duty car carrier markets with the ability unilaterally to raise prices or reduce quality. In addition, by reducing the number of competitors, these acquisitions increased the likelihood of anticompetitive coordinated behavior to raise prices or reduce quality.

Successfull entry is difficult and unlikely, in large part because the L-Arm as well as other patented wheel lift designs owned by Miller Industries are critical for effective competition in both of these markets. It would take a new entrant considerable time, expenditure, and effort to develop product designs that did not infringe Miller Industries' patents—if it could be done at all—as well as establish the necessary distribution network and gain customer acceptance of its products.

[2] A definition and explanation of HHI is provided in Appendix A to the Complaint.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment is designed to eliminate the anticompetitive effects of Miller Industries' acquisitions of Vulcan and Chevron, primarily by requiring compulsory licensing of the above-described patents to any present competitor or entrant at reasonable royalties.

A. Patent Licenses

The proposed Final Judgment directs Miller Industries to offer, until the expiration of the ten-year term of the decree, to any third party requesting it a non-exclusive license for any one or more of: (1) The L-Arm patent, (2) certain specified claims of the Vulcan Improvement Patents, that allow the L-Arm to pivot horizontally and vertically, (3) the Backsaver patent, and (4) the IRL patent.

All licenses will be uncancelable by Miller Industries until the last of the licensed patents has expired, unless the licensee materially breaches (as defined in the license, *e.g.,* for non-payment of royalties) its terms.

The proposed Final Judgment requires Miller Industries to retain the services of an Independent Auditor to collect royalty payments and provide Miller Industries with the Payments along with reports that do not disclose competitively sensitive sales information about a licensee.

Licenses will be for the full subject matter scope of the L-Arm, Backsaver, IRL patents, and for specified claims of the Vulcan Improvement Patents (the ''Licensed Claims''). These Licensed Claims cover the horizontal and vertical pivoting features and are the claims that Vulcan had licensed to Miller Industries before Vulcan was acquired. The claims of the Vulcan Improvement Patents that are not licensed (the ''Unlicensed Claims'') are also specified and described in the Final Judgment. These cover the same features that, prior to its acquisition by Miller Industries, Vulcan had reserved for its own exclusive use.

To clarify the features covered by the Licensed Claims, and to facilitate the production by licensees of wheel lifts embodying these features, the proposed Final Judgment makes clear that the wheel lift design now used in Miller Industries' Century model towtruck is covered by the Licensed Claims and its not precluded from licensees' use by the Unlicensed Claims. The engineering drawings for the Century model wheel lift design are appended to the proposed Final Judgment as Exhibits D and E.

The Proposed Final Judgment also includes another option to facilitate licensing of the Licensed Claims and promote product innovation. Licensees that wish to incorporate the features of the Licensed Claims into their own wheel lift designs—rather than use the Century model design—may seek assurance that their designs fall within the Licensed Claims and do not infringe the Unlicensed Claims. Miller Industries shall retain a Designated Expert, to be selected at the sole discretion of the Government, who will at the request of an existing or prospective licensee, determine whether a licensee's proposed design falls within Licensed Claims. Miller Industries will be bound by a determination by the Designated Expert that a design falls within the Licensed Claims and will not subsequently challenge that design as an infringement of any Unlicensed Claim of the Vulcan Improvement Patents. The proposed Final Judgment provides that Miller Industries will pay, up to a specified maximum amount, the cost for the Designated Expert to review the licensed patents and gain sufficient familiarity to be able to assess specific design proposals offered by licensees. Any licensee that opts for such a determination will bear the additional cost of the Designated Expert's determination regarding its particular design. The proposed Final Judgment imposes requirements designed to assure that information about the proposed design remains confidential with the Designated Expert until products embodying the design are actually sold.

Each licensee and prospective licensee under the Vulcan Improvement patents may use the services of the Designated Expert, but no one is required to use them. Miller Industries is required to grant each request for a license, and a licensee of the Licensed Claims may choose simply to design and market its product. Of course, a licensee choosing this option would not be protected against the risk of a possible claim of infringement and the costs inherent therein.

The proposed Final Judgment is intended to restore competition and promote further innovation in the markets for light-duty towtrucks and light-duty car carriers. This will benefit customers by providing them with lower prices, better quality, and a greater variety of products. The L-Arm, the Licensed Claims of the Vulcan Improvements, the IRL patent, and the Backsaver Patent are important for effective competition in the markets for light-duty towtrucks and car carriers. Licensing these designs will also lower entry barriers and allow many firms to

offer products with these important features.

The proposed Final Judgment requires broad licensing to promote the wide dispersion and use of this intellectual property. This licensing, offered to all firms now in the industry and to firms that may enter in the future, will likely enable small firms to become more effective competitors, will likely lessen Miller Industries' market dominance, and will substantially ease entry barriers in the future. Broad licensing and use of the intellectual property, now concentrated in Miller Industries' hands, will promote further innovation and improvements in light-duty towtruck and light-duty car carrier technology. Given the configuration of the markets here, and the fact that these acquisitions were completed some years ago, the broad licensing scheme required by the proposed Final Judgment is the most effective form of relief in this case and offers the prospect of substantially increasing competition in the affected markets.

Since the decree requires Miller to license all comers during the term of the decree for the life of the patents, it was necessary to prevent Miller from exercising market power over the price or terms of such licenses or from delaying, through lengthy negotiations, implementation of the compulsory licensing requirement. Therefore, the decree requires that licenses be at reasonable royalty rates not to exceed certain maximum amounts and contains model licenses that set forth the basic terms. However, the decree allows Miller Industries and a licensee to reach a mutual agreement to lower royalty rates or to vary other license terms.

B. Notification of Future Acquisitions

The proposed Final Judgment also requires Miller Industries to notify the Department of Justice prior to acquiring any assets of or interest in a manufacturer of towing and recovery equipment, or any patent relating to the manufacture of towing and recovery equipment, when the value of the acquisition is over $5 million. This provision supplements the statutory notification provisions of the HSR Act, under which parties generally need not file a notification if the dollar value of their transaction is below $15 million. This decree provision was included because the acquisitions of Vulcan and Chevron lessened competition even though the dollar value of these transactions fell below the HSR Act's notification threshold. It will give the Department of Justice the opportunity to assess, before the acquisitions are consummated, the likely competitive effects of any future Miller Industries' asset acquisitions greater than $5 million in value in the towing and recovery vehicle markets.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest. The APPA provides for a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so in writing within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All written comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to its entry. The written comments and the response of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to: Mary Jean Moltenbrey, Chief, Civil Task Force, Antitrust Division, United States Department of Justice, 325 Seventh Street, N.W., Suite 300, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over the action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits. The United States is satisfied, however, that the broad licensing required by the decree is the most effective form of relief in this case, where the challenged acquisitions were completed some years ago and given the configuration of these markets. The proposed relief will provide and promote competition in the design, manufacture and sale of towtrucks, and will significantly ease barriers to entry.

VII. Standard of Review Under the APPA for Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' In making that determination, the Court may consider:

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other consideration bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issuers at trial. 15 U.S.C. 16(e).

As the Court of Appeals for the District of Columbia Circuit held, the APPA permits the Court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, ''the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.[3] Rather,

[3] 119 Cong. Rec. 24598 (1973); see also United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A ''public interest'' determination can be made properly on the basis of the Competitive

absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comment in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977–1 Trade Cas. ¶ 61,508 at 71,980 9W.d. Mo. 1977). Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public. ''United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), quoting United States v. Bechtel Corp., 648 F.2d 660,666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). Precedent requires that

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is 'within the reaches of the public interest.' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[4]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability:

[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is ''within the reaches of public interest.'' [5]

Moreover, the Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and the Act does not authorize the Court to ''construct [its] own hypothetical case and then evaluate the decree against the cases.'' Microsoft, 56 F.3d at 1459. Since ''[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that the court ''is only authorized to review the decree itself'', and not to ''effectively redraft the complaint'' to inquire into other matters that the United States might have but did not pursue. Id.

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

For plaintiff United States of America.

Respectfully submitted,

Kurt Shaffert,

D.C. Bar No. 11791.

John W. Poole,

D.C. Bar No. 56944.

William Stallings,

D.C. Bar No. 444924, Attorneys, Civil Task Force, Antitrust Division, U.S. Department of Justice, 325 7th Street, N.W., Rm. 300, Washington, DC 20530.

Dated: February 23, 2000, Washington, DC.

Certificate of Service

This certifies that on this day I caused a true copy of the foregoing Competitive Impact Statement to be served by first class mail, postage prepaid, upon counsel for defendants, as indicated below:

C. Loring Jetton, Jr., Esquire, Wilmer, Cutler & Pickering, 2445 M Street, Northwest, Washington, DC 20037–1420, Counsel for Defendants Miller Industries, Inc., Miller Industries Towing Equipment, Inc., and Chevron, Inc.

Dated: February 23, 2000.

Kurt Shaffert.

[FR Doc. 00–5536 Filed 3–10–00; 8:45 am]

BILLING CODE 4410–11–M

Impact Statement and Response to Comments files pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and the further proceeding would aid the court in resolving those issues. *See* H.R. 93–1463, 93rd Cong. 2d Sess. 8–9, reprinted in (1974) U.S.C.C.A.N. 6535, 6538.

[4] United States v. Bechtel, 648 F.2d at 666 (internal citations omitted) (emphasis added); see United v. BNS, Inc., 858 F. 2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F. 2d 558, 565 (2d Cir. 1983).

[5] United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982) (citations omitted), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette, 406 F. Supp. at 716; United States v. Alcan Aluminium, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Maritime Advisory Committee for Occupational Safety and Health (MACOSH); Notice of Rechartering

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of Recharting of MACOSH.

SUMMARY: In accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. app. I), and after consultation with the General Services Administration (GSA), I have determined that rechartering the Maritime Advisory Committee for Occupational Safety and Health (MACOSH) is in the public interest in connection with the performance of duties imposed on the Department by the Occupational Safety and Health Act of 1970 (OSH Act), 84 Stat. 1590, 29 U.S.C. 651 *et seq.*). Authority to establish this Committee, which addresses maritime matters, is found in sections 6(b) and 7(b) of the OSH Act; section 41 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and by other general agency authority in Title 5 of the United States Code.

FOR FURTHER INFORMATION CONTACT: Chappell Pierce, Acting Director, Office of Maritime Standards, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–3609, 200 Constitution Avenue, N.W., Washington, DC 20210; Telephone: (202) 693–2255.

SUPPLEMENTARY INFORMATION:

I. Background

The Committee will advise OSHA on matters relevant to the safety and health of workers in the maritime industry. This includes advice on maritime issues that will result in more effective enforcement, training, and outreach programs, and streamlined regulatory efforts using consensual rulemaking techniques, where appropriate, as well as standard rulemaking procedures.

The Committee will function solely as an advisory body and in compliance with the provisions of the Federal Advisory Committee Act and OSHA's regulations covering advisory committees (29 CFR Part 1912). The Committee charter will be filed 15 days from the date of this publication.

II. Nominations

On January 24, 2000, the Agency solicited nominations for membership on MACOSH (65 FR 3740). Interested persons were invited to submit their own names or the name of another person who they believed to be qualified to serve on the advisory committee. OSHA will publish the names of those selected for membership on MACOSH shortly in the **Federal Register**.

III. Authority

This document was prepared under the direction of Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Washington, D.C. 20210, pursuant to sections 6(b) and 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655, 656), the Federal Advisory Committee Act (5 U.S.C. App. 2), and 29 CFR Part 1912.

Signed at Washington, DC this 6th day of March 2000.

Charles N. Jeffress,

Assistant Secretary of Labor.

[FR Doc. 00–6109 Filed 3–10–00; 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 2000–11; Exemption Application No. D–10721, et al.]

Grant of Individual Exemptions; Metropolitan Life

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, 5 U.S.C. App. 1 (1996), 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.

Metropolitan Life Insurance Company (MetLife), Located in New York, NY

[Prohibited Transaction Exemption 2000–11; Exemption Application No. D–10721]

Exemption

Section I. Exemptions Involving the Demutualization of Metlife and the Excess Holding of Consideration by Plans Sponsored by Metlife and its Affiliates (the MetLife Plans)

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 receipt, by any eligible policyholder (the Eligible Policyholder) of MetLife that is an employee benefit plan (the Plan), subject to applicable provisions of the Act and/or the Code, including any Eligible Policyholder that is a Plan covering employees of MetLife or its affiliates, of an interest (the Interest) in a trust (the Trust), whose corpus consists of common stock (the Common Stock) issued by MetLife, Inc. (the Holding Company), the parent of MetLife; or (2) the receipt of cash or policy credits by such Plans,[1] in exchange for such Eligible Policyholder's membership interest in MetLife, pursuant to a plan of conversion (the Plan of Reorganization) adopted by MetLife and implemented in accordance with section 7312 of the New York Insurance Law.

In addition, the restrictions of section 406(a)(1)(E) and (a)(2) and section 407(a)(2) of the Act shall not apply to the receipt and holding, by a MetLife Plan, of Trust Interests, whose fair market value exceeds 10 percent of the value of the total assets held by such Plan.

The exemptions that are described above are subject to the following conditions:

(a) The Plan of Reorganization is implemented in accordance with procedural and substantive safeguards that are imposed under New York Insurance Law and is subject to review and approval by the New York Superintendent of Insurance (the Superintendent). The Superintendent reviews the terms of the options that are provided to Eligible Policyholders of MetLife as part of such Superintendent's review of the Plan of Reorganization, and the Superintendent only approves the Plan of Reorganization following a determination that the Plan is fair and equitable to all Eligible Policyholders and is not detrimental to the public.

(b) Each Eligible Policyholder has an opportunity to vote at a special meeting to approve the Plan of Reorganization after receiving full written disclosure from MetLife.

(c) One or more independent fiduciaries of a Plan (the Independent Fiduciary) that is an Eligible Policyholder receives Trust Interests, cash or policy credits pursuant to the terms of the Plan of Reorganization and neither MetLife nor any of its affiliates exercises any discretion or provides ''investment advice,'' within the meaning of 29 CFR 2510.3–21(c) with respect to such acquisition.

(d) In the case of a MetLife Plan, the Independent Fiduciary—

(1) Votes at the special meeting of Eligible Policyholders to approve the Plan of Reorganization;

(2) Makes any election, to the extent available under the Plan of Reorganization, to receive Trust Interests or cash on behalf of the MetLife Plan;

(3) Monitors, on behalf of the MetLife Plan, the acquisition and holding of any Trust Interests received;

[1] Unless otherwise noted, the terms ''Plan'' and ''MetLife Plan'' are referred to collectively as the ''Plans.''

(4) Makes determinations on behalf of the MetLife Plan with respect to the voting and the continued holding of Trust Interests by such Plan.

(5) Withdraws shares of Holding Company Common Stock that are held in Trust which are equivalent to Trust Interests allocated to a MetLife Plan and disposes of such Trust Interests:

(i) Not exceeding the limits of section 407(a) of the Act in a prudent manner.

(ii) Exceeding the limits of section 407(a) of the Act within six months of the initial public offering (the IPO); and

(6) Provides the Department with a complete and detailed final report as it relates to the MetLife Plans prior to the effective date of the demutualization.

(e) Each Eligible Policyholder entitled to receive Trust Interests is allocated at least ten shares of Holding Company Common Stock and additional consideration may be allocated to Eligible Policyholders who own participating policies based on actuarial formulas that take into account each participating policy's contribution to the surplus of MetLife, which formulas have been reviewed by the Superintendent.

(f) All Eligible Policyholders that are Plans participate in the demutualization transaction on the same basis within their class groupings as other Eligible Policyholders that are not Plans.

(g) No Eligible Policyholder pays any brokerage commissions or fees in connection with the receipt of consideration.

(h) All of MetLife's policyholder obligations remain in force and are not affected by the Plan of Reorganization.

(i) The terms of the transactions are at least as favorable to the Plans as an arm's length transaction with an unrelated party.

Section II. Exemptions Involving Sales or Withdrawals Occurring in Connection With the Operation or Termination of the Trust

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 (1) sale by a Plan to the Holding Company of Holding Company Common Stock, which is held in the Trust for the benefit of such participating Plan and is evidenced by Trust Interests, following the effective date of the demutualization or upon the termination of the Trust; and (2) the withdrawal by a Plan of Holding Company Common Stock, as evidenced by Trust Interests, beginning on the first anniversary of the effective date of the demutualization until the termination of the Trust.

The exemptions are subject to the following conditions:

(a) The decision by a Plan to arrange for the sale of Holding Company Common Stock to the Holding Company or to withdraw Holding Company Common Stock is made by a Plan fiduciary which is independent of MetLife and its affiliates.

(b) No Plan pays any fees or commissions in connection with either transaction.

(c) The terms of the transactions are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

(d) Any sale of shares of Holding Company Common Stock held in the Trust for the benefit of a Plan to the Holding Company is at a price reflecting the fair market value of the Common Stock as determined by averaging the high and low trading prices as reported on the New York Stock Exchange on the day of sale, except that if such sale is pursuant to the termination of the Trust, such fair market value is determined as the average of the closing price for a share of such Holding Company Common Stock for the twenty consecutive trading days ending on the third calendar day immediately prior to the date of the sale.

Section III. Definitions

For purposes of this exemption:

(a) The term ''MetLife'' means Metropolitan Life Insurance Company and any affiliate of MetLife as defined in paragraph (b) of this Section III.

(b) An ''affiliate'' of MetLife includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with MetLife. (For purposes of this paragraph, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.); and

(2) Any officer, director or partner in such person.

(c) The term ''Eligible Policyholder'' means a policyholder whose name appears on MetLife's records as the owner of a policy on the adoption date of MetLife's Plan of Reorganization by MetLife's Board of Directors and, which is in full force for its full basic benefits and has not matured by death or otherwise been surrendered or terminated.

(d) The term ''policy credit'' means (1) an increase in accumulation value, to which the Company will apply no sales, surrender charges, or that will be further increased in value to offset any of these charges, under a policy that is a deferred annuity; (2) an increase in the amount of the payments distributed under a policy that is in the course of annuity payments; (3) additional insurance or dividends with interest, as appropriate (depending upon whether the additional insurance option or the dividends with interest option has been selected with respect to the underlying policy, provided that dividends with interest will apply where an option other than additional insurance or dividends with interest has been selected), under a policy that is a life insurance policy; or (4) an increase in the retired lives reserve, under a policy that is a life or health insurance funding account or a guaranteed life insurance funding account.

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) that was published on November 24, 1999 at 64 FR 66201.

Written Comments

The Department received 25 written comments with respect to the Notice. Twenty-four comments were submitted by Eligible Policyholders of MetLife and one comment was submitted by MetLife.

Of the Eligible Policyholder comments received, one commenter was in favor of the exemption and urged the Department to grant it. Six commenters requested general information that was not relevant to the exemption and their comments were, in turn, forwarded to appropriate personnel within MetLife for response.

Seventeen commenters said they were opposed to the exemption for various reasons. These commenters questioned whether the exemption would have an adverse impact upon their benefits or they expressed general dissatisfaction with the demutualization concept or with the insurer. Because many of the comment letters presented similar issues, particularly the effect of the demutualization on policyholder benefits, the Department forwarded a representative sample to MetLife for response.

In its comment, MetLife requested clarification to the Notice. The comment also sought to expand on the description of the transactions described in the Notice and the Summary of Facts and Representations (the Summary).

Discussed below are the substantive comments that were submitted by the Eligible Policyholders as well as MetLife's responses to the comment letters. Also discussed is MetLife's comment and the Department's responses to specific areas of technical

clarification in the Notice and the Summary.

Eligible Policyholder Comments

As noted above, a number of commenters said they were opposed to the exemption because they believed it might affect their policyholder benefits adversely or, as one commenter stated, ''relieve those in charge of the plan from the obligations of ERISA.''

In response, MetLife asserts that the comments have nothing to do with the merits of the exemption. Instead, MetLife explains that the commenters had an ample opportunity to express their concerns at the policyholder hearing that was held on January 24, 2000. In addition, MetLife states that the concerns of these policyholders have been addressed in the ''Policyholder Information Booklet, Part I,'' which was mailed to all Eligible Policyholders. According to MetLife, in that booklet, it is clearly stated that ''Your policy benefits, values, guarantees and dividend eligibility will not be reduced, and your policy premiums will not be increased, in any way, due to the demutualization.''

MetLife's Comments

1. *Duties of the Independent Fiduciary.* On page 66202 of the Notice, Section I(d) sets forth the duties of State Street Bank and Trust Company (State Street), the independent fiduciary for the MetLife Plans. MetLife states that it is its understanding that State Street's duty to continue to monitor a MetLife Plan's holding of Trust Interests or Holding Company Common Stock will exist only so long as the MetLife Plan's holding is in excess of the 10 percent limitation in section 407(a) of the Act. Once a MetLife Plan's holdings have been reduced to below this limit, which must occur within six months of the initial public offering (the IPO), MetLife notes that State Street's oversight activities will cease.

The Department wishes to confirm MetLife's understanding of the role of State Street as independent fiduciary for the MetLife Plans.

2. *Eligible Policyholder Consideration.* On page 66202 of the Notice, paragraph (e) of Section I provides for the allocation of Holding Company Common Stock to Eligible Policyholders among the fixed and variable components. However, MetLife represents that it would be more accurate to reword this condition as follows since not all policyholders who receive the fixed component of compensation will also receive the variable component:

(e) Each Eligible Policyholder entitled to receive Trust Interests is allocated at least ten shares of Holding Company Common Stock, and additional consideration may be allocated to Eligible Policyholders who own participating policies based on actuarial formulas that take into account each participating policy's contribution to the surplus of MetLife, which formulas have been reviewed by the Superintendent.

MetLife points out that the same comment is applicable to Representation 9(d) of the Summary.

In response to this clarification, the Department has made the requested revisions to the Notice and the Summary.

3. *MetLife Definition.* On page 66202 of the Notice, Section III(a) in part, defines the term ''MetLife'' as ''The MetLife Insurance Company.'' However, MetLife requests that the article ''The,'' be deleted from the term and in response to this comment, the Department has made the requested revision.

4. *Affiliate Definition.* On page 66202 of the Notice, paragraph (b) defines the term ''affiliate'' of MetLife to include—

(1) Any person directly or indirectly through one or more intermediaries, controlling controlled by, or under common control with MetLife; (For purposes of this paragraph, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

(2) Any officer, director or partner in such person; and

(3) Any corporation or partnership of which such person is an officer, director or a 5 percent partner or owner.

While Metlife concedes that subparagraphs (1) and (2) of the definition are acceptable, that portion of subparagraph (3) which includes an entity in which MetLife holds an interest of 5 percent or more is too broad. In preparing the list of MetLife Plans, MetLife states that it included Plans of entities in which it owned a 50 percent or greater interest. If it were required to use the 5 percent threshold, MetLife states that the list of Plans would have to include Plans of companies in which it holds a minority (but greater than 5 percent) interest. In many cases, MetLife represents that it has no knowledge of these Plans, and as a minority owner, has no control over them. Accordingly, MetLife requests that the Department delete subparagraph (3) from the definition. MetLife notes that subparagraph (1) would still pick up the majority-owned subsidiaries whose Plans are already included in the schedule of the MetLife Plans supplied to the Department.

The Department concurs with this comment and has made the requested modification.

5. *Eligible Policyholder Definition.* On page 66202 of the Notice, paragraph (c) of Section III defines the term ''Eligible Policyholder'' as —

* * * a policyholder whose name appears on MetLife's records as the owner of a policy on the adoption date of MetLife's Plan of Reorganization by MetLife's Board of Directors, which is in full force for its full basic benefits and has not matured by death or otherwise been surrendered or terminated and which remains in force on the effective date of MetLife's demutualization.

MetLife notes that the definition ends with the phrase ''and which remains in force on the effective date of MetLife's demutualization.'' However, MetLife wishes to clarify that New York law was recently amended to eliminate the requirement that the policy remain in force until the effective date to be eligible. Therefore, MetLife states that its Plan of Reorganization now provides that a policy which was in force on the adoption date (September 28, 1999) will be eligible even if it does not remain in force until the effective date.

In response, the Department has considered this clarification and has made the requested modification to the Notice.

6. *Policy Credit Definition.* On page 66202 of the Notice, paragraph (d) of Section III defines the term ''policy credit'' as —

* * * (1) a dividend deposit or dividend addition; (2) an increase in accumulation value (to which no sales or surrender or similar charges shall be applied); (3) additional coverage or benefits; (4) an extension of the expiry date; or (5) a reduction in premium payments.

MetLife represents that the definition of the term ''policy credit'' in the Notice is a somewhat simplified version. Therefore, it requests that the term as defined in the Plan of Reorganization, which is stated as follows, be substituted:

* * * (1) an increase in accumulation value, to which the Company will apply no sales, surrender charges, or that will be further increased in value to offset any of these charges, under a policy that is a deferred annuity; (2) an increase in the amount of the payments distributed under a policy that is in the course of annuity payments; (3) additional insurance or dividends with interest, as appropriate (depending upon whether the additional insurance option or the dividends with interest option has been selected with respect to the underlying policy, provided that dividends with interest will apply where an option

other than additional insurance or dividends with interest has been selected), under a policy that is a life insurance policy; or (4) an increase in the retired lives reserve,[2] under a policy that is a life or health insurance funding account or a guaranteed life insurance funding account.

In response, the Department has revised the definition of the term ''policy credit'' to reflect the version set forth in MetLife's final Plan of Reorganization.

7. *Trust Corpus.* On page 66203 of the Notice, the first sentence of Representation 5 of the Summary provides, in part, that MetLife will establish the Trust ''to hold shares of Holding Company Common Stock that are received by millions of policyholders under its Plan of Reorganization.'' For the sake of accuracy, MetLife states that this clause should be revised to state that the Trust will hold shares of Holding Company Common Stock that are allocated to policyholders since the policyholders will not actually ''receive'' the shares unless and until they are withdrawn from the Trust.

The Department concurs with this comment and has revised the first sentence of Representation 5.

8. *Miscellaneous Changes/Clarifications.* On page 66204 of the Notice, in the third paragraph of Representation 7 of the Summary, MetLife points out that the proper spelling of the Superintendent's actuarial adviser is ''Milliman & Robertson'' and not ''Miliman & Robertson.'' Similarly, on page 66204 of the Notice, in Representation 8 of the Summary, the parenthetical in the first sentence of the fourth paragraph should read ''(approximately 11.1 million in the case of MetLife) instead of ''(approximately 16 million in the case of MetLife).'' Finally, on page 66205 of the Notice, in Representation 9, Footnote 5 of the Summary states that the special policyholder meeting will be held ''in early January 2000.'' However, MetLife wishes to clarify that the public hearing occurred on January 24, 2000 and the policyholder vote took place on February 7, 2000.

The Department notes these clarifications.

9. *Canadian Policies.* On page 66205 of the Notice, in Representation 10 of the Summary, Footnote 6 describes the status of certain former Canadian policyholders of MetLife. To clarify the status of these policies, MetLife states that in July 1998, it sold a substantial portion of its Canadian operations to Clarica Life Insurance Company (Clarica Life). As part of that sale, MetLife explains that a large block of policies in effect with MetLife in Canada were transferred to Clarica Life and the holders of the transferred Canadian policies became policyholders of Clarica Life. MetLife indicates that the transferred policyholders are no longer MetLife policyholders and, therefore, are not entitled to compensation under the Plan of Reorganization.

However, as a result of a commitment made in connection with obtaining Canadian regulatory approval of that sale, if it demutualizes, MetLife states that its Canadian branch will make cash payments to those who are, or are deemed to be, holders of these transferred Canadian policies. MetLife notes that the payments will be determined in a manner that is consistent with the treatment of, and will be fair and equitable to, Eligible Policyholders. Further, MetLife states that the process of the IPO and any Other Capital Raising Transactions must be sufficient to reimburse MetLife for those payments.

Also in Representation 10, MetLife states that there is language describing how the shares of policyholders who elect to be cashed out will be sold to the Holding Company and the proceeds distributed to those policyholders. MetLife states that it is now contemplated that no shares of Holding Company Common Stock will be issued with respect to such policyholders. Instead, ''cash for cash-outs'' will be funded by the IPO or ''Other Capital Raising Transactions,'' a term defined in the Plan of Reorganization. MetLife adds that the Holding Company will always purchase Holding Company Common Stock at its discretion and it will not purchase such shares to provide cash for cash-outs. Instead, cash for cash-outs will be raised through the IPO or Other Capital Raising Transactions.

Further, the first paragraph of Representation 10 lists those categories of policyholders entitled to receive consideration in the form of cash. However, MetLife wishes to clarify that aside from the listed categories, the following category of policyholders is also entitled to receive cash:

> Each group Eligible Policyholder that (a) is an owner of a policy that is an individual retirement annuity within the meaning of section 408 or 408A of the Code or a tax-sheltered annuity within the meaning of section 403(b) of the Code, and (b) has affirmatively made an election to receive cash in lieu of Trust Interests on a form approved by the Superintendent that has been provided to such Eligible Policyholder pursuant to Section 5.5(b) (of the Plan of Reorganization) and has been properly completed and received by MetLife prior to the date set by the MetLife, but only with respect to such policy.

Additionally, in Representation 10, MetLife requests that the description of the categories of policies which will receive compensation in the form of policy credits be revised to more accurately read as follows:

> * * * Further, MetLife will allocate policy credits to (a) each owner of a policy this is an individual retirement annuity within the meaning of section 408A of the Code or a tax-sheltered annuity within the meaning of section 403(b) of the Code; (b) each owner of a policy that is an individual annuity contract that has been issued pursuant to a Plan qualified under section 401(a) or 403(a) of the Code directly to the Plan participant; (c) each owner of a policy that is an individual life insurance policy that has been issued pursuant to a Plan qualified under section 401(a) or 403(a) of the Code directly to the Plan participant; and (d) each owner of a policy that is a life or health insurance funding account or guaranteed life insurance funding account.

Finally, in Representation 10, Footnote 6 describes the possible limits on cash compensation. MetLife requests that the second bullet be revised to read as follows:

> • Each group Eligible Policyholder that elects to receive cash and is allocated not more than 25,000 shares will receive compensation in the form of cash.

Immediately following this bullet, MetLife also requests that a third bullet be added which would read:

> • Each group Eligible Policyholder that elects to receive cash and is allocated more than 25,000 shares will receive compensation in the form of—

The Department acknowledges these comments and has made the requested revisions.

10. *Holding Company Common Stock Held in the Trust.* On page 66206 of the Notice, the third sentence in the second paragraph of Representation 11 states, in pertinent part, that ''shares allocated to the Trust Beneficiary will continue to be held in the Trust until such Trust Beneficiary decides to withdraw allocable shares of Holding Company Common Stock for sale.'' MetLife wishes to emphasize that after one year from the effective date of the demutualization, shares may be withdrawn for any reason.

Also in Representation 11, Footnote 8 refers to Section 3.4(b) of the draft Trust Agreement. MetLife states that the

[2] MetLife represents that the phrase ''retired lives reserve'' refers to a reserve which is part of a group term life or health insurance policy by which monies are set aside under the policy for the payment of future premiums for eligible retirees covered under the policy.

reference should be to Section 4.2 of the Trust Agreement which governs the transfer of Trust Interests.

The Department notes these changes.

11. *The Purchase and Sale Program.* On page 66206 of the Notice, Representation 12 of the Summary describes the Purchase and Sale Program which will be established by the Holding Company following the completion of the IPO for each beneficiary of the Trust (the Trust Beneficiary). MetLife wishes to modify the fourth sentence in the second bullet point to read ''Following any partial withdrawal for sale, the Trust Beneficiary must still hold at least 100 Trust Interests.''

MetLife also notes that purchases under the Purchase and Sale Program will not begin until the first trading day following the 90th day after the effective date of the Plan of Reorganization, and that MetLife expects that sales will not begin until approximately 30 days after the effective date.

Finally, in the third sentence of the third full paragraph of Representation 12 the parenthetical reads ''(Accordingly, the Trust Beneficiary will receive the same consideration for its shares whether they are purchased by the Holding Company or by an unrelated party on the open market.)'' MetLife wishes to point out that this will not be the case for all sales. If the sale is on the open market, MetLife represents that the Trust Beneficiary will receive consideration equal to the weighted average price for all shares of Holding Company Common Stock that are held by the Trust (the Trust Shares) which are sold on that day. If the sale is to the Holding Company, MetLife explains that the consideration will be equal to the weighted average of the high and low trading prices of the shares for the date of the sale. Further, MetLife notes that these formulas are designed to provide an average market price for the day, but will not necessarily be the same as the price involved for each trade occurring on that day.

The Department notes these clarifications to Representation 12.

Also on page 66206 of the Notice, Representation 13 of the Summary describes the purchase aspect of the Purchase and Sale Program. However, MetLife states that this description can be further clarified. In this regard, MetLife points out that generally, Trust Beneficiaries with fewer than 1,000 Trust Interests may purchase additional shares of Holding Company Common Stock (to be held in the Trust) to increase their Trust Interests up to 1,000. Trust Beneficiaries must purchase at least $250 worth of shares or a smaller amount required to purchase up to the 1,000 maximum number of Trust Interests. Therefore, MetLife explains that ''multiple of 100'' rule is not part of the purchase side of the Purchase and Sale Program.

The Department has considered this clarification and has revised Representation 13 to reflect this change.

12. *Shareholder Number.* On page 66207 of the Notice, in Representation 14, the first sentence of Footnote 10 states that ''MetLife projects that the initial number of shareholders of the Holding Company may exceed 10 million.'' MetLife states that it would be more accurate to revise this sentence to read as follows: ''MetLife projects that, if the Trust mechanism were not used, the initial number of shareholders of the Holding Company could exceed 10 million.''

The Department notes this revision and has made the requested modification.

13. *Dividend Distribution.* On page 66207 of the Notice, Representation 15 describes the method of distributing dividends on Trust Shares which are paid to the Trustee. MetLife notes that the Trust Agreement also permits the Trustee to arrange with the Holding Company for the direct payment by the Holding Company of cash dividends to the Trust Beneficiaries at the same time as the payment of dividends to the Holding Company stockholders. Therefore, it wishes to clarify that the Holding Company intends to declare annual cash dividends, subject to the discretion of its Board of Directors, and to distribute them directly to the Trust Beneficiaries, as permitted by this provision.

The Department notes this clarification.

14. *Matters for Trust Beneficiary Voting.* On page 66207 of the Notice, the first sentence in the first paragraph of Representation 16 lists matters on which Trust Beneficiaries would be entitled to direct the Trustee how to vote shares of Holding Company Common Stock. However, MetLife wishes to expand the list to include * * * any merger or consolidation, a sale, lease or exchange of all or substantially all of the assets of the Holding Company, or a recapitalization or dissolution of the Holding Company * * *'' MetLife states that this provision would require a vote under applicable Delaware law.

In addition, the second through fourth sentences of the first paragraph of Representation 16 provide that the Trustee will vote all shares of Holding Company Common Stock that is held in Trust in proportion to the instructions received from Trust Beneficiaries which give such instructions unless the issue is a choice of competing candidates for director positions and Trust Beneficiaries representing 20 percent or fewer of the Trust Interests provide instructions. Then, the Trustee will vote only the shares of Holding Company Common Stock that are equal in number to the number of Trust Interests held by Trust Beneficiaries which provide instructions.

MetLife wishes to point out that the exception relating to when fewer than 20 percent of the Trust Beneficiaries provide instructions, has been deleted.

Finally, the third paragraph of Representation 16 discusses the termination of the Trust and provides that a Trust Beneficiary will have the option of receiving shares of allocable Holding Company Common Stock in-kind or receiving cash as a result of the sale of such Stock to the Holding Company. MetLife wishes to emphasize that upon termination of the Trust, a Trust Beneficiary will have the option of receiving shares in-kind or cash only if the Holding Company, in its sole discretion, elects to purchase all or a portion of the shares.[3]

In response, the Department has revised Representation 16 in light of these modifications.

15. *MetLife's Ownership Interest in State Street.* On page 66208 of the Notice, the fourth paragraph of Representation 17 of the Summary states, in part, that MetLife ''does not have an ownership interest'' in State Street. MetLife explains that this sentence should be read to mean an ownership interest other than the very minor one (*i.e.,* MetLife holds approximately .005962 of the total outstanding shares of State Street) which is described in the immediately preceding paragraph involving separate accounts.

The Department notes this clarification and has added the parenthetical ''(other than a negligible one),'' after the phrase ''ownership interest in State Street'' and before the word ''nor.''

[3] MetLife represents that it has not yet formulated procedures which will govern the possible purchase of Holding Company Common Stock upon the termination of the Trust. MetLife explains that there may be reasons why such purchase will not be strictly *pro rata.* For example, the Holding Company may wish to buy out odd lot holders first, or buy out holders who own more than (or less than) a certain number of shares. However, Metlife further explains that the result should not result in discrimination among Trust Beneficiaries since those who are not bought out by the Holding Company may sell their shares of Common Stock on the open market for fair market value.

16. *Preliminary Review/MetLife Plans.* On page 66208 of the Notice, the final sentence of Representation 18 states that ''MetLife'' rather than ''State Street'' has conducted a preliminary review of the Plan of Reorganization. The Department notes this error and has revised the sentence, accordingly.

Finally, MetLife states that it has come to its attention that seven in-house Plans of a MetLife subsidiary, New England Life Insurance Company, as well as one in-house Plan of another subsidiary, Fulcrum Financial Advisors, hold policies which may be eligible to receive compensation in the demutualization.[4] MetLife points out that State Street will act on behalf of these MetLife Plans and State Street has confirmed that it will undertake independent fiduciary responsibilities on behalf of these Plans.

For further information regarding the comments and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D–10721) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N–5638, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, D.C. 20210.

Accordingly, after giving full consideration to the entire record, including the written comments, the Department has decided to grant the exemption subject to the modifications and clarifications described above.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady 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

[Prohibited Transaction Exemption No. 2000–12; Exemption Application No. D–10819]

Exemption

Section I—Definitions and Special Rules

The following definitions and special rules will apply to this 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 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 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 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 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 exemption, Section II of this 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

[4] These MetLife Plans include The New England Benefit Plan for the Field Force; The New England Benefit Plan, The New England 401(k) Plan and Trust; The New England Retirement Plan and Trust; The New England Agents' Retirement Plan and Trust; The New England Agents' Deferred Compensation Plan and Trust; The New England Agency Employees' Retirement Plan and Trust; and Fulcrum Financial Advisors 401(k) Plan.

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, 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 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 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 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 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 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 exemption is effective for transactions occurring on or after March 13, 2000.

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 December 17, 1999, at 64 FR 70742.

Notice to Interested Persons: The applicant was unable to provide notice to interested persons of the pendency of the proposed exemption within the time period specified in the notice of proposed exemption published in the **Federal Register** on December 17, 1999. However, by letter dated February 1, 2000, the applicant represents that a copy of the notice of proposed exemption, and a supplemental statement in connection therewith as required by the Department's procedures at 29 CFR 2570.43(b), was delivered by January 25, 2000, to each client of FACM which is, or is using the assets of, an ''employee benefit plan'' (as defined in section 3(3) of the Act) or a ''plan'' (as defined in section 4975(e) of the Code). Interested persons were informed that they had until February 28, 2000, to comment or request a hearing on the proposed exemption. No written comments or hearing requests were received by the Department.

FOR FURTHER INFORMATION CONTACT: Mr. E.F. Williams of the Department, telephone (202) 219–8194. (This is not a toll-free number.)

Deutsche Bank AG, et al. (Deutsche Bank), Located in New York, NY

[Prohibited Transaction Exemption 2000–13; Exemption Application No. D–10384]

Exemption

Section I. Covered Transactions

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 (1) the sale to employee benefit plans (the Plans) of a synthetic guaranteed investment contract (the Buy & Hold Synthetic GIC) offered by Deutsche Bank, which is or may become a party in interest with respect to the Plans; and (2) extensions of credit by Deutsche Bank to the Plans for the purpose of funding benefit withdrawals.

This exemption is conditioned on the requirements set forth below in Section II.

Section II. General Conditions

(a) The decision to enter into a Buy & Hold Synthetic GIC is made on behalf of a participating Plan in writing by a fiduciary of such Plan which is independent of Deutsche Bank.

(b) Only Plans with total assets having an aggregate market value of at least $50 million are permitted to purchase Buy &

Hold 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 (*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 29 CFR 2510.3–101 (the Plan Asset Regulation), which entity has purchased a Buy & Hold 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 (*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 Buy & Hold 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—

(A) Has full investment responsibility with respect to Plan assets invested therein; and

(B) 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 Buy & Hold Synthetic GIC, the independent Plan fiduciary receives a full and detailed written disclosure of all material features concerning the Buy & Hold Synthetic GIC, including—

(1) A copy of the contract (the Contract), underlying the Buy & Hold Synthetic GIC, which has been executed by Deutsche Bank and the Plan fiduciary, which stipulates the relevant provisions of such instrument, the interest rate that is credited (the Crediting Rate) to the book value account (the Book Value Account) of the Buy & Hold Synthetic GIC, the applicable fees and the rights and obligations of the parties;

(2) Information explaining in a manner calculated to be understood by a Plan fiduciary that if adverse market conditions occur, that the Crediting Rate to the Book Value Account of a Buy & Hold Synthetic GIC may be as low as 0 percent; and

(3) Copies of the proposed exemption and grant notice with respect to the exemptive relief provided herein.

(d) Following the receipt of such disclosure, the Plan fiduciary approves, in writing, the execution of the Buy & Hold Synthetic GIC on behalf of the Plan.

(e) Upon entering into a Buy & Hold Synthetic GIC with a Plan fiduciary of a Plan that provides for participant investment selection, Deutsche Bank informs the Plan fiduciary that such fiduciary should provide each Plan participant with—

(1) A summary of the primary provisions of the Contract, including the applicable fees; and

(2) Information explaining that if adverse market conditions occur, the Book Value Account's Crediting Rate may be as low as 0 percent.

(f) Subsequent to a Plan's investment in a Buy & Hold Synthetic GIC, the Plan fiduciary and, if applicable, the Plan participant, upon such participant's request, receive a monthly report consisting of a statement of the Book Value Account, which specifies, among other things, the Book Value Account balance for the prior month, withdrawals from the Contract, any reduction in the balance of the Book Value Account on account of a security in the fixed portfolio (the Fixed Portfolio) becoming an impaired security, interest credited to the Book Value Account at the Crediting Rate, and the current month's ending balance for the Book Value Account. The report will also specify the Current Crediting Rate, the prior month's ending fair market value of the Fixed Portfolio, the proceeds of any securities liquidated, fees charged to the Plan, and the current month's ending fair market value of the Fixed Portfolio and rate of return.

(g) As to each Plan, the combined total of all fees and charges imposed under a Buy & Hold Synthetic GIC is not in excess of ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act.

(h) Each Buy & Hold Synthetic GIC specifically provides an objective method for determining the fair market value of the securities owned by the Plan pursuant to such GIC.

(i) Each Buy & Hold Synthetic GIC has a predefined maturity date selected by the Plan fiduciary and agreed to by Deutsche Bank.

(j) Neither Deutsche Bank nor its affiliates maintain custody of the assets underlying the Buy & Hold Synthetic GIC or commingle those assets with other funds under their management.

(k) The formulas for computing the Crediting Rate for the Buy & Hold Synthetic GIC and a charge for terminating the Buy & Hold Synthetic GIC within three years of its effective date (the Early Termination Charge) are objectively determined. Further, the Early Termination Charge compensates Deutsche Bank for its direct costs incurred in connection with the Buy & Hold Synthetic GIC.

(l) Deutsche Bank maintains books and records of each Buy & Hold Synthetic GIC transaction for a period of six years in a manner that is accessible for audit and examination. Such books and records are subject to annual audit by independent, certified public accountants.

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 February 1, 2000 at 65 FR 4843 as well as a notice of technical correction published on February 8, 2000 at 65 FR 6228.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 219–8881. (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 accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 8th day of March, 2000.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 00–6048 Filed 3–10–00; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (00–026)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

Copies of patent applications cited are available from the Office of Patent Counsel, Ames Research Center. Claims are deleted from the patent applications to avoid premature disclosure.

DATE: March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Robert M. Padilla, Patent Counsel, NASA Ames Research Center, Mail Code 202A–3, Moffett Field, CA 94035–1000; telephone (650) 604–5104, fax (650) 604–1592.

NASA Case No. ARC–14359–1GE: Method and System for an Automated Tool for En Route Traffic Controllers;

NASA Case No. ARC–14491–1NP: A Neural Net Algorithm that Emulates Chemical Processes.

Dated: March 6, 2000.

Edward A. Frankle,

General Counsel.

[FR Doc. 00–6040 Filed 3–10–00; 8:45 am]

BILLING CODE 7510–01–U

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (00–025)]

Notice of Prospective Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Prospective Patent License.

SUMMARY: NASA hereby gives notice that Cytec Industries, Inc., of Five Garret Mountain Plaza, West Paterson, NJ 07424, has applied for an exclusive license to practice the inventions described and claimed in NASA Case Numbers LAR 15544–1 entitled ''HIGH PERFORMANCE/HIGH TEMPERATURE TRANSFER MOLDING RESINS,'' LAR 15543–1 entitled ''PHENYLETHYNYL CONTAINING REACTIVE ADDITIVES,'' LAR 15834–1 entitled, ''HIGH PERFORMANCE/HIGH TEMPERATURE RESINS FOR INFUSION AND TRANSFER MOLDING PROCESSES,'' LAR 15534–1 entitled ''METHOD OF PREPARING POLYMERS WITH LOW MELT VISCOSITY,'' LAR 15700–1 entitled ''BLENDS OF POLYMERS WITH REACTIVE AND NON-REACTIVE ADDITIVES HAVING LOWER MELT VISCOSITY,'' and U.S. Patent No. 5,965,687 entitled ''METHOD OF PREPARING POLYMERS WITH LOW MELT VISCOSITY'' all of which are assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Written objections to the prospective grant of a license should be sent to Langley Research Center.

DATE: Responses to this notice must be received by May 12, 2000.

FOR FURTHER INFORMATION CONTACT: Hillary W. Hawkins, Patent Attorney, Langley Research Center, Mail Stop 212, Hampton, VA 23681–2199; Telephone 757–864–8882; Fax 757–864–9190.

Dated: March 7, 2000.

Edward A. Frankle,

General Counsel.

[FR Doc. 00–6039 Filed 3–10–00; 8:45 am]

BILLING CODE 7510–01–U

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Nixon Presidential Historical Materials; Opening of Materials

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of opening of materials.

SUMMARY: This notice announces the opening of additional files from the Nixon Presidential historical materials. Notice is hereby given that, in accordance with section 104 of Title I of the Presidential Recordings and Materials Preservation Act (''PRMPA'', 44 U.S.C. 2111 note) and 1275.42(b) of the PRMPA Regulations implementing the Act (36 CFR Part 1275), NARA has identified, inventoried, and prepared for public access integral file segments among the Nixon Presidential historical materials.

DATES: NARA intends to make these materials described in this notice available to the public beginning April 27, 2000. In accordance with 36 CFR 1275.44, any person who believes it necessary to file a claim of legal right or privilege concerning access to these materials must notify the Archivist of the United States in writing of the claimed right, privilege, or defense before April 12, 2000.

ADDRESSES: The materials will be made available to the public at the National Archives at College Park research room, located at 8601 Adelphi Road, College Park, Maryland beginning at 8:45 a.m. on April 27, 2000. Researchers must have a NARA researcher card, which they may obtain when they arrive at the facility.

Petitions asserting a legal or constitutional right or privilege which would prevent or limit access must be sent to the Archivist of the United States, National Archives at College Park, 8601 Adelphi Road, College Park, Maryland 20740–6001.

FOR FURTHER INFORMATION CONTACT: Karl Weissenbach, Director, Nixon Presidential Materials Staff, 301–713–6950.

SUPPLEMENTARY INFORMATION: The integral file segments of textual materials to be opened on April 27, 2000, consist of 84 cubic feet.

The White House Central Files Unit is a permanent organization within the White House complex that maintains a central filing and retrieval system for the records of the President and his staff. Some of the materials are from the White House Central Files, Subject Files. The Subject Files are based on an alphanumerical file scheme of 61

primary categories. Listed below are the integral file segments from the White House Central Files, Subject Files in this opening.

Subject Category Volume: 5 Cubic Feet

Federal Government (FG)

FG 54 Courts of the District of Columbia

FG 55 United States Court of Claims

FG 65 Independent Agencies, Boards, and Commissions

FG 67 Advertising Council

FG 68 Advisory Board on National Parks, Historic Sites, Buildings, and Monuments

FG69 Advisory Commission on Intergovernmental Relations

One file group from the Staff Member and Office Files, listed below, will also be made available to the public. This consists of materials that were transferred to Central Files but were not incorporated into the Subject Files.

File Group: Charles B. ''Bud'' Wilkinson Volume: 26 Cubic Feet

Three files are from the White House Central Files, Name Files. The Name Files were used for routine materials filed alphabetically by the name of the correspondent; copies of documents in the Name Files are usually filed by subject in the Subject Files. The Name Files relating to the three individuals will be made available with this opening.

White House Central Files, Name Files: Volume: 1 Cubic Feet

Earl Landgrebe

Peter W. Rodino

John G. Schmitz

In accordance with the provisions of Executive Order 12958, several series within the National Security Council files have been systematically reviewed for declassification and will be made available. In addition, a number of documents which were previously withheld from public access have been re-reviewed for release and or declassified under the provisions of Executive Order 12958, or in accordance with 36 CFR 1275.56 (Public Access Regulations).

National Security Council Files series: Volume: 51 Cubic Feet

A number of documents which were previously withheld from public access have been reviewed and/ or declassified under the Mandatory Review provisions of Executive Order 12958 and will be made available.

Previously restricted materials Volume: 1 Cubic Feet

Public access to some of the items in the file segments listed in this notice will be restricted as outlined in 36 CFR 1275.50 or 1275.52 (Public Access Regulations).

Dated: March 1, 2000.

John W. Carlin,

Archivist of the United States.

[FR Doc. 00–5724 Filed 3–10–00; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–341]

Detroit Edison Company; Fermi 2, Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–43, issued to the Detroit Edison Company (the licensee), for operation of Fermi 2, located in Monroe County, Michigan.

The proposed amendment would revise the Technical Specifications by changing (1) the design features description of the fuel storage equipment and configuration to allow an increase in the spent fuel pool (SFP) storage capacity and (2) the description of the high-density spent fuel racks program to clarify that the surveillance program is applicable only to racks containing Boraflex as a neutron absorber.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

The following previously postulated accident scenarios are considered:

a. A spent fuel assembly drop in the SFP.

b. Loss of SFP cooling flow.

c. A seismic event.

d. Misplaced fuel assembly.

The probability that any of the accidents in the above list can occur is not significantly increased by the modification itself. The probabilities of a seismic event or loss of SFP cooling flow are not influenced by the proposed changes. The probabilities of accidental fuel assembly drops or misplacement of a fuel assembly are primarily influenced by the methods used to lift and move these loads. The method of handling loads during normal plant operations is not changed, since the same equipment (*i.e.,* Refuel Bridge) and procedures will be used. Since the methods used to move loads during normal operations remain the same as those used previously, there is no significant increase in the probability of an accident.

During rack removal and installation, all work in the pool area will be controlled and performed in strict accordance with specific written procedures. Any movement of fuel assemblies required to support the modification (*e.g.,* removal and installation of racks) will be performed in the same manner as during normal refueling operations. Spent Fuel shipping cask movements will not be performed during the modification period.

Accordingly, the proposed modification does not involve a significant increase in the probability of an accident previously evaluated.

The consequences of the previously postulated scenarios for an accidental drop of a fuel assembly in the SFP have been re-evaluated for the proposed change. The results show that the postulated accident of a fuel assembly striking the top of the storage racks will not distort the racks sufficiently to impair their functionality. The minimum subcriticality margin, k_{eff} less than or equal to 0.95, will be maintained. The structural damage to the Reactor Building, pool liner, and fuel assembly resulting from a fuel assembly drop striking the pool floor or another assembly located within the racks is primarily dependent on the mass of the falling object and the drop height. Since these two parameters are not changed by the proposed modification, the structural damage to these items remains unchanged. The radiological dose at the exclusion area boundary will not be increased due to the changes. Thus, the results of the postulated fuel drop accidents remain acceptable and do not represent a significant increase in consequences from any of the same previously evaluated accidents that have been reviewed and found acceptable by the NRC.

The time to boil represents the onset of loss of pool water inventory and is commonly used as a gage for

establishing the comparison of consequences before and after a reracking project. The heat up rate in the SFP is a nearly linear function of the fuel decay heat load. The fuel decay heat load will increase subsequent to the proposed changes because of the increase in the number of fuel assemblies stored in the spent fuel pool. The thermal-hydraulic analysis determined the maximum fuel decay heat loads and the corresponding time to boil conditions subsequent to complete loss of forced cooling. These results show that, in the extremely unlikely event of a complete failure of both the FPCCS [fuel pool cooling and cleanup system] and RHR [residual heat removal] System, there would be at least 4.20 hours available for corrective actions. The maximum water boiloff rate is less than 91 gpm. This is less than the normal makeup capacity of 100 gpm available from the condensate storage tanks, and additional sources of makeup are available. It has been determined that this duration provides sufficient time for the operators to provide alternate means of makeup (i.e., fire hoses) before the onset of pool boiling. Therefore, the proposed change represents no increase in the consequences of loss of pool cooling.

The consequences of a design basis seismic event are not increased. The consequences of this accident are evaluated on the basis of subsequent fuel damage or compromise of the fuel storage or building configurations leading to radiological or criticality concerns. The racks are analyzed in their new configuration and found safe during seismic motion. Fuel has been determined to remain intact and the storage racks maintain the fuel and fixed poison configurations subsequent to a seismic event. The structural capability of the pool and liner will not be exceeded under the appropriate combinations of dead weight, thermal, and seismic loads. The Reactor Building structure will remain intact during a seismic event and will continue to adequately support and protect the fuel racks, storage array, and pool moderator/coolant. Thus, the consequences of a seismic event are not increased.

A fuel misplacement accident represents a fuel assembly inadvertently lowered or dropped outside of and adjacent to a storage rack. The consequence of a fuel misplacement accident has been analyzed for the worst possible storage configuration subsequent to the proposed modification, and it has been shown that the consequences remain acceptable with respect to the neutron multiplication factor staying below 0.95 (i.e. the same acceptance criteria as used for normal conditions). Therefore, there is no increase in consequences.

Therefore, it is concluded that the proposed changes do not significantly increase the probability or consequences of any accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any previously evaluated.

Load drops were determined to be events that might represent a new or different kind of accident. The new loads that will be required during or subsequent to installation of the new racks include the rack modules, the overhead platforms, and the pool gates. Racks will not be allowed to travel over any racks containing fuel assemblies, thus a rack drop onto fuel is precluded. A construction accident of a rack dropping onto the pool floor liner is not a postulated event due to the defense-in-depth approach to be taken, as discussed in detail within Section 10.2 of the attached Licensing Report (Enclosure 4 [to the November 19, 1999, application]). A new temporary hoist and rack lift rig will be introduced to lift and suspend the racks from the bridge of the Reactor Crane. These temporary lift items are designed in accordance with the requirements of NUREG 0612 and ANSI N14.6. Nevertheless, the analysis of a rack dropping to the liner has been performed and shown to be acceptable. The integrity of the liner will be maintained and no loss of pool coolant would occur subsequent to a rack dropping to the liner. Since fuel integrity is maintained and significant loss of coolant does not occur, the drop of a rack is not considered a new type of accident.

A drop of a pool gate is also an extremely unlikely event. The new storage racks will not be located directly beneath the gates. However, the drop of a gate, weighing approximately 9500 pounds, onto racks containing irradiated fuel assemblies, and the drop of a gate onto the pool liner have been analyzed. The analysis performed for the drop of a pool gate onto fuel demonstrates that the number of fuel rods damaged (81) remains below the Fermi 2 fuel handling accident design basis (of 140 rods). The analysis performed for the drop of a pool gate onto the liner demonstrates that the liner would be locally ruptured. However, the underlying concrete slab remains intact and possible leakage would be confined to the leak chase system, which is monitored and controllable. The kinetic energy associated with the drop of the heaviest (1460 pound) overhead platform is enveloped by the kinetic energy associated with the gate drop. Therefore, the potential structural damage to fuel and the liner would be bounded by the results for the gate. Since the resulting fuel damage does not exceed the previously analyzed design basis condition and significant loss of coolant would not occur, the drops of a gate or an overhead platform are not considered a new type of accident.

The additional heat load resulting from additional storage of spent fuel has been evaluated for the possibility of creating a new or different kind of accident. The existing Fermi 2 SFP cooling system, has been shown by analysis, to be capable of removing the decay heat generated by the additional spent fuel assemblies. The pool coolant will not be significantly affected. Thus, the increased heat load does not create the possibility a new or different kind of accident.

No unproven technology has been utilized in the design, analysis or in the proposed installation methodology. The basic technology for the Fermi 2 spent fuel pool capacity increase is consistent with other license amendments (over 80) approved by the USNRC. This change has been evaluated in accordance with the USNRC position paper ''OT Position for Review and Acceptance of Spent Fuel Storage and Handling Applications,['' dated] April 14, 1978 and Addition dated January 18, 1979.

The proposed change does not alter the operating requirements of the plant or of the equipment credited in the mitigation of the design basis accidents. The proposed change does not affect the parameters required for safe fuel storage. Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Involve a significant reduction in the margin of safety.

The function of the SFP is to store the fuel assemblies in a subcritical and coolable configuration through all environmental and abnormal loadings, such as an earthquake or fuel assembly drop. The new rack design must meet all applicable requirements for safe storage and be functionally compatible with the SFP.

Detroit Edison has addressed the safety issues related to the expanded pool storage capacity in the following areas:

1. Material, mechanical and structural considerations.

2. Nuclear criticality.

3. Thermal-hydraulic and pool cooling.

The mechanical, material, and structural designs of the new racks are

reviewed in accordance with the applicable provisions of the USNRC position paper ''OT Position for Review and Acceptance of Spent Fuel Storage and Handling Applications,'' [dated] April 14, 1978 and Addition dated January 18, 1979. The rack materials used are compatible with the spent fuel assemblies and the SFP environment. The design of the new racks preserves the proper margin of safety during abnormal loads such as a dropped assembly and tensile loads from a stuck assembly. It has been shown that such loads will not invalidate the mechanical design and material selection to safely store fuel in a coolable and subcritical configuration.

The methodology used in the criticality analysis of the expanded SFP storage capacity meets the appropriate NRC requirements and the ANSI standards (GDC 62, NUREG–0800, Section 9.1.2, the OT Position for Review and Acceptance of Spent Fuel Storage and Handling Applications, Reg. Guide 1.13, and ANSI ANS 8.17). The margin of safety for subcriticality is maintained by having the neutron multiplication factor equal to, or less than, 0.95, including uncertainties, under all accident conditions. This criterion is the same as that used previously to establish criticality safety evaluation acceptance and remains satisfied for all analyzed accidents. Therefore, the accepted margin of safety remains the same.

The thermal-hydraulic and cooling evaluation of the pool demonstrated that the pool can be maintained below the specified thermal limits under the conditions of the maximum heat load and during all credible accident sequences and seismic events. The bulk pool temperature will not exceed 150°F during any conditions when forced cooling is available. The increase from the current maximum normal SFP bulk temperature of 125°F is not significant, because the existing racks and cooling system were previously evaluated for the 150°F condition, as stated in UFSAR [Updated Final Safety Analysis Report] sections 9.1.2.2.2 and 9.1.3.1, respectively. The maximum local water temperature in the hottest rack cell will remain below the boiling point. The fuel will not undergo any significant heat up after an accidental drop of a fuel assembly on top of the rack blocking the flow path. The time of 4.20 hours for the onset of pool boiling, subsequent to total loss of forced cooling allows sufficient time for the operators to intervene and line up alternate cooling paths and/or the means of inventory make-up before the onset of pool boiling.

Thus, it is concluded that the changes do not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days of the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By April 12, 2000, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and accessible electronically through the ADAMS Public Electronic Reading Room link at the NRC Web site (http://www.nrc.gov). If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert

opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to John Flynn, Esq., Detroit Edison Company, 2000 Second Avenue, Detroit, Michigan 48226, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

The Commission hereby provides notice that this is a proceeding on an application for a license amendment falling within the scope of Section 134 of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10154. Under Section 134 of the NWPA, the Commission, at the request of any party to the proceeding, must use hybrid hearing procedures with respect to ''any matter which the Commission determines to be in controversy among the parties.''

The hybrid procedures in Section 134 provide for oral argument on matters in controversy, preceded by discovery under the Commission's rules and the designation, following argument of only those factual issues that involve a genuine and substantial dispute, together with any remaining questions of law, to be resolved in an adjudicatory hearing. Actual adjudicatory hearings are to be held on only those issues found to meet the criteria of Section 134 and set for hearing after oral argument.

The Commission's rules implementing Section 134 of the NWPA are found in 10 CFR Part 2, Subpart K, ''Hybrid Hearing Procedures for Expansion of Spent Fuel Storage Capacity at Civilian Nuclear Power Reactors' (published at 50 FR 41662 dated October 15, 1985). Under those rules, any party to the proceeding may invoke the hybrid hearing procedures by filing with the presiding officer a written request for oral argument under 10 CFR 2.1109. To be timely, the request must be filed within ten (10) days of an order granting a request for hearing or petition to intervene. The presiding officer must grant a timely request for oral argument. The presiding officer may grant an untimely request for oral argument only upon a showing of good cause by the requesting party for the failure to file on time and after providing the other parties an opportunity to respond to the untimely request. If the presiding officer grants a request for oral argument, any hearing held on the application must be conducted in accordance with the hybrid hearing procedures. In essence, those procedures limit the time available for discovery and require that an oral argument be held to determine whether any contentions must be resolved in an adjudicatory hearing. If no party to the proceeding timely requests oral argument, and if all untimely requests for oral argument are denied, then the usual procedures in 10 CFR part 2, subpart G, apply.

For further details with respect to this action, see the application for amendment dated November 19, 1999, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and accessible electronically through the ADAMS Public Electronic Reading Room link at the NRC Web site (http://www.nrc.gov).

Dated at Rockville, Maryland, this 7th day of March 2000.

For the Nuclear Regulatory Commission.

Andrew J. Kugler,

Project Manager, Section 1, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 00–6043 Filed 3–10–00; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

DOCKET NO. 50–289

Amergen Energy Company, LLC; Three Mile Island Nuclear Station, Unit 1, Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment to Facility Operating License No. DPR–50, issued to AmerGen Energy Company, LLC, (the licensee), for operation of the Three Mile Island Nuclear Station, Unit 1 (TMI–1), located in Dauphin County, PA.

Environmental Assessment

Identification of the Proposed Action

The proposed action would modify the operating license to delete an already completed license condition on reporting of aircraft movement; and delete reference to specific amendment and revision numbers for the Final Safety Analysis Report, Environmental Report, Modified Amended Physical Security Plan, Security Personnel Training and Qualification Plan, and Safeguards Contingency Plan and refer instead to the Updated Final Safety Analysis Report (UFSAR), and refer to the other documents ''as revised.'' Two minor grammatical errors are also corrected. The proposed action also modifies the basis for the Technical Specification (TS) related to pressurizer code safety valves, to delete reference to

the flow rate through the valve. The licensee is also adding to the Bases for this TS, information related to the required American Society for Mechanical Engineers Code, Section XI, required testing. The proposed action to delete reference in the operating license to a specific amendment number for the FSAR and Environmental Report and to correct minor grammatical errors requires an Environmental Assessment.

The proposed action is in accordance with the licensee's application for amendment dated May 13, 1999.

The Need for the Proposed Action

The proposed action is requested to provide administrative updating of the license requirements to delete outdated revisions to documents and refer instead to non-time-sensitive versions of these documents to avoid the need for future revisions to the related license condition.

Environmental Impacts of the Proposed Action

The NRC has completed its evaluation of the proposed action and concluded that the proposed changes are administrative in nature. The proposed action will not significantly increase the probability or consequences of accidents, no changes are being made in the types of any effluents that may be released off site, and there is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential nonradiological impacts, the proposed action does not involve any historic sites. It does not affect nonradiological plant effluents and has no other environmental impact. Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (i.e., the ''no-action'' alternative). Denial of the application would leave uncorrected grammatical errors and outdated references to documents in the license condition, the latter which may be misleading as to the current revision or may require updating of the license periodically to accurately reflect revisions to the documents referenced in the license condition without a specific benefit.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statement for the Three Mile Island Nuclear Station, Unit 1.

Agencies and Persons Consulted

In accordance with its stated policy, on February 17, 2000, the staff consulted with the Pennsylvania State official, Mr. Stan Maingi of the Pennsylvania Bureau of Radiation Protection, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated May 13, 1999, which is available for public inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street, NW., Washington, DC. Publicly available records will be accessible electronically from the ADAMS Public Library component on the NRC Web site, *http:www.nrc.gov* (the Electronic Reading Room).

Dated at Rockville, Maryland, this 7th day of March 2000.

For the Nuclear Regulatory Commission.

Timothy G. Colburn, Sr.,

Project Manager, Section 1, Project Directorate I, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 00–6041 Filed 3–10–00; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–269, 50–270, and 50–287]

Duke Energy Corporation; Oconee Nuclear Station, Units 1, 2, and 3, Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment to the Duke Energy Corporation (the licensee/Duke) for operation of the Oconee Nuclear Station, Units 1, 2, and 3, Facility Operating License Nos. DPR–38, DPR–47, and DPR–55, respectively, located in Oconee County, Seneca, South Carolina.

Environmental Assessment

Identification of the Proposed Action

The proposed amendment would revise the Facility Operating Licenses by (a) deleting the license conditions that have been fulfilled by actions that have been completed, (b) changing the license conditions that have been superseded by the current plant status, and (c) incorporating other administrative changes. In particular, the proposed amendment would remove (1) License Condition 3.C.1 that requires the licensee to accumulate the information required to establish baselines for the evaluation of thermal, chemical, and radiological effects of station operation on terrestrial and aquatic biota in Lakes Keowee and Hartwell; (2) License Condition 3.C.2, which requires the licensee to develop and implement a comprehensive monitoring program that will permit surveillance during plant operation of thermal, chemical, and radiological effects of station operation on terrestrial and aquatic biota in Lakes Keowee and Hartwell; (3) License Condition 3.G, which requires the licensee to implement a secondary water chemistry program having specified attributes; (4) License Condition 3.H, which requires the licensee to implement a program having specified attributes to reduce leakage from certain systems outside containment; (5) License Condition 3.I, which requires the licensee to implement an iodine monitoring program having certain attributes; (6) License Condition 3.J, which requires the licensee to implement a program ensuring the capability to accurately monitor the Reactor Coolant System subcooling margin; and (7) License Condition 3.K, which incorporates into the licenses the additional conditions currently set forth in Appendix C to the license. The proposed action also corrects clerical errors or out-of-date information on the licenses.

The proposed action is in accordance with the licensee's application for an amendment dated January 27, 2000.

The Need for the Proposed Action

After the startup of Oconee, requirements related to the establishment of environmental programs and the performance of studies of the effects of plant operation on the environment have been regulated by other programs. These programs include the Environmental Protection Agency's (EPA's) National Pollution Discharge Elimination System program and Section 316(a) and 316(b) of the Clean Water Act and other EPA programs, the Oconee Environmental

Technical Specifications and Offside Dose Calculations Manual, plant design and operation as described in the Updated Final Safety Analysis Report, and criteria contained in the Selected Licensee Commitments Manual.

In addition, the requirements in License Condition 3.G are equivalent to the requirements of Technical Specification (TS) 5.5.11, ''Secondary Water Chemistry;'' the requirements of License Condition 3.H are equivalent to those of TS 5.5.3, ''Reactor Coolant Sources Outside Containment;'' the requirements of License Condition 3.I are equivalent to those of TS 5.5.4, ''Post Accident Sampling;'' and the requirements of License Condition 3.J are equivalent to those of TS 5.5.17, ''Backup Method for Determining Subcooling Margin.'' Finally, the additional conditions currently set forth in Appendix C to the license, and which are required by License Condition 3.K, are all one-time or time-limited actions that have been completed and were adequately addressed.

Therefore, elimination of the license conditions that are the subject of this environmental assessment would delete (1) provisions for certain activities that are regulated by other government agencies or are being addressed by other programs, (2) requirements redundant to those in TS, and (3) requirements for one-time or time-limited actions that have been completed and were adequately addressed. This would eliminate unnecessary license conditions from the Facility Operating Licenses.

Environmental Impacts of the Proposed Action

The proposed action to implement the amendment would remove extraneous license conditions that (1) are now being regulated by other government agencies or were subsumed by other programs, (2) are redundant to TS, or (3) require actions that have been completed. The proposed action will not change the design of the facilities or the manner in which the licensee operates them. The staff has concluded that the proposed action will not significantly increase the probability or consequences of accidents, there are no changes being made in the types of any effluents that may be released offsite, and there is no significant increase in occupational or public radiation exposure. Therefore, the Commission concludes that there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential nonradiological environmental impacts, the proposed action does not involve any historic sites. It does not affect nonradiological plant effluents and has no other environmental impact. Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.,* the ''no-action'' alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statement for the Oconee Nuclear Station, Units 1, 2, and 3.

Agencies and Persons Consulted

In accordance with its stated policy, on March 6, 2000, the staff consulted with the South Carolina State official, Mr. Virgil L. Autry of the Division of Radiological Waste Management, Bureau of Land and Waste Management, Department of' Health and Environmental Control, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated January 27, 2000, which is available for public inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street, NW., Washington, DC. Publically available records will be accessible electronically from the ADAMS Public Library component on the NRC Web site, *http:www.nrc.gov* (the Electronic Reading Room).

Dated at Rockville, Maryland, this 6th day of March 2000.

For the Nuclear Regulatory Commission.

Richard L. Emch, Jr.,

Section Chief, Section 1, Project Directorate II, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 00–6042 Filed 3–10–00; 8:45 am]

BILLING CODE 7590–01–P

PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY

Executive Council on Integrity and Efficiency; Senior Executive Service Performance Review Board Membership

AGENCY: President's Council on Integrity and Efficiency (PCIE) and Executive Council on Integrity and Efficiency (ECIE).

ACTION: Notice.

SUMMARY: This notice sets forth the names and titles of the current membership of the PCIE/ECIE Performance Review Board.

EFFECTIVE DATE: January 3, 2000.

FOR FURTHER INFORMATION CONTACT: Individual Offices of (the) Inspector General.

SUPPLEMENTARY INFORMATION:

I. Background

The Inspector General's Act of 1978, as amended, has created independent audit and investigative units-Offices of (the) Inspector General-at 57 Federal agencies. In 1981, the President's Council on Integrity and Efficiency (PCIE) was established by Executive Order. An Executive Order in 1992 reaffirmed the PCIE and established the Executive Council on Integrity and Efficiency (ECIE). Both councils are interagency committees chaired by the Office of Management and Budget's Deputy Director for Management. Their mission is to continually identify, review, and discuss areas of weakness and vulnerability in Federal programs and operations to fraud, waste, and abuse, and to develop plans for coordinated, Government-wide activities that address these problems and promote economy and efficiency in Federal programs and operations. PCIE members include the 28 Inspectors General appointed by the President; ECIE members include the 29 Inspectors General appointed by their respective agency heads.

II. PCIE Performance Review Board

Under 5 U.S.C. 4314(c) (1)–(5) and in accordance with regulations prescribed by the Office of Personnel Management, each agency is required to establish one

or more Senior Executive Service (SES) performance review boards. The purpose of these boards is to review and evaluate the initial appraisal of a senior executive's performance by the supervisor, along with any recommendations to the appointing authority relative to the performance of the senior executive. The current members of the PCIE/ECIE Performance Review Board are as follows:

Joshua Gotbaum,

Executive Associate Director and Controller.

Members	Title
Agency for International Development	
Everett L. Mosley	Deputy Inspector General.
John L. Sullivan	Assistant Inspector General for Investigations.
Robert S. Perkins	Legal Counsel.
Department of Agriculture	
Joyce Fleischman	Deputy Inspector General.
Paula F. Hayes	Assistant Inspector General for Policy Development and Resources Management.
James R. Ebbitt	Assistant Inspector General for Audit.
Richard D. Long	Deputy Assistant Inspector General for Audit.
Robert W. Young, Jr	Deputy Assistant Inspector General for Audit.
Gregory S. Seybold	Assistant Inspector General for Investigations.
Jon E. Novak	Deputy Assistant Inspector General for Investigations.
Christine Jung	Deputy Assistant Inspector General for Investigations.
Department of Commerce	
Judith Gordon	Assistant Inspector General for Systems Evaluation.
Elizabeth Barlow	Counsel to the Inspector General.
Stephen Garmon	Assistant Inspector General for Investigation.
Mary Casey	Deputy Assistant Inspector General for Auditing.
Department of Defense	
John F. Keenan	Assistant Inspector General for Investigations.
Robert J. Lieberman	Assistant Inspector General for Auditing.
Charles W. Beardall	Deputy Assistant Inspector General for Criminal Investigative Policy and Oversight.
Carol L. Levy	Deputy Assistant Inspector General for Investigations.
David K. Steensma	Deputy Assistant Inspector General for Auditing.
Joel L. Leson	Director for Administration and Information Management.
C. Frank Broome	Director for Departmental Inquiries.
David M. Crane	Director for Intelligence Review.
Thomas Gimble	Director, Acquisition Management Audit Directorate.
David A. Brinkman	Director, Audit Follow-up and Technical Support Directorate.
Paul J. Granetto	Director, Contract Management Audit Directorate.
F. Jay Lane	Director, Finance and Accounting Directorate.
Shelton Young	Director, Business and Logistics Support Directorate.
Department of Energy	
Phillip L. Holbrook	Assistant Inspector General for Audit Services.
Judith D. Gibson	Assistant Inspector General for Resource Management.
Sandra L. Schneider	Assistant Inspector General for Inspections.
Herbert Richardson	Assistant Inspector General for Investigations.
Sandford J. Parnes	Counsel to the Inspector General.
Stanley R. Sulak	Director, Office of Performance Audits and Administration.
William S. Maharay	Regional Manager.
Department of Health and Human Services	
Michael F. Mangano	Principal Deputy Inspector General.
Thomas D. Roslewicz	Deputy Inspector General for Audit Services.
Joseph E. Vengrin	Assistant Inspector General for Audit Policy/Oversight.
George Reeb	Assistant Inspector General for Health Care Financing Audits.
Joe Green	Assistant Inspector General for Public Health Service Audits.
John A. Ferris	Assistant Inspector General for Human, Family and Department Service Audits.
John E. Hartwig	Deputy Inspector General for Investigations.
Robert E. Richardson	Assistant Inspector General for Criminal Investigations.
Frank J. Nahlik	Assistant Inspector General for Investigative Oversight and Support.
George Grob	Deputy Inspector General for Evaluation and Inspections.
Dennis J. Duquette	Deputy Inspector General for Management and Policy.
D. McCarty Thornton	Counsel to the Inspector General.
Lewis Morris	Assistant Inspector General for Litigation Coordination.
Department of Housing and Urban Development	
John J. Connors	Deputy Inspector General.
Kathryn M. Kuhl-Inclan	Assistant Inspector General for Audit.
Phillip A. Kesaris	Assistant Inspector General for Investigation.
Phillip X. Newsome	Deputy Assistant Inspector for Investigation.
Michael R. Phelps	Deputy Assistant Inspector General for Audit.

Members	Title
Department of Justice	
Robert L. Ashbaugh	Deputy Inspector General.
Mary W. Demory	Assistant Inspector General for Management and Planning.
Howard L. Sribnick	General Counsel.
Department of Labor	
Patricia A. Dalton	Deputy Inspector General.
Sylvia T. Horowitz	Assistant Inspector General for Management and Counsel.
John J. Getek	Assistant Inspector General for Audit.
Stephen J. Cossu	Assistant Inspector General for Investigations.
Department of State	
J. Richard Berman	Deputy Assistant Inspector General for Audits.
Donald Norman	Assistant Inspector General for Inspections.
LeRoy Lowery	Deputy Assistant Inspector General for Inspections.
James K. Blubaugh	Assistant Inspector General of Policy, Planning, and Management.
Jon Wiant	Assistant Inspector General for Security and Intelligence Oversight.
Department of Transportation	
Raymond J. DeCarli	Deputy Inspector General.
Todd J. Zinser	Assistant Inspector General for Investigations.
Alexis M. Stefani	Assistant Inspector General for Auditing.
Thomas J. Howard	Deputy Assistant Inspector General for Maritime and Departmental Programs.
John L. Meche	Deputy Assistant Inspector General for Financial and Information Technology.
Department of the Treasury	
Richard B. Calahan	Deputy Inspector General.
Dennis S. Schindel	Assistant Inspector General for Audit.
Emilie M. Baebel	Assistant Inspector General for Management Services.
Michael C. Tarr	Assistant Inspector General for Investigations.
Marla A. Freedman	Deputy Assistant Inspector General for Program Audits.
William Pugh	Deputy Assistant Inspector General for Financial Management.
Department of Veterans Affairs	
Thomas Williams	Assistant Inspector General for Investigations.
Michael G. Sullivan	Assistant Inspector General for Audit.
Michael Slachta, Jr	Deputy Assistant Inspector General for Audit.
Jon Wooditch	Assistant Inspector General for Management and Administration.
Alanson Schweitzer	Deputy Assistant Inspector General for Healthcare Inspections.
Maureen T. Regan	Counselor to the Inspector General.
Environmental Protection Agency	
James O. Rauch	Assistant Inspector General for Audit.
John Jones	Assistant Inspector General for Management.
Allen Fallin	Assistant Inspector General for Investigations.
Emmett Dashiell	Deputy Assistant Inspector for Investigations.
Federal Emergency Management Agency	
Richard L. Skinner	Deputy Inspector General.
Nancy L. Hendricks	Assistant Inspector General for Audits.
Paul J. Lillis	Assistant Inspector General for Investigations.
General Services Administration	
Joel S. Gallay	Deputy Inspector General.
Kathleen S. Tighe	Counsel to the Inspector General.
James Henderson	Assistant Inspector General for Investigations.
Mark Woods	Deputy Assistant Inspector General for Investigations.
Eugene L. Waszily	Assistant Inspector General for Auditing.
John Syarto	Deputy Assistant Inspector General for Auditing.
National Aeronautics and Space Administration	
David M. Cushing	Assistant Inspector General for Inspections, Administrative Investigations, and Assessments.
Samuel A. Maxey	Assistant Inspector General for Investigations.
Russell A. Rau	Assistant Inspector General for Auditing.
Nuclear Regulatory Commission	
David C. Lee	Deputy Inspector General.
Thomas J. Barchi	Assistant Inspector General for Audits.
James E. Childs	Assistant Inspector General for Investigations.
Office of Personnel Management	
Joseph R. Willever	Deputy Inspector General.
Harvey D. Thorp	Assistant Inspector General for Audits.
Sanders P. Gerson	Deputy Assistant Inspector General for Audits.

Members	Title
Norbert E. Vint	Assistant Inspector General for Investigations.
E. Jeremy Hutton	Assistant Inspector General for Legal Affairs.
Railroad Retirement Board	
William H. Tebbe	Assistant Inspector General for Investigations.
Henrietta B. Shaw	Assistant Inspector General for Audit.
Small Business Administration	
Peter L. McClintock	Deputy Inspector General.
Richard R. Smith	Assistant Inspector General for Investigations.
Robert G. Seabrooks	Assistant Inspector General for Auditing.
Thomas C. Cross	Assistant Inspector General for Inspections and Evaluation.
Social Security Administration	
Daniel R. Devlin	Deputy Assistant Inspector for Audit.
Patrick O'Carroll	Assistant Inspector General for Investigations.
Kathy Buller	Counsel to the Inspector General.
Peace Corps	
Charles Smith	Inspector General.
Equal Employment Opportunity Commission	
Aletha Brown	Inspector General.

[FR Doc. 00–6023 Filed 3–10–00; 8:45 am]
BILLING CODE 3110–01–P

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–24332; File No. 812–11942]

Calamos Advisors Trust, et al., Notice of Application

March 7, 2000.

AGENCY: Securities and Exchange Commission (''SEC'' or ''Commission'').

ACTION: Notice of Application for an order of exemption under Section 6(c) of the Investment Company Act of 1940 (''1940 Act'') for exemptions from the provisions of Section 9(a), 13(a), 15(a) and 15(b) of the 1940 Act and Rules 6e-2(b)(15) and 6e-3(T)(b)(15) thereunder.

SUMMARY OF APPLICATION: Applicants seek and order to the extent necessary to permit shares of any current of future series of Calamos Advisors Trust (''Fund'') designed to fund insurance products and shares of any other investment company or series thereof now or in the future registered under the 1940 Act that is designed to fund insurance products and for which Calamos Asset Management, Inc. (''Calamos''), or any of its affiliates, may serve as investment adviser, administrator, manager, principal underwriter or sponsor (the Fund, together with such other investment companies are referred to, collectively, as the ''Funds''), to be sold to and held by (1) variable annuity and variable life insurance separate accounts of both affiliated and unaffiliated life insurance companies; and (2) qualified pension and retirement plans.

Applicants: Calamos Advisors Trust and Calamos Asset Management, Inc.

FILING DATE: The application was filed on January 12, 2000, and amended on March 1,2000.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing on this application by writing to the Secretary of the SEC and serving Applicants with a copy of the request, in person or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on March 31, 2000, and accompanied by proof of service on the Applicants in the form of an affidavit for lawyers, a certificate of service. Hearing requests should state the nature of your interest, the reason for the request, and the issues you contest. Persons may request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street, N.W., Washington, D.C. 20549–0609. Applicants, c/o James S. Hamman, Jr., Esq., General Counsel, Calamos Asset Management, Inc., 1111 E. Warrenville Road, Naperville, Illinois 60563.

FOR FURTHER INFORMATION CONTACT: Ronald A. Holinsky, Attorney or Susan M. Olson, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 942–0607.

SUPPLEMENTARY INFORMATION: Following is a summary of the application. The complete application is available for a fee from the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549–0102 (tel. (202) 942–8090).

Applicants' Representations

1. The Fund is a Massachusetts business trust registered as an open-end management investment company. The Fund commenced operations on May 1, 1999 and currently consists of one series. Additional series may be added in the future.

2. Calamos is registered as an investment adviser under the Investment Advisers Act of 1940 and will be the investment manager for the Fund.

3. The Fund intends to offer its shares to separate accounts of both affiliated and unaffiliated insurance companies, supporting variable annuity and variable life insurance contracts. Separate accounts owning shares of the Fund and their insurance company depositors are referred to as ''Participating Separate Accounts'' and ''Participating Insurance Companies,'' respectively.

4. The Fund also intends to offer one or more series of its shares directly to qualified pension and retirement plans (''Plans'') outside the separate account context. The Plans will be pension or retirement plans intended to qualify under Sections 401(a) and 501(c) of the Internal Revenue Code of 1986, as amended (''Code''). The Fund's shares will be sold to Plans which are, or are designed to be, subject to the Employee Retirement Income Security Act of 1984 (''ERISA''), as amended. Participating Separate Accounts, Participating Insurance Companies, and Plans are collectively referred to as ''Participants''.

5. The Participating Insurance Companies will establish their own Participating Separate Accounts and design their own contracts. Each

Participating Insurance Company will enter into a fund participation agreement with the Funds on behalf of its Participating Separate Account and will have the legal obligation of satisfying all requirements under state and federal law. The role of the Fund, so far as the federal securities laws are applicable, will be to offer their shares to separate accounts of Participating Insurance Companies and to Plans and to fulfill any conditions that the Commission may impose upon granting the order requested in the application.

6. Plans may choose the Fund (or any series thereof) as their sole investment or as one of several investments. Plan participants may or may not be given an investment choice depending on the Plan itself. Shares of the Fund sold to Plans would be held by the trustee(s) of the Plans as mandated by Section 403(a) of ERISA. Calamos will not act as investment adviser to any of the Plans that will purchase shares of the Fund. There will be no pass-through voting to the participants in such Plans as it is not required to be provided under ERISA.

Applicants' Legal Analysis

1. Applicants request that the Commission issue an order under Section 6(c) of the 1940 Act granting exemptive relief from Sections 9(a), 13(a), and 15(a) and 15(b) of the 1940 Act and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder, to the extent necessary to permit shares of the Fund to be offered and sold to variable annuity and variable life insurance separate accounts of both affiliated and unaffiliated insurance companies and to Plans.

2. In connection with the funding of scheduled premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a unit investment trust, Rule 6e–2(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act. The exemptions granted by Rule 6e–2(b)(15) are available, however, only where the management investment company underlying the separate account (''underlying fund'') offers its shares ''exclusively to variable life insurance separate accounts of the life insurer or any affiliated life insurance company * * *'' Therefore, the relief granted by Rule 6e–2(b)(15) is not available with respect to a scheduled premium variable life insurance separate account that owns shares of an underlying fund that also offers its shares to a variable annuity or flexible premium variable life insurance separate account of the same company or of any affiliated life insurance company. The use of a common management investment company as the underlying investment medium for both variable annuity and variable life insurance separate accounts of the same insurance company or of any affiliated life insurance company is referred to herein as ''mixed funding.'' In addition, the relief granted by Rule 6e–2(b)(15) is not available if shares of the underlying management investment company are offered to variable annuity or variable life insurance separate accounts of unaffiliated life insurance companies. The use of a common management investment company as the underlying investment medium for both variable annuity and variable life insurance separate accounts of the same insurance company or of any unaffiliated life insurance company is referred to herein as ''shared funding.''

3. In connection with the funding of flexible premium variable life insurance contracts issued through a separate account, Rule 6e–3(T)(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act. The exemptions granted by Rule 6e–3(T)(b)(15) are available, however, only where the separate account's underlying fund offers its shares ''exclusively to separate accounts of the life insurer, or of any affiliated life insurance company, offering either scheduled contracts or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company, or which offer their shares to any such life insurance company in consideration solely for advances made by the life insurer in connection with the operation of the separate account * * *'' Therefore, Rule 6e–3(T)(b)(15) permits mixed funding with respect to a flexible premium variable life insurance separate account. However, Rule 6e–3(T)(b)(15) does not permit shared funding because the relief granted by Rule 6e–3(T)(b)(15) is not available with respect to a flexible premium variable life insurance separate account that owns shares of a management investment company that also offers its shares to separate accounts (including flexible premium variable life insurance separate accounts) of unaffiliated life insurance companies.

4. Applicants state that the relief granted by Rules 6e–2(b)(15) and 6e–3(T)(b)(15) is not affected by the purchase of shares of the Fund by a Plan. However, because the relief under Rules 6e–2(b)(15) and 6e–3(T)(b)(15) is available only where shares of the underlying fund are offered exclusively to separate accounts, exemptive relief is necessary if shares of the Fund are also to be sold to Plans.

5. Applicants state that the current tax law permits the Fund to increase its asset base through the sale of shares to Plans. Section 817(h) of the Code imposes certain diversification standards on the underlying assets of the variable contracts. The Code provides that such contracts shall not be treated as an annuity contract or life insurance contract for any period during which the investments are not adequately diversified in accordance with regulations prescribed by the Treasury Department. Treasury regulations provide that, to meet the diversification requirements, all of the beneficial interests in an investment company must be held by the segregated asset accounts of one or more insurance companies. The regulations do contain certain exceptions to this requirement, however, one of which permits shares of an investment company to be held by the trustee of a Plan without adversely affecting the ability of shares in the same investment company also to be held by the separate accounts of insurance companies in connection with their variable contracts (Treas. Reg. § 1.8 17–5(f)(3)(iii)).

6. Applicants state that the promulgation of Rules 6e–2(b)(15) and 6e–3(T)(b)(15) preceded the issuance of these Treasury regulations which made it possible for shares of a Fund to be held by the trustee of a Plan without adversely affecting the ability of shares of the Fund to also be held by the separate accounts of insurance companies in connection with their variable life insurance contracts. Thus, Applicants assert that the sale of shares of a Fund to separate accounts through which variable life insurance contracts are issued and Plans could not have been envisioned at the time of the adoption of Rules 6e–2(b)(15) and 6e–3(T)(b)(15), given the then-current tax law.

7. Applicants assert that if the Funds were to sell shares only to Plans or to separate accounts funding variable annuity contracts, no exemptive relief would be necessary. Applicants state that none of the relief provided under Rules 6e–2(b)(15) and 6e–3(T)(b)(15) relates to Plans or to a registered investment company's ability to sell its shares to such purchasers. Exemptive relief is requested in the application only because some of the separate accounts that will invest in the Fund (or series thereof) may themselves be investment companies that rely on Rules 6e–2 and 6e–3(T) and that desire to have the relief continue in place.

8. In general, Section 9(a) of the 1940 Act disqualifies any person convicted of certain offenses, and any company

affiliated with that person, from serving in various capacities with respect to an underlying registered management investment company. More specifically, Section 9(a)(3) of the 1940 Act provides that it is unlawful for any company to act as investment adviser to, or principal underwriter for, any registered open-end investment company if an affiliated person of that company is subject to a disqualification enumerated in Sections 9(a)(1) or (2). Rules 6e–2(b)(15)(i) and (ii), and 6e–3(T)(b)(15)(i) and (ii) provide partial exemptions from Section 9(a) under certain circumstances, subject to the limitations on mixed and shared funding. These exemptions limit the application of eligibility restrictions to affiliated individuals or companies that directly participate in the management of the underlying management investment company.

9. Applicants state that the relief provided by Rules 6e–2(b)(15) and 6e–3(T)(b)(15) permits the life insurer to serve as the underlying fund's investment adviser or principal underwriter, provided that none of the insurer's personnel who are ineligible pursuant to Section 9(a) are participating in the management or administration of the fund. Applicants state that the partial relief from Section 9(a) provided by Rules 6e–2(b)(15) and 6e–3(T)(b)(15), in effect, limits the amount of monitoring necessary to ensure compliance with Section 9 to that which is appropriate in light of the policy and purposes of Section 9. Applicants assert that it is not necessary for the protection of investors or the purposes fairly intended by the policy and provisions of the 1940 Act to apply the provisions of Section 9(a) to the many individuals in an insurance company complex, most of whom typically will have no involvement in matters pertaining to investment companies funding the separate accounts. Applicants assert that it also is unnecessary to apply the restrictions of Section 9(a) to the many individuals in various unaffiliated insurance companies (or affiliated companies of participating insurance companies) that may utilize the Funds as a funding medium for variable contracts. Moreover, Applicants state that the appropriateness of the relief requested will not be affected by the proposed sale of shares of the Fund to Plans, because the insulation of the Fund from those individuals who are disqualified under the 1940 Act remains in place.

10. Applicants state that Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) under the 1940 Act provide exemptions from the pass-through voting requirements with respect to several significant matters, assuming the limitations on mixed and shared funding are observed.

11. Applicants further represent that the sale of Fund shares to Plans should not affect the relief requested. With respect to Plans, there is no requirement to pass-through voting rights to Plan participants. Shares of the Funds sold to Plans would be held by the trustees of such Plans as mandated by Section 403(a) of ERISA. Section 403(a) also provides that the trustees must have exclusive authority and discretion to manage and control the Plan with two exceptions: (a) when the Plan expressly provides that the trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees are subject to proper directions made in accordance with the terms of the Plan and not contrary to ERISA; and (b) when the authority to manage, acquire or dispose of assets of the Plan is delegated to one or more investment managers pursuant to Section 402(c)(3) of ERISA. Unless one of the two exceptions stated in Section 403(a) applies, the Plan trustees have exclusive authority and responsibility for voting proxies.

12. Applicants state that where a named fiduciary appoints an investment manager, the investment manager has the responsibility to vote the shares held unless the right to vote such shares is reserved to the trustees or the named fiduciary. Accordingly, Applicants submit that unlike the case with insurance company separate accounts, the issue of the resolution of material irreconcilable conflicts with respect to voting is not present with respect to Plans since such Plans are not entitled to pass-through voting privileges.

13. Applicants generally expect many Plans to have their trustee(s) or other fiduciaries exercise voting rights attributable to investment securities held by the Plan in their discretion. Some of the Plans, however, may provide for the trustee(s), or investment adviser(s) or another named fiduciary to exercise voting rights in accordance with instructions from participants. Applicants submit that where a Plan does not provide participants with the right to give voting instructions, there is no potential for material irreconcilable conflicts of interest between or among contract owners and Plan investors with respect to voting of the Fund's shares. Applicants further submit that where a Plan does provide participants with the right to give voting instructions, they see no reason to believe that participants in Plans generally, or those in a particular Plan, either as a single group or in combination with participants in other Plans, would vote in a manner that would disadvantage contract owners. The purchase of shares of the Fund by Plans that provide voting rights does not present any complications not otherwise occasioned by mixed and shared funding.

14. Applicants submit that even if a Plan were to hold a controlling interest in the Fund, such control would not disadvantage other investors in the Fund to any greater extent than is the case when any institutional shareholder holds a majority of the voting securities of any open-end management investment company. In this regard applicants submit that investment in the fund by a Plan will not create any of the voting complications occasioned by mixed and shared funding. Unlike mixed or shared funding, Plan investor voting rights cannot be frustrated by veto rights of insurers or state regulators.

15. Applicants state that no increased conflicts of interest would be presented by the granting of the requested relief. Applicants assert that shared funding does not present any issues that do not already exist where a single insurance company is licensed to do business in several states. Applicants note that where different Participating Insurance Companies are domiciled in different states, it is possible that the state insurance regulatory body in a state in which one participating Insurance Company is domiciled could require action that is inconsistent with the requirements of other insurance regulators in one or more other states in which other Participating Insurance Companies are domiciled. Applicants submit that this possibility is no different or greater than exists where a single insurer and its affiliates offer their insurance products in several states.

16. Applicants further submit that affiliation does not reduce the potential for differences in state regulatory requirements. In any event, the conditions discussed below are designed to safeguard against any adverse effects that these differences may produce. If a particular state insurance regulator's decision conflicts with the majority of other state regulators, the affected insurer may be required to withdraw its participating Separate Account's investment in the Fund.

17. Applicants also argue that affiliation does not eliminate the potential, if any exists, for divergent judgments as to when a participating insurance Company could disregard contract owner voting instructions. Potential disagreement is limited by the

requirement that disregarding voting instructions be both reasonable and based on specified good faith determinations. however, if a participating insurance Company's decision to disregard Contract owner voting instructions represents a minority position or would preclude a majority vote approving a particular change, such participating Insurance Company may be required, at the election of the Fund, to withdraw its separate account, investment in the Fund. No charge or penalty will be imposed as a result of such a withdrawal.

18. Applicants submit that there is no reason why the investment policies of the Fund with mixed funding would, or should, be materially different from what those policies would, or should, be if the Fund supported only variable annuity or only variable life insurance contracts. hence, Applicants state, there is no reason to believe that conflicts of interest would result from mixed funding. moreover, Applicants represent that the Fund will not be managed to favor or disfavor any particular insurer or type of contract.

19. As noted above, Section 817(h) of the code imposes certain diversification standards on the assets underlying the variable contracts held in the portfolios of management investment companies. Treasury Regulation Section 1.817–5(f)(3)(iii), which establishes diversification requirements for such portfolios, specifically permits, among other things, ''qualified pension or retirement plans'' and separate accounts to share the same underlying management investment company. Therefore, Applicants assert that neither the Code, the Treasury regulations, nor the revenue rulings thereunder, recognize or proscribe any inherent conflicts of interest if qualified plans, variable annuity separate accounts, and variable life separate accounts all invest in the same management investment company.

20. Applicants note that while there are differences in the manner in which distributions from variable contracts and Plans are taxed, the tax consequences do not raise any conflicts of interest. When distributions are to be made, and the Participating Separate Account or a Plan cannot net purchase payments to make the distributions, the Participating Separate Account or Plan will redeem shares of the Fund at their net asset value in conformity with Rule 22c–1 under the 1940 Act to provide proceeds to meet distribution needs. The Plan will then make distributions in accordance with the terms of the Plan. The life insurance company will surrender values from the Separate Account into the general account to make distributions in accordance with the terms of the variable contract.

21. Applicants state that the sale of shares to Plans should not increase the potential for material irreconcilable conflicts of interest between or among different types of investors. Applicants submit that there should be very little potential for such conflicts beyond that which would otherwise exist between variable annuity and variable life insurance contract owners.

22. Applicants also state that it is possible to provide an equitable means of giving voting rights to Participating Separate Account contract owners and to Plans. The transfer agent for the Fund will inform each Participating Insurance Company of each Participating Separate Account's share ownership in the Fund, as well as inform the trustees of Plans of their holdings. The Participating Insurance company then will solicit voting instructions in accordance with Rules 6e–2 and 6e–3 (T), as applicable, and its participation agreement with the Fund. Shares held by Plans will be voted in accordance with applicable law. The voting rights provided to Plans with respect to shares of the Fund would be no different from the voting rights that are provided to Plans with respect to shares of funds sold to the general public.

23. Applicants submit that the ability of the Fund to sell its shares directly to Plans does not create a ''senior security,'' as such term is defined under Section 12(g) of the 1940 Act, with respect to any contract owner as opposed to a Plans participant. Regardless of the rights and benefits of Plan participants or contract owners, the Plans and the Participating Separate Accounts only have rights with respect to their respective shares of the Fund. No shareholder of the Fund has any preference over any other shareholder with respect to distribution of assets or payments of dividends.

24. Applicants state that there are no conflicts between the contract owners of Participating Separate Accounts and Plan participants with respect to the state insurance commissioners' veto powers over investment objectives. The basic premise of shareholder voting is that shareholders may not all agree with a particular proposal. While interests and opinions of shareholders may differ, however, this does not mean that there are any inherent conflicts of interest between or among such shareholders. State insurance commissioners have been given the veto power in recognition of the fact that insurance companies usually cannot simply redeem their separate accounts out of one fund and invest in another. Generally, complex and time-consuming transactions must be undertaken to accomplish such redemptions and transfers. Conversely, trustees of Plans can make the decision quickly and redeem their shares of the Fund and reinvest in another funding vehicle without the same regulatory impediments faced by separate accounts, or, as is the case with most Plans, even hold cash pending a suitable investment. Based on the foregoing, applicants represent that even should the interests of contract owners and the interests of Plans conflict, the conflicts can be resolved almost immediately because the trustees of the Plans can, independently, redeem shares out of the Fund.

25. Applicants also assert that there does not appear to be any greater potential for material irreconcilable conflicts arising between the interests of Plan participants and contract owners of Participating Insurance Companies from possible future changes in the federal tax laws than that which already exists between variable annuity and variable life insurance contract owners.

26. Applicants believe that the summary of the discussion contained herein demonstrates that the sale of shares of the Fund to qualified plans and variable contracts does not increase the risk of material irreconcilable conflicts of interest. Furthermore, Applicants state that the use of the Fund with respect to Plans is not substantially different from the Fund's current use, in that Plans, like variable contracts, are generally long-term retirement vehicles. In addition, applicants assert that regardless of the type of shareholder in the Fund, Calamos is or would be contractually or otherwise obligated to manage the Fund solely and exclusively in accordance with the Fund's investment objectives, policies and restrictions as well as any guidelines established by the Fund's Board of Trustees.

27. Applicants assert that various factors have prevented more insurance companies from offering variable annuity and variable life insurance contracts than currently do so. These factors include the costs of organizing and operating a funding medium, the lack of expertise with respect to investment management, and the lack of public name recognition as investment professionals. In particular, some smaller life insurance companies may not find it economically feasible, or within their investment or administrative expertise, to enter the variable contract business on their own.

Applicants assert that use of the Fund as a common investment medium for variable contracts would ameliorate these concerns. Participating Insurance companies would benefit not only from the investment advisory and administrative expertise of Calamos and its affiliates, but also from the cost efficiencies and investment flexibility afforded by a large pool of funds. Applicants submit that therefore, making the Fund available for mixed and shared funding will encourage more insurance companies to offer variable contracts. Applicants claim that this should result in increased competition with respect to both variable contract design and pricing, which can be expected to result in more product variation and lower charges. Moreover, the sale of the shares of the Fund to Plans should further increase the amount of assets available for investment by the Fund. This in turn, should inure to the benefit of contract owners by promoting economies of scale, by permitting greater safety through greater diversification, and by making the addition of new portfolios to the Fund more feasible.

28. Applicants assert that there is no significant legal impediment to permitting mixed and shared funding and sales of Fund shares to Plans.

Applicant's Conditions

Applicant consents to the following conditions if the application is granted:

1. A majority of the Board of Trustees or Board of Directors (''Board'') of the Fund shall consist of persons who are not ''interested persons'' of the Fund, as defined by Section 2(a)(19) of the Act and the Rules thereunder and as modified by any applicable orders of the Commission, except that if this condition is not met by reason of the death, disqualification, or bona fide resignation of any trustee or director, then the operation of this condition shall be suspended: (a) For a period of 45 days if the vacancy or vacancies may be filled by the Board; (b) for a period of 60 days if a vote of shareholders is required to fill the vacancy or vacancies; or (c) for such longer period as the Commission may prescribe by rule, or by order upon application.

2. The Board will monitor the Fund for the existence of any material irreconcilable conflict among the interests of the contract owners of all separate accounts investing in the Fund and of Plan participants investing in the Fund. A material irreconcilable conflict may arise for a variety of reasons, including: (a) An action by any state insurance regulatory authority; (b) a change in applicable federal or state insurance, tax, or securities laws or regulations, or a public ruling, private letter ruling, no-action or interpretative letter, or any similar action by insurance, tax, or securities regulatory authorities; (c) an administrative or judicial decision in any relevant proceeding; (d) the manner in which the investments of any Fund or series are being managed; (e) a difference in voting instruction given by variable annuity contract owners and variable life insurance contract owners; (f) a decision by an insurer to disregard the voting instructions of contract owners; or (g) if applicable, a decision by a Plan to disregard voting instructions of Plan participants.

3. In the event that a Plan or Plan participant shareholder should become an owner of 10% or more of the assets of the Fund, such Plan will execute a fund participation agreement including the conditions of the Application set forth herein, to the extent applicable. A Plan or Plan participant will execute an application containing an acknowledgement of this condition at the time of its initial purchase of shares of a Fund.

4. Participating Insurance Companies, Calamos, any other investment adviser of the Fund, and any Plans that execute a fund participation agreement upon becoming an owner of 10% or more of the Fund's assets (''Participants'') will report any potential or existing conflicts to the Board. Participants will be responsible for assisting the Board in carrying out its responsibilities under these conditions by providing the Board with all information reasonably necessary for the Board to consider any issues raised. This responsibility includes, but is not limited to, an obligation by each Participating Insurance Company to inform the Board whenever it has determined to disregard contract owner voting instructions and, when pass-through voting is applicable, an obligation of each Plan to inform the Board whenever it has determined to disregard voting instructions from Plan participants. The responsibilities to report such information and conflicts and to assist the Board will be a contractual obligation of all Participating Insurance Companies and Plans under their agreements governing participation in the Fund, and such agreements shall provide, in the case of Participating Insurance Companies, that such responsibilities will be carried out with a view only to the interests of contract owners or, in the case of Plans, Plan participants.

5. If it is determined by a majority of the Board, or a majority of its disinterested trustees or directors, that a material irreconcilable conflict exists, the relevant Participating Insurance Companies and Plans, at their expense and to the extent reasonably practicable (as determined by a majority of the disinterested trustees or directors), shall take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict. Such steps could include: (a) withdrawing the assets allocable to some or all of the separate accounts from the Fund or any series thereof and reinvesting such assets in a different investment medium which may include another series of the Fund; (b) submitting the question as to whether such segregation should be implemented to a vote of all affected contract owners and, as appropriate, segregating the assets of any appropriate group (*i.e.,* annuity or life insurance contract owners, or variable contract owners of one or more participating insurance companies) that votes in favor of such segregation, or offering to the affected contract owners the option of making such a change; and (c) establishing a new registered management investment company or managed separate account. If a material irreconcilable conflict arises because of an insurer's decision to disregard contract owner voting instructions and the decision represents a minority position or would preclude a majority vote, the insurer may be required, at the election of the Fund, to withdraw its separate account's investment in the Fund, and no charge or penalty will be imposed as a result of such withdrawal. If a material irreconcilable conflict arises because of a Plan's decision to disregard Plan participant voting instructions, if applicable, and that decision represents a minority position or would preclude a majority vote, the Plan may be required, at the election of the Fund, to withdraw its investment in such Fund, and no charge or penalty will be imposed as a result of such withdrawal. To the extent permitted by applicable law, the responsibility to take remedial action in the event of a Board determination of a material irreconcilable conflict and bear the cost of such remedial action shall be a contractual obligation of all Participating Insurance Companies and Plans under their agreements governing participation in the Fund and these responsibilities will be carried out with a view only to the interests of the contract owners and Plan participants, as appropriate.

6. For purposes of Condition 5, a majority of the disinterested members of the Board shall determine whether or not any proposed action adequately

remedies any material irreconcilable conflict but in no event will the Fund, or Calamos (or any other investment adviser) be required to establish a new funding medium for any variable contract. No Participating Insurance Company shall be required by Condition 5 to establish a new funding medium for any variable contract if an offer to do so has been declined by a vote of the majority of contract owners materially and adversely affected by the material irreconcilable conflict. No Plan shall be required by this Condition 5 to establish a new funding medium for such Plan if: (a) An offer to do so has been declined by a vote of a majority of Plan participants materially and adversely affected by the irreconcilable material conflict, or (b) pursuant to governing Plan documents and applicable law, the Plan makes such decision without a Plan participant vote.

7. Participants will be informed promptly in writing of the Board's determination of the existence of a material irreconcilable conflict and its implications.

8. Participating Insurance Companies will provide pass-through voting privileges to contract owners who invest in Participating Separate Accounts so long as the Commission continues to interpret the 1940 Act as requiring pass-though voting privileges for contract owners. Accordingly, Participating Insurance Companies will vote shares of the Fund or series thereof held in Participating Separate Accounts in a manner consistent with voting instructions timely received from contract owners. In addition, each Participating Insurance Company will vote shares of the Fund, or series thereof, held in its separate accounts for which it has not received timely voting instructions as well as shares it owns, in the same proportion as those shares for which it has received voting instructions. Participating Insurance Companies will be responsible for assuring that each of their Participating Separate Accounts calculate voting privileges in a manner consistent with all other Participating Insurance Companies. The obligation to vote the Fund's shares and calculate voting privileges in a manner consistent with all other Participating Separate Accounts shall be a contractual obligation of all Participating Insurance Companies under the agreements governing participation in the Fund. Each Plan will vote as required by applicable law and governing Plan documents.

9. The Fund will notify all Participating Insurance Companies and Plans that disclosure in separate account prospectuses or plan prospectuses or other plan disclosure documents regarding potential risks of mixed and shared funding may be appropriate. The Fund shall disclose in its prospectus that: (a) Its shares are offered to insurance company separate accounts which fund both annuity and life insurance contracts, (b) due to differences in tax treatment and other considerations, the interests of various contract owners participating in the Fund and the interest of Plans investing in the Fund may conflict, and (c) the Board will monitor for the existence of any material conflicts and determine what action, if any, should be taken.

10. All reports of potential or existing conflicts of interest received by the Board, and all Board action with regard to: (a) determining the existence of a conflict; (b) notifying Participants of a conflict; and (c) determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the Board or other appropriate records and such minutes or other records shall be made available to the Commission upon request.

11. If and to the extent Rule 6e–2 Rule 6e–3(T) are amended, or Rule 6e-3 under the 1940 Act is adopted, to provide exemptive relief from any provision of the 1940 Act or the rules thereunder with respect to mixed or shared funding on terms and conditions materially different from any exemptions granted in the order requested by Applicants, then the Fund and/or Participating Insurance Companies, as appropriate, shall take such steps as may be necessary to comply with Rules 6e–2 and 6e–3(T), as amended, and proposed Ruled 6e–3, as adopted, to the extent applicable.

12. The Fund will comply with all provisions of the 1940 Act requiring voting by shareholders (for these purposes, the persons having a voting interest in the shares of the Fund). In particular, the Fund will either provide for annual meetings (except to the extent that the Commission may interpret Section 16 of the 1940 Act not to require such meetings) or comply with Section 16(c) of the 1940 Act (although the Fund is not one of the trusts described in Section 16(c) of the Act) as well as with Section 16(a) and, if and when applicable, section 16(b) of the 1940 Act. Further, the Fund will act in accordance with the Commission's interpretation of the requirements of Section 16(a) with respect to periodic elections of Board members and with whatever rules the Commission may promulgate with respect thereto.

13. No less than annually, the Participants shall submit to the Board such reports, materials or data as the Board may reasonably request so that the Board may carry out fully the obligations imposed upon it by the conditions contained in the Application. Such reports, materials and data shall be submitted more frequently if deemed appropriate by the Board. The obligations of the Participants to provide these reports, materials, and data to the Board when it so reasonably requests shall be a contractual obligation of all Participants under the agreements governing their participation in the Fund.

Conclusion

For the reasons and upon the facts stated above, Applicants assert that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 00–6079 Filed 3–10–00; 8:45 am]

BILLING CODE 8010–01–M

SECURITY AND EXCHANGE COMMISSION

[Release No. 35–27149]

Filings Under the Public Utility Holding Company ''Act'' of 1935, as Amended (Act)

March 8, 2000.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the applicant(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The applicant(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the applicant(s) and/or declaration(s) should submit their views in writing by March 8, 2000, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549–0609, and serve a copy on the relevant applicant(s) and/or decalarant(s) at the address(es) specified below. Proof of service (by

affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After March 28, 2000, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Eastern Utilities Associates (70–9611)

Eastern Utilities Associates (''EUA''), a registered holding company located at 750 West Center Street, P.O. Box 543, West Bridgewater, Massachusetts 02379, has filed a declaration under section 12(b) of the Act and rules 45 and 54 under the Act.

EUA requests Commission approval to guaranty certain performance obligations of EUA Cogenex Corporation (''Cogenex''), a wholly owned nonutility subsidiary of EUA, in connection with (1) Cogenex's sale of certain (''Asset Sale'') to Fleet Business Credit Corporation (''Fleet''), and (2) the proposed restructuring and additional funding by Fleet of certain Cogenex contracts previously sold to Fleet under a separate program agreement (''Restructuring'').

Under the Asset Sale and the Restructuring, Cogenex proposes to sell to Fleet, for 475 million, approximately $81 million dollars worth of assets, which will include energy service contracts, notes receivable, and energy efficient equipment. EUA estimates that the energy service contracts will generate, as of January 1, 2000, approximately $110 million of gross cash flow.

As a condition to entering into the Asset Sale and the Restructuring, Fleet has requested that EUA (or its agreed upon successor) (1) Maintain a 51% ownership interest in Cogenex, and (2) Guaranty Cogenex's obligations under the Asset Sale and the Restructuring, including the continued service and performance of the energy service contracts (''Performance Guaranty''). Under the Asset Sale and Restructuring, Fleet will assume all third party credit risk under the contracts. The total principal subject to the Performance Guaranty will be approximately $100 million ($75 million for the Asset Sale and Restructuring and $25 million previously funded by Fleet prior to the Restructuring).

For the Commission by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 00–6077 Filed 3–10–00; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42498; File No. SR–Amex–99–21]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change by the American Stock Exchange LLC Amending Section 106 of the Amex Company Guide

March 6, 2000.

I. Introduction

On June 10, 1999, the American Stock Exchange LLC (''Exchange'' or ''Amex''), submitted to the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change amending Section 106 of the *Amex Company Guide.* The Exchange filed Amendments No. 1 [3] and No. 2 [4] to the proposed rule change on June 14, 1999 and December 1, 1999, respectively. The proposed rule change, as amended, was published for comment in the **Federal Register** on January 24, 2000.[5] The Commission received no comments on the proposal. This order approves the proposal, as amended.

II. Description of the Proposal

The Exchange proposes to amend Section 106 of the *Amex Company guide* to provide for the trading of stock index industry group warrants [6] pursuant to new Rule 19b–4(e) [7] under the Act. Section 106 of the *Amex Company Guide* currently authorizes the Exchange to trade warrants on a stock index industry group pursuant to Section 19(b)(3)(A) of the Act provided that the index meets the generic criteria set forth in Commentary .02 to Amex Rule 901C.[8] As discussed in the New Products Release, however, the Exchange would no longer be required to submit, pursuant to new Rule 19b–4(e) under the Act, a proposed rule change to trade warrants on a new stock index industry group provided the index meets the generic criteria set forth in Commentary .02 to Amex Rule 901C.

In the New Products Release, the Commission noted that in order to rely on the amendment and not submit filings pursuant to Section 19(b)(3)(A) for warrants that satisfy the criteria of rule 901C, a self-regulatory organization would be required to submit a proposed rule change for Commission approval to eliminate the Section 19(b)(3)(A) rule filing requirement from its existing rules. [9] Accordingly, to enable the Exchange to use new Rule 19b–4(e), the Exchange proposes to eliminate the Section 19(b)(3)(A) rule filing requirement from Section 106 of the *Amex Company Guide.*[10] Amex Rule 901c will remain unchanged. The Exchange represents that the use of new Rule 19b–4(e) will be in accordance with the terms and conditions set forth in the New Products Release.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Letter from Scott Van Hatten, Amex, to Richard Strasser, Assistant Director, Division of Market Regulation (''Division''), Commission, dated June 11, 1999 (''Amendment No. 1''). The Exchange originally filed the proposed rule change under Section 19(b)(3)((A) of the Act. Pursuant to Commission staff's request, the Exchange refiled the proposed rule change under Section 199b)(2) of the Act.

[4] Letter from Scott Van Hatten, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated December 1, 1999 (''Amendment No. 2''). Amendment No. 2 states that the Exchange will issue a circular prior to trading any new index warrant pursuant to Rule 19b–4(e) to (i) highlight specific risks associated with warrants on new indexes and remind members that index warrants are direct obligations of the issuer, which are not subject to a clearing house guarantee, (ii) clarify that index warrants may only be sold to accounts approved for standardized options trading, and (iii) clarify that the Exchange's options suitability standards apply to index warrants. Amendment No. 2 also states that Amex Rules 1100 through 1110, which govern issuer eligibility, margin requirements, discretionary accounts, supervision of accounts, position and exercise limits, reportable positions, and trading halts and suspensions, will apply to index warrants. Finally, Amendment No. 2 states that the Exchange's enhanced surveillance procedures will continue to apply to surveillance of index warrants traded pursuant to rule 19b–4(e).

[5] Securities Exchange Act Release No. 42342 (Jan. 14, 2000), 65 FR 3750.

[6] Amex Rule 900C defines ''Stock Index Industry Group'' as a stock index group relating to a stock index which reflects representative stock market values or prices of a particular industry or related industries (also referred to as a ''narrow based index'').

[7] *See* Securities Exchange Act Release No. 40761 (Dec. 8, 1998), 63 FR 70952 (Dec. 22, 1998) (''New Products Release'').

[8] The Commission granted approval to list and trade narrow-based index warrants pursuant to Section 19(b)(3)(A) in Securities Exchange Act Release No. 37007 (March 21, 1996), 61 FR 14165 (March 29, 1996).

[9] *See supra* n. 7, at n. 89.

[10] The Commission approved a similar change to Amex Rule 901C to permit the trading of narrow-based index options pursuant to new Rule 19b–4(e). *See* Securities Exchange Act Release No. 41091 (Feb. 23, 1999), 64 FR 10515 (March 4, 1999).

the Act [11] and the rules and regulations thereunder applicable to a national securities exchange, in that it is designed to facilitate securities transactions and to remove impediments to and perfect the mechanism of a free and open market.[12] The Commission believes that proposed rule change will significantly reduce the Exchange's regulatory burden and allow it to compete more effectively in today's marketplace by facilitating the listing and trading of stock index industry group warrants that meet the generic criteria of Commentary .02 to Exchange Rule 901c. The commission also believes that the proposed rule change will benefit investors by enabling the Exchange to more quickly provide them with tailored products that directly meet their evolving investment needs. The Commission notes that the New Products Release authorizes the Exchange to list and trade certain derivative securities without first riling with the Commission a proposed rule change pursuant to Section 19(b)(3)(A) of the Act, but requires the Exchange to eliminate references to these filing requirements before it can rely on Rule 19b–4(e). The Commission also notes that the Exchange's existing trading rules, procedures, surveillance programs, and listing standards will apply to generic stock index industry group warrants listed and traded on the Exchange and that the Exchange has represented that it will comply with the terms and conditions of the New Product Release.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, [13] that the proposed rule change (SR–Amex–99–21), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. [14]

Jonathan G. Katz,

Secretary.

[FR Doc. 00–6008 Filed 3–10–00; 8:45 am]

BILLING CODE 8010–01–M

[11] 15 U.S.C. 78f(b)(5).

[12] In approving this rule change, the Commission has considered the proposal's impact on efficiency, competition, and capital formation, consistent with Section 3 of the Act. 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42491; File No. SR–ODD–00–01]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval to Proposed Supplement to Options Disclosure Document Regarding FLEX Equity Options

March 2, 2000.

On March 2, 2000, the Options Clearing Corporation (''OCC'') submitted to the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Rule 9b–1 under the Securities Exchange Act of 1934 (''Act''),[1] five definitive copies of a Supplement to its options disclosure document (''ODD''), which describes, among other things, the risks and characteristics of trading in flexibly structure options (''FLEX options''). In particular, the Supplement deletes the discussion of restrictions on exercise price intervals and exercise prices for FLEX equity call options.[2]

The ODD currently contains general disclosures on the characteristics and risks of trading options on equity securities. The Commission has approved proposals by three options exchanges to remove restrictions on exercise price intervals and exercise prices for FLEX equity call options.[3] The proposed Supplement to the ODD deletes the discussion of these restrictions.

The Commission has reviewed the ODD Supplement and finds that it complies with Rule 9b–1 under the Act.[4] The Supplement is intended to be read in conjunction with the ODD, which discusses the characteristics and risks of options generally. The ODD, along with the Supplement, provides information regarding FLEX options sufficient to describe the special characteristics of these products. Rule. 9b–1 provides that an options market must file five preliminary copies of an amended ODD with the Commission at least 30 days prior to the date definitive copies of the ODD are furnished to customers, unless the Commission determines otherwise, having due regard for the adequacy of information disclosed and the protection of investors.[5] The Commission has reviewed the Supplement, and finds that it is consistent with the protection of investors and in the public interest to allow the distribution of the Supplement as of the date of this order.

It is therefore ordered, pursuant to Rule 9b–1 under the Act,[6] that the proposed Supplement regarding FLEX equity options (SR–ODD–00–01) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Jonathan G. Katz,

Secretary.

[FR Doc. 00–6007 Filed 3–10–00; 8:45 am]

BILLING CODE 8010–01–M

[1] 17 CFR 240.9b–1.

[2] *See* Letter from James C. Yong, First Vice President and General Counsel, OCC, to Katherine A. England, Division of Market Regulation, Commission, dated March 1, 2000.

[3] The Commission approved these proposals after the Internal Revenue Service clarified the tax treatment of these options. *See* Release No. 34–42371 (January 31, 2000), 65 FR 5921 (February 7, 2000) (order approving SR–CBOE–99–63); Release No. 34–42389 (February 7, 2000), 65 FR 8224 (February 17, 2000) (order approving SR–PCX–00–01 and SR–Amex–00–02).

[4] 17 CFR 240.9b–1.

[5] This provision is intended to permit the Commission either to accelerate or extend the time period in which definitive copies of a disclosure document may be distributed to the public.

[6] 17 CFR 240.9b–1.

[7] 17 CFR 200.30–3(a)(39).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42365A; File No. SR–Phlx–99–46]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Registration of Trading Floor Personnel

March 7, 2000.

In FR Document No. 00–2634, on page 5923 for Monday, February 7, 2000, Column 1, the second line of the text of proposed Phlx Rule 620 was incorrectly stated. The words ''*Each Floor Broker, Specialist and*'' should appear prior to ''*Registered Options Trader.*'' Thus, the first portion of the rule should read as follows: ''*(a) Trading Floor Member Registration—Each Floor Broker, Specialist and Registered Options Trader on any Exchange trading floor must register* * * *''

Jonathan G. Katz,

Secretary.

[FR Doc. 00–6006 Filed 3–10–00; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

Region I—SBA Providence District Office, Rhode Island SBA Advisory Council; Notice of Public Meeting

The Rhode Island SBA Advisory Council located in Providence, Rhode Island, will hold a public meeting at 8:00 a.m. on Friday, March 24, 2000, at the Marriott Hotel located on One Orms Street in Providence, Rhode Island 02904, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information write or call Mark S. Hayward, Acting District Director, 380 Westminster Street, Room 511, Providence, Rhode Island 02903 or telephone at (401) 528–4561.

Bettie Baca,

Counselor to the Administrator/Public Liaison.

[FR Doc. 00–5971 Filed 3–10–00; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 3249]

Culturally Significant Objects Imported for Exhibition; Determinations: ''Imperial China: The Art of the Horse in Chinese History''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority of October 19, 1999, I hereby determine that the objects to be included in the exhibition ''Imperial China: The Art of the Horse in Chinese History,'' imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to loan agreements with foreign lenders. I also determine that the exhibition or display of the exhibit objects at the International Museum of the Horse, Lexington, KY from on or about May 1, 2000, to on or about August 31, 2000, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of exhibit objects, contact Carol Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/619–6981). The address is U.S. Department of State, SA–44; 301–4th Street, S.W., Room 700, Washington, D.C. 20547–0001.

Dated: March 5, 2000.

William B. Bader,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 00–6101 Filed 3–10–00; 8:45 am]

BILLING CODE 4710–08–U

DEPARTMENT OF STATE

Public Notice No. 3233

Renewal of Cultural Property Advisory Committee Charter

The Charter of the Cultural Property Advisory Committee is being renewed for a two-year period. The membership of this advisory committee consists of private sector experts in archaeology/anthropology/ethnology; experts in the international sale of cultural property; and, representatives of museums and of the general public. The committee was established by 19 U.S.C. 2601 *et seq,* the Convention on Cultural Property Implementation Act. It reviews requests from other countries seeking U.S. import restrictions on archaeological or ethnological material the pillage of which places a country's cultural heritage in jeopardy. The committee makes findings and recommendations to the Secretary of State, who, on behalf of the President, determines whether to impose the import restrictions.

FOR FURTHER INFORMATION CONTACT: Cultural Property Advisory Committee, U.S. Department of State, Bureau of Educational and Cultural Affairs, Rm. 247, State Annex 44, 301 4th St., SW, Washington, DC 20547. Phone (202) 619–6612; Fax: (202) 619–5177.

Dated March 6, 2000.

Maria P. Kouroupas,

Executive Director, Cultural Property Advisory Committee, Department of State.

[FR Doc. 00–6099 Filed 3–10–00; 8:45 am]

BILLING CODE 4710–11–U

DEPARTMENT OF STATE

[Public Notice No: 3232]

Advisory Committee on Historical Diplomatic Documentation; Notice of Meeting

The Advisory Committee on Historical Diplomatic Documentation will meet in the Department of State, 2201 ''C'' Street NW, Washington, D.C., April 10–11, 2000 in Conference Room 1406. Prior notification and a valid photo are mandatory for entrance into the building. One week before the meeting the public must notify Gloria Walker, Office of Historian (202–663–1124) providing their date of birth, Social Security number, and telephone number.

The Committee will meet in open session from 9 a.m. through Noon on Monday, April 10, 2000, to discuss the implementation of Executive Order 12958 with respect to Department of State records, the declassification and transfer of Department of State electronic records to the National Archives and Records Administration, and the modernization of the Foreign Relations series. The remainder of the Committee's sessions from 1:45 p.m. on Monday, April 10, 2000 until Noon on Tuesday, April 11, 2000 will be closed in accordance with Section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463). The agenda calls for discussions involving consideration of matters not subject to public disclosure under 5 U.S.C. 552b(c)(1), and that the public interest requires that such activities be withheld from disclosure.

Questions concerning the meeting should be directed to William Slany, Executive Secretary, Advisory Committee on Historical Diplomatic Documentation, Department of State, Office of the Historian, Washington, DC, 20520, telephone (202) 663–1123, (e-mail *pahistoff@panet.us-state.gov*).

February 29, 2000.

William Slany,

Executive Secretary.

[FR Doc. 00–6098 Filed 3–10–00; 8:45 am]

BILLING CODE 4710–08–U

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Shannon County, Missouri

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement (EIS) will be prepared for proposed improvements to the transportation system in Shannon County, Missouri.

FOR FURTHER INFORMATION CONTACT: Mr. Donald Neumann, Programs Engineer, FHWA Division Office, 209 Adams Street, Jefferson City, MO 65101, Telephone: (573) 636–7104 or Mr. Bob

Sfreddo, Director of Project Development, Missouri Department of Transportation, P.O. Box 270, Jefferson City, MO 65102, Telephone: (573) 751–4586.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Missouri Department of Transportation (MoDOT), the National Park Service (NPS), and the Ozark National Scenic Riverways (ONSR) will prepare an EIS for a proposed project to improve Route 19 in south-central, Missouri. The proposed project extends from 2.0 miles south of Route EE south 3.0 miles to 1.0 mile south of Round Spring, Missouri. This proposal includes the replacement of three bridges over Spring Valley Creek, Sinking Creek, and the Current River. All three rivers are in Ozark National Scenic Riverways. Improvements are considered necessary to: (1) Improve safety and capacity for local and through traffic, (2) replace three bridges which are structurally deficient and functionally obsolete and, (3) support local and regional economic development for Shannon County and the surrounding area.

The proposed project will provide a two-lane roadway with at-grade intersections at rural crossroads. Alternatives under consideration include (1) taking no action; (2) transportation management options; (3) constructing new bridges and roadways beside the existing alignment; and (4) constructing a two-land roadway on new location.

The scoping process will involve all appropriate federal, state, and local agencies, and private organizations and citizens who have previously expressed or are known to have interest in this proposal. The scoping process was initiated at a September 23, 1999 meeting. Further public meetings will be held to engage the regional community in the decision making process and to obtain public comment. A public hearing will be held to present the findings of the draft EIS (DEIS). The DEIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA or MoDOT at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12373 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: March 3, 2000.

Donald L. Neumann,

Program Engineer, Jefferson City.

[FR Doc. 00–6058 Filed 3–10–00; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environment Impact Statement: Texas and Howell Counties, Missouri

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement (EIS) will be prepared for proposed improvements to the transportation system in Texas and Howell Counties, Missouri.

FOR FURTHER INFORMATION CONTACT: Mr. Donald Neumann, Programs Engineer, FHWA Division Office, 209 Adams Street, Jefferson City, MO 65101, Telephone: (573) 636–7104 or Mr. Bob Sfreddo, Director of Project Development, Missouri Department of Transportation, P.O. Box 270, Jefferson City, MO 65102, Telephone: (573) 751–4586.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Missouri Department of Transportation (MoDOT), the National Park Service (NPS), and the Ozark National Scenic Riverways (ONSR) will prepare an EIS for a proposed project to improve Route 17 in south-central Missouri. The project extends from Route O in Texas County south 2.5 miles to 0.5 mile south of the Howell County Line. This proposal includes the replacement of a bridge over the Jacks Fork River, which is in the Ozark National Scenic Riverways. Improvements are considered necessary to: (1) improve safety and capacity for local and through traffic, (2) replace a bridge which is structurally deficient and functionally obsolete and, (3) support local and regional economic development for Texas and Howell Counties and the surrounding area.

The proposed project will provide a two-lane roadway with at-grade intersections at rural crossroads. Alternatives under consideration include: (1) Taking no action; (2) transportation management options; (3) constructing a bridge and roadway beside the existing alignment; and (4) constructing a roadway on new location.

The scoping process will involve all appropriate federal, state, and local agencies, and private organizations and citizens who have previously expressed or are known to have interest in this proposal. The scoping process was initiated at a September 23, 1999 meeting. Further public meetings will be held to engage the regional community in the decision making process and to obtain public comment. A public hearing will be held to present the findings of the draft EIS (DEIS). The DEIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA or MoDOT at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12373 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Issued on: March 3, 2000.

Donald L. Neumann,

Programs Engineer, Jefferson City.

[FR Doc. 00–6059 Filed 3–10–00; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Numbers LI–96–2 and FRA–1999–5894]

Canadian National Railroad, Canadian Pacific Railway; Public Hearing

The Canadian National Railroad and the Canadian Pacific Railway have independently petitioned the Federal Railroad Administration (FRA) seeking a permanent waiver of compliance with the Locomotive Safety Standards, Title 49, Code of Federal Regulations (CFR), Parts 229.27(a) and 229.29(a) concerning the time interval requirements of the periodic cleaning, repairing and testing of locomotive air brake components for all of their locomotives operating in the United States equipped with 26L type brake equipment.

This proceeding is identified as Canadian National Railroad, Docket LI–96–2, and Canadian Pacific Railway, Docket FRA–1999–5894. FRA issued public notices seeking comments of

interested parties and conducted field investigations in this matter. After examining the carriers' proposals, letters of protest, and field reports, FRA has determined that a public hearing is necessary before a final decision is made on these proposals.

Accordingly, a public hearing is hereby set for 9:00 a.m. on Wednesday, April 12, 2000, in Room 2230, Nassif building, 400 Seventh St. S.W., Washington, D.C. 20590. Interested parties are invited to present oral statements at this hearing. The hearing will be informal and will be conducted in accordance with Rule 25 of the FRA Rules of Practice (49 CFR Part 211.25) by a representative designated by FRA. The hearing will be a non-adversarial proceeding; therefore, there will be no cross-examination of persons presenting statements. The FRA representative will make an opening statement outlining the scope of the hearing. After all initial statements have been completed, those persons wishing to make a brief rebuttal will be given the opportunity to do so in the same order in which initial statements were made. Additional procedures, if necessary for the conduct of the hearing, will be announced at the hearing.

Issued in Washington, D.C. on March 8, 2000.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 00–6071 Filed 3–10–00; 8:45 am]

BILLING CODE 4910–06–U

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From the Requirements of Title 49 Code of Federal Regulations Part 236

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroads have petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR Part 236 as detailed below.

Docket No. FRA–2000–6810.

Applicant: Gateway Western Railway Company, Mr. Charles D. Shaffer, Supervisor Communication and Signals, 200 South Main, Venice, Illinois 62090.

Gateway Western Railway Company seeks approval of the proposed modification of the Louisiana Movable Bridge Interlocking, milepost 274.50, on Subdivision No. 2, near Louisiana, Missouri, consisting of the conversion of the manual controlled interlocking to automatic control operation.

The reason given for the proposed changes is to remove Bridge Tenders from the Hours of Service requirements.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and contain a concise statement of the interest of the Protestant in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

All communications concerning this proceeding should be identified by the docket number and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, Room PI–401, Washington, D.C. 20590–0001. Communications received within 45 days of the date of this notice will be considered by the FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9:00 a.m.–5:00 p.m.) at DOT Central Docket Management Facility, Room PI–401 (Plaza Level), 400 Seventh Street, S.W., Washington, D.C. 20590–0001. All documents in the public docket are also available for inspection and copying on the internet at the docket facility's Web site at *http://dms.dot.gov.*

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, D.C. on March 8, 2000.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 00–6073 Filed 3–10–00; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief from the Requirements of Title 49 Code of Federal Regulations Part 236

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroads have petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR Part 236 as detailed below.

Docket No. FRA–2000–6811.

Applicant: Gateway Western Railway Company, Mr. Charles D. Shaffer, Supervisor Communication and Signals, 200 South Main, Venice, Illinois 62090.

Gateway Western Railway Company seeks approval of the proposed modification of the Pearl Movable Bridge Interlocking, milepost 251.20, on Subdivision No. 2, near Pearl, Illinois, consisting of the conversion of the manual controlled interlocking to automatic control operation.

The reason given for the proposed changes is to remove Bridge Tenders from the Hours of Service requirements.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and contain a concise statement of the interest of the Protestant in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

All communications concerning this proceeding should be identified by the docket number and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, Room PI–401, Washington, D.C. 20590–0001. Communications received within 45 days of the date of this notice will be considered by the FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9:00 a.m.–5:00 p.m.) at DOT Central Docket Management Facility, Room PI–401 (Plaza Level), 400 Seventh Street, S.W., Washington, D.C. 20590–0001. All documents in the public docket are also available for inspection and copying on the internet at the docket facility's Web site at *http://dms.dot.gov.*

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, D.C. on March 8, 2000.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 00–6074 Filed 3–10–00; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From the Requirements of Title 49 Code of Federal Regulations Part 236

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroads have petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR Part 236 as detailed below.

Docket No. FRA–2000–6779.

Applicant: Union Pacific Railroad Company, Mr. Phil Abaray, Chief Engineer—Signals, 1416 Dodge Street, Room 1000, Omaha, Nebraska 68179–1000.

Union Pacific Railroad Company seeks approval of the proposed discontinuance and removal of the traffic control system, on the No. 3 main track, between C.P. 005, milepost 4.9 and C.P. 007, milepost 7.1, at East Los Angeles, California, consisting of the discontinuance and removal of controlled signal 3E, near milepost 5.9.

The reason given for the proposed changes is that signal 3E is a controlled leaving signal, and train crews are required to call the dispatcher to clear the signal, causing unnecessary delay to operations, radio traffic, and dispatcher activity.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and contain a concise statement of the interest of the Protestant in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

All communications concerning this proceeding should be identified by the docket number and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, Room PI–401, Washington, D.C. 20590–0001. Communications received within 45 days of the date of this notice will be considered by the FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9:00 a.m.–5:00 p.m.) at DOT Central Docket Management Facility, Room PI–401 (Plaza Level), 400 Seventh Street, S.W., Washington, D.C. 20590–0001. All documents in the public docket are also available for inspection and copying on the internet at the docket facility's Web site at *http://dms.dot.gov.*

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, D.C. on March 8, 2000.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 00–6072 Filed 3–10–00; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Federal Invention Available for Licensing and Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of availability and intent.

SUMMARY: Notice is hereby given that the Federally owned invention U.S. Patent No. 5,909,786, issued June 8, 1999, entitled ''Apparatus and Method for Reducing Fiber Waste by Lint Cleaners'' is available for licensing and the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to Continental Eagle Corporation, of Prattville, Alabama, an exclusive license to Serial No. 09/107,799.

DATES: Comments must be received on or before June 12, 2000.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Room 4–1158, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights to this invention is assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as Continental Eagle Corporation has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within ninety (90) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard M. Parry, Jr.,

Assistant Administrator.

[FR Doc. 00–6010 Filed 3–10–00; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Federal Invention Available for Licensing and Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of Availability and Intent.

SUMMARY: Notice is hereby given that a Federally owned invention, U.S. Patent No. Re. 35,460, a reissue of U.S. Patent No. 5,233,090, entitled ''Method for Fiber Loading a Chemical Compound'' is available for licensing and that the U.S. Department of Agriculture, Forest Service, intends to grant to Voith Sulzer Paper Technology North America Inc., of Appleton, Wisconsin, an exclusive license for U.S. Patent No. Re. 35,460.

DATES: Comments must be received on or before June 12, 2000.

ADDRESSES: Send comments to: USDA Forest Service, One Gifford Pinchot Drive, Madison, Wisconsin 53705–2398.

FOR FURTHER INFORMATION CONTACT: Janet I. Stockhausen of the USDA Forest Service at the Madison address given above; telephone: 608–231–9502.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights to this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as Voith Sulzer Paper Technology North America Inc. has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C.

209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within ninety (90) days from the date of this published Notice, the Forest Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard M. Parry, Jr.,

Assistant Administrator.

[FR Doc. 00–6012 Filed 3–10–00; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 99–098–1]

Environmental Impact Statement; Importation of Unmanufactured Wood Articles From Mexico

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of intent.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service intends to prepare an environmental impact statement relative to our proposed rule for the importation of pine and fir logs and lumber and other unmanufactured wood articles from Mexico. The environmental impact statement will examine the potential effects of the proposed rule on the human environment, including cumulative impacts of methyl bromide use that could result if our proposed rule is adopted. In order to identify cumulative impacts, the environmental impact statement will consider the incremental impact of the proposed rule when added to other past, present, and reasonably foreseeable future actions. We invite the public to comment on what specific issues we should address in the environmental impact statement.

DATES: We will consider all comments that we receive by April 12, 2000.

ADDRESSES: Please send your comment and three copies to: Docket No. 99–098–1, 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. 99–098–1.

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 dockets, are available on the Internet at http://www.aphis.usda.gov/ppd/rad/webrepor.html.

FOR FURTHER INFORMATION CONTACT: Dr. Arnold Foudin, Senior Operations Officer, Policy Planning and Critical Issues, PPQ, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1234; (301) 734–7601.

SUPPLEMENTARY INFORMATION:

Background

On June 11, 1999, the Animal and Plant Health Inspection Service (APHIS) published a proposed rule in the **Federal Register** (64 FR 31512–31518, Docket No. 98–054–1) to amend the regulations in 7 CFR part 319 to add restrictions on the importation of pine and fir logs and lumber and other unmanufactured wood articles from Mexico. Under the proposal, certain unmanufactured wood articles would be required to be treated in order to be eligible for importation into the United States. The proposed rule would allow treatment with methyl bromide as an alternative to heat treatment.

Several of the comments we received on the proposed rule and its accompanying environmental assessment indicated the need to consider the cumulative environmental impacts of methyl bromide use. Regulations issued by the Council on Environmental Quality (CEQ) implementing the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), define ''cumulative impact'' as ''the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.''

Based on the comments described above, APHIS intends to prepare an environmental impact statement (EIS) relative to our proposed rule for the importation of pine and fir logs and lumber and other unmanufactured wood articles from Mexico. The EIS will consider, among other things, the cumulative environmental impacts of methyl bromide use that could result if the proposed rule is adopted. As provided in the definition above, to fully consider the incremental impacts of methyl bromide use that could result if our proposed rule is adopted, we also need to identify other past, present, and reasonably foreseeable uses of methyl bromide.

We plan to seek assistance from, and coordinate closely with, among others, experts at the U.S. Environmental Protection Agency and the United Nations Environmental Programme in drafting the EIS and in identifying uses of methyl bromide. This notice also requests public comments to help us identify other significant environmental issues that should be addressed or analyzed in the EIS and to help us identify additional uses of methyl bromide.

The EIS will analyze the full range of alternatives available to the decisionmaker in the APHIS rulemaking proceeding described above, including ''no action'; use of the entire range of treatment options, including methyl bromide; and treatment options other than methyl bromide.

The EIS will also identify other APHIS and non-APHIS uses of methyl bromide in order to determine the potential incremental cumulative impacts that could result if our proposed rule is adopted.

This notice and the upcoming EIS are intended to fulfill the requirements of both NEPA and Executive Order 12114, ''Environmental Effects Abroad of Major Federal Actions,'' to the extent applicable. A notice announcing the availability of the draft EIS for review will be published in the **Federal Register**. The notice will also request comments on the draft EIS.

This notice is issued in accordance with: (1) NEPA, (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 7th day of March 2000.

Bobby R. Acord,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 00–6069 Filed 3–10–00; 8:45 am]

BILLING CODE 3410–34–U

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 99–084–2]

Public Meeting; Center for Veterinary Biologics

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of public meeting.

SUMMARY: This is the second notice to producers of veterinary biological products, product users, and other interested persons that we are holding our ninth public meeting to discuss regulatory and policy issues related to the manufacture, distribution, and use of veterinary biological products. This notice includes information on the agenda, as well as on the place, dates, and times of the meeting. It also indicates a contact person for obtaining registration forms, lodging information, and copies of the agenda.

DATES: The public meeting will be held on Monday and Tuesday, April 3 and 4, 2000, from 8 a.m. to 5 p.m. each day.

ADDRESSES: The public meeting will be held in the Scheman Building at the Iowa State Center, Iowa State University, Ames, IA.

FOR FURTHER INFORMATION CONTACT: Ms. Judy Denato, Center for Veterinary Biologics, Veterinary Services, APHIS, 1800 Dayton Avenue, P.O. Box 844, Ames, IA 50010; telephone (515) 663–7838, fax (515) 663–7673; or e-mail: judith.e.denato@usda.gov.

SUPPLEMENTARY INFORMATION: The Animal and Plant Health Inspection Service (APHIS) has previously announced that it is scheduling the ninth public meeting on veterinary biologics in Ames, IA, on April 3 and 4, 2000 (see 64 FR 61058–61059, Docket No. 99–084–1). In that notice, APHIS requested that interested persons submit suggestions for agenda topics. Based on the submissions received and on other considerations, the agenda for the ninth public meeting includes, but is not limited to, the following:

—State of the Center for Veterinary Biologics
—Results of community networking sessions, scenarios, and future strategies
—Regulation approval process/Federal preemption and the Virus-Serum-Toxin Act
—International harmonization and trade issues, including international cooperation on harmonization of technical requirements for registration of veterinary medicinal products (VICH)
—Animal use in testing
—Labeling issues, including concerns with imported products, species without a label claim, duration of immunity, safety, and maternal antibody interference with vaccination
—Updates on current topics of interest

During the ''open discussion'' portion of the meeting, attendees will have the opportunity to present their views on any matter concerning the APHIS veterinary biologics program. Comments may be either impromptu or prepared. Persons wanting to make a prepared statement should indicate their intention to do so at the time of registration by indicating the subject of their remarks and the approximate amount of time they would like to speak. APHIS welcomes and encourages the presentation of comments at the meeting.

Registration forms, lodging information, and copies of the agenda for the ninth public meeting may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT.** This information is also accessible on the world wide web at the following address: http://www.aphis.usda.gov/vs/cvb. The registration deadline is March 13, 2000. A block of hotel rooms has been set aside for this meeting until this date. Early reservation of rooms is strongly encouraged.

Done in Washington, DC, this 7th day of March 2000.

Thomas E. Walton,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 00–6070 Filed 3–10–00; 8:45 am]

BILLING CODE 3410–34–U

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 00–004C]

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 00N–0597]

Codex Alimentarius: Meeting of the Codex Committee on General Principles; Organization for Economic Cooperation and Development: Meeting of the Ad Hoc Group on Food Safety

AGENCIES: Food Safety and Inspection Service, USDA; Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food Safety and Inspection Service (FSIS), and the Office of Food Safety, U.S. Department of Agriculture (USDA); and the Food and Drug Administration (FDA), U.S. Department of Health and Human Services (HHS), announced a public meeting in the March 1, 2000, **Federal Register** (65 FR 11031). That document contained an error in the **DATES** section.

The comment due date of April 24, 2000, was incorrect. This document corrects that date. The correct comment due date is March 24, 2000.

Patrick J. Clerkin,

Associate U.S. Manager for Codex Alimentarius, U.S. Department of Agriculture.

Margaret M. Dotzel,

Acting Associate Commissioner for Policy, Food and Drug Administration.

[FR Doc. 00–6068 Filed 3–10–00; 8:45 am]

BILLING CODE 3410–DM–P; 4164–01–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Rural Housing Service (RHS), USDA.

ACTION: Proposed collection; Comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Housing Service's intention to request an extension for a currently approved information collection in support of the program for Rural Housing Loans.

DATES: Comments on this notice must be received by May 12, 2000 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Dean A. Daetwyler, Senior Loan Specialist, Single Family Housing Guaranteed Loan Division, RHS, United States Department of Agriculture, Mail Stop 0784, 1400 Independence Ave., SW, Washington, DC 20250–0784, Telephone (202) 690–0514, E-mail ddaetwyl@rdmail.rural.usda.gov.

SUPPLEMENTARY INFORMATION:

Title: 7 CFR 1980–D, Rural Housing Loans.

OMB Number: 0575–0078.

Expiration Date of Approval: June 30, 2000.

Type of Request: Extension of a currently approved information collection.

Abstract: The Rural Housing Service (RHS) is authorized under Section 517

(d) of Title V of the Housing Act of 1949, as amended, to issue loan guarantees for the acquisition of new or existing dwellings and related facilities to provide decent, safe, and sanitary living conditions and other structures in rural areas by eligible recipients.

The Act also authorizes the Secretary to pay the holder of a guaranteed loan the difference between the rate of interest paid by the borrower and the market rate of interest.

The purpose of the program is to assist low and moderate income individuals and families acquire or construct a single family residence in a rural area with loans made by private lenders. Eligibility for this program includes low and moderate income families or persons whose income does not exceed 115 percent of the median income for the area, as determined by the Secretary.

The GRH program was authorized under the Cranston-Gonzalez National Affordable Housing Act and the Agency issued a final rule implementing the GRH program on April 17, 1991, before departmental reorganization. The program began as a pilot program in 20 States on May 17, 1991. In 1992, the GRH program was offered on a nationwide basis. During the implementation process, the Agency looked for ways to improve the program and make it more user friendly.

The Agency recognized the need to make its program even more compatible with the existing structure of the mortgage lending community. On May 22, 1995, the Agency published the final rule incorporating the needed changes to encourage greater participation by lenders and the secondary market for mortgage loans.

The information requested by the Agency includes borrower financial information such as household income, assets and liabilities, and monthly expenses. All information collected is vital for the Agency to determine if borrowers qualify for and assure they receive all assistance for which they are eligible. Information requested on lenders is required to ensure lenders are eligible to participate in the GRH program. Lender requirements are in compliance with OMB Circular A–129.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .4 hours per response.

Respondents: Individuals or households and business or other for-profits.

Estimated Number of Respondents: 47,200.

Estimated Number of Responses per Respondent: 8.7.

Estimated Total Annual Burden on Respondents: 154,250 hours.

Copies of this information collection can be obtained from Tracy Gillin, Team Leader, Regulations and Paperwork Management Branch, at (202) 692–0039.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of RHS, including whether the information will have practical utility; (b) the accuracy of RHS's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (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 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. Comments may be sent to Tracy Gillin, Team Leader, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave. SW, Washington, DC 20250. 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.

Dated: March 2, 2000.

James C. Kearney,

Administrator, Rural Housing Service.

[FR Doc. 00–6102 Filed 3–10–00; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–403–801; C–403–802]

Continuation of Antidumping Duty and Countervailing Duty Orders: Fresh and Chilled Atlantic Salmon From Norway

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Continuation of Antidumping Duty and Countervailing Duty Orders: Fresh and Chilled Atlantic Salmon from Norway.

SUMMARY: On February 4, 2000 and February 7, 2000, respectively, the Department of Commerce (''the Department''), pursuant to sections 751(c) and 752 of the Tariff Act of 1930, as amended (''the Act''), determined that revocation of the antidumping duty [1] and countervailing duty [2] orders on fresh and chilled Atlantic salmon from Norway is likely to lead to continuation or recurrence of dumping and a countervailable subsidy. On March 1, 2000, the International Trade Commission (''the Commission''), pursuant to section 751(c) of the Act, determined that revocation of the antidumping duty and countervailing duty orders on fresh and chilled Atlantic salmon from Norway would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time (65 FR 11082). Therefore, pursuant to 19 CFR 351.218(f)(4), the Department is publishing notice of the continuation of the antidumping duty and countervailing duty orders on fresh and chilled Atlantic salmon from Norway.

EFFECTIVE DATE: March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Kathryn B. McCormick or Melissa G. Skinner, Office of Policy for Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW, Washington, D.C. 20230; telephone: (202) 482–1930 or (202) 482–1560, respectively.

SUPPLEMENTARY INFORMATION

Background

On July 1, 1999, the Department initiated, and the Commission instituted, sunset reviews (64 FR 35588 and 64 FR 35680, respectively) of the antidumping duty and countervailing duty orders on fresh and chilled Atlantic salmon from Norway, pursuant to section 751(c) of the Act. As a result of its reviews, the Department found that revocation of the antidumping duty and countervailing duty orders would likely lead to continuation or recurrence of dumping and a countervailable subsidy, and notified the Commission of the magnitude of the margins and a net countervailable subsidy likely to prevail were the orders to be revoked.[3]

On March 1, 2000, the Commission determined, pursuant to section 751(c) of the Act, that revocation of the antidumping duty and countervailing

[1] *See Final Results of Expedited Sunset Review: Fresh and Chilled Atlantic Salmon from Norway,* 65 FR 5584 (February 4, 2000).

[2] *See Final Results of Expedited Sunset Review: Fresh and Chilled Atlantic Salmon from Norway,* 65 FR 5854 (February 7, 2000).

[3] *See Final Results of Expedited Sunset Review: Fresh and Chilled Atlantic Salmon from Norway,* 65 FR 5584 (February 4, 2000); and *Final Results of Expedited Sunset Review: Fresh and Chilled Atlantic Salmon from Norway,* 65 FR 5954 (February 7, 2000).

duty orders on fresh and chilled Atlantic salmon from Norway would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time (*see Fresh and Chilled Atlantic Salmon from Norway* 65 FR 11082 (March 1, 2000) and USITC Publication 3282 (February 2000), Investigation Nos. 701–TA–302 (Review), and 731–TA–454 (Review).

Scope

The product covered by these orders is the species Atlantic salmon (Salmon Salar) marketed as specified herein; the order excludes all other species of salmon: Danube salmon, Chinook (also called ''king'' or ''quinnat''), Coho (''silver''), Sockeye (''redfish'' or ''blueback''), Humpback (''pink'') and Chum (''dog''). Atlantic salmon is a whole or nearly-whole fish, typically (but not necessarily) marketed gutted, and cleaned, with the head on. The subject merchandise is typically packed in fresh-water ice (''chilled''). Excluded from the subject merchandise are fillets, steaks and other cuts of Atlantic salmon. Also excluded are frozen, canned, smoked or otherwise processed Atlantic salmon. Atlantic salmon was classifiable under item number 110.2045 of the Tariff Schedules of the United States Annotated (''TSUSA''). Prior to January 1, 1990, Atlantic salmon was provided for under item numbers 0302.0060.8 and 0302.12.0065.3 of the Harmonized Tariff Schedule of the United States (''HTSUS'') (56 FR 7678, February 25, 1991). Currently, it is provided for under HTSUS item number 0302.12.00.02.09. The subheadings above are provided for convenience and customs purposes. The written description remains dispositive.

Determination

As a result of the determinations by the Department and the Commission that revocation of the antidumping duty and countervailing duty orders would be likely to lead to continuation or recurrence of dumping and a countervailable subsidy, and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping duty and countervailing duty orders on fresh and chilled Atlantic salmon from Norway. The Department will instruct the U.S. Customs Service to continue to collect antidumping duty and countervailing duty deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of continuation of these orders will be the date of publication in the **Federal Register** of this Notice of Continuation. Pursuant to section 751(c)(2) and 751 (c)(6) of the Act, the Department intends to initiate the next five-year review of these orders not later than February 2005.

Dated: March 7, 2000.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 00–6091 Filed 3–10–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–815 and A–580–816]

Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Final results of antidumping duty administrative reviews.

SUMMARY: On September 8, 1999, the Department of Commerce (''Department'') published the preliminary results of the administrative reviews of the antidumping duty orders on certain cold-rolled and corrosion-resistant carbon steel flat products from Korea. These reviews cover three manufacturers/exporters. The period of review (''POR'') is August 1, 1997 through July 31, 1998.

Based on our analysis of the comments received, we have made changes in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margins for the reviewed firms are listed below in the section entitled ''Final Results of the Reviews.''

EFFECTIVE DATE: March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Juanita Chen (Dongbu), Becky Hagen (the POSCO Group), Marlene Hewitt (Union), Robert Bolling, or James Doyle, Enforcement Group III, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Washington, D.C. 20230, telephone 202–482–0409 (Chen), 202–482–3362 (Hagen), 202–482–1385 (Hewitt), 202–482–3434 (Bolling), or 202–482–0159 (Doyle), fax 202–482–1388.

SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930 (''Act'') are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (''URAA''). In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations at 19 CFR Part 351 (1998).

Background

The Department published antidumping duty orders on certain cold-rolled and corrosion-resistant carbon steel flat products from Korea on August 19, 1993. Antidumping Duty Orders on Certain Cold-Rolled Carbon Steel Flat Products and Certain Corrosion-Resistant Carbon Steel Flat Products from Korea, 58 FR 44159 (August 19, 1993). The Department published a notice of Opportunity to Request Administrative Review of the antidumping duty orders for the 1997/98 review period on August 11, 1998. Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review, 63 FR 42821 (August 11, 1998). On August 31, 1998, respondent Union Steel Manufacturing Co., Ltd. (''Union'') requested that the Department conduct an administrative review of the antidumping duty order on corrosion-resistant carbon steel flat products from Korea, and respondents Dongbu Steel Co., Ltd. (''Dongbu'') and Pohang Iron and Steel Co., Ltd. (''POSCO'') requested that the Department conduct administrative reviews of the antidumping duty orders on cold-rolled and corrosion-resistant carbon steel flat products from Korea. On August 31, 1998, petitioners in the original less-than-fair-value (''LTFV'') investigations (AK Steel Corporation; Bethlehem Steel Corporation; Inland Steel Industries, Inc.; LTV Steel Company; National Steel Corporation; and U.S. Steel Group—a unit of USX Corporation) requested that the Department conduct administrative reviews of the antidumping duty orders on cold-rolled and corrosion-resistant carbon steel flat products from Korea with respect to all three of the aforementioned respondents. We initiated these reviews on September 23, 1998. See 63 FR 51893 (September 29, 1998).

On August 31, 1999, the Department issued the preliminary results of these administrative reviews. See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Preliminary Results of Antidumping

Duty Administrative Reviews, 64 FR 48767 (September 8, 1999) (''Korean Flat-Rolled 5th Reviews Prelim.''). The Department has now completed these administrative reviews in accordance with section 751 of the Act.

Scope of the Reviews

The review of ''certain cold-rolled carbon steel flat products'' covers cold-rolled (cold-reduced) carbon steel flat-rolled products, of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished or coated with plastics or other nonmetallic substances, in coils (whether or not in successively superimposed layers) and of a width of 0.5 inch or greater, or in straight lengths which, if of a thickness less than 4.75 millimeters, are of a width of 0.5 inch or greater and which measures at least 10 times the thickness or if of a thickness of 4.75 millimeters or more are of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the Harmonized Tariff Schedule (''HTS'') under item numbers 7209.15.0000, 7209.16.0030, 7209.16.0060, 7209.16.0090, 7209.17.0030, 7209.17.0060, 7209.17.0090, 7209.18.1530, 7209.18.1560, 7209.18.2550, 7209.18.6000, 7209.25.0000, 7209.26.0000, 7209.27.0000, 7209.28.0000, 7209.90.0000, 7210.70.3000, 7210.90.9000, 7211.23.1500, 7211.23.2000, 7211.23.3000, 7211.23.4500, 7211.23.6030, 7211.23.6060, 7211.23.6085, 7211.29.2030, 7211.29.2090, 7211.29.4500, 7211.29.6030, 7211.29.6080, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7215.50.0015, 7215.50.0060, 7215.50.0090, 7215.90.5000, 7217.10.1000, 7217.10.2000, 7217.10.3000, 7217.10.7000, 7217.90.1000, 7217.90.5030, 7217.90.5060, 7217.90.5090. Included in this review are flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (i.e., products which have been ''worked after rolling'')—for example, products which have been beveled or rounded at the edges. Excluded from this review is certain shadow mask steel, i.e., aluminum-killed, cold-rolled steel coil that is open-coil annealed, has a carbon content of less than 0.002 percent, is of 0.003 to 0.012 inch in thickness, 15 to 30 inches in width, and has an ultra flat, isotropic surface.

The review of ''certain corrosion-resistant carbon steel flat products'' covers flat-rolled carbon steel products, of rectangular shape, either clad, plated, or coated with corrosion-resistant metals such as zinc, aluminum, or zinc-, aluminum-, nickel- or iron-based alloys, whether or not corrugated or painted, varnished or coated with plastics or other nonmetallic substances in addition to the metallic coating, in coils (whether or not in successively superimposed layers) and of a width of 0.5 inch or greater, or in straight lengths which, if of a thickness less than 4.75 millimeters, are of a width of 0.5 inch or greater and which measures at least 10 times the thickness or if of a thickness of 4.75 millimeters or more are of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the HTS under item numbers 7210.30.0030, 7210.30.0060, 7210.41.0000, 7210.49.0030, 7210.49.0090, 7210.61.0000, 7210.69.0000, 7210.70.6030, 7210.70.6060, 7210.70.6090, 7210.90.1000, 7210.90.6000, 7210.90.9000, 7212.20.0000, 7212.30.1030, 7212.30.1090, 7212.30.3000, 7212.30.5000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7212.60.0000, 7215.90.1000, 7215.90.3000, 7215.90.5000, 7217.20.1500, 7217.30.1530, 7217.30.1560, 7217.90.1000, 7217.90.5030, 7217.90.5060, 7217.90.5090. Included in this review are flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.,* products which have been ''worked after rolling'')—for example, products which have been beveled or rounded at the edges. Excluded from this review are flat-rolled steel products either plated or coated with tin, lead, chromium, chromium oxides, both tin and lead (''terne plate''), or both chromium and chromium oxides (''tin-free steel''), whether or not painted, varnished or coated with plastics or other nonmetallic substances in addition to the metallic coating. Also excluded from this review are clad products in straight lengths of 0.1875 inch or more in composite thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness. Also excluded from this review are certain clad stainless flat-rolled products, which are three-layered corrosion-resistant carbon steel flat-rolled products less than 4.75 millimeters in composite thickness that consist of a carbon steel flat-rolled product clad on both sides with stainless steel in a 20%-60%-20% ratio.

These HTS item numbers are provided for convenience and U.S. Customs purposes. The written descriptions remain dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to these administrative reviews are addressed in the ''Issues and Decision Memorandum'' (''Decision Memo'') from Joseph A. Spetrini, Deputy Assistant Secretary, Import Administration, to Robert S. LaRussa, Assistant Secretary for Import Administration, dated March 6, 2000, which is hereby adopted and incorporated by reference into this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memo, is attached to this notice as an Appendix. Parties can find a complete discussion of all issues raised in these reviews and the corresponding recommendations in this public memorandum which is on file at the U.S. Department of Commerce, in the Central Records Unit, in room B–099. In addition, a complete version of the Decision Memo, accessible in B–099 and on the Web at www.ita.doc.gov/import—admin/records/frn. The paper copy and electronic version of the Decision Memorandum are identical in content.

Use of Facts Available

In accordance with section 776 of the Act, we have determined that the use of facts available is appropriate for certain portions of our analysis of the POSCO Group. For a discussion of our determination with respect to this matter, see the POSCO Group's facts available section of the Decision Memo, accessible in B–099 and on the Web at www.ita.doc.gov/import__admin/records/frn.

Sales Below Cost in the Home Market

The Department disregarded home market below-cost sales that failed the cost test for Dongbu, the POSCO Group, and Union in these final results of review.

Duty Absorption

On October 20, 1998, the petitioners requested that the Department determine whether antidumping duties have been absorbed by an exporter or producer subject to these administrative reviews, in the event that the subject merchandise was sold during this period of review in the United States through an importer affiliated with the POSCO Group, Dongbu, or Union. Section 751(a)(4) of the Act provides that, if requested, the Department will

determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an affiliated importer. Section 751(a)(4) of the Act authorizes this inquiry during an administrative review initiated two years or four years after publication of an order. For transition orders as defined in section 751(c)(6)(C) of the Act (i.e., antidumping orders in effect as of January 1, 1995), section 351.213(j)(2) of the Department's regulations provides that the Department will make such as determination for any administrative review initiated in 1996 or 1998. The orders in these cases are transition orders, which went into effect in 1993. See Notice of Antidumping Duty Orders: Certain Cold-Rolled Carbon Steel Flat Products and Certain Corrosion-Resistant Carbon Steel Flat Products from Korea, 58 FR 44159 (August 19, 1993). Because this review was initiated in 1998, and the petitioners made a timely request for a duty absorption determination (i.e., within 30 days of the date of publication of the notice of initiation of this review), we find that the regulatory requirements for a duty absorption determination have been met. See 19 CFR 351.213(j).

We have determined that duty absorption has occurred with respect to the percentages of sales shown below which were made through the respondents' U.S. affiliates and which had positive dumping margins:

Producer/manufacturer/exporter	Percentage of U.S. affiliate's sales with dumping margins
Certain Cold-Rolled Carbon Steel Flat Products	
The POSCO Group	2.70
Certain Corrosion-Resistant Carbon Steel Flat Products	
Dongbu	20.81
The POSCO Group	6.85
Union	4.49

With respect to the above companies, we presume that the duties will be absorbed for those sales which were dumped. This presumption can be rebutted with evidence that the unaffiliated purchasers in the United States will pay the ultimately assessed duty. However, there is no such evidence on the record. Although we afforded interested parties the opportunity to submit evidence that unaffiliated purchasers in the United States will absorb duties, no party availed itself of this opportunity. Therefore, under these circumstances, we have determined that antidumping duties have been absorbed by the above-listed firms on the percentages of U.S. sales indicated.

Request for Revocation

The POSCO Group

On August 31, 1998, the POSCO Group submitted a request, in accordance with 19 CFR 351.222(e), that the Department revoke the orders covering certain cold-rolled carbon steel flat products and certain corrosion-resistant carbon steel flat products from Korea with respect to its sales of this merchandise.

In accordance with 19 CFR 351.222(e), these requests were accompanied by a certification from POSCO that it had not sold the subject merchandise at less than normal value (''NV'') for a three-year period, including this review period, and would not do so in the future. POSCO also agreed to its immediate reinstatement of the relevant antidumping order, as long as any firm is subject to the order, if the Department concludes under 19 CFR 351.216 that, subsequent to revocation, POSCO sold the subject merchandise at less than NV. In the third administrative reviews, we determined that the POSCO Group sold both cold-rolled and corrosion-resistant carbon steel flat products at less than normal value. See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews, 63 FR 13170 (March 18, 1998), as amended at 63 FR 20572 (April 27, 1998). Although the final results of the third reviews are subject to litigation, that litigation is not yet complete. In the fourth administrative reviews, the POSCO Group had *de minimis* margins for both products. See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews, 64 FR 10982 (March 8, 1999). Consequently, we have determined that because the POSCO Group does not have three consecutive years of zero or *de minimis* margins on cold-rolled carbon steel flat products and corrosion-resistant carbon steel flat products, it is not eligible for revocation of these orders under 19 CFR 351.222(e).

Dongbu

On August 31, 1998, Dongbu submitted a request, in accordance with 19 CFR 351.222(e), that the Department revoke the orders covering certain corrosion-resistant carbon steel flat products from Korea with respect to its sales of this merchandise.

In accordance with 19 CFR 351.222(e), the request was accompanied by a certification from Dongbu that it had not sold the subject merchandise at less than NV for a three-year period, including this review period, and would not do so in the future. Dongbu also agreed to its immediate reinstatement in the relevant antidumping order, as long as any firm is subject to the order, if the Department concludes under 19 CFR 351.216 that, subsequent to revocation, it sold the subject merchandise at less than NV. In the third administrative review, we determined that Dongbu sold corrosion-resistant carbon steel flat products at less than normal value. *See* Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews, 63 FR 13170 (March 18, 1998), as amended at 63 FR 20572 (April 27, 1998). In the fourth administrative review, we determined that Dongbu was selling corrosion-resistant carbon steel products at less than normal value. *See* Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews, 64 FR 10982 (March 8, 1999). Consequently, we determine that because Dongbu does not have three consecutive years of zero or de minimis margins on corrosion-resistant steel, it is not eligible for revocation of the order on corrosion-resistant steel under 19 CFR 351.222(e).

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made certain changes in the margin calculations. We have also corrected certain programming and clerical errors in our preliminary results, where applicable. Any alleged programming or clerical errors with which we do not agree are discussed in the relevant sections of the ''Decision Memorandum,'' accessible in B–099 and on the Web at www.ita.doc.gov/import—admin/records/frn.

Final Results of the Reviews

We determine that the following percentage weighted-average margins exist for the period August 1, 1997 through July 31, 1998:

Producer/Manufacturer/Exporter	Weighted-average margin
Certain Cold-Rolled Carbon Steel Flat Products	
Dongbu	0.00

Producer/Manufacturer/Exporter	Weighted-average margin
The POSCO Group	0.41
Union	0.00
Certain Corrosion-Resistant Carbon Steel Flat Products	
Dongbu	1.29
The POSCO Group	0.68
Union	0.14

The Department shall determine, and the U.S. Customs Service (''Customs'') shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b), we have calculated exporter/importer-specific assessment rates. With respect to both export price and constructed export price sales, we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct Customs to assess the resulting percentage margins against the entered Customs values for the subject merchandise on each of that importer's entries under the relevant order during the review period.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of administrative reviews for all shipments of cold-rolled and corrosion-resistant carbon steel flat products from Korea entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act: (1) The cash deposit rates for the reviewed companies will be the rates shown above except that, for firms whose weighted-average margins are less than 0.5 percent and therefore *de minimis,* the Department shall require no deposit of estimated antidumping duties; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less than fair value (''LTFV'') investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 14.44 percent (for certain cold-rolled carbon steel flat products) or 17.70 percent (for certain corrosion-resistant carbon steel flat products). These rates are the ''all others'' rates from the LTFV investigations. See Antidumping Duty Orders on Certain Cold-Rolled Carbon Steel Flat Products and Certain Corrosion-Resistant Carbon Steel Flat Products from Korea, 58 FR 44159 (August 19, 1993).

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as the only reminder to parties subject to administrative protective orders (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305 or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: March 6, 2000.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

Appendix

Issues in Decision Memo

Comments and Responses

General Comments

1. Normal Value
A. Currency Conversions

Company-Specific Comments

Dongbu Steel Co., Ltd.

1. EP/CEP.
A. Calculation and Allocation of U.S. Indirect Selling Expense.
2. COP/CV.
A. Use of Fourth Administrative Reviews Databases.
3. Other AD Issues.
A. U.S. Date of Sale.

Pohang Iron and Steel Co., Ltd. (''POSCO''), Pohang Coated Steel Co., Ltd. (''POCOS''), and Pohang Steel Industries Co., Ltd. (''PSI'') (collectively, ''POSCO Group'')

1. Facts Available
A. Adjustment to Costs for Differences in Coating Weight
B. Model Match Criteria/Yield Strength
C. Weighted-Average Costs
D. Cost Reconciliation
2. COP/CV
A. Start-up Costs
B. Major Input/Transactions Disregarded Rule
C. Conversion Costs
3. EP/CEP
A. CEP v. EP Classification
4. Other AD Issues
A. Level-of-Trade
B. Home Market Credit
C. Home Market Downstream Sales Credit
D. Product Characteristics for Downstream Sales
E. Overrun Sales

Union Steel Manufacturing Co., Ltd. (''Union'')

1. Other AD Issues
A. Home Market Credit Days
B. Prime v. Non-Prime

[FR Doc. 00–6089 Filed 3–10–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–421–804]

Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On September 8, 1999, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on certain cold-rolled carbon steel flat products from the Netherlands (64 FR 48775). This review covers one manufacturer/exporter of the subject merchandise to the United States and the period of review (POR) of August 1, 1997, through July 31, 1998. Based on our analysis of the comments received, we have made changes in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margin for the reviewed firm is listed below in the section entitled ''Final Results of Review.''

EFFECTIVE DATE: March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Ilissa Kabak or Robert James, Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230;

telephone: (202) 482–1395 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 8, 1999, the Department published in the **Federal Register** (64 FR 48775) the preliminary results of the administrative review of the antidumping duty order on certain cold-rolled carbon steel flat products from the Netherlands (58 FR 44172 (August 19, 1993), *see also* 61 FR 47871 (September 11, 1996)). We invited parties to comment on our preliminary results. The Department has now completed this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended.

Applicable Statute and Regulations

Unless otherwise stated, all citations to the Tariff Act of 1930, as amended, (the Act) are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to 19 CFR Part 351 (1998).

Scope of this Review

The products covered by this review include cold-rolled (cold-reduced) carbon steel flat-rolled products, of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished or coated with plastics or other nonmetallic substances, in coils (whether or not in successively superimposed layers) and of a width of 0.5 inch or greater, or in straight lengths which, if of a thickness less than 4.75 millimeters, are of a width of 0.5 inch or greater and which measures at least 10 times the thickness or if of a thickness of 4.75 millimeters or more are of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the Harmonized Tariff Schedule (HTS) under item numbers 7209.15.0000, 7209.16.0030, 7209.16.0060, 7209.16.0090, 7209.17.0030, 7209.17.0060, 7209.17.0090, 7209.18.1530, 7209.18.1560, 7209.18.2550, 7209.18.6000, 7209.25.0000, 7209.26.0000, 7209.27.0000, 7209.28.0000, 7209.90.0000, 7210.70.3000, 7210.90.9000, 7211.23.1500, 7211.23.2000, 7211.23.3000, 7211.23.4500, 7211.23.6030, 7211.23.6060, 7211.23.6085, 7211.29.2030, 7211.29.2090, 7211.29.4500, 7211.29.6030, 7211.29.6080, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7215.50.0015, 7215.50.0060, 7215.50.0090, 7215.90.5000, 7217.10.1000, 7217.10.2000, 7217.10.3000, 7217.10.7000, 7217.90.1000, 7217.90.5030, 7217.90.5060, and 7217.90.5090. Included in this review are flat-rolled products of non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.,* products which have been ''worked after rolling'')—for example, products which have been beveled or rounded at the edges. Excluded from this review is certain shadow mask steel, *i.e.,* aluminum-killed, cold-rolled steel coil that is open-coil annealed, has a carbon content of less than 0.002 percent, of 0.003 to 0.012 inch in thickness, 15 to 30 inches in width, and has an ultra flat, isotropic surface. These HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

Period of Review

The POR is August 1, 1997, through July 31, 1998. This review covers entries of certain cold-rolled carbon steel flat products from the Netherlands produced by Hoogovens Staal B.V. (Hoogovens).

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the ''Issues and Decision Memorandum'' (Decision Memorandum) from Joseph A. Spetrini to Robert S. LaRussa, Assistant Secretary for Import Administration, dated March 6, 2000, which is hereby adopted and incorporated by reference into this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as an Appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum which is on file in the Central Records Unit, room B–099 of the main Department building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Web at www.ita.doc.gov/import__admin/records/frn/. The paper copy and electronic version of the Decision Memorandum are identical in content.

Duty Absorption

We have determined that no duty absorption has occurred with respect to U.S. sales made by Hoogovens. For a discussion of our determination with respect to this matter, see the ''Duty Absorption'' section of the Decision Memorandum, accessible in B–099 and on the Web at www.ita.doc.gov/import__admin/records/frn/.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made certain changes in the margin calculations. We have also corrected certain programming and clerical errors in our preliminary results, where applicable. Any alleged programming or clerical errors with which we do not agree are discussed in the relevant sections of the ''Decision Memorandum,'' accessible in B–099 and on the Web at www.ita.doc.gov/import__admin/records/frn/.

Final Results of Review

As a result of our review, we determine that the following weighted-average margin exists:

Manufacturer/exporter	Period of review	Margin (percent)
Hoogovens Staal B.V	8/1/97–7/31/98	0.26

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. For assessment purposes, the duty assessment rate will be a specific amount per metric ton. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following deposit requirements will be effective upon publication of this notice of final results of review for all shipments of cold-rolled carbon steel flat products from the Netherlands entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Act: (1) The cash deposit rate for Hoogovens will be zero, in light of its *de minimis* weighted-average margin; (2) if the

exporter is not a firm covered in this review, a prior review, or the original less than fair value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (3) if neither the exporter nor the manufacturer is a firm covered in this review, the cast deposit rate will be 19.32 percent. This is the ''all others'' rate from the amended final determination in the less than fair value investigation. *See Amended Final Determination Pursuant to CIT Decision: Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands,* 61 FR 47871 (September 11, 1996).

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act and sections 351.213 and 351.221 of the Department's regulations.

Dated: March 6, 2000.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

Appendix—Issues in Decision Memorandum

Comments and Responses

1. Decision of Export Price or Constructed Export Price status
2. CEP Profit
3. Financial Expenses
4. Ministerial Error in Calculating U.S. Warranty Expenses
5. Duty Absorption

[FR Doc. 00–6086 Filed 3–10–00; 8:45 am]

BILLING CODE 3510–DS–U

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–837, A–428–821]

Large Newspaper Printing Presses from Japan and Germany: Postponement of Preliminary Results of Antidumping Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Extension of time limits for preliminary results of antidumping duty administrative reviews.

SUMMARY: The Department of Commerce is extending the time limit for the preliminary results of the antidumping duty administrative reviews of the antidumping duty orders on large newspaper printing presses from Japan and Germany. The review involving Japan covers the period September 1, 1998, through August 31, 1999. The reviews involving Germany cover the periods September 1, 1997, through August 31, 1998; and September 1, 1998 through August 31, 1999.

EFFECTIVE DATE: March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Sunkyu Kim, at (202) 482–2613 for Japan; and Katherine Johnson, at (202) 482–4929 for Germany, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230.

Postponement of Preliminary Results of Reviews: The Department of Commerce (the Department) initiated reviews of the antidumping duty orders on large newspaper printing presses (LNPPs) from Japan and Germany on November 4, 1999 (64 FR 60161). The current deadline for the preliminary results in these reviews is June 1, 2000. In accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended, we determine that it is not practicable to complete the administrative reviews of LNPPs from Japan and Germany within the original time frame. *See* February 28, 2000, Memorandum from Sunkyu Kim, Acting Program Manager, and Irene Darzenta Tzafolias, Program Manager, to Richard W. Moreland, Deputy Assistant Secretary for Import Administration. Thus, the Department is extending the time limit for completion of the preliminary results until no later than September 29, 2000, which is 365 days after the last day of the anniversary month of the order.

We intend to issue the final results of these administrative reviews within 120 days after the publication of the preliminary results.

Dated: March 6, 2000.

Richard W. Moreland,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 00–6090 Filed 3–10–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–825]

Oil Country Tubular Goods From Korea; Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On September 8, 1999, the Department of Commerce (''the Department'') published the preliminary results of the antidumping duty administrative review on oil country tubular goods (''OCTG'') from Korea (64 FR 48783). This review covers one manufacturer/exporter of the subject merchandise to the United States, SeAH Steel Corporation (''SeAH''), and the period August 1, 1997 through July 31, 1998, which is the third period of review (''POR'').

Based on our analysis of the comments received and our discussion of the currency conversion methodology explained below, we have made a change in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margin is listed below in the section entitled ''Final Results of Review.''

EFFECTIVE DATE: March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Jonathan Lyons, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0374.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (''the Act''), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (''URAA''). In addition, unless otherwise indicated, all citations

to the Department's regulations are references to the provisions codified at 19 CFR Part 351 (1999).

Background

On August 11, 1995, the Department published in the **Federal Register** (60 FR 41058) the antidumping duty order on oil country tubular goods from Korea. On September 8, 1999, the Department published in the **Federal Register** the preliminary results of the antidumping duty administrative review of this antidumping order (64 FR 48783) for the period August 1, 1997 through July 31, 1998. We invited interested parties to comment and received two comments and rebuttals regarding SeAH. At the request of certain interested parties, we held a public hearing on October 19, 1999. The Department has now completed this review in accordance with section 751(a) of the Act.

Under section 751(a)(3)(A) of the Act, the Department may extend the deadline for completion of an administrative review if it determines that it is not practicable to complete the review within the statutory time limit. On December 14, 1999, the Department published a notice of extension of the time limit for the final results in the review to March 6, 2000. *See Notice of Extension of Time Limit for Antidumping Duty Administrative Review of Oil Country Tubular Goods from Korea*, 64 FR 69723.

Scope of Review

The products covered by this order are oil country tubular goods (''OCTG''), hollow steel products of circular cross-section, including only oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, whether or not conforming to American Petroleum Institute (''API'') or non-API specifications, whether finished or unfinished (including green tubes and limited service OCTG products). This scope does not cover casing or tubing pipe containing 10.5 percent or more of chromium, or drill pipe. The products subject to this order are currently classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') under item numbers: 7304.29.10.10, 7304.29.10.20, 7304.29.10.30, 7304.29.10.40, 7304.29.10.50, 7304.29.10.60, 7304.29.10.80, 7304.29.20.10, 7304.29.20.20, 7304.29.20.30, 7304.29.20.40, 7304.29.20.50, 7304.29.20.60, 7304.29.20.80, 7304.29.30.10, 7304.29.30.20, 7304.29.30.30, 7304.29.30.40, 7304.29.30.50, 7304.29.30.60, 7304.29.30.80, 7304.29.40.10, 7304.29.40.20, 7304.29.40.30, 7304.29.40.40, 7304.29.40.50, 7304.29.40.60, 7304.29.40.80, 7304.29.50.15, 7304.29.50.30, 7304.29.50.45, 7304.29.50.60, 7304.29.50.75, 7304.29.60.15, 7304.29.60.30, 7304.29.60.45, 7304.29.60.60, 7304.29.60.75, 7305.20.20.00, 7305.20.40.00, 7305.20.60.00, 7305.20.80.00, 7306.20.10.30, 7306.20.10.90, 7306.20.20.00, 7306.20.30.00, 7306.20.40.00, 7306.20.60.10, 7306.20.60.50, 7306.20.80.10, and 7306.20.80.50. The HTSUS item numbers are provided for convenience and Customs purposes. The written description remains dispositive of the scope of this review.

Period of Review

The period of review is August 1, 1997 through July 31, 1998.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the ''Issues and Decision Memorandum'' (Decision Memorandum) from Joseph A. Spetrini, Deputy Assistant Secretary, Import Administration, to Robert S. LaRussa, Assistant Secretary for Import Administration, dated March 6, 2000, which is hereby adopted and incorporated by reference into this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as an Appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum which is on file in the Central Records Unit, room B–099 of the main Department building.

In addition, a complete version of the Decision Memorandum can be accessed directly on the Web at www.ita.doc.gov/import_admin/records/frn/. The paper copy and electronic version of the Decision Memorandum are identical in content.

Currency Conversion

We made currency conversions in accordance with section 773A of the Act. Section 773A(a) of the Act directs the Department to use a daily exchange rate to convert foreign currencies into U.S. dollars unless the daily rate involves a fluctuation. The Department considers a ''fluctuation'' to exist when the daily exchange rate differs from the benchmark rate by 2.25 percent or more. The benchmark is defined as the moving average of rates for the past 40 business days. When we determine a fluctuation to have existed, we generally substitute the benchmark rate for the daily rate, in accordance with established practice. (An exception to this rule is described below.) (For an explanation of this method, *see Policy Bulletin 96–1: Currency Conversions*, 61 FR 9434 (March 8, 1996)).

Our analysis of the U.S. dollar/Korean won exchange rates demonstrates that the Korean won declined rapidly in November and December 1997. Specifically, the won declined more than 40 percent over this two-month period. The decline was, in both speed and magnitude, many times more severe than any change in the dollar-won exchange rate during recent years, and it did not rebound significantly in a short time. As such, we determine that the decline in the won during November and December 1997 was of such magnitude that the dollar-won exchange rate cannot reasonably be viewed as having simply fluctuated at that time, *i.e.*, as having experienced only a momentary drop in value relative to the normal benchmark. Accordingly, the Department used actual daily exchange rates exclusively in November and December 1997. *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip from the Republic of Korea*, 64 FR 30664, 30670 (June 8, 1999) (''*Stainless Steel from Korea*'').

We note, however, that we have refined our methodology somewhat from that applied in both *Stainless Steel from Korea* and our preliminary results of the instant review. We recognize that, following a large and precipitous decline in the value of a currency, a period may exist wherein it is unclear whether further declines are a continuation of the large and precipitous decline or merely fluctuations. Under the circumstances of this case, such uncertainty may have existed following the large, precipitous drop in November and December 1997. Thus, we devised a methodology for identifying the point following a precipitous drop at which it is reasonable to presume that rates differing more than 2.25 percent from the benchmark were merely fluctuating. Following the precipitous drop in November and December 1997, we continued to use only actual daily rates until the daily rates were not more than 2.25 percent below the average of the 20 previous daily rates for five consecutive days. At that point, we determined that the pattern of daily rates no longer reasonably precluded the possibility that they were merely ''fluctuating.'' Using a 20-day average for this purpose

provides a reasonable indication that it is no longer necessary to refrain from using the normal methodology, while avoiding the use of daily rates exclusively for an excessive period of time.

Accordingly, from the first of these five days, we resumed classifying daily rates as ''fluctuating'' or ''normal'' in accordance with our standard practice, except that we began with a 20-day benchmark and on each succeeding day added one daily rate to the average until the normal 40-day average was restored as the benchmark. *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 64 FR 56759, 56763 (October 21, 1999). *See also Polyethylene Terephthalate Film, Sheet and Strip From Korea: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke in Part*, 64 FR 62648, 62649 (November 17, 1999). Applying this methodology in the instant case, we used daily rates from November 3, 1997, through January 13, 1998. We then resumed the use of our normal methodology, starting with a benchmark based on the average of the 20 reported daily rates from January 14, 1998. We used the normal 40-day benchmark from February 12, 1998 to the close of the review period.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made a change in the margin calculations to account for the refined exchange rate methodology discussed above. We made no additional changes to the calculations. Any alleged programming or clerical errors with which we do not agree are discussed in the relevant sections of the ''Decision Memorandum.''

Final Results of Review

We determine that the following percentage weighted-average dumping margins exist for the period August 1, 1997 through July 31, 1998:

	Margin (percent)
SeAH Steel Company	15.02

The Department shall determine, and Customs shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b), we have calculated exporter/importer-specific assessment rates. With respect to both export price and constructed export price sales, we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct Customs to assess the resulting margins against the entered Customs values for the subject merchandise on each of that importer's entries under the relevant order during the review period.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of oil country tubular goods from Korea entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for the reviewed company will be the rate shown above; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 12.17 percent. This rate is the ''All Others'' rate from the LTFV investigation.

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as the only reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305 or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this determination and notice in accordance with sections section 751(a)(1) and 777(i) of the Act.

Dated: March 6, 2000.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

Appendix 1—Issues in Decision Memo

Comments and Responses

1. Date of Sale for Third-Country Sales
2. Normal Value Currency Conversions for Third-Country Sales

[FR Doc. 00–6087 Filed 3–10–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–815]

Sulfanilic Acid From the People's Republic of China; Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of the 1997–1998 antidumping duty administrative review of sulfanilic acid from the People's Republic of China.

SUMMARY: On September 8, 1999, the Department of Commerce (the Department) published the preliminary results of its administrative review of the antidumping duty order on sulfanilic acid from the People's Republic of China (PRC). The merchandise covered by this order is all grades of sulfanilic acid, which include technical (or crude) sulfanilic acid, refined (or purified) sulfanilic acid and sodium salt of sulfanilic acid. The review covers the period August 1, 1997 through July 31, 1998, and all PRC exporters of the subject merchandise.

Based on our analysis of the comments received, we have made changes in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margins for the reviewed firms are listed below in the section entitled ''Final Results of the Review.''

EFFECTIVE DATE: March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Sean Carey or Dana Mermelstein, AD/CVD Enforcement, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3964 or (202) 482–3208, respectively.

SUPPLEMENTARY INFORMATION:

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to 19 CFR Part 351 (1998).

Background

On September 8, 1999, the Department published the preliminary results of its administrative review of the antidumping duty order on sulfanilic acid from the PRC (64 FR 48788). The review covers all exporters of sulfanilic acid. The period of review (POR) is August 1, 1997 through July 31, 1998. We invited parties to comment on our preliminary results of review. No timely requests were made for a public hearing. The Department has conducted this review in accordance with section 751 of the Act.

Scope of Review

The product covered by this review are all grades of sulfanilic acid, which include technical (or crude) sulfanilic acid, refined (or purified) sulfanilic acid and sodium salt of sulfanilic acid.

Sulfanilic acid is a synthetic organic chemical produced from the direct sulfonation of aniline with sulfuric acid. Sulfanilic acid is used as a raw material in the production of optical brighteners, food colors, specialty dyes, and concrete additives. The principal differences between the grades are the undesirable quantities of residual aniline and alkali insoluble materials present in the sulfanilic acid. All grades are available as dry, free flowing powders.

Technical sulfanilic acid, classifiable under the subheading 2921.42.24 of the Harmonized Tariff Schedule (HTS), contains 96 percent minimum sulfanilic acid, 1.0 percent maximum aniline, and 1.0 percent maximum alkali insoluble materials. Refined sulfanilic acid, also classifiable under the subheading 2921.42.24 of the HTS, contains 98 percent minimum sulfanilic acid, 0.5 percent maximum aniline and 0.25 percent maximum alkali insoluble materials.

Sodium salt (sodium sulfanilate), classifiable under the HTS subheading 2921.42.79, is a powder, granular or crystalline material which contains 75 percent minimum equivalent sulfanilic acid, 0.5 percent maximum aniline based on the equivalent sulfanilic acid content, and 0.25 percent maximum alkali insoluble materials based on the equivalent sulfanilic acid content.

Although the HTS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the ''Issues and Decision Memorandum'' (Decision Memo) from Joseph A. Spetrini, Deputy Assistant Secretary, Import Administration, to Robert S. LaRussa, Assistant Secretary for Import Administration, dated March 6, 2000 which is hereby adopted and incorporated by reference into this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memo, is attached to this notice as an Appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum which is on file in Import Administration's Central Records Unit (CRU), Room B–099 of the Main Commerce Building. For a discussion of our determination with respect to this matter, see the (topic heading) section of the Decision Memo, accessible in the CRU and on the Web at www.ita.doc.gov/import__admin/record/frn under the (topic heading) section. The paper copy and electronic version of the Decision Memo are identical in content.

Use of Facts Available (If Necessary)

For a discussion of our application of the facts available, see the ''Facts Available'' section of the Decision Memo, which is on file in the CRU and also available at the Web address shown above.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made certain changes in the margin calculations. We also have corrected certain programming and clerical errors in our preliminary results, where applicable. Any alleged programming and clerical errors with which we do not agree are discussed in the relevant sections of the Decision Memo, accessible in the CRU and also available at the Web address shown above.

Final Results of Review

We determine that the following percentage weighted-average margins exist for the period August 1, 1997 through July 31, 1998:

Manufacturer/producer/exporter	Time period	Margin (percent)
Yude (Yude/Xinyu) Chemical Industry, Co. and Zhenxing (Zhenxing/Mancheng) Chemical Industry, Co [1]	8/1/97–7/31/98	18.75
PRC Rate [2]	8/1/97–7/31/98	85.20

[1] Exporters Yude (Yude/Xinyu) and Zhenxing (Zhenxing/Mancheng) have been collapsed for the purposes of this administrative review. *See Sulfanilic Acid from the People's Republic of China: Preliminary Results of Antidumping Administrative Review*, 64 FR 48788 (September 8, 1999); Decision Memo, Affiliation/Collapsing section.

[2] This rate will be applied to all firms other than Yude (Yude/Xinyu) and Zhenxing (Zhenxing/Mancheng), including all firms which did not respond to our questionnaire.

The Department shall determine, and Customs shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b), we have calculated exporter/importer-specific assessment rates. With respect to both export price and constructed export price sales, we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct Customs to assess the resulting percentage margins against the entered Customs values for the subject merchandise on each of that importer's entries under the relevant order during the review period.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of sulfanilic acid from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section

751(a)(2)(c) of the Act: (1) The cash deposit rate for Yude/Xinyu and Zhenxing/Mancheng will be the rate shown above except that, for firms whose weighted-average margins are less than 0.5 percent and therefore *de minimis*, the Department shall require no deposit of estimated antidumping duties; (2) the cash deposit rate for all other PRC exporters (*i.e.,* the PRC rate) will be 85.20 percent; and (3) the cash deposit rate for non-PRC exporters of subject merchandise from the PRC will be the rate applicable to the PRC supplier of that exporter. These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this determination in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: March 6, 2000.

Robert S. LaRussa.

Assistant Secretary for Import Administration.

Appendix

Issues in the Decision Memo

1. Facts Available
2. Non-Market Economies
   Factor Valuation
3. Affiliation
   Control
   Collapsing
4. EP/CEP
   Movement Expenses
5. Circumstances-of-Sale Adjustments
   Indirect Selling Expenses
6. Packing and Movement Expenses
   Inventory Carrying Costs
7. Miscellaneous Issues
8. Programming and Clerical Errors

[FR Doc. 00–6085 Filed 3–10–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–201–810]

Certain Cut-to-Length Carbon Steel Plate From Mexico: Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of Countervailing Duty Administrative Review.

SUMMARY: On September 8, 1999, the Department of Commerce (the Department) published in the **Federal Register** its preliminary results of the administrative review of the countervailing duty order on certain cut-to-length carbon steel plate (CTL Plate) from Mexico for the period January 1, 1997 through December 31, 1997.

Based on our analysis of the comments received, we have made changes to the net subsidy rate. Therefore, the final results differ from the preliminary results. The final net subsidy rate for the reviewed company is listed below in the section entitled ''Final Results of Review.''

EFFECTIVE DATE: March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Norbert Gannon or Eric B. Greynolds, Office of AD/CVD Enforcement VI, Import Administration, U.S. Department of Commerce, Room 4012, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (URAA) effective January 1, 1995 (the Act). The Department is conducting this administrative review in accordance with section 751(a) of the Act. All citations to the Department's regulations reference 19 CFR Part 351(April 1998), unless otherwise indicated. Because the request for this administrative review was filed before January 1, 1999, the Department's substantive countervailing duty regulations, which were published in the **Federal Register** on November 25, 1998 (63 FR 65348), do not govern this review.

Background

On September 8, 1999, the Department published the preliminary results of the administrative review of the countervailing duty order on certain cut-to-length carbon steel plate from Mexico. *See Certain Cut-to-Length Carbon Steel Plate from Mexico: Preliminary Results of Countervailing Duty Administrative Review*, 64 FR 48796 (September 8, 1999) (*Preliminary Results*). This review covers one manufacturer/exporter, Altos Hornos de Mexico, S.A. (AHMSA). The review covers the period January 1, 1997 through December 31, 1997, and twenty-one programs.

Scope of the Review

The products covered by this administrative review are certain cut-to-length carbon steel plates. These products include hot-rolled carbon steel universal mill plates (i.e., flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 millimeters but not exceeding 1,250 millimeters and of a thickness of not less than 4 millimeters, not in coils and without patterns in relief), of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain hot-rolled carbon steel flat-rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the Harmonized Tariff Schedules of the United States (HTSUS) under item numbers 7208.31.0000, 7208.32.0000, 7208.33.1000, 7208.33.5000, 7208.41.0000, 7208.42.0000, 7208.43.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.11.0000, 7211.12.0000, 7211.21.0000, 7211.22.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, and 7212.50.0000. Included in this administrative review are flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (i.e., products which have been ''worked after rolling'')—for example, products which have been bevelled or rounded at the edges. Excluded from this administrative review is grade X–70 plate. HTSUS subheadings are provided for convenience and Customs purposes.

The written description of the scope of this proceeding is dispositive.

Analysis of Comment Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the ''Issues and Decision Memorandum'' (Decision Memorandum) from Holly Kuga, Acting Deputy Assistant Secretary, Import Administration, to Robert S. LaRussa, Assistant Secretary for Import Administration, dated March 6, 2000, which is hereby adopted and incorporated by reference into this notice. A list of issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as Appendix I. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum which is on file in room B–099 of the Main Commerce Building. In addition, a complete version of the Decision Memorandum can be accessed directly on the World Wide Web at www.ita.doc.gov/import__admin/records/frn, under the heading ''Mexico.'' The paper copy and electronic version of the Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made certain changes to the net subsidy rate. Any changes are discussed in the relevant sections of the Decision Memorandum.

Final Results of Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated an individual subsidy rate for each producer/exporter subject to this review. We will instruct the U.S. Customs Service (Customs) to assess countervailing duties as indicated below on all appropriate entries. For the period January 1, 1997 through December 31, 1997, we determine the net subsidy rate for the reviewed company to be as follows:

MARGIN

Manufacturer/exporter	Percent
AHMSA	10.42

We will instruct Customs to assess countervailing duties as indicated above. The Department will also instruct Customs to collect cash deposits of estimated countervailing duties in the percentages detailed above of the f.o.b. invoice price on all shipments of the subject merchandise from reviewed companies, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

Because the URAA replaced the general rule in favor of a country-wide rate with a general rule in favor of individual rates for investigated and reviewed companies, the procedures for establishing countervailing duty rates, including those for non-reviewed companies, are now essentially the same as those in antidumping cases, except as provided for in section 777A(e)(2)(B) of the Act. The requested review will normally cover only those companies specifically named. See 19 CFR 351.213(b). Pursuant to 19 CFR 351.212(c), for all companies for which a review was not requested, duties must be assessed at the cash deposit rate, and cash deposits must continue to be collected at the rate previously ordered. As such, the countervailing duty cash deposit rate applicable to a company can no longer change, except pursuant to a request for a review of that company. *See Federal-Mogul Corporation and The Torrington Company* v. *United States,* 822 F. Supp. 782 (CIT 1993); *Floral Trade Council* v. *United States,* 822 F. Supp. 766 (CIT 1993). Therefore, the cash deposit rates for all companies except those covered by this review will be unchanged by the results of this review.

We will instruct Customs to continue to collect cash deposits for non-reviewed companies at the most recent company-specific or country-wide rate applicable to the company. Accordingly, the cash deposit rates that will be applied to non-reviewed companies covered by this order will be the rate for that company established in the most recently completed administrative proceeding conducted under the Act, as amended by the URAA. If such a review has not been conducted, the rate established in the most recently completed administrative proceeding pursuant to the statutory provisions that were in effect prior to the URAA amendments is applicable. *See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Mexico,* 58 FR 37352 (July 9, 1993) (*Certain Steel 1993*). These rates shall apply to all non-reviewed companies until a review of a company assigned these rates is requested. In addition, for the period January 1, 1997 through December 31, 1997, the assessment rates applicable to all non-reviewed companies covered by this order are the cash deposit rates in effect at the time of entry.

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)).

Dated: March 6, 2000.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

Appendix I—Issues in Discussed in Decision Memorandum

[www.ita.doc.gov/import__admin/records/frn, under the heading (''Mexico'')]

Methodology and Background Information

I. Subsidies Valuation Information
  A. Allocation Period
  B. Discount Rates
II. Change in Ownership
  A. Background
  B. Change in Ownership Calculation Methodology
III. Inflation Methodology

Analysis of Programs

I. Programs Conferring Subsidies
  A. GOM Equity Infusions
  B. 1986 Assumption of AHMSA's Debt
  C. 1988 and 1990 Debt Restructuring of AHMSA Debt and the Resulting Discounted Prepayment in 1996 of AHMSA's Restructured Debt Owed to the GOM
  D. IMIS Research and Development Grants
  E. Pre-privatization Lay-off Financing from the GOM and the 1991 Equity Infusion in Connection with the Debt-to-Equity Swap of PROCARSA Shares
  F. Bancomext Export Loans
  G. PITEX Duty-Free Imports for Companies That Export
  H. Immediate Deduction
II. Programs Determined To Be Not Countervailable
  A. Committed Investment
  B. The Mexican Corporation of Materials Research, S.A. de C.V. (COMIMSA)
  C. Waiver of Taxes on AHMSA Purchase of Fundadora de Monterrey, S.A. de C.V. (FMSA)
  D. Discounted Freight Rates
  E. Promotion of Highly Exportable Companies (ALTEX)
III. Other Programs Examined
  A. Nafinsa Long-Term Loans
IV. Programs Not Used
  A. Bancomext Short-Term Import Financing
  B. FONEI Long-Term Financing
  C. Export Financing Restructuring
  D. Bancomext Trade Promotion Services and Technical Support

E. ECEX
F. Article 15 & 94 Loans
V. Analysis of Comments
Comment 1: Requested Use of Facts Available
Comment 2: The 1988 and 1990 Debt Restructuring of AHMSA Debt and the Resulting Discounted Prepayment in 1996 of AHMSA's Restructured Debt Owed to the GOM
Comment 3: Discount Rates Used by the Department as Part of Its Significant Inflation Methodology
Comment 4: Use of Certain Company-Specific Loans in the Derivation of Short-Term and Long-Term Benchmark Interest Rates
Comment 5: Committed Investment
Comment 6: Value-Added Taxes (VAT) Under the Program for Temporary Import for Producing Products for Export (PITEX)
Comment 7: Machinery and Auxiliary Materials Imported Under PITEX
Comment 8: Immediate Deduction
Comment 9: Nafinsa Long-Term Loans
Comment 10: The Department's Compliance With the SCM Agreement Regarding Its Initiation of Investigations of New Subsidies Alleged During the POR

[FR Doc. 00–6088 Filed 3–10–00; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Evaluation of State Coastal Management Programs and National Estuarine Research Reserves

AGENCY: Office of Ocean and Coastal Resource Management National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), DOC.

ACTION: Notice of availability of final evaluation findings.

SUMMARY: Notice is hereby given of the availability of the final evaluation findings for the Wisconsin, Oregon and Guam Coastal Management Programs, and the Hudson River (New York), Ace Basin (South Carolina), South Slough (Oregon), Wells (Maine), and Weeks Bay (Alabama) National Estuarine Research Reserves (NERRs). Sections 312 and 315 of the Coastal Zone Management Act of 1972 (CZMA), as amended, require a continuing review of the performance of coastal states with respect to approval of coastal management programs, and the operation and management of NERRs.

The states of Wisconsin and Oregon, and the Territory of Guam were found to be implementing and enforcing their federally approved coastal management programs, addressing the national coastal management objectives identified in CZMA Section 303(2)(A)–(K), and adhering to the programmatic terms of their financial assistance awards.

Hudson River, Ace Basin, South Slough, Wells, and Weeks Bay NERRs were found to be adhering to programmatic requirements of the NERR System. Copies of these final evaluation findings may be obtained upon written request from: Margo E. Jackson, Deputy Director, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, 10th Floor, Silver Spring, Maryland 20910, or *Margo.E.Jackson@noaa.gov,* (301) 713–3155 Extension 114.

Federal Domestic Assistance Catalog 11.419; Coastal Zone Management Program Administration.

Capt. Ted Lillestolen,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 00–6028 Filed 3–10–00; 8:45 am]
BILLING CODE 3510–08–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–203–000]

ANR Pipeline Company; Notice of Proposed Changes in FERC GAS Tariff

March 7, 2000.

Take notice that on March 1, 2000, ANR Pipeline Company (ANR), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets proposed to be effective April 1, 2000.

Thirteenth Revised Sheet No. 19
Seventh Revised Sheet No. 68H

ANR states that the purpose of this filing is to comply with the annual redetermination of the levels of ANR's Transporter's Use (%) as required by ANR's currently effective tariff, to become effective April 1, 2000. This redetermination reflects a decrease in the fuel use percentages for all of the transportation rate routes on ANR's system, as well as for storage and gathering services. ANR states that all of its Volume No. 1 and Volume No. 2 customers and interested State Commissions have been mailed a copy of this filing.

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, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the 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 in the Public Reference Room. This filing may be viewed on the Web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–5987 Filed 3–10–00; 8:45 am]
BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER00–741–001]

Canal Emirates Power International, Inc.; Notice of Filing

March 7, 2000.

Take notice that on February 25, 2000, Canal Emirates Power International, Inc. (Canal), 22 Charles Street, Binghamton, New York 13905–2247, tendered for filing with the Federal Energy Regulatory Commission a revision to its market-based rate tariff. The filing consisted of 1st Revised Sheet No. 1, which superseded Original Sheet No. 1. The filing is intended to comply with the January 27, 2000 order of the Federal Energy Regulatory Commission in the above-referenced docket, which granted the Petition of Canal Emirates Power International, Inc., for Acceptance of Initial Rate Schedule, Waivers and Blanket Authority, subject to the requirement that Canal revise its rate schedule to limit its authority to sell ancillary services to sales into the markets administered by the New York ISO.

Canal is a privately-held New York corporation having its principal place of business at 22 Charles Street, Binghamton, New York 13905–2247. Canal is the owner of a 50 MW cogeneration facility that is located in Binghamton. Canal is engaged directly and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric

energy at wholesale. Canal does not have any affiliate corporations.

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, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before March 17, 2000. 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).

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 00–5974 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–202–000]

Columbia Gas Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

March 7, 2000.

Take notice that on March 1, 2000, Columbia Gas Transmission Corporation (Columbia), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets with a proposed effective date of April 1, 2000:

Forty-fourth Revised Sheet No. 25
Forty-fourth Revised Sheet No. 26
Forty-fourth Revised Sheet No. 27
Fortieth Revised Sheet No. 28
Nineteenth Revised Sheet No. 30
Fifteenth Revised Sheet No. 31

Columbia states that these revised tariff sheets are filed pursuant to Section 45, ''Electric Power Costs Adjustment (EPCA),'' of the General Terms and Conditions (GTC) of Columbia's FERC Gas Tariff, Second Revised Volume No. 1. Section 45.1 allows Columbia to recover electric power costs incurred for compression of natural gas by means of various Transportation EPCA Rates and an LNG EPCA Rate, each of which shall be comprised of a current EPCA rate and an EPCA surcharge. The Transportation EPCA Rate is applicable to buyers under Columbia's FTS, NTS, SST, GTS, OPT, and ITS rate schedules. The LNG EPCA Rate is applicable to Rate Schedules X–131, X–132, and X–133.

Columbia states that these revised tariff sheets are being filed to reflect adjustments to Columbia's current costs for electric power for the twelve-month period beginning April 1, 2000.

Columbia states that copies of its filing have been mailed to all firm customers, interruptible customers, and affected state commission.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the 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 in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–5978 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–200–000]

Columbia Gas Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

March 7, 2000.

Take notice that on March 1, 2000, Columbia Gas Transmission Corporation (Columbia), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets with a proposed effective date of April 1, 2000:

Forth-third Revised Sheet No. 25
Forty-third Revised Sheet No. 26
Forty-third Revised Sheet No. 27
Thirty-ninth Revised Sheet No. 28

Columbia states that this filing comprises Columbia's annual filing pursuant to Section 36.2 of the General Terms and Conditions (GTC) of its Tariff. GTC Section 36, ''Transportation Costs Rate Adjustment (TCRA),'' enables Columbia to adjust its TCRA rates prospectively to reflect estimated current costs and unrecovered amounts for the deferral period. The TCRA rates consist of a current TCRA rate, reflecting an estimate of costs for a prospective 12-month period, and a TCRA surcharge rate, which is a true-up for actual activity within the deferral period. In this filing, the TCRA rate consists of a Current Operational TCRA Rate and an Operational TCRA Surcharge to recover the unrecovered amounts for the deferral period pursuant to GTC Section 36.4(a).

Columbia states that copies of its filing have been mailed to all firm customers, interruptible customers, and affected state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protest will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commissions and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–5979 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–198–000]

Columbia Gas Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

March 7, 2000.

Take notice that on March 1, 2000, Columbia Gas Transmission Corporation (Columbia), tendered for filing as part of its FERC Gas Tariff, Second Revised

Volume No. 1, the following revised tariff sheet, with a proposed effective date of April 1, 2000:

Eighth Revised Sheet No. 44

Columbia states that it submits its annual filing pursuant to the provisions of Section 35, Retainage Adjustment Mechanism (RAM), of the General Terms and Conditions (GTC) of its Tariff. Eighth Revised Sheet No. 44 sets forth the retainage factors applicable to Columbia's transportation, storage and gathering services, as revised by this filing.

Columbia states that copies of its filing have been mailed to all firm customers, interruptible customers and affected state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the 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 in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–5980 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–197–000

Columbia Gulf Transmission Company; Notice of Proposed Changes in FERC Gas Tariff

March 7, 2000.

Take notice that on March 1, 2000, Columbia Gulf Transmission Company (Columbia Gulf), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets, with a proposed effective date of April 1, 2000:

Twenty-third Revised Sheet No. 18
Thirteenth Revised Sheet No. 18A
Twenty-fourth Revised Sheet No. 19

Columbia Gulf states that this filing represents Columbia Gulf's annual filing pursuant to the provisions of Section 33, Transportation Retainage Adjustment (TRA), of the General Terms and Conditions (GTC) of its Tariff.

Columbia Gulf further states that the tariff sheets listed above set forth the transportation retainage factors as a result of this filing. GTC Section 33.2 enables Columbia Gulf to state retainage factors for its rate zones, which factors consist of a current and an over/under recovered component. Pursuant to GTC Section 33.4(a), the current component reflects the estimate of total company-use, lost, and unaccounted-for quantities required during the 12-month period commencing, in an annual filing such as this, on April 1. Pursuant to GTC Section 33.4(b) the over/under recovered component reflects the reconciliation of ''actual'' company-use, lost, and unaccounted-for quantities with quantities actually retained by Columbia Gulf for the preceding calendar year; *i.e.,* the deferral period.

The deferral period for this annual filing is the preceding calendar year being January 1, 1999 through December 31, 1999. Appendix A sets forth Columbia Gulf's actual experience during the deferral period. As reflected therein, Columbia Gulf was in a net under-recovery position as of December 31, 1999. Consequently, in this filing Columbia Gulf is implementing an under-recovered surcharge component for each of the retainage factors to increase future quantities to be retained.

Columbia Gulf states that copies of its filing have been mailed to all firm customers, interruptible customers, and affected state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the 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 in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–5981 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 11516–000]

Commonwealth Power Company; Notice Granting Intervention

March 7, 2000.

On February 9, 1995, the Commission issued a notice of the application for a license filed by Commonwealth Power Company (Commonwealth) for the existing Irving Dam Project No. 11516, located on the Thornapple River in Barry County, Michigan. The notice established April 10, 1995, as the deadline for filing motions to intervene.

On March 24, 1995, the Michigan Department of Natural Resources (MDNR) filed a timely request for intervention. Commonwealth filed a response in opposition to the motion.

Granting the motion to intervene will not unduly delay or disrupt the proceeding or prejudice other parties to it. Therefore, pursuant to Rule 214,[1] the motion to intervene in this proceeding file by MDNR is granted, subject to the Commission's Rules and Regulations.

David P. Boergers,

Secretary.

[FR Doc. 00–5990 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–287–047]

El Paso Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

March 7, 2000.

Take notice that on March 1, 2000, El Paso Natural Gas Company (El Paso), tendered for filing the following tariff sheet to its FERC Gas Tariff, Second Revised Volume No. 1–A, to become effective March 1, 2000.

Twenty-Second Revised Sheet No. 31

El Paso states that the above tariff sheet is being filed to implement a

[1] 18 CFR 385.214 (1999).

negotiated rate contract pursuant to the Commission's Statement of Policy on Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas pipelines issued January 31, 1996 at Docket Nos. RM95–6–000 and RM96–7–000.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.10 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must filed a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–5988 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP93–187–017, RP93–62–015 and CP88–546–010]

Equitrans, L.P.; Notice of Refund Report

March 7, 2000.

Take notice that on March 1, 2000, Equitrans, L.P. (Equitrans), tendered for filing its Refund Report pursuant to Article II, Section 2 of the Stipulation and Agreement (Settlement) filed on July 31, 1995 in the above reference dockets, and approved by the Commission on September 28, 1995.

Equitrans states that the purpose of this filing is to report the refunds made to its customers on February 29, 2000 for the difference between the amount collected during the four-year surcharge period for well plugging and abandonment and the $2.6 million Equitrans was authorized to collect. The total amount refunded is $55,882.95, which includes interest computed in accordance with Section 154.501 of the Commission's Regulations. The refunds were allocated based on the same percentages used in collecting the surcharge from each customer over the four-year period.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed on or before March 14, 2000. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–5976 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–208–000]

Panhandle Eastern Pipe Line Company; Notice of Proposed Changes in FERC Gas Tariff

March 7, 2000.

Take notice that on March 1, 2000, Panhandle Eastern Pipe Line Company (Panhandle), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the tariff sheets listed on Appendix A to the filing, to become effective April 1, 2000.

Panhandle states that this filing is made in accordance with Section 24 (Fuel Reimbursement Adjustment) of the General Terms and Conditions in Panhandle's FERC Gas Tariff, First Revised Volume No. 1.

Panhandle states that the revised tariff sheets filed herewith reflect the following changes to Fuel Reimbursement Percentages:

(1) No change in the Gathering Fuel Reimbursement Percentage;

(2) No change in the Field Zone Fuel Reimbursement Percentage;

(3) a (0.05%) decrease in the Market Zone Fuel Reimbursement Percentage;

(4) No change in the Injection and in the Withdrawal Field Area Storage Reimbursement Percentages; and

(5) No change in the Injection and in the Withdrawal Market Area Storage Reimbursement Percentages.

Panhandle further states that copies of this filing are being served on all affected customers and applicable state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the 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 in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–5985 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–518–011]

PG&E Gas Transmission, Northwest Corporation; Notice of Proposed Change in FERC Gas Tariff

March 7, 2000.

Take notice that on March 1, 2000, PG&E Gas Transmission, Northwest Corporation (PG&E GT–NW), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1–A Seventh Revised Sheet No. 7 and Fourth Revised Sheet No. 7A. PG&E GT–NW requests that the above-referenced tariff sheets become effective March 1, 2000.

PG&E GT–NW states that these sheets are being filed to reflect the implementation of two negotiated rate agreements.

PG&E GT–NW further states that a copy of this filing has been served on PG&E GT–NW's jurisdictional customers, and interested state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion

to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the 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 in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers.

Secretary.

[FR Doc. 00–5989 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–207–000]

Southwest Gas Storage Company; Notice of Proposed Changes in FERC Gas Tariff

March 7, 2000.

Take notice that on March 1, 2000, Southwest Gas Storage Company (Southwest), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following revised tariff sheet proposed to become effective April 1, 2000.

First Revised Sheet No. 5

Southwest states that this filing is made in accordance with Section 16 (Fuel Reimbursement Adjustment) of the General Terms and Conditions in Southwest's FERC Gas Tariff, First Revised Volume No. 1. The Fuel Reimbursement Adjustment filed herewith reflects the following Fuel Reimbursement Percentage: (1) West Area Storage Facilities Injection 1.36% and Withdrawal 0.59%; and (2) East Area Storage Facilities Injection 2.37% and Withdrawal 1.11%.

Southwest further states that copies of this filing are being served on all affected customers and applicable state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the 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 in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers.

Secretary.

[FR Doc. 00–5977 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–204–000]

Transcontinental Gas Pipe Line Corporation; Notice of Proposed Changes in FERC Gas Tariff

March 7, 2000.

Take notice that on March 1, 2000, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing to become part of its FERC Gas Tariff, Third Revised Volume No. 1, certain revised tariff sheets which tariff sheets are enumerated in Appendix A attached to the filing. The tariff sheets are proposed to be effective April 1, 2000.

Transco states that the instant filing is submitted pursuant to Section 41 of the General Terms and Conditions of Transco's FERC Gas Tariff which provides that Transco will file to reflect net changes in the Transmission Electric Power (TEP) rates 30 days prior to each TEP Annual Period beginning April 1. Attached in Appendix B are workpapers supporting the derivation of the revised TEP rates reflected on the tariff sheets included therein.

The TEP rates are designed to recover Transco's transmission electric power costs for its electric compressor stations (Stations 100, 115, 120, 125, 145 and 205). The costs underlying the revised TEP rates consist of two components—the Estimated TEP Costs for the period April 1, 2000 through March 31, 2001 plus the balance in the TEP Deferred Account including accumulated interest as of January 31, 2000. Appendix C contains schedules detailing the Estimated TEP Costs for the period April 1, 2000 through March 31, 2001 and Appendix D contains workpapers supporting the calculation of the TEP Deferred Account.

Transco states that it is serving copies of the instant filing to its affected customers, State Commissions and other interested parties.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the 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 in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–5984 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–209–000]

Transcontinental Gas Pipe Line Corporation; Notice of Proposed Changes In FERC Gas Tariff

March 7, 2000.

Take notice that on March 1, 2000, Transcontinental Gas Pipe Line Corporation (Transco), tendered for filing to become part of its FERC Gas Tariff, Third Revised Volume No. 1, certain revised tariff sheets enumerated in Appendix A attached to the filing.

Transco states that the instant filing is submitted pursuant to Section 38 of the General Terms and Conditions of Transco's FERC Gas Tariff which provides that Transco will file, to be effective each April 1, a redetermination of its fuel retention percentages

applicable to transportation and storage rate schedules. The derivations of the revised fuel retention percentages included therein are based on Transco's estimate of gas required for operations (GRO) for the forthcoming annual period April 2000 through March 2001 plus the balance accumulated in the Deferred GRO Account at January 31, 2000. Transco has included an adjustment to the calculation of the deferred GRO for the annual period April 1999 through March 2000 in order to comply with the Commission's February 23, 2000 order (Order) in Transco's Docket No. TM99–6–29–000.

Also included in the filing is an alternate sheet that reflects a decrease in the fuel retention percentage applicable to the firm storage service provided by Transco under Rate Schedules LG–A, LNG, LNG–R and LG–S. The fuel percentages on the alternate sheet reflects a large under recovery in Transco's Deferred GRO Account amortized over a three year period, along with the estimate of the GRO for the forthcoming annual period.

Included in Appendices B and B–1 attached to the filing are the workpapers supporting the derivation of the revised fuel retention factors. Appendix C contains workpapers supporting the recalculation of the Deferred GRO Account balance as of January 31, 2000.

Transco states that copies of the filing are being mailed to its affected customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the 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 in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–5986 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP00–102–000]

Transcontinental Gas Pipe Line Corporation; Notice of Request Under Blanket Authorization

March 6, 2000.

Take notice that on February 28, 2000, Transcontinental Gas Pipe Line Corporation (Transco), P.O. Box 1396, Houston, Texas 77251, tendered for filing in Docket No. CP00–102–000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.211) for authorization to construct and operate a delivery point for a new gas transportation customer, Visy Paper, Inc. (Visy Paper), a paper manufacturer, under Transco's blanket certificate issued in Docket No. CP82–426–000, pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Transco states that the delivery point will consist of two 4-inch tap valve assemblies, a meter station with one 3-inch orifice meter tube, 3-inch inlet and outlet meter station yard piping, electronic flow measurement equipment, and other appurtenant facilities. Transco states that the delivery point will be installed at or near milepost 1065.00 on Transco's mainline in Rockdale County, Georgia. Transco also states that Visy Paper will construct, or cause to be constructed, appurtenant facilities to enable it to receive gas from Transco at such point and move the gas to its existing paper plant. Transco states the new delivery point will be used by Visy Paper to receive up to 6,000 dekatherms per day (dt/d) of gas from Transco on a firm, capacity release or interruptible basis. Transco states that upon completion of the delivery point, Transco will commence transportation service to Visy Paper or its suppliers pursuant to Transco's Rate Schedules FT, FT–R or IT and Part 284(G) of the Commission's regulations. Transco states that the addition of the delivery point will have no significant impact on its peak day or annual deliveries, and is not prohibited by its FERC Gas Tariff. Transco has estimated the total costs of Transco's proposed facilities to be approximately $254,045. Transco states that Visy Paper will reimburse Transco for all costs associated with such facilities.

In addition, Transco states that Visy Paper's plant is currently served by Atlanta Gas Light Company's (AGL) system. Transco also states that gas is physically delivered to the plant by AGL's system, but Visy Paper purchases the gas from others. Transco states that Visy Paper has informed Transco that, for a variety of business reasons, Visy Paper wants to have gas supplied to its plant in the future by the Transco system.

Transco further states that it filed an application with the Commission on April 29, 1999 in Docket No. CP99–392–000 for its SouthCoast Expansion Project (SouthCoast Project), and that one of the customers on such project is Visy Paper, which will receive gas at this delivery point on a firm basis for 4,500 dt/d. Transco states that once the SouthCoast Project is in service, Visy Paper will be entitled to receive gas at this delivery point on a firm basis. Transco states that the SouthCoast Project is scheduled to go into service on November 1, 2000. Transco states that Visy Paper has represented to Transco that it is important for Visy Paper to begin receiving gas at this delivery point as soon as possible on a capacity release or interruptible basis. Transco states that Visy Paper has, therefore, requested Transco to file this prior notice application now so that it can begin receiving as at this delivery point as soon as possible.

Transco's contact person for this project is Toi Anderson, P.O. Box 1396, Houston, Texas 77251, (713) 215–4540.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–6063 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–206–000]

Trunkline Gas Company; Notice of Proposed Changes in FERC Gas Tariff

March 7, 2000.

Take notice that on March 1, 2000, Trunkline Gas Company (Trunkline), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the tariff sheets listed in Appendix A attached to the filing to become effective April 1, 2000.

Trunkline states that this filing is being made in accordance with Section 22 (Fuel Reimbursement Adjustment) of Trunkline's FERC Gas Tariff, First Revised Volume No. 1. The revised tariff sheets listed on Appendix A reflect: a (0.48)% decrease (Field Zone to Zone 2), a (0.46)% decrease (Zone 1A to Zone 2), a (0.17)% decrease (Zone 1B to Zone 2), a 0.08% increase (Zone 2 only), a (0.53)% decrease (Field Zone to Zone 1B), a (o.51)% decrease (Zone 1A to Zone 1B), a (0.22)% decrease (Zone 1B only), a (0.28)% decrease (Field Zone to Zone 1A), a (0.26)% decrease (Zone 1A only) and a 0.01% increase (Field Zone only) to the currently effective fuel reimbursement percentages.

Trunkline states that a copy of this filing are being served on all affected shippers and interested state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the 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 in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–5982 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–257–005]

William Gas Pipelines Central, Inc; Notice of Proposed Changes in FERC Gas Tariff

March 7, 2000.

Take notice that on March 1, 2000, Williams Gas Pipelines Central, Inc. (Williams), tendered for filing to become part of its FERC Gas Tariff, Original Volume No. 1, Substitute First Revised Sheet Nos. 30–32, with the proposed effective date of November 1, 1999.

Williams states that it made a filing in this docket on December 30, 1999 to set forth each customer's direct bill or refund amount in Williams' FERC Gas Tariff and to modify Articles 14.2, 27 and 28 to refer only to the Settlement. The instant filing is being made to correct the allocations among four customers. Two customers were affected by a capacity release adjustment not reflected correctly. Two other customers were affected by a contract that was transferred from one customer to the other not being reflected in the system on the correct date. A revised Exhibit B1 and B2 are enclosed, as well as revised tariff sheets.

Williams state that a copy of its filing was served on all participants listed on the service lists maintained by the Commission in the dockets referenced above and on all of Williams' jurisdictional customers and interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of the filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–5983 Filed 3–10–00; 8:45am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2720–032 and 2471–005]

Wisconsin Electric Power Company; Notice Granting Late Intervention

March 7, 2000.

On December 2, 1999, the Commission issued a notice of the application for amendment of license filed by Wisconsin Electric Power Company (Wisconsin Electric), for its existing Sturgeon Falls Project No. 2720, located on the Menominee River, in Dickenson County, Michigan and Marinette County, Wisconsin. The notice established January 31, 2000, as the deadline for the filing of motions to intervene.

On December 3, 1999, the Commission issued a notice of the application for surrender of license filed by Wisconsin electric for its existing Sturgeon Hydroelectric Project No. 2471, located on the sturgeon river, in Dickenson County, Michigan. The notice established February 1, 2000, as the deadline for filing motions to intervene.

On February 4, 2000, River Alliance of Wisconsin filed a late motion to intervene in both proceedings.[1] Granting the motion to intervene will not unduly delay or disrupt the proceedings or any other parties to them. Therefore, pursuant to Rule 214,[2] the motion to intervene filed in these proceedings by the River Alliance of Wisconsin is granted, subject to the Commission's rules and regulations.

David P. Boergers,

Secretary.

[FR Doc. 00–5975 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EG00–105–000, *et al.*]

Texas Independent Energy Operating Company, LLC, *et al.* Electric Rate and Corporate Regulation Filings

March 6, 2000.

Take notice that the following filings have been made with the Commission:

[1] By the same pleading, River Alliance of Wisconsin filed timely motions to intervene in several related proceedings. Because those motions were unopposed, they were granted automatically.

[2] 18 CFR 385.214.

[Docket No. EG00–105–000]

1. Texas Independent Energy Operating Company, LLC

Take notice that on March 1, 2000, Texas Independent Energy Operating Company, LLC (Applicant), with its principal office at 4100 Spring Valley Road, Suite 1001, Dallas, Texas 75244 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 Delaware limited liability company. Applicant will be engaged directly, or indirectly through a Section 2(a)(11)(B) affiliate, and exclusively in operating a 1000 MW natural gas-fired generating facility and certain interconnection facilities necessary to effect the sale of electric energy at wholesale located in Ector County, Texas and a 1000 MW natural gas-fired generating facility and certain interconnection facilities necessary to effect the sale of electric energy at wholesale located in Guadalupe County, Texas; selling electric energy at wholesale; and engaging in project development activities with respect thereto.

Comment date: March 27, 2000, 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.

[Docket No. EG00–106–000]

2. Doyle I, L.L.C.

Take notice that on February 28, 2000, Doyle I, L.L.C. (Doyle), a limited liability company with its principal place of business at 1400 Smith Street, Houston, Texas 77002, 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.

Doyle states that it will be engaged directly and exclusively in the business of owning and operating a natural-gas fired, 342 MW generation facility (Facility) located in Walton, Georgia. Doyle will sell the Facility's capacity exclusively at wholesale.

Comment date: March 27, 2000, 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.

[Docket No. EG00–107–000]

3. DTE Georgetown, LLC

Take notice that on March 1, 2000, DTE Georgetown, LLC (DTE Georgetown), a Delaware limited liability corporation with its principal place of business at 425 South Main Street, Suite 201, Ann Arbor, MI 48107, 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.

Comment date: March 27, 2000, 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.

[Docket No. ER98–2683–006]

4. Nicole Energy Services, Inc.

Take notice that on March 1, 2000, Nicole Energy Services, Inc. filed a quarterly report for information only.

[Docket No. ER99–933–002]

5. California Power Exchange Corporation

Take notice that on March 1, 2000, the California Power Exchange Corporation (CalPX), tendered for filing a corrected refund report in the above-referenced docket.

Copies of the filing were served on each of CalPX's participants and on the official service list in this docket.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

6. Calcasieu Power, LLC

[Docket No. ER00–1049–000]

Take notice that on March 1, 2000, Calcasieu Power, LLC tendered for filing pursuant to Rule 205, 18 CFR 385.205, a Revised FERC Electric Rate Schedule No. 1 in compliance with the Commission's order dated February 23, 2000.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

7. Reliant Energy HL&P

[Docket No. ER00–1413–000]

Take notice that on February 25, 2000, Reliant Energy HL&P tendered for filing a revised executed transmission service agreement (TSA) with Tex-La Electric Cooperative of Texas, Inc., for Long-Term Firm Transmission Service under Reliant Energy HL&P's FERC Electric Tariff, Third Revised Volume No. 1, for Transmission Service To, From and Over Certain HVDC Interconnections. The executed TSA supersedes the unexecuted TSA filed in the above-captioned docket on January 31, 2000.

Reliant Energy HL&P has requested an effective date for the TSA of January 1, 2000.

Copies of the filing were served on Tex-La and the Public Utility Commission of Texas.

Comment date: March 17, 2000, in accordance with Standard Paragraph E at the end of this notice.

8. Delano Energy Company, Inc.

[Docket No. ER00–891–001]

Take notice that on February 29, 2000, Delano Energy Company, Inc. (Delano) tendered a compliance filing pursuant to the Commission's February 9 Order accepting Delano's request to engage in wholesale electric power and energy transactions at market-based rates (Market Rate Tariff) and directing Delano to limit its authority to sell ancillary services to sales into the markets administered by the California ISO.

Comment date: March 21, 2000, in accordance with Standard Paragraph E at the end of this notice.

9. PJM Interconnection, L.L.C.

[Docket No. ER99–1618–003]

Take notice that on March 1, 2000, PJM Interconnection, L.L.C. (PJM), tendered for filing an amendment to Schedule 11 (PJM Capacity Credit Markets) of the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. extending the expiration date of the mandatory Sell Offers and Buy Bids provision until May 31, 2001.

Copies of this filing were served upon all PJM Members and the electric regulatory commissions in the PJM Control Area.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

10. California Power Exchange Corporation

[Docket No. ER00–1642–000]

Take notice that on March 1, 2000, the California Power Exchange Corporation, on behalf of its CalPX Trading Services Division (CTS), tendered for filing an amendment to its February 17, 2000, filing in this proceeding. The purpose of the amendment is to make the filing consistent with the Commission's February 24, 2000, Order in Docket No. ER00–951–000.

CTS continues to request the same effective dates as it requested in the February 17, 2000 filing. Specifically, CTS requests waiver of notice to permit a March 1, 2000 effective date for the changes pertaining to providing notice on the new software. CTS requests a May 1, 2000 effective date for the bulk of the filing.

Copies of the filing were served upon the CTS' jurisdictional customers and

the California Public Utilities Commission.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

11. Entergy Services, Inc.

[Docket No. ER00–1743–000]

Take notice that on March 1, 2000, Entergy Services, Inc., on behalf of Entergy Corporation and the five Entergy Operating Companies: Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (together Entergy), tendered for filing (1) a Pro Forma Interconnection and Operating Agreement and (2) Procedures and Requirements for Adding Generation to Entergy's Transmission System.

Entergy has requested that the Pro Forma Interconnection Agreement and Interconnection Procedures become effective at the earliest possible date.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

12. Pacific Gas and Electric Company

[Docket No. ER00–1744–000]

Take notice that on March 1, 2000, Pacific Gas and Electric Company (PG&E), tendered for filing several agreements between PG&E and East Bay Municipal Utility District (EBMUD)(collectively, Parties) providing for special facilities and the parallel operation of EBMUD's Pardee and Camanche Powerhouses and PG&E's electrical system. PG&E is filing the following agreements for each of the Pardee and Camanche Powerhouses, all dated February 15, 2000: (1) a Generator Special Facilities Agreement (GSFA); (2) a Generator Interconnection Agreement; and (3) a Letter Agreement Regarding Special Facilities and Interconnection.

The GSFA's permit PG&E to recover the ongoing costs associated with owning, operating and maintaining the Special Facilities, including the cost of any alterations and additions. As detailed in the Special Facilities Agreements, PG&E proposes to charge EBMUD a monthly Cost of Ownership Charge equal to the rate for transmission-level, customer-financed facilities in PG&E's currently effective Electric Rule 2, as filed with the California Public Utilities Commission (CPUC). PG&E's currently effective rate of 0.31% for Pardee Powerhouse or 0.307% for Camanche Powerhouse for transmission-level, customer-financed Special Facilities is contained in the CPUC's Advice Letter 1960-G/1587-E, effective August 5, 1996, a copy of which is included as Attachment 6 of this filing.

PG&E has requested permission to use automatic rate adjustments whenever the CPUC authorizes a new Electric Rule 2 Cost of Ownership Rate for transmission-level, customer-financed Special Facilities, but has agreed to cap the rate at 0.52% per month.

Copies of this filing have been served upon EBMUD and the CPUC.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

13. PJM Interconnection, L.L.C.

[Docket No. ER00–1745–000]

Take notice that on March 1, 2000, PJM Interconnection, L.L.C. (PJM), tendered for filing two executed umbrella service agreements for network integration transmission service under state required retail access programs. The agreements are with Total Gas & Electric, Inc., and Agway Energy Services-PA, Inc.

Copies of this filing were served upon the parties to the service agreements and the state commissions within the PJM control area.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

14. DTE Georgetown, LLC

[Docket No. ER00–1746–000]

Take notice that on March 1, 2000, DTE Georgetown, LLC (Georgetown) tendered for filing a petition for authorization to make sales of capacity and energy at market-based rates, and a request for certain related blanket authorizations and waivers.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

15. American Electric Power Service Corporation

[Docket No. ER00–1747–000]

Take notice that on March 1, 2000, the American Electric Power Service Corporation (AEPSC), tendered for filing executed Firm and Non-Firm Point-to-Point Transmission Service Agreements for El Paso Merchant Energy, L.P. and a Non-Firm Point-to-Point Transmission Service Agreement for Conectiv Energy Supply, Inc. The agreements are pursuant to the AEP Companies' Open Access Transmission Service Tariff (OATT). The OATT has been designated as FERC Electric Tariff Original Volume No. 4, effective July 9, 1996.

AEPSC requests waiver of notice to permit the Service Agreements to be made effective for service billed on and after February 1, 2000.

AEPSC also requests termination of one service agreement executed by Sonat Power Marketing, L.P., under AEP Companies' FERC Electric Tariff Original Volume No. 4. El Paso Merchant Energy, L.P. (EPME), the successor in interest to Sonat Power Marketing, L.P., has requested the termination of the service agreement.

A copy of the filing was served upon the Parties and the state utility regulatory commissions of Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia and West Virginia.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

16. Southwestern Electric Power Company

[Docket No. ER00–1748–000]

Take notice that on March 1, 2000, Southwestern Electric Power Company (SWEPCO), tendered for filing the final return on common equity (Final ROE) to be used in establishing final redetermined formula rates for wholesale service in Contract Year 1999 to Northeast Texas Electric Cooperative, Inc., the City of Bentonville, Arkansas, Rayburn Country Electric Cooperative, Inc., Cajun Electric Power Cooperative, Inc., Tex-La Electric Cooperative of Texas, Inc., the City of Hope, Arkansas, and East Texas Electric Cooperative, Inc. SWEPCO provides service to these Customers under contracts which provide for periodic changes in rates and charges determined in accordance with cost-of-service formulas, including a formulaic determination of the return on common equity.

In accordance with the provisions of the formula rate contracts, SWEPCO seeks an effective date of January 1, 1999 and, accordingly, seeks waiver, to the extent necessary, of the Commission's notice requirements.

Copies of the filing were served on the affected wholesale Customers, the Public Utility Commission of Texas, the Louisiana Public Service Commission and the Arkansas Public Service Commission.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

17. Sithe Maryland Holdings LLC, Sithe New Jersey Holdings LLC and Sithe Pennsylvania Holdings LLC

[Docket No. ER00–1749–000]

Take notice that on March 1, 2000, Sithe Maryland Holdings LLC, Sithe New Jersey Holdings LLC and Sithe Pennsylvania Holdings LLC (collectively, the Sithe PJM Companies), tendered for filing a Notification of

Change in Status and Petition for Acceptance of Pro Forma Revised Rate Schedules and Supplements, by which the Sithe PJM Companies provide notice that upon the closing of the sale of the equity interests in Sithe Maryland, Sithe New Jersey and Sithe Pennsylvania to Reliant Energy Power Generation, Inc., or one or more of its direct or indirect, wholly-owned subsidiaries, the Sithe PJM Companies' successors, Reliant Energy Maryland Holdings, LLC, Reliant Energy New Jersey Holdings, LLC and Reliant Energy Pennsylvania Holdings, LLC, will be affiliated with an electric utility with a franchised service territory and various exempt wholesale generators.

Due to the affiliation post-transaction with a traditional electric utility, the Sithe PJM Companies are submitting for filing pro forma revised FERC Electric Rate Schedules Nos. 1 and 2 and Codes of Conduct.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

18. PJM Interconnection, L.L.C.

[Docket No. ER00–1750–000]

Take notice that on March 1, 2000, PJM Interconnection, L.L.C. (PJM), tendered for filing 4 executed service agreements for network integration transmission service and for point-to-point transmission service under the PJM Open Access Transmission Tariff.

Copies of this filing were served upon the parties to the service agreements and the state commissions within the PJM control area.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

19. Doyle I, L.L.C.

[Docket No. ER00–1751–000]

Take notice that on March 1, 2000, Doyle I, L.L.C., pursuant to Section 205 of the Federal Power Act, 16 U.S.C. § 824d (1994), and section 35.12 of the Commission's Regulations, 18 CFR 35.12, tendered for filing an initial rate schedule, FERC Electric Rate Schedule No. 1, for the sale of capacity at cost-based rates, applicable to a Power Purchase and Sale Agreement, as amended, between Doyle and Oglethorpe Power Corporation (Oglethorpe).

Doyle requests that the Commission grant waivers of certain regulatory requirements under Subpart A of 18 CFR Part 35, as described below. In addition, Doyle requests waiver of the 60-day prior notice requirement to permit its initial rate schedule to be effective March 15, 2000.

Copies of the filing were served upon Oglethorpe and on the Georgia Public Service Commission.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

20. Entergy Services, Inc.

[Docket No. ER00–1752–000]

Take notice that on March 1, 2000, Entergy Services, Inc. (Entergy Services), on behalf of Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (collectively, the Entergy Operating Companies), tendered for filing an Assignment and Consent Agreement between Entergy Services, Ralph R. Mabey as Chapter 11 Trustee for Cajun Electric Power Cooperative, Inc., and Louisiana Generating LLC.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

21. Duquesne Light Company

[Docket No. ER00–1753–000]

Take notice that March 1, 2000, Duquesne Light Company (DLC), tendered for filing a Service Agreement dated February 29, 2000 with Cargill-Alliant, LLC under DLC's Open Access Transmission Tariff (Tariff). The Service Agreement adds Cargill-Alliant, LLC as a customer under the Tariff.

DLC requests an effective date of February 29, 2000 for the Service Agreement.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

22. Duquesne Light Company

[Docket No. ER00–1754–000]

Take notice that March 1, 2000, Duquesne Light Company (DLC), tendered for filing a Service Agreement dated February 29, 2000, with Cargill-Alliant LLC under DLC's Open Access Transmission Tariff (Tariff). The Service Agreement adds Cargill-Alliant LLC as a customer under the Tariff.

DLC requests an effective date of February 29, 2000, for the Service Agreement.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

23. Duquesne Light Company

[Docket No. ER00–1755–000]

Take notice that on March 1, 2000, Duquesne Light Company (DLC), tendered for filing a Service Agreement dated February 29, 2000 with FirstEnergy Corporation under DLC's Open Access Transmission Tariff (Tariff). The Service Agreement adds FirstEnergy Corporation as a customer under the Tariff.

DLC requests an effective date of February 29, 2000, for the Service Agreement.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

24. Duquesne Light Company

[Docket No. ER00–1756–000]

Take notice that March 1, 2000, Duquesne Light Company (DLC), tendered for filing a Service Agreement dated February 29, 2000, with FirstEnergy Corporation under DLC's Open Access Transmission Tariff (Tariff). The Service Agreement adds FirstEnergy Corporation as a customer under the Tariff.

DLC requests an effective date of February 29, 2000, for the Service Agreement.

Comment date: March 21, 2000, in accordance with Standard Paragraph E at the end of this notice.

25. Duquesne Light Company

[Docket No. ER00–1757–000]

Take notice that March 1, 2000, Duquesne Light Company (DLC), tendered for filing a Service Agreement dated December 10, 1999 with Allegheny Energy Supply Company under DLC's Open Access Transmission Tariff (Tariff). The Service Agreement adds Allegheny Energy Supply Company as a customer under the Tariff.

DLC requests an effective date of February 29, 2000, for the Service Agreement.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

26. Duquesne Light Company

[Docket No. ER00–1758–000]

Take notice that March 1, 2000, Duquesne Light Company (DLC), tendered for filing a Service Agreement dated December 10, 1999 with Allegheny Energy Supply Company under DLC's Open Access Transmission Tariff (Tariff). The Service Agreement adds Allegheny Energy Supply Company as a customer under the Tariff.

DLC requests an effective date of February 29, 2000, for the Service Agreement.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

27. Duquesne Light Company

[Docket No. ER00–1759–000]

Take notice that March 1, 2000, Duquesne Light Company (DLC), tendered for filing a Service Agreement dated February 29, 2000 with Conectiv Energy Supply, Inc., under DLC's Open Access Transmission Tariff (Tariff). The Service Agreement adds Conectiv Energy Supply, Inc. as a customer under the Tariff.

DLC requests an effective date of February 29, 2000, for the Service Agreement.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

28. Ameren Services Company

[Docket No. ER00–1760–000]

Take notice that on March 1, 2000, Ameren Services Company (Ameren Services), tendered for filing an unexecuted Network Operating Agreement and an unexecuted Service Agreement for Network Integration Transmission Service between Ameren Services and the City of Farmington, Missouri (Farmington). Ameren Services asserts that the purpose of the Agreements is to permit Ameren Services to provide transmission service to Farmington pursuant to Ameren's Open Access Tariff.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

29. Ameren Services Company

[Docket No. ER00–1761–000]

Take notice that on March 1, 2000, Ameren Services Company (Ameren Services), tendered for filing an unexecuted Network Operating Agreement and an unexecuted Service Agreement for Network Integration Transmission Service between Ameren Services and the City of Owensville, Missouri (Owensville). Ameren Services asserts that the purpose of the Agreements is to permit Ameren Services to provide transmission service to Owensville pursuant to Ameren's Open Access Tariff.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

30. Ameren Services Company

[Docket No. ER00–1762–000]

Take notice that on March 1, 2000, Ameren Services Company (Ameren Services), tendered for filing an unexecuted Network Operating Agreement and an unexecuted Service Agreement for Network Integration Transmission Service between Ameren Services and City Light & Power, City of Fredericktown, Missouri (Fredericktown). Ameren Services asserts that the purpose of the Agreements is to permit Ameren Services to provide transmission service to Fredericktown pursuant to Ameren's Open Access Tariff.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

31. Cleco Utility Group Inc.

[Docket No. ER00–1763–000]

Take notice that on March 1, 2000, Cleco Utility Group Inc., Transmission services (CLECO), tendered for filing their service agreement for short term firm point-to-point transmission services under its Open Access Transmission Tariff with Aquila Energy Marketing Corporation.

CLECO requests an effective date of March 7, 2000.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

32. Dayton Power and Light Company

[Docket No. ER00–1764–000]

Take notice that on March 1, 2000, Dayton Power and Light (DP&L), tendered for filing a Transmission and Ancillary Service Reassignment Tariff.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

33. Maine Public Service Company

[Docket No. ER00–1765–000]

Take notice that on March 1, 2000, Maine Public Service Company (Maine Public), tendered for filing an executed Service Agreement for Firm Point-To-Point Transmission Service under Maine Public's open access transmission tariff with WPS Energy Services, Inc.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

34. Tampa Electric Company

[Docket No. ER00–1766–000]

Take notice that on March 1, 2000, Tampa Electric Company (Tampa Electric) tendered for filing a service agreement with Southern Company Services, Inc. (Southern) under Tampa Electric's market-based sales tariff.

Tampa Electric requests that the service agreement be made effective on February 3, 2000.

Copies of the filing have been served on Southern and the Florida Public Service Commission.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

35. Conectiv Energy Supply, Inc.

[Docket No. ER00–1770–000]

Take notice that March 1, 2000, Conectiv, on behalf of Conectiv Energy Supply, Inc. (CESI), Conectiv Delmarva Generation, LLC (CDG) and Conectiv Atlantic Generation, LLC (CAG), on March 1, 2000, tendered for filing under the provisions of Section 205 of the Federal Power Act: (1) CESI's updated market-based rate tariff, a notice of change in status and CESI's service agreements with Delmarva Power & Light Company and Atlantic City Electric Company; (2) CDG's market-based rate tariff and CDG's tolling agreement with CESI, which is a service agreement pursuant to this tariff; and (3) CAG's market-based rate tariff and CAG's service agreement with CESI under this tariff.

Conectiv requests that the Commission allow the rate schedule to become effective on May 1, 2000, which is sixty days after the filing and the date on which Conectiv hopes that the transfer of certain generating facilities to CDG and CAG will occur.

Copies of the filing were served upon Delmarva's wholesale requirements customers, and the Maryland People's Counsel, Maryland Public Service Commission, Delaware Public Service Commission, New Jersey Public Service Commission and the Virginia State Corporation Commission.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

36. Atlantic City Electric Company, Delmarva Power and Light Company

[Docket Nos. ER00–1771–000 and ER00–1772–000]

Delmarva Power and Light Company Docket No. ER00–1772–000

Take notice that March 1, 2000, Atlantic City Electric Company (Atlantic) and Delmarva Power and Light Company (Delmarva), tendered for filing interconnection agreements between Atlantic and Conectiv Atlantic Generation, LLC (CAG); and between Delmarva and Conectiv Delmarva, LLC (CDG).

The Atlantic Interconnection Agreement contains terms and conditions for the interconnection of CAG and Atlantic facilities and the Delmarva Interconnection Agreement contains terms and conditions for the interconnection of CDG and Delmarva facilities.

Copies of the filing were served upon the Delaware Public Service Commission, the Maryland Public Service Commission, the State of New Jersey Board of Public Utilities and the

Virginia State Corporation Commission, Energy Division, where the two utilities operate, Delmarva's jurisdictional requirements customers and Vineland, Dover, Easton and Old Dominion Electric Cooperative who are transmission dependent utilities taking interconnection service from Delmarva and Atlantic.

Comment date: March 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

37. Oklahoma Gas and Electric Company

[Docket No. ER00–1785–000]

Take notice that on February 25, 2000, Oklahoma Gas and Electric Company (OG&E) tendered for filing a revised Open Access Transmission Tariff to provide Network Integration Transmission Service under the Southwest Power Pool, Inc. (SPP) Regional Tariff.

Copies of this filing have been served on the affected parties, the Oklahoma Corporation Commission and the Arkansas Public Service Commission.

Comment date: March 17, 2000, in accordance with Standard Paragraph E at the end of this notice.

38. Public Service Company of New Mexico

[Docket No. ER00–1786–000]

Take notice that on February 29, 2000, Public Service Company of New Mexico (PNM) filed as an amendment to the San Juan Project Participation Agreement (Participation Agreement) an Interim Invoicing Agreement with respect to invoicing for coal deliveries from San Juan Coal Company among PNM, Tucson Electric Power Company (TEP) and the other owners of interests in the San Juan Generating Station. This interim agreement effectively modifies the Participation Agreement for an interim period from January 1, 2000 through December 31, 2000.

PNM requests waiver of the Commission's notice requirements in order to allow the Interim Invoicing Agreement to be effective as of January 1, 2000.

Copies of this filing have been served upon the New Mexico Public Regulation Commission, TEP and each of the owners of an interest in the San Juan Generating Station.

Comment date: March 21, 2000, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

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, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 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. 00–5992 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–U

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meeting

March 8, 2000.

The Following Notice of Meeting is Published Pursuant to Section 3(A) of the Government in The Sunshine Act (Pub. L. No. 94–409), 5 U.S.C 552B:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission

DATE AND TIME: March 15, 2000, 10:00 a.m.

PLACE: Room 2C 888 First Street, N.E. Washington, D.C. 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda * Note—Items Listed on the Agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: David P. Boergers, Secretary, Telephone (202) 208–0400, For a recording listing items stricken from or added to the meeting, call (202) 208–1627.

This is a list of matters to be considered by the Commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the reference and information center.

Consent Agenda—Hydro, 736th—Meeting March 15, 2000, Regular Meeting (10:00 a.m.)

CAH–1.
Docket# EL95–49, 001, Fourth Branch Associates v. Niagara Mohawk Power Corporation
Other#s P–6032, 040, Fourth Branch Associates v. Niagara Mohawk Power Corporation

CAH–2.
Docket# P–6559, 015, H. Bruce Cox

CAH–3.
Docket# P–4632, 021, Clifton Power Corporation
Other#s P–4632, 023, Clifton Power Corporation

CAH–4.
Docket# P–459, 105, The Coalition for the Fair and Equitable Regulation of Docks on Lake of the Ozarks, Inc. V. Union Electric Company, D.B.A. Amerenue

Consent Agenda—Electric

CAE–1.
Docket# ER00–1139, 000, Gleason Power I, L.L.C.
Other#s ER00–1140, 000, Des Plaines Green Land DevelopmenT, L.L.C.
ER00–1141, 000, West Fork Land Development Company, L.L.C.
ER00–1147, 000, Aes Londonderry, LLC
ER00–1171, 000, Tiverton Power Associates Limited Partnership

CAE–2.
Omitted

CAE–3.
Docket# ER00–1182, 000, Puget Sound Energy, Inc.

CAE–4.
Docket# ER00–1258, 000, First Electric Cooperative Corporation
Other#s EL00–37, 000, First Electric Cooperative Corporation

CAE–5.
Docket# ER00–1175, 000, NSP Operating Companies

CAE–6.
Omitted

CAE–7.
Docket# ER97–1523, 022, Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric and Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., New York Power Authority and Rochester Gas and Electric Corporation

CAE–8.
Docket# OA97–163, 008, Mid-Continent Area Power Pool
Other#s OA97–658, 008, Mid-Continent Area Power Pool
ER97–1162, 007, Mid-Continent Area Power Pool

CAE–9.
Docket# ER99–2609, 000, Firstenergy Operating Companies
Other#s EL99–71, 000, Firstenergy Operating Companies
EL99–71, 001, Firstenergy Operating Companies
ER99–2609, 002, Firstenergy Operating Companies
ER99–2647, 000, American Transmission Systems, Inc.

CAE–10.
Docket# ER99–3084, 000, Entergy Services, Inc.
Other#s ER99–3093, 000, Entergy Services, Inc.
ER99–3133, 000, Entergy Services, Inc.
ER99–3175, 000, Entergy Services, Inc.
ER99–3176, 000, Entergy Services, Inc.
ER99–3188, 000, Entergy Services, Inc.
ER99–3252, 000, Entergy Services, Inc.

ER99–3302, 000, Entergy Services, Inc.
ER99–3315, 000, Entergy Services, Inc.
ER99–3960, 000, Entergy Services, Inc.
CAE–11.
Docket# ER99–3393, 000, PJM Interconnection, L.L.C.
CAE–12.
Docket# EC00–38, 000, Peco Energy Company
Other#s EL00–26, 000, Susquehanna Power Company
ER00–803, 000, Peco Energy Power Company
CAE–13.
Docket# EC00–34, 000, Atlantic City Electric Company, Delmarva Power & Light Company and Peco Energy Company
Other#s EC00–35, 000, Atlantic City Electric Company, Delmarva Power & Light Company and PSEG Nuclear LLC
CAE–14.
Omitted
CAE–15.
Docket# EF99–3021, 000, United States Department of Energy—Southeastern Power Administration
CAE–16.
Omitted
CAE–17.
Omitted
CAE–18.
Docket# EL99–54, 001, San Francisco Bay Area Rapid Transit District v. Pacific Gas and Electric Company
CAE–19.
Omitted
CAE–20.
Docket# ER99–2332, 001, Sierra Pacific Power Company
CAE–21.
Omitted
CAE–22.
Docket# EL99–58, 000, Village of Freeport, New York v. Consolidated Edison Company of New York, Inc.
CAE–23.
Docket# NJ99–3, 000, Salt River Project Agricultural Improvement and Power District
CAE–24.
Docket# EL00–32, 000, Public Service Company of Colorado
CAE–25.
Omitted
CAE–26.
Docket# EL00–12, 000, Tennessee Power Company
CAE–27.
Docket# EL98–36, 000, Aquila Power Corporation v. Entergy Services, Inc., Entergy Arkansas, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., Entergy New Orleans, Inc. and Entergy Gulf States, Inc.
Other#s ER91–569, 009, Entergy Services, Inc.
CAE–28.
Docket# EL00–20, 000, Southern California Water Company, d.b.a Bear Valley Electric v. Southern California Edison Company
CAE–29.
Docket# EL99–92, 000, Midamerican Energy Company
CAE–30.
Docket# EL00–24, 000, The Village of Jackson Center, Ohio, The Village of Versailles, Ohio and The City of Tipp City, Ohio v. The Dayton Power & Light Company
CAE–31.
Docket# EL99–66, 000, Wabash Valley Power Association and American Municipal Power-Ohio, Inc. v. American Electric Power Service Corporation
Other#s EL99–72, 000, Indiana Municipal Power Agency v. American Electric Power Service Corporation
CAE–32.
Docket# OA00–2, 000, Midamerican Energy Company

Consent Agenda—Gas and Oil

CAG–1.
Docket# RP00–180, 000, Williston Basin Interstate Pipeline Company
CAG–2.
Docket# RP00–182, 000, Young Gas Storage Company, Ltd.
CAG–3.
Docket# RP99–286, 000, Granite State Gas Transmission, Inc.
Other#s RP99–286, 001, Granite State Gas Transmission, Inc.
CAG–4.
Docket# RP99–176, 010, Natural Gas Pipeline Company of America
CAG–5.
Docket# RP00–76, 001, Wyoming Interstate Company, Ltd.
CAG–6.
Docket# RP00–181, 000, MIGC, Inc.
CAG–7.
Docket# RP00–108, 001 ,Questar Pipeline Company
CAG–8.
Docket# RP99–330, 001, Consumer Services Association, Inc. d/b/2 United Gas Services v. K N Interstate Gas Transmission Company and K N Energy, Inc.
CAG–9.
Omitted
CAG–10.
Docket# RP97–71, 000, Transcontinental Gas Pipe Line Corporation
CAG–11.
Docket# PR99–19, 000, Oneok Gas Storage, L.L.C. and Oneok Sayre Storage Company
CAG–12.
Docket# RP87–15 et al., 036, Trunkline Gas Company, et al.
Other#s RP92–122, 008, Trunkline LNG Company
CAG–13.
Docket# RP96–312, 017, Tennessee Gas Pipeline Company
Other#s RP96–312, 025, Tennessee Gas Pipeline Company
RP96–312, 026, Tennessee Gas Pipeline Company
GT99–26, 002, Tennessee Gas Pipeline Company
CAG–14.
Docket# RP99–335, 001, Transwestern Pipeline Company
CAG–15.
Docket# RP97–375, 009, Wyoming Interstate Company, Ltd.
Other#s RP99–381, 000, Wyoming Interstate Company, Ltd.
CAG–16.
Omitted
CAG–17.
Docket# RP00–8, 003, Reliant Energy Gas Transmission Company
CAG–18.
Docket# GP91–8, 008, Jack J. Grynberg v. Rocky Mountain Natural Gas Company
Other#91–10, 008, Rocky Mountain Natural Gas Company v. Jack J. Grynberg
CAG–19.
Docket# OR99–3, 000, Frontier Oil and Refining Company v. Express Pipeline Partnership
CAG–20.
Docket# MG99–26, 001, Dauphin Island Gathering Partners
CAG–21.
Docket# CP98–238, 002, Destin Pipeline Company, L.L.C.
CAG–22.
Docket# CP00–41, 000, Questar Pipeline Company
CAG–23.
Docket# CP00–56, 000, Atmos Energy Corporation
Other#s CP00–60, 000, Associated Natural Gas Company
CAG–24.
Docket# CP99–615, 000, Petal Gas Storage, L.L.C.
CAG–25.
Docket# CP99–21, 000, Northern Border Pipeline Company
CAG–26.
Docket# CP99–579, 001, Southern LNG Inc.
Other#s CP99–580, 001, Southern LNG Inc.
CP99–581, 001, Southern LNG Inc.
CP99–582, 002, Southern LNG Inc.
CAG–27.
Docket# CP99–61, 002, Tristate Pipeline, L.L.C.
Other#s CP99–62, 002, Tristate Pipeline, L.L.C.
CP99–63, 002, Tristate Pipeline, L.L.C.
CP99–64, 002, Tristate Pipeline, L.L.C.
CAG–28.
Docket# RM98–17, 001, Landowner Notifications, Expanded Categorical Exclusions, and Other Environmental Filing Requirements
CAG–29.
Docket# PR00–1, 000, Oneok Field Services Company
Other#s PR00–1, 001, Oneok Field Services Company
CAG–30.
Docket# CP97–549, 001, CNG Transmission Corporation
CAG–31.
Docket# GP97–1, 002, Rocky Mountain Natural Gas Company
CAG–32.
Docket# RP99–504, 000, Willians Gas Pipelines Central, Inc.

Hydro Agenda

H–1. Reserved

Electic Agenda

E–1.
Docket# EC98–40, 000, Americal Electric Power Company and Central and South West Corporation
Other# ER98–2770, 000, American Electric Power Company and Central and South West Corporation

ER98–2786, 000, American Electric Power Company and Central and South West Corporation Opinion and Order on Merger.

Oil and Gas Agenda

I. Pipeline Rate Matters

PR–1.
Reserved

II. Pipeline Certificate Matters

PC–1.
Reserved

David P. Boergers,

Secretary.

[FR Doc. 00–6163 Filed 3–9–00; 11:41 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Revised Landowner Pamphlet

March 7, 2000.

The ''most recent edition'' of the Commission's pamphlet: ''An Interstate Natural Gas Facility on My Land? What Do I Need to Know?'', has been issued. It is dated February 2000.

The revised pamphlet is available on the Commission's website. From the home page at www.ferc.fed.us select the link to the Office of External Affairs in the lower right column of links, or enter www.ferc.fed.us/intro/oea directly into your browser. The link to the revised pamphlet (www.ferc.fed.us/intro/oea/6513gpo.pdf) is on this page. This version should be used and may be copied until the full color version of the pamphlet is available through the Government Printing Office (GPO). The Commission will issue a further notice when the pamphlet may be obtained from the GPO.

Questions about the pamphlet should be directed to: Federal Energy Regulatory Commission, Office of External Affairs, 888 First Street, N.E., Washington, DC 20426, (202) 208–1088.

David P. Boergers,

Secretary.

[FR Doc. 00–5991 Filed 3–10–00; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6560–1]

Interim Statement of Policy on Alternative Dispute Resolution

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: This document publishes the interim statement of policy of the United States Environmental Protection Agency regarding the use of alternative dispute resolution (''ADR''). In addition to publishing the interim statement of policy, this document describes a process for developing and issuing a final EPA policy on ADR. We are also requesting public comment on issues that the Agency should take into consideration in preparing a final ADR policy and comments on how EPA can best encourage the acceptance and use of ADR techniques in appropriate circumstances.

This document is published in the **Federal Register** to affirm the commitment of the U.S. Environmental Protection Agency to the use of alternative dispute resolution (ADR) in Agency activities. Nothing in this document creates any right or benefit by a party against the United States.

DATES: Comments must be submitted on or before May 12, 2000.

ADDRESSES: Please address comments to W. Robert Ward, Dispute Resolution Specialist, by mail at U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW (MC 2310A), Washington, D.C. 20460, or by e-mail at ward.robert@epa.gov.

FOR FURTHER INFORMATION CONTACT: W. Robert Ward, Dispute Resolution Specialist, U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW (MC 2310A), Washington, D.C., 20460; (202) 564–2922; *ward.robert@epa.gov*.

SUPPLEMENTARY INFORMATION: This interim statement of policy is consistent with the Administrative Dispute Resolution Act of 1996 (Public Law 104–320, Oct. 19, 1996, 5 U.S.C. 571–583), which requires, in part, that each federal agency adopt a policy that addresses the use of ADR. It is also consistent with provisions of the Civil Justice Reform Act (Public Law 101–650, Dec. 1, 1990, 28 U.S.C. 471–482), Executive Order 12988, ''Civil Justice Reform,'' February 5, 1996; the Regulatory Negotiation Act of 1996 (Public Law 104–320, Oct. 19, 1996, 5 U.S.C. 561–570); the Federal Acquisition Streamlining Act (Public Law 103–355, Oct. 13, 1994, 41 U.S.C. 405); the Contracts Disputes Act (41 U.S.C. 601–613); the Federal Acquisition Regulation (48 CFR 33.204); Executive Order 12979, ''Agency Procurement Protests,'' October 25, 1995; Equal Employment Opportunity Commission regulations (29 CFR part 1614); Presidential Memorandum, ''Designation of Interagency Committees to Facilitate and Encourage Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking,'' May 1, 1998, and the Report of the National Performance Review, ''Creating a Government that Works Better and Costs Less,'' September 7, 1993.

Interim Statement of Policy on Alternative Dispute Resolution

It is the policy of the Environmental Protection Agency to consider, under guidelines to be established by the Agency for this purpose, the use of ADR techniques in the conduct of Agency activities and to use ADR whenever it is appropriate. For purposes of this interim statement of policy, ADR has the definition given to it by the Administrative Dispute Resolution Act, namely, ''any procedure that is used to resolve issues in controversy, including but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombuds, or any combination thereof.'' 5 U.S.C. 571. In addition, it is the policy of the Environmental Protection Agency to work to prevent disputes and to use ADR techniques where appropriate to engage stakeholders as a part of the dispute prevention effort. It is furthermore the policy of the Environmental Protection Agency to develop new programs that employ alternative means of dispute prevention and resolution; to provide information and training in alternative dispute resolution methods for Agency staff and managers who may have occasion to use ADR in their work; to enhance its program for providing the services of third-party neutrals on an expedited basis; and to track and report on the use of ADR throughout the Agency.

Alternative dispute resolution techniques are increasingly being used by Federal agencies, private citizens and organizations to prevent and resolve disputes and manage cases. The Environmental Protection Agency already has a long history of encouraging and supporting the use of ADR in Agency practice. In 1981, EPA issued a policy designed to provide guidance and direction on reasonable and effective means of involving the public in program decisions under all of the major environmental statutes. 46 FR 5736, Jan. 19, 1981. In 1983, EPA established the Regulatory Negotiation Project to explore and demonstrate the value of negotiation and other consensus-building techniques for developing regulations. In 1987, the Project expanded its activities to the use of consensus-building in policy

dialogues and the development of research strategies.

In 1985, EPA's Office of Enforcement piloted the use of ADR to assist in the resolution of enforcement actions. In 1987, EPA issued a ''Guidance on the Use of Alternate Dispute Resolution in EPA Enforcement Cases'' establishing the review of all enforcement actions for the potential use of ADR processes and the use of ADR whenever such use may lead to a prompt, fair, and efficient resolution of disputes.

In 1996, the Office of Solid Waste and Emergency Response initiated a program to use ADR professionals to facilitate the resolution of hazardous waste site disputes. Also in 1996, the Office of Civil Rights piloted the use of ADR processes to support the resolution of Equal Employment Opportunity complaints.

In October 1998, as partial fulfillment of the requirements of the ADR Act and in response to the Presidential Memorandum on ADR of May 1, 1998, EPA appointed a Dispute Resolution Specialist. In November of 1999, the establishment of a Conflict Prevention and Resolution Center was announced. The Center will be part of the Agency's ADR Law Office that will serve as EPA's national ADR policy and coordination office. In addition, the Agency has established ombuds programs in several Regional and headquarter offices and is currently developing programs for the use of ADR in contract and claims disputes, and in programs that invite public participation.

The Agency's capacity for accessing outside professional facilitation and mediation support has significantly increased through a series of contracts managed by the Agency. In 1988, EPA issued a contract authorizing up to $1,000,000 in neutral services over three years. The most recent contract, issued in 1999, has a ceiling of more than $41,000,000. The growth in demand for outside dispute resolution services reflects the breadth of ADR activities that have been supported by the Agency.

Additional Steps

An internal Agency workgroup is preparing a final Agency ADR policy and is determining the need for practice-specific guidances on the use of ADR in certain EPA programs. The final policy and/or guidelines will address Agency activities and issues cited in the Administrative Dispute Resolution Act (''ADRA'') as well as other issues deemed important to the appropriate practice of ADR at EPA. Activities that will be considered during EPA's policy development process include:

(1) Formal and informal adjudications;

(2) Issuance of rules and regulations;

(3) Development of policy and guidance;

(4) Enforcement and compliance actions;

(5) Issuing and revoking licenses and permits;

(6) Grants administration and Memoranda of Understanding;

(7) Contract placement and administration;

(8) Interactions with the public and regulated community;

(9) Legal actions brought by or against the Agency;

(10) Employment related actions.

In addition, the policy and/or guidances will address salient issues such as confidentiality, the use of binding arbitration, and guidelines for providing appropriate ADR training. In developing the final policy, the Agency will take into account any comments received on the interim statement of policy published in this document. The Agency also plans to issue a draft of the final ADR policy for public review and will seek comment at that time.

Coordination With Public Participation Policy Review

On November 30 of last year, EPA's Regulatory Steering Committee published a document in the **Federal Register** seeking public comment on the Agency's 1981 Policy on Public Participation, including the question of how the Agency can best engage the public in an effort to revise that policy (and other related EPA policies and regulations). (See 64 FR 66906, Nov. 30, 1999) Because interaction with the public and regulated community is one of the areas to be addressed in the final ADR policy, the Agency will be using the feedback received in response to that document to inform the final ADR policy as well.

Request for Public Comment

The Environmental Protection Agency invites public comment on issues that the internal Agency workgroup should consider in developing a final ADR policy. In particular, the Agency would like to hear the views of stakeholders regarding how EPA can best encourage the acceptance and use of ADR techniques in appropriate circumstances. Comments should be received by May 12, 2000.

Dated: March 7, 2000.

Carol Browner,

Administrator.

[FR Doc. 00–6097 Filed 3–10–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6560–2]

Carolina Creosoting Corporation Site, Leland, Brunswick County, North Carolina; Notice of Proposed Settlement

AGENCY: Environmental Protection Agency.

ACTION: Notice of Proposed Settlement.

SUMMARY: Pursuant to 122(h)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the U.S. Environmental Protection Agency (EPA) proposed to settle its claim for past response cost incurred at the Carolina Creosoting Corporation Site (Site) located in Leland, Brunswick County, North Carolina with Mr. Edward Theobold. EPA will consider public comments on the proposed settlement for thirty (30) days following the date of publication of this notice. EPA may withdraw or modify the proposed settlement should such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper or inadequate. Copies of the proposed settlement are available from: Paula V. Batchelor, U.S. EPA Region 4, Waste Management Division, 61 Forsyth Street, SW, Atlanta, Georgia 30303, 404/562–8887.

Written Comments should be sent to Ms. Batchelor at the above address and should reference the Carolina Creosoting Corporation Site.

Dated: February 28, 2000.

Franklin E. Hill,

Chief, CERCLA Programs Services Branch, Waste Management Division.

[FR Doc. 00–6096 Filed 3–10–00; 8:45 am]

BILLING CODE 6570–50–M

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 10:00 a.m., Thursday, March 16, 2000.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED: 1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any matters carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Lynn S. Fox, Assistant to the Board; 202–452–3204.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at http://www.federalreserve.gov for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: March 9, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–6191 Filed 3–9–00; 1:08 pm]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 991–0278]

Michael T. Berkley, D.C., and Mark A. Cassellius, D.C.; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before April 6, 2000.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: C. Steven Baker or Nicholas Franczyk, Federal Trade Commission, Midwest Region, 55 E. Monroe St., Suite 1860, Chicago, IL 60603–5701. (312) 960–5633.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for March 7, 2000), on the World Wide Web, at ''http://www.ftc.gov/ftc/formal.htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room H–130, 600 Pennsylvania Avenue, NW, Washington, DC 20580, either in person or by calling (202) 326–3627.

Public comment is invited. Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW, Washington, DC 20580. Two paper copies of each comment should be filed, and should be accompanied, if possible, by a 3½ inch diskette containing an electronic copy of the comment. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement from Michale T. Berkley, D.C., and Mark A. Cassellius, D.C., to a proposed consent order. The agreement settles charges by the Federal Trade Commission that Drs. Berkley and Cassellius have violated Section 5 of the Federal Trade Commission Act by conspiring between themselves and with other chiropractors to fix prices for chiropractic services and to boycott the Gundersen Lutheren Health Plan (''Gundersen'') to obtain higher reimbursement rates for services. The proposed consent order has been placed on the public record for thirty days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the agreement and proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Drs. Berkley and Cassellius that the law has been violated as alleged in the complaint.

The Complaint

Drs. Berkley and Cassellius are chiropractors with their principal places of business in La Crosse, Wisconsin. Except to the extent that competition has been restrained as alleged in the complaint, Drs. Berkley and Cassellius have been, and are now, in competition with each other and with other chiropractors in and around La Crosse, Wisconsin.

Since at least January 1997, and continuing until at least June 1997, Drs. Berkley and Casselius conspired among themselves and with other chiropractors to fix prices for chiropractic services and to boycott Gundersen, a third-party payer doing business in and around La Crosse County, Wisconsin. The purpose of the boycott was, among other things, to obtain higher reimbursement from Gundersen for chiropractic services. Drs. Berkley and Cassellius organized at least two meetings of La Crosse area chiropractors to discuss their concerns about Gundersen. A central concern raised at these meetings was Gundersen's purportedly low reimbursement rates. During these meetings, the chiropractors agreed that Gundersen should increase its reimbursement rates and determined that a majority of the chiropractors were willing to leave the Gundersen network if it did not address their concerns. Dr. Berkley, acting on behalf of the group of chiropractors, communicated to Gundersen the chiropractors' concerns and the implicit threat of a boycott. The threatened boycott was successful: Gundersen, fearing the loss of a substantial number of chiropractic providers and the disruption of its network, acceded to the chiropractors' demands and increased its reimbursement rates by 20%.

Drs. Berkley and Cassellius and the other unnamed chiropractors have not integrated their practices in any economically significant way, nor have they created any efficiencies that might justify this conduct. Had they done either of these, under some circumstances, the agreement on price might not have been unlawful. Their actions have harmed consumers by increasing the prices that are paid for chiropractic services and by depriving consumers of the benefits of competition among chiropractors.

The Proposed Consent Order

The proposed consent order is designed to prevent the illegal concerted action alleged in the complaint. Paragraph II.A prohibits Drs. Berkley and Cassellius from fixing prices for any chiropractic goods or services. Paragraph II.B prohibits them from: (1) Engaging in collective negotiations on behalf of any chiropractors; (2) orchestrating concerted refusals to deal; or (3) fixing prices, or any other terms, on which chiropractors deal. Paragraph II.C. prohibits Drs. Berkley and Cassellius from encouraging, advising, or pressuring any person to engage in any action that would be prohibited if the person were subject to the order.

Paragraph II. includes a proviso allowing Drs. Berkley and Cassellius to engage in conduct (including collectively determining reimbursement and other terms of contracts with payers) that is reasonably necessary to operate (a) any ''qualified risk-sharing joint arrangement,'' or, provided Drs. Berkley and Cassellius have complied with the order's prior notification requirements, (b) any ''qualified clinically integrated joint arrangement.''

For the purposes of the order, a ''qualified risk-sharing joint arrangement'' must satisfy three conditions. First, all physicians participating in the arrangement must share substantial financial risk from their participation in the arrangement. The order lists ways in which physicians might share financial risk, tracking the types of financial risk sharing set forth in the Statements of Antitrust Enforcement Policy in Health Care, Statement 8 on Physician Network Joint Ventures issued jointly by the FTC and the Department of Justice on August 28, 1996 (4 Trade Reg. Rep. (CCH) ¶13,153 at 20,814). For example, physician participants can agree to provide services to a health plan at a ''capitated'' rate (a fixed payment per enrollee regardless of the amount of services provided to an enrollee). Second, any agreement on prices or terms of reimbursement entered into by the arrangement must be reasonably necessary to obtain significant efficiencies through the joint arrangement. For example, a joint arrangement for billing services alone would not be sufficient, because the agreement on prices would not be necessary to achieve the benefits of the billing services. Third, the arrangement must be non-exclusive, *i.e.,* physicians can also deal with payers individually or through other arrangements.

For purposes of the order, a ''qualified clinically integrated joint arrangement'' is one in which physicians undertake cooperative activities to achieve efficiencies in the delivery of clinical services without necessarily sharing substantial financial risk. The cooperation may include: (1) Establishing mechanisms to monitor and control utilization of health care services that are designed to control costs and assure quality of care; (2) selectively choosing network physicians who are likely to further these efficiency objectives; and (3) the significant investment of capital, both monetary and human, in the necessary infrastructure and capability to realize the claimed efficiencies. *Id.* at 20,817.

In order for a qualified clinically integrated joint arrangement formed by Drs. Berkley and Cassellius to fall within the proviso, they must comply with the order's requirements for prior notification. The prior notification mechanism will allow the Commission to evaluate a specific proposed arrangement and assess its likely competitive impact. This requirement will help guard against the recurrence of acts and practices that have restrained competition and consumer choice.

Paragraph III. requires that Drs. Berkley and Cassellius distribute a notification letter and copies of the complaint and order to all current and future agents, representatives, and employees whose activities are affected by the order, or who have responsibilities with respect to the subject matter of the order. Paragraph IV. requires that Drs. Berkley and Cassellius notify the Commission of any change in their employment and would require them to provide copies of the complaint and consent order to any new employer for which their new duties and responsibilities are subject to any provisions in the order.

Paragraph V. requires that Drs. Berkley and Cassellius distribute a copy of the complaint and order to each payer or provider who, at any time since January 1, 1997, has communicated any desire, willingness, or interest in contracting for chiropractic goods and services with either of them.

Paragraphs VI. and VII. consist of standard Commission reporting and compliance procedures. Finally, Paragraph VIII. contains a standard twenty year ''sunset'' provision under which the terms of the order terminate twenty years after the date of issuance.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 00–6046 Filed 3–10–00; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

[Docket No. 981–0386]

Nine West Group Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before April 5, 2000.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW, Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: Richard Parker, FTC/H–374, 600 Pennsylvania Ave., NW, Washington, D.C. 20580. (202) 326–2574.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practices (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for March 6, 2000), on the World Wide Web, at ''http://www.ftc.gov/ftc/formal.htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room H–130, 6000 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326–3627.

Public comment is invited. Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW, Washington, D.C. 20580. Two paper copies of each comment should be filed, and should be accompanied, if possible, by a 3½ inch diskette containing an electronic copy of the comment. Such comments or views will be considered by the Commission and will be available for inspection and

copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission (''the Commission'') has accepted, subject to final approval, an agreement from Nine West Group Inc. (''Nine West'') to a proposed consent order. The agreement settles charges by the Commission that Nine West violated Section 5 of the Federal Trade Commission Act by entering into vertical agreements that restricted retail price competition in the sale of women's shoes. Nine West is a major manufacturer and seller of women's shoes and sells shoes under the ''Easy Spirit,'' ''Enzo Angiolini,'' ''Bandolino,'' cK/Calvin Klein,'' ''Pappagallo,'' ''Selby,'' ''Amalfi,'' ''Calico,'' ''Evan-Picone,'' ''Westies,'' ''Capezio,'' ''Joyce,'' and ''9 & Co.'' labels. Jones Apparel Group, Inc., purchased Nine West in July of 1999, and is a signatory to the consent agreement, but none of the conduct alleged in the complaint occurred after the purchase.

The proposed consent order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The purpose of this analysis is to invite public comment on the proposed order. This analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Nine West that the law has been violated as alleged in the complaint.

The Complaint

Nine West Group is a Delaware corporation with its principal place of business in White Plains, New York. Nine West sells women's footwear to retail outlets throughout the United States, including many of the nation's largest department stores.

The complaint alleges that beginning in January 1988 and continuing until at least July 31, 1999, Nine West entered into agreements with certain retailers that fixed, raised, and stabilized retail prices to consumers. Nine West adopted pricing policies that determine which shoes the retailer could not discount or promote outside of specified times. Nine West did not merely announce these policies and terminate a retailer that did not adhere to them, which would have been lawful, but instead Nine West sought agreement from these dealers on future pricing. For example, Nine West suspended shipments and said it would resume them only if the dealer promised not to violate the policy again. Nine West also coerced compliance by threatening to withhold discounts or advertising funds if the dealer refused to comply with a pricing policy. Retailers communicated to Nine West that they would adhere to the pricing policies.

The Proposed Consent Order

The proposed consent order is designed to prevent Nine West from agreeing with its dealers to set prices. Paragraph II of the order prohibits Nine West from fixing, controlling, or maintaining the retail price of women's footwear. It also prohibits Nine West from coercing or pressuring any dealer to maintain, adopt, or adhere to any resale price. Nine West also may not secure or attempt to secure commitments or assurances from any dealer concerning resale prices. Finally, Paragraph II prohibits Nine West, for a period of ten years, from notifying a dealer in advance that the dealer is subject to a temporary suspension of supply (e.g., no shoes shipped for six months) or a partial suspension (e.g., no orders of Easy Spirit loafers) if the dealer sells Nine West shoes below a designated price.

Paragraph III of the order requires that for a period of five years from the date on which the order becomes final, Nine West shall clearly and conspicuously include a statement on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any Nine West product to any dealer. The required statement explains that while Nine West may suggest resale prices for its products, dealers remain free to determine on their own the prices at which they will sell and advertise Nine West's products.

Paragraph IV of the order requires Nine West to mail a letter (see attachment A) to its retailers with a copy of the Commission's order. The letter states that while Nine West may send materials to them with suggested retail prices, they are free to sell and advertise at a price they choose. Paragraph V requires that the same letter with a copy of the Commission's order be sent to new employees of Nine West.

Paragraph VI of the order requires Nine West to notify the Commission at least thirty days prior to any proposed changes in the corporation, such as dissolution or sale. Paragraph VII consists of standard Commission reporting and compliance procedures. Finally, Paragraph VIII contains a standard ''sunset provision,'' under which the terms of the order terminate twenty years after the date of issuance.

By direction of the Commission.

Donald S. Clark,

Secretary.

Statement of Commissioners Orson Swindle and Thomas B. Leary

We have voted to accept the consent agreement for public comment because we have reason to believe that the conduct engaged in by Nine West falls outside the limited zone of protection afforded by the *Colgate* doctrine,[1] and thus is per se illegal under current law. We do not mean to indicate agreement, however, with the artificial analysis mandated by the *Colgate* doctrine or with the overboard per se condemnation resale price maintenance (''RPM''), which the Colgate doctrine mitigates to some degree.

We do not know what conclusion we might have reached had Nine West's behavior been analyzed under the rule of reason, because that question did not arise. Nevertheless, one can easily posit instances of minimum RPM that involve a mixture of procompetitive and anticompetitive effects, like any other vertical restraint, and undercut the continuing validity of the per se rule against the practice. Several years ago, the Supreme Court took the beneficial step of reexamining the overruling the doctrine that condemned maximum RPM as per se illegal.[2] When an appropriate case arises, we believe that the Court should continue this healthy trend by reassessing the even hoarier per se treatment of minimum RPM.[3]

[FR Doc. 00–6044 Filed 3–10–00; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

[File No. 971–0117]

Wisconsin Chiropractic Association, et al.; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

[1] *United States* v. *Colgate & Co.,* 250 U.S. 300 (1919).

[2] *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997), overruling *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968).

[3] *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.* 220 U.S. 373 (1911).

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before April 6, 2000.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: C. Steven Baker or Nicholas Franczyk, Federal Trade Commission, Midwest Region, 55 E. Monroe St., Suite 1860, Chicago, IL 60603–5701. (312) 960–5633.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for March 7, 2000), on the World Wide Web, at ''http://www.ftc.gov/ftc/formal.htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room H–130, 600 Pennsylvania Avenue, NW, Washington, DC 20580, either in person or by calling (202) 326–3627.

Public comment is invited. Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW Washington, DC 20580. Two paper copies of each comment should be filed, and should be accompanied, if possible, by a 3½ inch diskette containing an electronic copy of the comment. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement from the Wisconsin Chiropractic Association (''WCA'') and its executive director, Russell A. Leonard, to a proposed consent order. The agreement settles charges by the Federal Trade Commission that the WCA and Mr. Leonard have violated Section 5 of the Federal Trade Commission Act by conspiring with some of the WCA's members and others to fix prices for chiropractic services and to boycott third-party payers to obtain higher reimbursement rates for services. The proposed consent order has been placed on the public record for thirty days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the agreement and proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by the WCA or Mr. Leonard that the law has been violated as alleged in the complaint.

The Complaint

The WCA is a professional trade association of chiropractors with its principal place of business in Madison, Wisconsin. The WCA has approximately 900 chiropractor members. A substantial majority of the chiropractors licensed to practice in the state of Wisconsin are members of the WCA. The WCA exists and operates in substantial part for the pecuniary benefit of its members. Mr. Leonard is, and during the time period addressed by the allegations of the complaint was, the executive director of the WCA.

Professional services performed by chiropractors include, among other things, spinal and extra spinal manipulations. Prior to January 1, 1997, chiropractors generally billed for these services using a single billing code regardless of the number of regions adjusted. Osteopathic physicians performing manipulation treatments, by contrast, had been using multiple codes to bill based on the number of regions of the body adjusted. Beginning in January 1997, the federal government and private insurance companies began accepting four new codes for chiropractic manipulations. The new chiropractic manipulative treatment (''CMT'') codes reflected more detailed or precise descriptions of the manipulation services and allowed chiropractors, like osteopathic physicians, to bill based on the number of regions adjusted.

Beginning in late 1996, shortly after the new CMT codes were announced, the WCA, acting through its executive director Mr. Leonard, orchestrated an agreement among its members to raise fees for chiropractic manipulation services. In late 1996 and continuing into early 1997, the WCA conducted training seminars on the new codes for members in localities throughout the state. The WCA urged chiropractors not to make any decisions on their fees under the new codes before attending one of these meetings. During the meetings, Mr. Leonard told the chiropractors that the new CMT codes provided them with a unique opportunity to increase their fees. Mr. Leonard advised members that it was important that the new codes for chiropractic manipulation were priced properly, and that the WCA's view was that proper pricing was at the same level that osteopathic physicians billed for spinal manipulation services. He provided detailed data on current osteopathic pricing, and encouraged chiropractors to raise their prices to the osteopathic levels.

At the meetings Mr. Leonard assured members that if they all raised their rates, third-party payers would not reject or reduce these higher charges for the new codes. Under the ''UCR'' (''usual, customary, and reasonable rate'') system of reimbursement that was in general use in Wisconsin's health care industry, price increases by a significant number of chiropractors would raise the UCR level and thereby result in higher reimbursement for chiropractic services. On the other hand, if other members did not raise their prices, UCR levels would not rise, the chiropractor would not receive higher reimbursement, and he or she would be identified to patients as an ''outlier'' whose fees were far higher than other chiropractors. Each chiropractor's action in conformity with the WCA's pronouncement would be aided by knowledge that other members were taking similar action. Many members left the WCA local meetings with the understanding that they and others at the meeting would raise their prices in accordance with the WCA's request. After the new codes took effect,

Mr. Leonard surveyed member pricing in certain localities, and reported back to members that chiropractors in these areas had succeeded in raising reimbursement levels.

As a result of these actions by the WCA and Mr. Leonard, many chiropractors raised their fees to the osteopathic levels. Other chiropractors increased their fees substantially more than they had in previous years. Overall, the effect of these actions was to raise the prices that consumers pay for chiropractic services.

In furtherance of the WCA's efforts to raise chiropractic fees, the WCA and Mr. Leonard regularly provided fee surveys to the WCA's members. At times, these fee surveys reflected insufficiently aggregated data, thus effectively identifying current prices by individual chiropractic offices. Fee survey data were also furnished in connection with boycotts of managed care plans.

In March 1997, the WCA and Mr. Leonard organized a boycott by WCA members of MultiPlan, a preferred provider network. At a board meeting, the WCA directors on Mr. Leonard's recommendation agreed to reject, and to encourage their fellow chiropractors to reject, MultiPlan's proposed contract amendments and new fee schedule. Mr. Leonard recommended that chiropractors demand a fee schedule reflecting 85% of market price, and provided survey data that showed current average charges throughout the state. At training seminars held in early April 1997, Mr. Leonard criticized MultiPlan's proposed amendments and fee schedule, encouraged chiropractors to discuss the contract with others in their area, and reminded them that if enough chiropractors rejected the contract, MultiPlan would be forced to renegotiate the terms. Soon thereafter many of the chiropractic members of the WCA submitted letters of termination to MultiPlan.

Mr. Leonard routinely reviewed managed care contract offers to the WCA's members and circulated to the WCA's membership memoranda containing adverse comments about these plans' fee schedules for the new CMT codes. In his comments, Mr. Leonard frequently encouraged chiropractors to negotiate higher fees with the plans, and advised them to exchange all information they received with other chiropractors in their area. In so doing, Mr. Leonard reminded the WCA's members that they would be more successful in their fee negotiations with third-party payers if the members continued to negotiate on a united front. In addition, Mr. Leonard, again acting in his capacity as executive director of the WCA, told third-party payers that they should be paying chiropractors the same amount that osteopaths are paid for manipulation services, encouraged third-party payers to agree to pay specific sums certain or to calculate fees in a manner proposed by the WCA, and called third-party payers to follow up on complaints of low reimbursement that he encouraged and received from individual WCA members.

The WCA's member have not integrated their practices in any economically significant way, nor have they created any efficiencies that might justify this conduct. The purpose of this conduct was to secure higher fees and reimbursement. The WCA's actions harmed consumers by increasing the prices for chiropractic services and depriving consumers of the benefits of competition among chiropractors.

The Proposed Consent Order

The proposed consent order is designed to prevent the illegal concerted action alleged in the complaint. Paragraphs II and III of the proposed order contain the key provisions. These two paragraphs are almost identical in their coverage, except that Paragraph II applies to the WCA and Paragraph III applies to Mr. Leonard. Paragraphs II.A and III.A prohibit the WCA and Mr. Leonard from fixing prices for any chiropractic goods or services (or, in the case of Mr. Leonard, any health care goods or services). The broader category including ''any health care goods or services'' is needed should Mr. Leonard obtain employment with another health care entity outside the chiropractic field.

Paragraphs II.B and III.B prohibit the WCA and Mr. Leonard from creating, suggesting, or endorsing any proposed fees or conversion factors for any health care goods or services. Here, the WCA is also subject to the broader category of ''any health care goods or services'' since the allegations in the complaint include the WCA's endorsement of osteopathic fee schedules.

Paragraphs II.C and III.C prohibit the WCA and Mr. Leonard from engaging in negotiations on behalf of any chiropractor or group of chiropractors (or, in the case of Mr. Leonard, any provider or group of providers). In addition, this paragraph prohibits them from orchestrating concerted refusals to deal.

Paragraphs II.D and III.D prohibit the WCA and Mr. Leonard from urging or recommending that any chiropractor (or, in the case of Leonard, any provider) accept or not accept any term or condition of any participation agreement. Paragraphs II.E and III.E prohibit the WCA and Mr. Leonard from soliciting or communicating any chiropractor's (or, in the case of Leonard, any provider's) views, decisions or intentions concerning any participation agreement.

Pursuant to Paragraphs II.F and III.F, the WCA and Mr. Leonard are prohibited from organizing or participating in any meeting or discussion where they expect chiropractors (providers) will discuss intentions concerning participation in any health plans. In addition, these paragraphs prohibit the WCA and Mr. Leonard from continuing any meeting where any person makes such a communication unless the person is ejected from the meeting. Finally, this paragraph requires that the WCA and Mr. Leonard terminate any meeting where two or more persons make such communications.

Paragraphs II.G and III.G ban the WCA and Mr. Leonard from initiating, originating, developing, publishing, or circulating any fee survey for any health care goods or services for a period of two years after the date that the order becomes final, or until December 31, 2001, whichever is earlier. The two-year ban on fee surveys is necessitated by the gross misuse of fee surveys alleged in the complaint. In addition, for five years thereafter, Paragraphs II.H and III.H prohibit the WCA and Mr. Leonard from conducting or distributing any fee survey unless: (1) The data collection and analysis are managed by a third party; (2) the raw fee survey data is retained by the third party and not made available to the respondents; (3) any information that is shared among or is available to providers is more than three months old; and (4) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated that it would not allow respondents or any other recipients to identify the prices charged or compensation paid by any particular provider. These requirements are identical to the requirements found in the safe harbor provisions of the Statements of Antitrust Enforcement Policy in Health Care, Statement 5 on Providers' Collective Provision of Fee-Related Information to Purchasers of Health Care Services, issued jointly by the FTC and the Department of Justice on August 18, 1996 (4 Trade Reg. Rep. (CCH) ¶ 13,153 at 20,809).

Paragraphs II.I and III.I prohibit the WCA and Mr. Leonard from encouraging, advising or pressuring any

person to engage in any action that would be prohibited if the person were subject to the order.

Paragraphs II and III contain provisos allowing the WCA and Mr. Leonard to exercise their First Amendment petitioning rights and to solicit competition-restricting government action where protected under the Noerr-Pennington doctrine. In addition, Paragraph III contains a proviso allowing Mr. Leonard to engage in certain acts otherwise prohibited by the order providing he is acting as an agent, employee, or representative exclusively for a single provider or payer.

Paragraph IV. requires that the WCA maintain copies of: (1) All documents distributed at meetings and seminars; (2) all fee surveys and a record of their distribution; and (3) all documents relating to any subject that is covered by any provision in the order. Paragraph V. requires that the WCA provide copies of the complaint and order: (1) To all current and future officers, directors, and members; (2) to all current and future agents, representatives, and employees whose activities are affected by the order, or who have responsibilities with respect to the subject matter of the order; and (3) to the third-party payers set forth in Appendix B to the order.

Paragraph VI. requires that the WCA notify the Commission of any change in its corporate structure that may affect compliance obligations. Similarly, Paragraph VII. requires that Mr. Leonard notify the Commission of any change in his employment and would require him to provide copies of the complaint and consent order to any new employer for which his new duties and responsibilities are subject to any provisions in the order.

Paragraphs VIII. and IX. consist of standard Commission reporting and compliance procedures. Finally, Paragraph X. contains a standard twenty-year ''sunset'' provision under which the terms of the order terminate twenty years after the date of issuance.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 00–6045 Filed 3–10–00; 8:45 am]

BILLING CODE 6750–01–M

GENERAL SERVICES ADMINISTRATION

Regulation and Program Development Division; Cancellation of a Standard Form

AGENCY: Federal Supply Service, General Services Administration.

ACTION: Notice.

SUMMARY: This notice announces the General Services Administration's intent to cancel the following Standard form because of low user demand:

SF 1203, U.S. Government Billing of Lading-Privately Owned Personal Property (7-part snapout version) (identified by NSN 7540–01–082–0589). The 7-part continous feed version of this form is still available from FSS.

FOR FURTHER INFORMATION CONTACT: General Services Administration, Form Management, (202) 501–0581.

DATES: Effective March 13, 2000.

Dated: February 28, 2000.

Barbara M. Williams,

Deputy Standard and Optional Forms Management Officer.

[FR Doc. 00–6084 Filed 3–10–00; 8:45 am]

BILLING CODE 6820–34–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Agency Information Collection Activities; Proposed Collections; Comment Request

The Department of Health and Human services, Office of the secretary will periodically publish summaries of proposed information collections projects and solicit the public comments in compliance with the requirements of Section 3506 (c)(2)(A) of the Paperwork Reduction Act of 1995. To request more information on the project or to obtain a copy of the information collection plans and instruments, call the OS Reports Clearance Officer on (202) 690–6207.

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 Projects 1. Evaluation of the BodyWise Eating

Disorder Initiative—NEW

A primary goal of the BodyWise Eating Disorder Initiative is to provide information to and motivate middle school staff to improve understanding and knowledge of eating disorder issues affecting preadolescents. The Office on Women's Health is proposing an evaluation of this initiative to look for changes in school practices and awareness regarding eating disorder issues. The evaluation will also seek information on how the bodyWise materials are being used and their strengths and weaknesses. The study design features an pre-test/post-test model with questionnaires being completed by a sample of middle school staff. Burden Information for Pre-test—Number of Respondents: 357; Burden per Response: 30 minutes; Burden for Pre-test; 179 hours—Burden Information for Post-test—Number of Respondents: 322; Burden per Response: 30 minutes; Burden for post-test: 161 hours—Total Burden: 340 hours.

Send comments to Cynthia Agnes Bauer, OS Reports Clearance Officers, Room 503H, Humphrey Building, 200 Independence Avenue S.W., Washington DC, 20201. Written comments should be received within 60 days of this notice.

Dated: March 3, 2000.

Dennis P. Williams,

Deputy Assistant Secretary, Budget.

[FR Doc. 00–5972 Filed 3–10–00; 8:45 am]

BILLING CODE 4150–04–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Agency Information Collection Activities: Submission for OMB Review; Comment Request

The Department of Health and Human Services, Office of the Secretary publishes a list of information collections it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) and CFR 1320.5. The following are those information collections recently submitted to OMB.

1. Financial Summary of Obligation and Expenditure of Block Grant Funds (45 CFR 96.30). Public Law 101–510 amended 31 U.S.C. Chapter 15 to provide that, by the end of the fifth fiscal year after the fiscal year in which the Federal government obligated the funds, the account will be canceled. If valid charges to a canceled account are presented after cancellation, they may be honored only by charging them to a current appropriation account, not to exceed an amount equal to 1 percent of

the total appropriations of that account. Because of our need to determine the status of grant accounts, we have determined that it is appropriate to require an annual report on obligations and/or expenditures from all grantees under the block grant programs. The expenditure information to be collected under 45 CFR 96.30 will allow the Department to determine aggregate obligations, expenditures, and available balances. The Department can then use the information to close the grant accounts in accordance with P.L. 101–510. Annual Responses: 620; Burden per Response: one hour; Total Annual Burden for Financial Summary: 620 hours.

OMB Desk Officer: Allison Eydt.

Copies of the information collection packages listed above can be obtained by calling the OS Reports Clearance Office on (202) 690–6207. Written comments and recommendations for the proposed information collection should be sent directly to the OMB desk officer designate above at the following address: Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street, N.W., Washington, D.C. 20503.

Comments may also be sent to Cynthia Agens Bauer, OS Reports Clearance Officer, Room 503H, Hubert H. Humphrey Building, 200 Independence Ave S.W., Washington, D.C. 20201.

Written comments should be received within 30 days of this notice.

Dated: March 3, 2000.

Dennis P. Williams,

Deputy Assistant Secretary, Budget.

[FR Doc. 00–5973 Filed 3–10–00; 8:45 am]

BILLING CODE 4150–04–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Agency for Toxic Substance and Disease Registry

American Indian/Alaska Native Governments and Organizations Budget Planning and Priorities Meeting

The Office of the Director of the Centers for Disease Control and Prevention (CDC) and Agency for Toxic Substance and Disease Registry (ATSDR) announces the following meeting:

Name: Centers for Disease Control and Prevention (CDC) and Agency for Toxic Substances and Disease Registry (ATSDR) American Indian/Alaska Native (AI/AN) Governments and Organizations Budget Planning and Priorities Meeting.

Time and Date: 9 a.m.–5 p.m., March 17, 2000.

Place: Roybal Campus, Building 2, Auditorium A, 1600 Clifton Road, Atlanta Georgia 30333.

Status: The meeting is open to the public and is limited only by the space available. The meeting room accommodates approximately 150 people. For those unable to attend the meeting, a toll-free audio bridge has been arranged from 9:00 am to 5:00 pm. The public comment period is scheduled from 1:30 p.m.–3:00 p.m. Comments and recommendations may be received via audio conference and fax.

Purpose: In accordance with Departmental policy on consultation with (AI/AN) Governments and Organizations, CDC/ATSDR will host this meeting to give AI/AN people an opportunity to present their public health program needs and priorities. The timing of this meeting will allow CDC and ATSDR to consider these needs and priorities in developing the FY 2002 budget request.

Matters to be Discussed: The agenda will include opening remarks/introductions, testimony of AI/AN leaders, public comments period, break-out sessions and general discussion.

Audio Bridge and Fax Information: All times scheduled are Eastern time. Your Conference Name: CDC and ATSDR American Indian and Alaska Native Governments and Organizations Budget Planning and Priorities Meeting. Audio bridge conference telephone number for non-federal participants: 800–311–3437. Audio bridge conference telephone number for Atlanta Area participants: 404–639–3277 Fax telephone number for comments and recommendations: 800–553–6323.

Conference Code: 222222.

Date: March 17, 2000.

Audio bridge Conference Time: 8:45 a.m.–5:00 p.m. Public Comment Period (Audio and Fax): 1:30 p.m.–3:00 p.m. If you have a problem during your audio conference, please call; Non-Federal Participants: 800–793–8598 and Atlanta Area Participants: 404–639–7550.

Contact Person for More Information: Mr. Dean Seneca, Office of the Associate Director for Minority Health, CDC, 1600 Clifton Road, M/S D39, Atlanta, Georgia 30333, telephone 404/639–7220, e-mail zkg8@CDC.gov.

The Director, Management Analysis and Services office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: March 7, 2000.

Burma Burch,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 00–6029 Filed 3–10–00; 8:45 am]

BILLING CODE 4160–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Injury Research Grant Review Committee: Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act (Public Law 92–463) of October 6, 1972, that the Advisory Committee for Energy-Related Epidemiologic Research, Centers for Disease Control and Prevention, of the Department of Health and Human Services, has been renewed for a 2-year period extending through February 28, 2002.

For further information, contact Michael Sage, Executive Secretary, Advisory Committee for Energy-Related Epidemiologic Research, Centers for Disease Control and Prevention, of the Department of Health and Human Services, 1600 Clifton Road, NE, M/S F–35–32, Atlanta, Georgia 30333, telephone 404/639–2524 or fax 404/639–2575.

The Director, Management and Analysis and Services office has been delegated the authority to sign Federal Register notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: March 7, 2000.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 00–6031 Filed 3–10–00; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 00051]

Research on the Impact of Laws and Policies on Public Health Notice of Availability of Funds

A. Purpose

In cooperation with the Office of Prevention Research (Prevention Research Initiative), the Public Health Practice Program Office at the Centers for Disease Control and Prevention (CDC) announces the availability of Fiscal Year (FY) 2000 funds for grant applications for research to evaluate the impact of laws and policies on public health. CDC is committed to achieving

the health promotion and disease prevention objectives of ''Healthy People 2010,'' a national activity to reduce morbidity and mortality and improve the quality of life. This announcement is related to multiple Healthy People objectives and especially to objective 23–15. For the conference copy of ''Healthy People 2010'' visit the internet site: http://www.health.gov/healthypeople.

The purpose of this program is to stimulate research evaluating the implementation and impact of federal, state, and local statutes, regulations, contract specifications, licensing requirements, and other legally enforceable public policies on the prevention of death, disease, injury, and disability, on the promotion of health, and on the conduct of public health services. Research is expected to produce scientific findings of interest to public health practitioners and policy makers at the state, local, and federal levels.

B. Eligible Applicants

Applications may be submitted by public and private nonprofit and for-profit organizations, small and minority women owned businesses, and by governments and their agencies; that is, universities, colleges, research institutions, other public and private nonprofit and for-profit organizations, State and local governments or their bona fide agents, and federally recognized Indian tribal governments, Indian tribes, or Indian tribal organizations.

Note: Public Law 104–65 states that an organization described in section 501(c)(4) of the Internal Revenue Code of 1986 that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, cooperative agreement, contract, loan or any other form.

C. Availability of Funds

Approximately $500,000 is available in FY 2000 to fund approximately 2–3 research project grants. Awards are anticipated to range from $150,000 to $250,000 in total costs (direct and indirect) per year. It is expected that the awards will begin on or about September 30, 2000, and will be made for a 12-month budget period within a project period not to exceed 3 years. Funding estimates may change. Continuation awards within an approved project period will be made on the basis of satisfactory progress as evidenced by required reports and the availability of funds in subsequent years.

Use of Funds

Note: Grant funds will not be made available to support the provision of direct care services. Eligible applicants may enter into contracts, including consortia agreements (as set forth in the PHS Grants Policy Statement) as necessary to meet the requirements of the program and strengthen the overall application.

D. Programmatic Interest Areas

Research applications are requested that address: (1) The specific areas of interest below (not listed in priority order), and (2) other areas that the applicant demonstrates are significant for the purpose identified in Section A of this announcement.

(1) Immunization

The impact of laws on the achievement of recommended immunization rates or related public health services. For example, (a) the impact of laws relevant to state immunization registries (*e.g.*, laws related to privacy/confidentiality of individual patient health care information, sharing of immunization information, and establishment of immunization registries) on immunization rates and/or on the development, quality, provider participation in, and coverage of state immunization registries; (b) comparison of the impact of alternative state laws for school enrollment and alternative approaches to their implementation (*e.g.*, evaluating the impact of different requirements, implementation policies and programs, and attitudes of key stakeholders).

(2) HIV and Sexually Transmitted Diseases

The impact of state or local laws and their enforcement on HIV/STD risk behaviors and incidence or on the use of preventive health services; for example: laws that proscribe certain sexual behaviors (*e.g.*, sodomy laws), laws that regulate access to or possession of drug paraphernalia, laws mandating HIV testing of newborns, criminal penalties for drug use during pregnancy, laws that seek to affect youth behavior (*e.g.*, curfews and/or drinking age), and laws that criminalize the knowing transmission of HIV or that require disclosure of HIV or other STD infection to sexual partners.

(3) Injury Related to Motor Vehicles

The impact of state requirements for licensure of adolescents and older drivers on their mobility, health, and safety (crash, injury, or fatality risks).

(4) Occupational Safety and Health

The impact of the following laws pertaining to the prevention of work injuries and diseases: (a) California and/or Washington state ergonomic standards to prevent work-related musculoskeletal disorders; (b) State ''needle-stick'' laws requiring safety-engineered devices and related measures to prevent ''needle stick'' injuries among health care workers; (c) State and local laws and requirements for ensuring healthful indoor air quality for office workers; and, (d) federal health standards of the Occupational Safety and Health Administration and Mine Safety and Health Administration for preventing occupational, noise-induced hearing loss among workers.

(5) Public Health Reporting Laws

Impact of state public health laws and requirements for reporting by health care providers and medical testing laboratories (*e.g.*, reporting of infectious disease cases and cases of elevated blood lead).

(6) Emergency Public Health Practice

Impact of federal, state, and local laws on the preparedness of public health organizations for, and their response to: natural disasters, unintended releases of hazardous chemical or biological agents, threats and incidents of terrorism, and other types of disasters.

(7) Urban Planning

Impact of local laws and requirements on infectious, chronic, and environmental diseases and their risk factors (*e.g.*, air quality and respiratory diseases such as asthma, physical exercise, obesity, and cardiovascular disease), and on injury (*e.g.*, pedestrian and cycling injuries).

(8) Infectious Disease Screening and Treatment for Immigrants

Impact of infectious disease requirements of U.S. immigration laws on the appropriateness and quality of screening and treatment for infectious diseases provided to immigrants.

(9) Public Health System and Infrastructure

Impact of laws on the public health system and its infrastructure: organizations; information, communications, laboratories, and other systems; and public health workforce; (*e.g.*, laws pertaining to performance standards, practitioner competencies, and accountability for public health services).

For all of these programmatic areas, it is the intent of this grant program to fund applications comprising

innovative, multi-disciplinary research strategies. Model approaches are sought for evaluating the impact of public health laws, within or across different areas of public health (*e.g.*, infectious diseases, chronic diseases and health promotion, environmental health, injury prevention, occupational safety and health, and public health systems).

As appropriate and feasible, applications are encouraged to address the fullest complement of possible measures for assessing outcomes. These measures could include health and safety outcomes (*e.g.*, frequency and severity of injury, illness, disability, or hazard exposure); economic outcomes (*e.g.*, costs at the level of the individual, household, community, industry, or society; or distribution of costs among payers); social outcomes (*e.g.*, impact on educational attainment, employment); as well as measures of change in behavior, knowledge, attitudes, use of technological interventions, organization of public health systems, quality and quantity of prevention services and public health practice and other proximate measures associated with health and other outcomes.

Applications are encouraged which include plans to obtain and analyze information on the implementation of the referenced laws, as appropriate and necessary for evaluating their impact. Quantitative and qualitative information on application, enforcement, or compliance activities associated with a law under evaluation, and on compliance-related knowledge, attitudes, and behaviors of the target audience(s), will often be important to the interpretation and inferential value of statistical findings on outcomes generated through regression analyses and other statistical methods. Information on implementation also may address factors that may either impede or promote the impact of laws and policies on public health.

E. Program Requirements

The following are applicant requirements:

1. A principal investigator who has conducted research, published the findings in peer-reviewed journals, and has specific authority and responsibility to carry out the proposed project.

2. Demonstrated experience (on the applicant's project team) in conducting, evaluating, and publishing in peer-reviewed journals research evaluating public health law or other public policies, programs or interventions.

3. Effective and well-defined working relationships within the performing organization and with outside entities that will ensure implementation of the proposed activities.

4. The overall match between the applicant's proposed theme and research objectives described under the heading ''Programmatic Interest Areas.''

F. Application Content

Letter of Intent (LOI)

Prospective applicants are asked to submit, by April 21, 2000, a letter of intent that includes the number and title of the Announcement, a descriptive title of the proposed research, the name, address, and telephone number of the Principal Investigator, and the identities of other key personnel and participating institutions. Although a letter of intent is not required, is not binding, and is not used in the review of an application, the information that it contains is used to estimate the potential review workload and avoid conflict of interest in the review. The letter of intent is to be submitted to the Grants Management Specialist listed under ''Where to Obtain Additional Information'' section of this announcement.

Application

Use the information in the Programmatic Interest Areas, Evaluation Criteria and Other Requirements sections to develop the application content. Your application will be evaluated on the criteria listed, so it is important to follow them in laying out your research proposal.

The grant applications for research on the impact of public health laws should include:

1. Justification of the research needs and explanation of the scientific basis for the research, the expected outcome, and the relevance of the findings to preventing disease, injury, and disability.

2. Specific, measurable, and explicitly scheduled objectives.

3. A detailed plan describing the methods by which the objectives will be achieved, including their sequence.

4. A description of the role and responsibilities of the principal investigator.

5. A description of all the project staff and their role in the proposed research, regardless of their funding source. It should include their title, qualifications, experience, responsibilities in the proposed research, percentage of time each will devote to the research, as well as that portion of their salary to be paid by the grant.

6. A description of those activities related to, but not supported by the grant.

7. A description of the involvement of other entities that will relate to the proposed research, if applicable. It should include letters of support and a clear statement of their roles.

8. A detailed first year's budget for the grant with future annual projections.

An applicant organization has the option of having specific salary and fringe benefit amounts for individuals omitted from the copies of the application which are made available to outside reviewing groups. To exercise this option: on the original and five copies of the application, the applicant must use asterisks to indicate those individuals for whom salaries and fringe benefits are not shown; the subtotals must still be shown.

G. Submission and Deadline

Submit the original and five copies of PHS–398 (OMB Number 0925–0001). (Adhere to the instructions on the Errata Instruction Sheet for PHS 398). Forms are in the application kit and are also available at the following Internet address: http://www.cdc.gov/od/pgo/forminfo.htm.

In addition to sending the original and five copies of the proposal, please also enclose a copy of the proposal on a 3.5 diskette in WordPerfect, Word, or ASCII format. If you have access to an electronic version of PHS–398 (OMB Number 0925–0001), please include the electronic forms on the diskette. If you do not have access or capability to use an electronic version, please ensure that the following items in narrative format are included on your diskette: Abstract, Biographical sketches, Research Plan (items A–I), and Other Support pages. Label the diskette with your name, operating system, software, and proposal title. (Example: John Doe, DOS, WordPerfect 6, Public Law Modeling in the 21st Century). If the title is too long, please truncate.

Please submit on or before June 2, 2000, to the Grants Management Specialist identified in the ''Where to Obtain Additional Information'' section of this announcement.

Deadline: Applications shall be considered as meeting the deadline if they are either:

(a) Received on or before the deadline date; or

(b) Sent on or before the deadline date and received in time for submission to the independent review group. (Applicants must request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

Late Applications: Applications which do not meet the criteria in (a) or

(b) above are considered late applications, will not be considered, and will be returned to the applicant.

H. Evaluation Criteria

Applications that are complete and responsive may be subjected to a preliminary evaluation by a peer review group to determine if the application is of sufficient technical and scientific merit to warrant further review (triage); the CDC will withdraw from further consideration applications judged to be noncompetitive and promptly notify the principal investigator/program director and the official signing for the applicant organization. Those applications judged to be competitive will be further evaluated by a dual review process.

The evaluation process of the proposals will be conducted through a secure interactive Internet site. Each competitive application will be evaluated individually against the following criteria by a Special Emphasis Panel (SEP) appointed by CDC. The SEP will score each proposal based on scientific and technical merit. Factors to be considered by the SEP include:

1. Significance—Does this study address an important problem related to the research goals outlined in the ''Programmatic Interest Areas'' section of this document? If the aims of the application are achieved, how would scientific knowledge be advanced? What would be the effect of this study on the concepts and methods that drive this field?

2. Approach—Are the conceptual framework, design (including composition of study population), methods, and analyses adequately developed, well-integrated and appropriate to the aims of the project? Does the applicant acknowledge potential problem areas and consider alternative tactics?

3. Innovation—Does the project employ novel concepts, approaches or methods? Are the aims original and innovative? Does the project challenge existing paradigms or develop new methodologies that can serve as models for future research?

4. Investigator—Is the investigator appropriately trained and well suited to carry out this work? Is the work proposed appropriate to the experience level of the principal investigator and other researchers, if any?

5. Environment—Does the scientific environment in which the work will be done contribute to the probability of success? Do the proposed experiments take advantage of unique features of the scientific environment or employ useful collaborative arrangements? Is there documentation of cooperation from necessary participants in the project, where applicable? Is there evidence of institutional support and availability of resources necessary to perform the project?

6. Human Subjects—If Human Subjects are involved, does the applicant adequately address the requirements of 45 CFR Part 46 for the protection of human subjects?

7. If Human Subjects are involved, has the applicant met the CDC Policy requirements regarding the inclusion of women, ethnic, and racial groups in the proposed research. This includes:

a. The proposed plan for the inclusion of both sexes and racial and ethnic minority populations for appropriate representation.

b. The proposed justification when representation is limited or absent.

c. A statement as to whether the design of the study is adequate to measure differences when warranted.

d. A statement as to whether the plans for recruitment and outreach for study participants include the process of establishing partnerships with community(ies) and recognition of mutual benefits.

A second programmatic review will be conducted by a panel of Senior Federal Officials. The Senior Federal Officials will review the ranked proposals to assure maximal impact and balance of the proposed research. The factors to be considered will include:

1. The results of the peer review.

2. The imporantance of the proposed research for meeting the primary goals of this initiative, as described in ''Programmatic Interest Areas.''

3. Budgetary considerations.

I. Other Requirements

Technical Reporting Requirements

Provide CDC with the original plus two copies of:

1. Annual progress reports.

2. Financial status report, no more than 90 days after the end of the budget period.

3. Final financial status report and performance report, no more than 90 days after the end of the project period.

Send all reports to the Grants Management Specialist identified in the ''Where to Obtain Additional Information'' section of this announcement.

For descriptions of the following Other Requirements, see Attachment I in the application package:

AR–1 Human Subjects Requirements

AR–2 Requirements for Inclusion of Women and Racial and Ethnic Minorities in Research

AR–4 HIV/AIDS Confidentiality Provisions

AR–10 Smoke-Free Workplace Requirements

AR–11 Healthy People 2010

AR–12 Lobbying Restrictions

AR–13 Prohibition on Use of CDC Funds for Certain Gun Control Activities

J. Authority and Catalog of Federal Domestic Assistance Number

This program is authorized under section 1704 of the Public Health Service Act, 42 U.S.C. section 300u–3, as amended.

The Catalog of Federal Domestic Assistance number is 93.283.

K. Where To Obtain Additional Information

This and other CDC announcements are available through the CDC homepage on the Internet. The address for the CDC homepage is http://www.cdc.gov.

If you have questions after reviewing the contents of all the documents, business management assistance may be obtained from: Carrie Clark, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Announcement 00051, Centers for Disease Control and Prevention 2920 Brandywine Road, Room 3000, Atlanta, GA 30341, Telephone (770) 488–2719, Email address: zri4@cdc.gov

For program technical assistance, contact: Anthony D. Moulton, Ph.D., Associate Director for Policy, Program Analysis and Academic Programs, Public Health Practice Program Office (PHPPO), Centers for Disease Control and Prevention, 4770 Buford Hwy. (K–36), Atlanta, GA 30341–3724, Phone 770–488–2404/Fax 770–488–2420, E-mail: ADM6@CDC.GOV

Dated: March 7, 2000.

John L. Williams,

Director, Procurement and Grants Office, Centers of Disease Control and Prevention (CDC).

[FR Doc. 00–6030 Filed 3–10–00; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[Program Announcement No. 93631–00–01]

Developmental Disabilities: Final Notice of Availability of Financial Assistance and Request for Applications to Support Family Support Model Demonstration Projects under the Projects of National Significance Program

AGENCY: Administration on Developmental Disabilities (ADD), ACF, DHHS.

ACTION: Notice.

SUMMARY: The Administration on Developmental Disabilities, Administration for Children and Families (ACF), announces that applications are being accepted for funding of Fiscal Year 2000 under family support.

This program announcement consists of five parts. Part I, the Introduction, discusses the goals and objectives of ACF and ADD. Part II provides the necessary background information on ADD for applicants. Part III describes the review process. Part IV describes the priority under which ADD requests applications for Fiscal Year 2000 funding of projects. Part V describes in detail how to prepare and submit an application.

Grants will be awarded under this program announcement subject to the availability of funds for support of these activities.

DATES: The closing date for submittal of applications under this announcement is May 12, 2000.

Deadline: Mailed applications shall be considered as meeting an announced deadline if they are received on or before the deadline time and date at the U.S. Department of Health and Human Services, ACF/Administration on Developmental Disabilities, 370 L'Enfant Promenade SW, Mail Stop 326F, Washington, DC 20447, Attention: Lois Hodge. Any applications received after 4:30 p.m. on the deadline date will not be considered for competition.

Applicants must ensure that a legibly dated U.S. Postal Service postmark or a legibly dated, machine produced postmark of a commercial mail service is affixed to the envelope/package containing the application(s). To be acceptable as proof of timely mailing, a postmark from a commercial mail service must include the logo/emblem of the commercial mail service company and must reflect the date the package was received by the commercial mail service company from the applicant. Private Metered postmarks shall not be acceptable as proof of timely mailing.

Applications *handcarried* by applicants, applicant couriers, other representatives of the applicant, or by overnight/express mail couriers shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8:00 a.m. and 4:30 p.m., EST, at the U.S. Department of Health and Human Services, ACF/Administration on Developmental Disabilities, 370 L'Enfant Promenade SW, ACF Mail Center, 2nd Floor (near loading dock), Aerospace Center, 901 D Street, SW, Washington, DC 20024, between Monday and Friday (excluding Federal holidays). This address must appear on the envelope/package containing the application with the note ''Attention: Lois Hodge.'' Applicants using express/overnight services should allow two working days prior to the deadline date for receipt of applications. (Applicants are cautioned that express/overnight mail services do not always deliver as agreed.)

ADD cannot accommodate transmission of applications by fax or through other electronic media. Therefore, applications transmitted to ADD electronically will not be accepted regardless of date or time of submission and time of receipt.

Late Applications: Applications that do not meet the criteria above are considered late applications. ADD shall notify each late applicant that its application will not be considered in the current competition.

Extension of Deadlines: ADD may extend the deadline for all applicants because of acts of God such as floods and hurricanes, or when there is widespread disruption of the mails. However, if ADD does not extend the deadline for all applicants, it may not waive or extend the deadline for any applicants.

ADDRESSES: Application materials are available from Pat Laird, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447, 202/690–7447; http://www.acf.dhhs.gov/programs/add; or add@acf.dhhs.gov.

FOR FURTHER INFORMATION CONTACT: Administration for Children and Families (ACF), Pat Laird, 370 L'Enfant Promenade, S.W., Washington, D.C., 20447, 202/690–7447; or add@acf.dhhs.gov.

Notice of Intent to Submit Application: If you intend to submit an application, please send a post card with the number and title of this announcement, your organization's name and address, and your contact person's name, phone and fax numbers, and e-mail address to: Administration on Developmental Disabilities, 370 L'Enfant Promenade SW, Mail Stop 300F, Washington, DC, 20447, Attn: Family Support. This information will be used to determine the number of expert reviewers needed and to update the mailing list to whom program announcements are sent.

SUPPLEMENTARY INFORMATION:

Part I. General Information

A. Goals of the Administration on Developmental Disabilities

The Administration on Developmental Disabilities (ADD) is located within the Administration for Children and Families (ACF), Department of Health and Human Services (DHHS). Although different from the other ACF program administrations in the specific populations it serves, ADD shares a common set of goals that promote the economic and social well being of families, children, individuals and communities. Through national leadership, ACF and ADD envision:

- Families and individuals empowered to increase their own economic independence and productivity;
- Strong, healthy, supportive communities having a positive impact on the quality of life and the development of children;
- Partnerships with individuals, front-line service providers, communities, States and Congress that enable solutions which transcend traditional agency boundaries;
- Services planned and integrated to improve client access;
- A strong commitment to working with Native Americans, persons with developmental disabilities, refugees and migrants to address their needs, strengths and abilities; and
- A community-based approach that recognizes and expands on the resources and benefits of diversity.

Emphasis on these goals and progress toward them will help more individuals, including people with developmental disabilities, to live productive and independent lives integrated into their communities.

B. Purpose of the Administration on Developmental Disabilities

The Administration on Developmental Disabilities (ADD) is the lead agency within ACF and DHHS responsible for planning and administering programs that promote

the self-sufficiency and protect the rights of persons with developmental disabilities.

The Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C.6000, *et seq.*) (the Act) supports and provides assistance to States and public and private nonprofit agencies and organizations to assure that individuals with developmental disabilities and their families participate in the design of and have access to culturally competent services, supports, and other assistance and opportunities that promote independence, productivity, integration and inclusion into the community.

In the Act, Congress expressly found that:

- Disability is a natural part of the human experience that does not diminish the right of individuals with developmental disabilities to enjoy the opportunity for independence, productivity, integration and inclusion into the community;
- Individuals whose disabilities occur during their developmental period frequently have severe disabilities that are likely to continue indefinitely;
- Individuals with developmental disabilities often require lifelong specialized services and assistance, provided in a coordinated and culturally competent manner by many agencies, professionals, advocates, community representatives, and others to eliminate barriers and to meet the needs of such individuals and their families; The Act further established as the policy of the United States:
- Individuals with developmental disabilities, including those with the most severe developmental disabilities, are capable of achieving independence, productivity, integration and inclusion into the community, and often require the provision of services, supports and other assistance to achieve such;
- Individuals with developmental disabilities have competencies, capabilities and personal goals that should be recognized, supported, and encouraged, and any assistance to such individuals should be provided in an individualized manner, consistent with the unique strengths, resources, priorities, concerns, abilities, and capabilities of the individual;
- Individuals with developmental disabilities and their families are the primary decision makers regarding the services and supports such individuals and their families receive; and play decision making roles in policies and programs that affect the lives of such individuals and their families; and
- It is in the nation's interest for people with developmental disabilities to be employed, and to live conventional and independent lives as a part of families and communities.

Toward these ends, ADD seeks: To enhance the capabilities of families in assisting people with developmental disabilities to achieve their maximum potential; to support the increasing ability of people with developmental disabilities to exercise greater choice and self-determination; to engage in leadership activities in their communities; as well as to ensure the protection of their legal and human rights.

The four programs funded under the Act are:

- Federal assistance to State developmental disabilities councils;
- State system for the protection and advocacy of individuals rights;
- Grants to University Affiliated Programs for interdisciplinary training, exemplary services, technical assistance, and information dissemination; and
- Grants for Projects of National Significance.

C. Statutory Authorities Covered Under This Announcement

The Developmental Disabilities Assistance and Bill of Rights Act of 1996, 42 U.S.C. 6000, *et seq.* The Projects of National Significance is Part E of the Developmental Disabilities Assistance and Bill of Rights Act of 1996, 42 U.S.C. 6081, *et seq.* The Consolidated Appropriations Act, FY 2000, P.L. 106–113.

Part II. Background Information for Applicants

A. Description of Family Support Program

The Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) was amended in 1994 by adding at the end the ''Families of Children With Disabilities Support Act of 1994''. The purpose of this new family support program was for states to create or expand statewide systems change. Although authorization levels were provided, funds were never appropriated. The administrative authority for implementing the family support program was given to the U.S. Department of Health and Human Services and within that Department it was delegated to the Administration on Developmental Disabilities. The authority for this program was to expire at the end of fiscal year 1998 or September 30, 1998.

In the fiscal year 2000 appropriations act, funds were provided for this program for one year. It allows for the award of competitive, statewide systems change grants to conduct training and technical assistance and other national activities designed to address the problems which impede the self-sufficiency of families of children with disabilities.

Part III. The Review Process

A. Eligible Applicants

Before applications under this Announcement are reviewed, each will be screened to determine that the applicant is eligible for funding as specified. Applications from organizations that do not meet the eligibility requirements for the priority area will not be considered or reviewed in the competition, and the applicant will be so informed.

Only public or non-profit private entities, not individuals, are eligible to apply under any of the priority areas. All applications developed jointly by more than one agency or organization must identify only one organization as the lead organization and official applicant. The other participating agencies and organizations can be included as co-participants, subgrantees or subcontractors.

Nonprofit organizations must submit proof of nonprofit status in their applications at the time of submission. One means of accomplishing this is by providing a copy of the applicant's listing in the Internal Revenue Service's most recent list of tax-exempt organizations described in section 501 (c) (3) of the IRS code or by providing a copy of the currently valid IRS tax exemption certificate, *or* by providing a copy of the articles of incorporation bearing the seal of the State in which the corporation or association is domiciled.

ADD cannot fund a nonprofit applicant without acceptable proof of its nonprofit status.

B. Review Process and Funding Decisions

Timely applications under this announcement from eligible applicants received by the deadline date will be reviewed and scored competitively. Experts in the field, generally persons from outside of the Federal government, will use the appropriate evaluation criteria listed later in this Part to review and score the applications. The results of this review are a primary factor in making funding decisions.

ADD reserves the option of discussing applications with, or referring them to, other Federal or non-Federal funding sources when this is determined to be in the best interest of the Federal

government or the applicant. It may also solicit comments from ADD Regional Office staff, other Federal agencies, interested foundations, national organizations, specialists, experts, States and the general public. ADD will consider these comments, along with those of the expert reviewers, in making funding decisions.

In making decisions on awards, ADD will consider whether applications focus on or feature: services to culturally diverse or ethnic populations among others; a substantially innovative strategy with the potential to improve theory or practice in the field of human services; a model practice or set of procedures that holds the potential for replication by organizations administering or delivering of human services; substantial involvement of volunteers; substantial involvement (either financial or programmatic) of the private sector; a favorable balance between Federal and non-Federal funds available for the proposed project; the potential for high benefit for low Federal investment; a programmatic focus on those most in need; and/or substantial involvement in the proposed project by national or community foundations.

This year, 5 points will be awarded in scoring for any project that demonstrates in their application a partnership and collaboration with any of the 140 Empowerment Zones/ Enterprise Communities. A discussion of how the involvement of the EZ/EC is related to the objectives and/or the activities of the project must be clearly outlined for the award of the 5 points. Also, a letter from the appropriate representative of the EZ/EC must accompany the application indicating its agreement to participate and describing its role in the project.

To the greatest extent possible, efforts will be made to ensure that funding decisions reflect an equitable distribution of assistance among the States and geographical regions of the country, rural and urban areas, and ethnic populations. In making these decisions, ADD may also take into account the need to avoid unnecessary duplication of effort.

C. Evaluation Process

Using the evaluation criteria below, a panel of at least three reviewers (primarily experts from outside the Federal government) will review the applications. To facilitate this review, applicants should ensure that they address each minimum requirement in the priority area description under the appropriate section of the Project Narrative Statement.

Reviewers will determine the strengths and weaknesses of each application in terms of the evaluation criteria listed below, provide comments, and assign numerical scores. The point value following each criterion heading indicates the maximum numerical weight that each section may be given in the review process.

D. Structure of Priority Area Descriptions

The priority area description is composed of the following sections:

- *Eligible Applicants:* This section specifies the type of organization that is eligible to apply under the particular priority area. Specific restrictions are also noted, where applicable.
- *Purpose:* This section presents the basic focus and/or broad goal(s) of the priority area.
- *Background Information:* This section briefly discusses the legislative background as well as the current state-of-the-art and/or current state-of-practice that supports the need for the particular priority area activity. Relevant information on projects previously funded by ACF and/or other State models are noted, where applicable.
- *Evaluation Criteria:* This section presents the basic set of issues that must be addressed in the application. Typically, they relate to need for assistance, results expected, project design, and organizational and staff capabilities. Inclusion and discussion of these items is important since the information provided will be used by the reviewers in evaluating the application against the evaluation criteria.
- *Minimum Requirements for Project Design:* This section presents the basic set of issues that must be addressed in the application. Typically, they relate to project design, evaluation, and community involvement. This section also asks for specific information on the proposed project. Inclusion and discussion of these items is important since they will be used by the reviewers to evaluate the applications against the evaluation criteria. Project products, continuation of the project after Federal support ceases, and dissemination/ utilization activities, if appropriate, are also addressed.
- *Project Duration:* This section specifies the maximum allowable length of the project period; it refers to the amount of time for which Federal funding is available.
- *Federal Share of Project Costs:* This section specifies the maximum amount of Federal support for the project.
- *Matching Requirement:* This section specifies the minimum non-Federal contribution, either cash or in-kind match, required.
- *Anticipated Number of Projects To Be Funded:* This section specifies the number of projects ADD anticipates funding under the priority area.
- *CFDA:* This section identifies the Catalog of Federal Domestic Assistance (CFDA) number and title of the program under which applications in this priority area will be funded. This information is needed to complete item 10 on the SF 424.

Please note that applications under this announcement that do not comply with the specific priority area requirements in the section on ''Eligible Applicants'' will not be reviewed.

Experience has shown that an application which is broader and more general in concept than outlined in the priority area description is less likely to score as well as an application more clearly focused on, and directly responsive to, the concerns of that specific priority area. Therefore, applicants should tailor their applications according to the requirements of the priority area description.

E. Available Funds

ADD intends to award new grants resulting from this announcement during the fourth quarter of fiscal year 2000, subject to the availability of funding. The size of the awards will vary. The priority area description includes information on the maximum Federal share of the project costs and the anticipated number of projects to be funded.

For general information, the term ''budget period'' refers to the interval of time (usually 12 months) into which a multi-year period of assistance (project period) is divided for budgetary and funding purposes. The term ''project period'' refers to the total time a project is approved for support, including any extensions.

F. Grantee Share of Project Costs

Grantees must match $1 for every $3 requested in Federal funding to reach 25% of the total approved cost of the project. The total approved cost of the project is the sum of the ACF share and the non-Federal share. Cash or in-kind contributions may meet the non-Federal share, although applicants are encouraged to meet their match requirements through cash contributions. Therefore, a project requesting $100,000 in Federal funds (based on an award of $100,000 per budget period) must include a match of

at least $33,333 (total project cost is $133,333, of which $33,333 is 25%).

An exception to the grantee cost-sharing requirement relates to applications originating from American Samoa, Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands. Applications from these areas are covered under Section 501(d) of P. L. 95–134, which requires that the Department waive ''any requirement for local matching funds for grants under $200,000.''

The applicant contribution must generally be secured from non-Federal sources. Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. However, funds from some Federal programs benefiting Tribes and Native American organizations have been used to provide valid sources of matching funds. If this is the case for a Tribe or Native American organization submitting an application to ADD, that organization should identify the programs which will be providing the funds for the match in its application. If the application successfully competes for PNS grant funds, ADD will determine whether there is statutory authority for this use of the funds. The Administration for Native Americans and the DHHS Office of General Counsel will assist ADD in making this determination.

G. General Instructions for the Uniform Project Description

The following ACF Uniform Project Description (UPD) has been approved under OMB Control Number 0970–0139.

Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions.

1. *Project summary/abstract:* Provide a summary of the project description (a page or less) with reference to the funding request.

2. *Objectives and need for assistance:* Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

3. *Results or benefits expected:* Identify the results and benefits to be derived. For example, when applying for a grant to establish a neighborhood child care center, describe who will occupy the facility, who will use the facility, how the facility will be used, and how the facility will benefit the community which it will serve.

4. *Approach:* Outline a plan of action which describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors which might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity. When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates. Identify the kinds of data to be collected, maintained, and/or disseminated. Note that clearance from the U.S. Office of Management and Budget might be needed prior to a ''collection of information'' that is ''conducted or sponsored'' by ACF. List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

5. *Organization Profile:* Provide information on the applicant organization(s) and cooperating partners such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information. Any non-profit organization submitting an application must submit proof of its non-profit status in its application at the time of submission. The non-profit agency can accomplish this by providing a copy of the applicant's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in Section 501(c)(3) of the IRS code, *or* by providing a copy of the currently valid IRS tax exemption certificate, or by providing a copy of the articles of incorporation bearing the seal of the State in which the corporation or association is domiciled.

H. Cooperation in Evaluation Efforts

Grantees funded by ADD may be requested to cooperate in evaluation efforts funded by ADD. The purpose of these evaluation activities is to learn from the combined experience of multiple projects funded under a particular priority area.

I. Closed Captioning for Audiovisual Efforts

Applicants must include closed captioning and audio description in the development of any audiovisual products.

Part IV. Fiscal Year 2000 Families of Children with Disabilities Support Projects—Description and Requirements

The following section presents the final announcement for the area of family support for Fiscal Year 2000 and solicits the appropriate applications.

Eligible Applicants

A State entity, unit or office designated by the chief executive officer of the state as the lead agency for this project. Proof of designation as lead agency by the governor/CEO must be submitted with the application. Applicants who were awarded grants last year (FY 1999) under this priority area are not eligible.

Purpose

Project funds are to be utilized to support systems change activities designed to assist each State to develop and implement, or expand and enhance, a family-centered and family-directed, culturally competent, community-centered, comprehensive, statewide system of family support for families of children with disabilities designed to—

(1) Ensure the full participation, choice and control of families of children with disabilities in decisions related to the provision of such family support for their family;

(2) Ensure the active involvement of families of children with disabilities in the planning, development,

implementation, and evaluation of such a statewide system;

(3) Increase the availability of, funding for, access to, and provision of family support for families of children with disabilities;

(4) Promote training activities that are family-centered and family-directed and that enhance the ability of family members of children with disabilities to increase participation, choice, and control in the provision of family support for families of children with disabilities;

(5) Increase and promote interagency coordination among State agencies, and between State agencies and private entities that are involved in these projects; and

(6) Increase the awareness of laws, regulations, policies, practices, procedures, and organizational structures, which facilitate or impede the availability or provision of family support for families of children with disabilities.

Background Information

The concept of family support for families with a child with a disability is a relatively new phenomenon in disability policy. Historically, the only means of receiving publicly funded services for a child with a severe disability was by placing the child in a state institution. With a shift in thinking in the early 1980s to a more family-centered approach to service provision many states initiated family support legislation. This legislation was often the result of initiatives developed by the state developmental disabilities councils. Currently, all the states plus the District of Columbia offer some type of family support program; this has consisted of any community-based service administered or financed by the state MR/DD agency providing for vouchers, direct cash payments to families, reimbursement, or direct payments to service providers which the state agency itself identified as family support. A review of these programs reveals the range of services that fall within ''family support''—cash subsidy payments, respite care, family counseling, architectural adaptation of the home, in-home counseling, sibling support programs, education and behavior management services and the purchase of specialized equipment. Family support is a growing expenditure in state budgets; in 1996 it constituted 2.3% of total MR/DD resources, compared to 1.6% in 1992. The number of families supported is also growing, from 174,441 in 1992 to 280,535 in 1996.

The Federal government's involvement in family support began in 1982 with what is known as the ''Katie Beckett Waiver'', an option under Medicaid which allows a state to waive the deeming of parental income and resources for any child eighteen years of age and under who is eligible for placement in a Medicaid certified long term care institution or hospital, ICF/MR or nursing home. This waiver allows parents access to an array of family, home and community supports. A majority of states have not exercised this option.

Federal disability policy in the 1980s increasingly began to reflect the principles of family-centered, community-based, coordinated care as Federal programs were established or reauthorized. The Temporary Respite Care and Crisis Nurseries Act of 1986 funded a variety of in-home and out-of-home respite programs; a new Part H for infants, toddlers, and their families was added in 1986 to the then Education of the Handicapped Act; the reauthorization of the Maternal and Child Health Care Block grant in 1989 emphasized these principles in it's Children with Special Health Care Needs program; and in the Developmental Disabilities Assistance and Bill of Rights Act a definition of family support services was added in 1990.

Minimum Requirements for Project Design

ADD is interested in awarding grant funds that will maximize opportunities for systems change through the collaboration with and strengthening of generic community action service organizations in order to ensure the provision of family support to families of children with disabilities. Activities should contain the following key components:

- Establish a state policy council of families of children with disabilities or utilize an existing council which will advise and assist the lead entity in the performance of activities of this application and be composed of a majority of members who are family members of children with disabilities and who are youth with disabilities (ages 18–21);
- Training and technical assistance for family members, service providers, community members, professionals, members of the Policy Council, state agency staff, students and others;
- Interagency coordination of Federal and State policies, resources, and services; interagency workgroups to enhance public funding options and coordination; and other interagency activities that promote coordination;
- Outreach to locate families who are eligible for family support and to identify groups who are underserved or unserved;
- Policy studies that relate to the development and implementation, or expansion and enhancement, of a statewide system of family support for families of children with disabilities;
- Hearings and forums to solicit input from families of children with disabilities regarding family support programs, policies, and plans for such families;
- Public awareness and education to families of children with disabilities, parent groups and organizations, public and private agencies, students, policymakers, and the general public;
- Needs assessment;
- Data collection and analysis related to the statewide system of family support for families of children with disabilities;
- Implementation plans to utilize generic community service organizations in innovative partnerships to include families of children with disabilities;
- Pilot demonstration projects to demonstrate new approaches to the provision of family support for families of children with disabilities;
- Evaluation system using measurable outcomes based on family satisfaction indicators such as the extent to which a service or support meets a need, solves a problem, or adds value for a family, as determined by the individual family.

ADD is particularly interested in applications that incorporate into these activities one or more of the following populations relevant to their state: (1) Unserved and underserved populations which includes populations such as individuals from racial and ethnic minority backgrounds, economically disadvantaged individuals, individuals with limited-English proficiency, and individuals from underserved geographic areas (rural or urban); (2) aging families of adult children with disabilities who are over age 21 with a focus on assisting those families and their adult child to be included as self-determining members of their communities; (3) foster/adoptive families of children with disabilities; (4) families participating in the state's Temporary Assistance to Needy Families Program (TANF), welfare-to-work, and/or SSI program; (5) veterans with families having a child with a disability; (6) parents with disabilities, especially with cognitive disabilities, having children with or without

disabilities; and (7) families of children with behavioral/emotional issues.

As a general guide, ADD will expect to fund only those applications for projects that incorporate the following elements:

- Consumer/self-advocate orientation and participation.
- Key project personnel with direct life experience with living with a disability.
- Strong advisory components that consist of a majority of individuals with disabilities and a structure where individuals with disabilities make real decisions that determine the outcome of the grant.
- Research reflects the principles of participatory action.
- Cultural competency.
- A description of how individuals with disabilities and their families will be involved in all aspects of the design, implementation, and evaluation of the project.
- Attention to unserved and inadequately served individuals, having a range of disabilities from mild to severe, from multicultural backgrounds, rural and inner-city areas, migrant, homeless, and refugee families, with severe disabilities.
- Compliance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 as amended by the Rehabilitation Act amendments of 1998 (P.L. 105–220).
- Collaboration through partnerships and coalitions.
- Development of the capacity to communicate and disseminate information and technical assistance through e-mail and other effective, affordable, and accessible forms of electronic communication.

Applications should also include provisions for the travel of a key staff person during the project period to Washington, DC.

Evaluation Criteria

The four criteria that follow will be used to review and evaluate each application under this announcement. Each of these criterion should be addressed in the project description section of the application. The point values indicate the maximum numerical weight each criterion will be accorded in the review process. The specific information to be included under each of these headings is described in Section G of Part III, General Instructions for the Uniform Project Description. Additional information that must be included is described below.

Criterion 1: Objectives and Need for Assistance (20 points)

The application must identify the precise location of the project and area to be served by the proposed project. Maps and other graphic aids must be attached.

Criterion 2: Results or Benefits Expected (20 points)

The extent to which they are consistent with the objectives of the application, and the extent to which the application indicates the anticipated contributions to policy, practice, theory and/or research. The extent to which the proposed project costs is reasonable in view of the expected results.

Criterion 3: Approach (35 points)

Discuss the criteria to be used to evaluate the results, and explain the methodology that will be used to determine if the needs identified and discussed are being met and if the results and benefits identified are being achieved.

Criterion 4: Organization Profile (25 points)

The application identifies the background of the project director/principal investigator and key project staff (including name, address, training, educational background and other qualifying experience) and the experience of the organization to demonstrate the applicant's ability to effectively and efficiently administer this project. The application describes the relationship between this project and other work planned, anticipated or under way by the applicant which is being supported by Federal assistance.

This section should consist of a brief (two to three pages) background description of how the applicant organization (or the unit within the organization that will have responsibility for the project) is organized, the types and quantity of services it provides, and/or the research and management capabilities it possesses. It may include descriptions of any current or previous relevant experience, or describe the competence of the project team and its demonstrated ability to produce a final product that is readily comprehensible and usable. An organization chart showing the relationship of the project to the current organization should be included.

Project Duration

This announcement is soliciting applications for a project period up to seventeen (17) months under this area. Awards, on a competitive basis, can be up to a seventeen-month (17) budget period.

Federal Share of Project Costs

The maximum Federal share is not to exceed $200,000 for a state and not to exceed $100,000 for a territory for the budget period.

Matching Requirement

Grantees must match $1 for every $3 requested in Federal funding to reach 25% of the total approved cost of the project. The total approved cost of the project is the sum of the ACF share and the non-Federal share. Cash or in-kind contributions may meet the non-Federal share, although applicants are encouraged to meet their match requirements through cash contributions. Therefore, a project requesting $200,000 in Federal funds (based on an award of $200,000 per budget period) must include a match of at least $66,666 (the total project cost is $266,666, of which $66,666 is 25%).

Anticipated Number of Projects To Be Funded

It is anticipated that up to twenty-two (22) projects will be funded.

CFDA

ADD's CFDA (Code of Federal Domestic Assistance) number is 93.631—Developmental Disabilities—Projects of National Significance. This information is needed to complete item 10 on the SF 424.

Part V. Instructions for the Development and Submission of Applications

This Part contains information and instructions for submitting applications in response to this announcement. Application forms and other materials can be obtained by any of the following methods: Pat Laird, ADD, 370 L'Enfant Promenade SW, Mailstop 300F, Washington, DC, 20447, 202/690–7447; http://www.acf.dhhs.gov/programs/add; or add@acf.dhhs.gov. Please copy and use these forms in submitting an application.

Potential applicants should read this section carefully in conjunction with the information contained within the specific priority area under which the application is to be submitted. The priority area description is in Part IV.

A. Required Notification of the State Single Point of Contact (SPOC)

All applications under the ADD priority areas are required to follow the Executive Order (E.O.) 12372 process, ''Intergovernmental Review of Federal Programs,'' and 45 CFR Part 100,

''Intergovernmental Review of Department of Health and Human Services Program and Activities.'' Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

Note: State/Territory Participation In The Intergovernmental Review Process Does Not Signify Applicant Eligibility for Financial Assistance Under a Program. A Potential Applicant Must Meet The Eligibility Requirements of The Program For Which it is Applying Prior to Submitting an Application to its SPOC, If Applicable, or to ACF.

As of November 20, 1998, all States and territories, except Alabama, Alaska, American Samoa, Colorado, Connecticut, Hawaii, Idaho, Kansas, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, Ohio, New York, Oklahoma, Oregon, Palau, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, and Washington, have elected to participate in the Executive Order process and have established a State Single Point of Contact (SPOC). Applicants from these jurisdictions or for projects administered by Federally recognized Indian Tribes need take no action regarding E.O. 12372. Otherwise, applicants should contact their SPOCs as soon as possible to alert them of the prospective applications and receive any necessary instructions.

Applicants must submit all required materials to the SPOC as soon as possible so that the program office can obtain and review SPOC comments as part of the award process. It is imperative that the applicant submit all required materials and indicate the date of this submittal (or date SPOC was contacted, if no submittal is required) on the SF 424, item 16a.

Under 45 CFR 100.8(a)(2), a SPOC has 60 days from the application due date to comment on proposed new or competing continuation awards. These comments are reviewed as part of the award process. Failure to notify the SPOC can result in delays in awarding grants.

SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those Official State process recommendations that may trigger the ''accommodate or explain'' rule.

When comments are submitted directly to ACF, they should be addressed to: Department of Health and Human Services, Administration for Children and Families, Division of Discretionary Grants and Audit Resolution, 370 L'Enfant Promenade, SW, Mail Stop 326F, Washington, DC 20447, Attn: 93.631 ADD—Projects of National Significance.

Contact information for each State's SPOC is found at the ADD website (http://www.acf.dhhs.gov/programs/add) or by contacting Pat Laird, ADD, 370 L'Enfant Promenade SW, Mailstop 300F, Washington, DC, 20447, 202/690–7447.

B. Notification of State Developmental Disabilities Planning Councils

A copy of the application must also be submitted for review and comment to the State Developmental Disabilities Council in each State in which the applicant's project will be conducted. A list of the State Developmental Disabilities Councils can be found at ADD's website: http:/// www.acf.dhhs.gov/programs/add or by contacting Pat Laird, ADD, 370 L'Enfant Promenade SW, Mailstop 300F, Washington, DC, 20447, 202/690–7447.

C. Deadline for Submittal of Applications

One signed original and two copies of the application must be submitted on or before May 12, 2000 to: U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Developmental Disabilities, 370 L'Enfant Promenade, SW, Mail Stop 326F, Washington, DC 20447, Attn: Lois Hodge.

Applications may be mailed or hand-delivered. Hand-delivered applications are accepted during the normal working hours of 8:00 a.m. to 4:30 p.m., Monday through Friday. Applications shall be considered as meeting an announced deadline if received by the deadline date at the ACF Grants Office (Close of Business: 4:30 p.m., local prevailing time).

Late applications: Applications that do not meet the criterion stated above are considered late applications. ACF/ADD shall notify each late applicant that its application will not be considered in the current competition.

Extension of deadlines: ACF may extend the deadline for all applicants due to acts of God, such as floods, hurricanes, or earthquakes; or when there is a widespread disruption of the mails. However, if the granting agency does not extend the deadline for all applicants, it may not waive or extend the deadline for any applicants.

D. Instructions for Preparing the Application and Completing Application Forms

The SF 424, SF 424A, SF 424A–Page 2 and Certifications/Assurances are contained in the application package that can be accessed as mentioned earlier in this announcement. Please prepare your application in accordance with the following instructions:

1. SF 424 Page 1, Application Cover Sheet

Please read the following instructions before completing the application cover sheet. An explanation of each item is included. Complete only the items specified. Top of Page. Enter the single priority area number under which the application is being submitted. An application should be submitted under only one priority area.

Item 1. ''Type of Submission''—Preprinted on the form.

Item 2. ''Date Submitted'' and ''Applicant Identifier'' —Date application is submitted to ACF and applicant's own internal control number, if applicable.

Item 3. ''Date Received By State''—State use only (if applicable).

Item 4. ''Date Received by Federal Agency''—Leave blank.

Item 5. ''Applicant Information''.

''Legal Name''—Enter the legal name of applicant organization. For applications developed jointly, enter the name of the lead organization only. There must be a single applicant for each application.

''Organizational Unit''—Enter the name of the primary unit within the applicant organization which will actually carry out the project activity. Do not use the name of an individual as the applicant. If this is the same as the applicant organization, leave the organizational unit blank.

''Address''—Enter the complete address that the organization actually uses to receive mail, since this is the address to which all correspondence will be sent. Do not include both street address and P.O. box number unless both must be used in mailing.

''Name and telephone number of the person to be contacted on matters involving this application (give area code)''—Enter the full name (including academic degree, if applicable) and telephone number of a person who can respond to questions about the application. This person should be accessible at the address given here and will receive all correspondence regarding the application.

Item 6. ''Employer Identification Number (EIN)''—Enter the employer

identification number of the applicant organization, as assigned by the Internal Revenue Service, including, if known, the Central Registry System suffix.

Item 7. ''Type of Applicant''—Self-explanatory.

Item 8. ''Type of Application''—Preprinted on the form.

Item 9. ''Name of Federal Agency''—Preprinted on the form.

Item 10. ''Catalog of Federal Domestic Assistance Number and Title''—Enter the Catalog of Federal Domestic Assistance (CFDA) number assigned to the program under which assistance is requested and its title. For all of ADD's priority areas, the following should be entered, ''93.631—Developmental Disabilities: Projects of National Significance.''

Item 11. ''Descriptive Title of Applicant's Project''—Enter the project title. The title is generally short and is descriptive of the project, not the priority area title.

Item 12. ''Areas Affected by Project''—Enter the governmental unit where significant and meaningful impact could be observed. List only the largest unit or units affected, such as State, county, or city. If an entire unit is affected, list it rather than subunits.

Item 13. ''Proposed Project''—Enter the desired start date for the project and projected completion date.

Item 14. ''Congressional District of Applicant/Project''—Enter the number of the Congressional district where the applicant's principal office is located and the number of the Congressional district(s) where the project will be located. If Statewide, a multi-State effort, or nationwide, enter ''00.''

Items 15. Estimated Funding Levels. In completing 15a through 15f, the dollar amounts entered should reflect, for a 17-month or less project period, the total amount requested. If the proposed project period exceeds 17 months, enter only those dollar amounts needed for the first 12 months of the proposed project.

Item 15a. Enter the amount of Federal funds requested in accordance with the preceding paragraph. This amount should be no greater than the maximum amount specified in the priority area description.

Items 15b–e. Enter the amount(s) of funds from non-Federal sources that will be contributed to the proposed project. Items b–e are considered cost sharing or ''matching funds.'' The value of third party in-kind contributions should be included on appropriate lines as applicable. For more information regarding funding as well as exceptions to these rules, see Part III, Sections E and F, and the specific priority area description.

Item 15f. Enter the estimated amount of program income, if any, expected to be generated from the proposed project. Do not add or subtract this amount from the total project amount entered under item 15g. Describe the nature, source and anticipated use of this program income in the Project Narrative Statement.

Item 15g. Enter the sum of items 15a–15e.

Item 16a. ''Is Application Subject to Review By State Executive Order 12372 Process? Yes.''—Enter the date the applicant contacted the SPOC regarding this application. Select the appropriate SPOC from the listing provided at the end of Part IV. The review of the application is at the discretion of the SPOC. The SPOC will verify the date noted on the application.

Item 16b. ''Is Application Subject to Review By State Executive Order 12372 Process? No.''—Check the appropriate box if the application is not covered by E.O. 12372 or if the program has not been selected by the State for review.

Item 17. ''Is the Applicant Delinquent on any Federal Debt?''—Check the appropriate box. This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include audit disallowances, loans and taxes.

Item 18. ''To the best of my knowledge and belief, all data in this application/preapplication are true and correct. The document has been duly authorized by the governing body of the applicant and the applicant will comply with the attached assurances if the assistance is awarded.''—To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for signature of this application by this individual as the official representative must be on file in the applicant's office, and may be requested from the applicant.

Item 18a–c. ''Typed Name of Authorized Representative, Title, Telephone Number''—Enter the name, title and telephone number of the authorized representative of the applicant organization.

Item 18d. ''Signature of Authorized Representative'' —Signature of the authorized representative named in Item 18a. At least one copy of the application must have an original signature. Use colored ink (not black) so that the original signature is easily identified.

Item 18e. ''Date Signed''—Enter the date the application was signed by the authorized representative.

2. SF 424A—Budget Information—Non-Construction Programs

This is a form used by many Federal agencies. For this application, Sections A, B, C, E and F are to be completed. Section D does not need to be completed.

Sections A and B should include the Federal as well as the non-Federal funding for the proposed project covering (1) the total project period of 17 months or less or (2) the first year budget period, if the proposed project period exceeds 15 months.

Section A—Budget Summary. This section includes a summary of the budget. On line 5, enter total Federal costs in column (e) and total non-Federal costs, including third party in-kind contributions, but not program income, in column (f). Enter the total of (e) and (f) in column (g).

Section B—Budget Categories. This budget, which includes the Federal as well as non-Federal funding for the proposed project, covers (1) the total project period of 17 months or less or (2) the first-year budget period if the proposed project period exceeds 17 months. It should relate to item 15g, total funding, on the SF 424. Under column (5), enter the total requirements for funds (Federal and non-Federal) by object class category.

A separate budget justification should be included to explain fully and justify major items, as indicated below. The types of information to be included in the justification are indicated under each category. For multiple year projects, it is desirable to provide this information for each year of the project. The budget justification should immediately follow the second page of the SF 424A.

Personnel—Line 6a. Enter the total costs of salaries and wages of applicant/grantee staff. Do not include the costs of consultants, which should be included on line 6h, ''Other.''

Justification: Identify the principal investigator or project director, if known. Specify by title or name the percentage of time allocated to the project, the individual annual salaries, and the cost to the project (both Federal and non-Federal) of the organization's staff who will be working on the project.

Fringe Benefits—Line 6b. Enter the total costs of fringe benefits, unless treated as part of an approved indirect cost rate.

Justification: Provide a break-down of amounts and percentages that comprise fringe benefit costs, such as health insurance, FICA, retirement insurance, etc.

Travel—Line 6c. Enter total costs of out-of-town travel (travel requiring per diem)

for staff of the project. Do not enter costs for consultant's travel or local transportation, which should be included on Line 6h, ''Other.''

Justification: Include the name(s) of traveler(s), total number of trips, destinations, length of stay, transportation costs and subsistence allowances.

Equipment—Line 6d. Enter the total costs of all equipment to be acquired by the project. For State and local governments, including Federally recognized Indian Tribes, ''equipment'' is tangible, non-expendable personal property having a useful life of more than one year and acquisition cost of $5,000 or more per unit.

Justification: Equipment to be purchased with Federal funds must be justified. The equipment must be required to conduct the project, and the applicant organization or its subgrantees must not have the equipment or a reasonable facsimile available to the project. The justification also must contain plans for future use or disposal of the equipment after the project ends.

Supplies—Line 6e. Enter the total costs of all tangible expendable personal property (supplies) other than those included on Line 6d.

Justification: Specify general categories of supplies and their costs.

Contractual—Line 6f. Enter the total costs of all contracts, including (1) procurement contracts (except those which belong on other lines such as equipment, supplies, etc.) and (2) contracts with secondary recipient organizations, including delegate agencies. Also include any contracts with organizations for the provision of technical assistance. Do not include payments to individuals on this line. If the name of the contractor, scope of work, and estimated total costs are not available or have not been negotiated, include on Line 6h, ''Other.''

Justification: Attach a list of contractors, indicating the names of the organizations, the purposes of the contracts, and the estimated dollar amounts of the awards as part of the budget justification. Whenever the applicant/grantee intends to delegate part or the entire program to another agency, the applicant/grantee must complete this section (Section B, Budget Categories) for each delegate agency by agency title, along with the supporting information. The total cost of all such agencies will be part of the amount shown on Line 6f. Provide backup documentation identifying the name of contractor, purpose of contract, and major cost elements.

Construction—Line 6g. Not applicable. New construction is not allowable.

Other—Line 6h. Enter the total of all other costs. Where applicable, such costs may include, but are not limited to: insurance; medical and dental costs; noncontractual fees and travel paid directly to individual consultants; local transportation (all travel which does not require per diem is considered local travel); space and equipment rentals; printing and publication; computer use; training costs, including tuition and stipends; training service costs, including wage payments to individuals and supportive service payments; and staff development costs. Note that costs identified as ''miscellaneous'' and ''honoraria'' are not allowable.

Justification: Specify the costs included.

Total Direct Charges—Line 6i. Enter the total of Lines 6a through 6h.

Indirect Charges—6j. Enter the total amount of indirect charges (costs). If no indirect costs are requested, enter ''none.'' Generally, this line should be used when the applicant (except local governments) has a current indirect cost rate agreement approved by the Department of Health and Human Services or another Federal agency.

Local and State governments should enter the amount of indirect costs determined in accordance with HHS requirements. When an indirect cost rate is requested, these costs are included in the indirect cost pool and should not be charged again as direct costs to the grant.

In the case of training grants to other than State or local governments (as defined in title 45, Code of Federal Regulations, part 74), the Federal reimbursement of indirect costs will be limited to the lesser of the negotiated (or actual) indirect cost rate or 8 percent of the amount allowed for direct costs, exclusive of any equipment charges, rental of space, tuition and fees, post-doctoral training allowances, contractual items, and alterations and renovations.

For training grant applications, the entry under line 6j should be the total indirect costs being charged to the project. The Federal share of indirect costs is calculated as shown above. The applicant's share is calculated as follows:

(a) Calculate total project indirect costs (a*) by applying the applicant's approved indirect cost rate to the total project (Federal and non-Federal) direct costs.

(b) Calculate the Federal share of indirect costs (b*) at 8 percent of the amount allowed for total project (Federal and non-Federal) direct costs exclusive of any equipment charges, rental of space, tuition and fees, post-doctoral training allowances, contractual items, and alterations and renovations.

(c) Subtract (b*) from (a*). The remainder is what the applicant can claim as part of its matching cost contribution.

Justification: Enclose a copy of the indirect cost rate agreement. Applicants subject to the limitation on the Federal reimbursement of indirect costs for training grants should specify this.

Total—Line 6k. Enter the total amounts of lines 6i and 6j.

Program Income—Line 7. Enter the estimated amount of income, if any, expected to be generated from this project. Do not add or subtract this amount from the total project amount.

Justification: Describe the nature, source, and anticipated use of program income in the Program Narrative Statement.

Section C—Non-Federal Resources. This section summarizes the amounts of non-Federal resources that will be applied to the grant. Enter this information on line 12 entitled ''Totals.'' In-kind contributions are defined in title 45 of the Code of Federal Regulations, Parts 74.51 and 92.24, as ''property or services which benefit a grant-supported project or program and which are contributed by non-Federal third parties without charge to the grantee, the subgrantee, or a cost-type contractor under the grant or subgrant.''

Justification: Describe third party in-kind contributions, if included.

Section D—Forecasted Cash Needs. Not applicable.

Section E—Budget Estimate of Federal Funds Needed For Balance of the Project. This section should only be completed if the total project period exceeds 17 months.

Totals—Line 20. For projects that will have more than one budget period, enter the estimated required Federal funds for the second budget period (months 13 through 24) under column ''(b) First.'' If a third budget period will be necessary, enter the Federal funds needed for months 25 through 36 under ''(c) Second.'' Columns (d) and (e) are not applicable in most instances, since ACF funding is almost always limited to a three-year maximum project period. They should remain blank.

Section F—Other Budget Information.

Direct Charges—Line 21. Not applicable.

Indirect Charges—Line 22. Enter the type of indirect rate (provisional, predetermined, final or fixed) that will be in effect during the funding period,

the estimated amount of the base to which the rate is applied, and the total indirect expense.

Remarks—Line 23. If the total project period exceeds 17 months, you must enter your proposed non-Federal share of the project budget for each of the remaining years of the project.

3. Project Summary/Abstract

Clearly mark this separate page with the applicant name as shown in item 5 of the SF 424, the priority area number as shown at the top of the SF 424, and the title of the project as shown in item 11 of the SF 424. The summary description should not exceed 300 words. These 300 words become part of the computer database on each project.

Care should be taken to produce a summary description that accurately and concisely reflects the proposal. It should describe the objectives of the project, the approaches to be used and the outcomes expected. The description should also include a list of major products that will result from the proposed project, such as software packages, materials, management procedures, data collection instruments, training packages, or videos (please note that audiovisuals must be closed captioned and audio described). The project summary description, together with the information on the SF 424, will constitute the project ''abstract.'' It is the major source of information about the proposed project and is usually the first part of the application that the reviewers read in evaluating the application.

Project Description. The Project Description is a very important part of an application. It should be clear, concise, and address the specific requirements mentioned under the priority area description in Part IV. The narrative should also provide information concerning how the application meets the evaluation criteria, using the following headings:

(a) Objectives and Need for Assistance;

(b) Results and Benefits Expected;

(c) Approach; and

(d) Organization Profile.

The specific information to be included under each of these headings is described in Section G of Part III, General Instructions for the Uniform Project Description, and under Part IV, Evaluation Criteria.

The narrative should be typed double-spaced on a single-side of an 8 1/2″ x 11″ plain white paper, with 1″ margins on all sides, using black print no smaller than 12 pitch or 12 point size. All pages of the narrative (including charts, references/footnotes, tables, maps, exhibits, etc.) must be sequentially numbered, beginning with ''Objectives and Need for Assistance'' as page number one. Applicants should not submit reproductions of larger size paper, reduced to meet the size requirement.

The length of the application, including the application forms and all attachments, should not exceed 60 pages. This will be strictly enforced. A page is a single side of an 8 1/2 x 11″ sheet of paper. Applicants are requested not to send pamphlets, brochures or other printed material along with their application as these pose copying difficulties. These materials, if submitted, will not be included in the review process if they exceed the 60-page limit. Each page of the application will be counted to determine the total length.

5. Part V—Assurances/Certifications

Applicants are required to file a SF 424B, Assurances—Non-Construction Programs and the Certification Regarding Lobbying. Both must be signed and returned with the application. Applicants must also provide certifications regarding: (1) Drug-Free Workplace Requirements; and (2) Debarment and Other Responsibilities. These two certifications are self-explanatory. Copies of these assurances/certifications can be obtained from the ADD website (http://www.acf.dhhs.gov/programs/add) or by contacting Pat Laird, ADD, 370 L'Enfant Promenade SW, Mailstop 300F, Washington, DC, 20447, 202/690–7447. These forms can be reproduced, as necessary. A duly authorized representative of the applicant organization must certify that the applicant is in compliance with these assurances/certifications. *A signature on the SF 424 indicates compliance with the Drug Free Workplace Requirements, and Debarment and Other Responsibilities certifications, and need not be mailed back with the application.*

In addition, applicants are required under Section 162(c)(3) of the Act to provide assurances that the human rights of all individuals with developmental disabilities (especially those individuals without familial protection) who will receive services under projects assisted under Part E will be protected consistent with section 110 (relating to the rights of individuals with developmental disabilities). Each application must include a statement providing this assurance.

For research projects in which human subjects may be at risk, a Protection of Human Subjects Assurance may be required. If there is a question regarding the applicability of this assurance, contact the Office for Research Risks of the National Institutes of Health at (301) 496–7041.

E. Checklist for a Complete Application

The checklist below is for your use to ensure that your application package has been properly prepared.

—One original, signed and dated application, plus two copies. Applications for different priority areas are packaged separately;

—Application is from an organization that is eligible under the eligibility requirements defined in the priority area description (screening requirement);

—Application length does not exceed 60 pages, unless otherwise specified in the priority area description.

A complete application consists of the following items in this order:

—Application for Federal Assistance (SF 424, REV 4–88);

—A completed SPOC certification with the date of SPOC contact entered in line 16, page 1 of the SF 424 if applicable.

—Budget Information—Non-Construction Programs (SF 424A, REV 4–88);

—Budget justification for Section B—Budget Categories;

— Proof of designation as lead agency;

—Table of Contents;

—Letter from the Internal Revenue Service, etc. to prove non-profit status, if necessary;

—Copy of the applicant's approved indirect cost rate agreement, if appropriate;

—Project Description (See Part III, Section C);

—Any appendices/attachments;

—Assurances—Non-Construction Programs (Standard Form 424B, REV 4–88);

—Certification Regarding Lobbying;

—Certification of Protection of Human Subjects, if necessary; and

—Certification of the Pro-Children Act of 1994 (Environmental Tobacco Smoke), signature on the application represents certification.

F. The Application Package

Each application package must include an original and two copies of the complete application. Each copy should be stapled securely (front and back if necessary) in the upper left-hand corner. All pages of the narrative (including charts, tables, maps, exhibits, etc.) must be sequentially numbered, beginning with page one. In order to facilitate handling, please do not use covers, binders or tabs. Do not include extraneous materials as attachments,

such as agency promotion brochures, slides, tapes, film clips, minutes of meetings, survey instruments or articles of incorporation.

G. Paperwork Reduction Act of 1995 (P.L. 104–13)

The Uniform Project Description information collection within this announcement is approved under the Uniform Project Description (0970–0139), Expiration Date 10/31/2000.

Public reporting burden for this collection of information is estimated to average 10 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed, and reviewing the collection of information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

(Federal Catalog of Domestic Assistance Number 93.631 Developmental Disabilities—Projects of National Significance)

Dated: March 1, 2000.

Sue Swenson,

Commissioner, Administration on Developmental Disabilities.

[FR Doc. 00–6107 Filed 3–10–00; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 00N–0836]

Agency Information Collection Activities: Proposed Collection; Comment Request; Environmental Impact Considerations

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 collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on requirements governing applications for FDA approval to market a new drug.

DATES: Submit written comments on the collection of information by May 12, 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: Karen Nelson, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

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 collection of information, 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.

Environmental Impact Considerations—Part 25 (21 CFR Part 25)—(OMB Control Number 0910–0322)—Extension

FDA is requesting OMB approval for the reporting requirements contained in FDA's regulation ''Environmental Impact Considerations'' (part 25).

The National Environmental Policy Act (NEPA) (42 U.S.C. 4321–4347), states national environmental objectives and imposes upon each Federal agency the duty to consider the environmental effects of its actions. Section 102(2)(C) of NEPA requires the preparation of an environmental impact statement (EIS) for every major Federal action that will significantly affect the quality of the human environment.

FDA's NEPA regulations are at part 25. All applications or petitions requesting agency action require the submission of an Environmental Assessment (EA) or a claim of categorical exclusion. Section 25.15(a) and (d) specify the procedures for submitting to FDA a claim for a categorical exclusion (certain classes of FDA-regulated actions have little or no potential to cause significant environmental effects and are excluded from the requirements to prepare an EA or EIS). Section 25.40(a) and (c) specify the content requirements for EA's for nonexcluded actions.

This collection of information is used by FDA to assess the environmental impact of agency actions and to ensure that the public is informed of environmental analyses. Firms wishing to manufacture and market substances regulated under statutes for which FDA is responsible must, in most instances, submit applications requesting approval. Environmental information must be included in such applications (when not eligible for categorical exclusion) for the purpose of determining whether the proposed action may have a significant impact on the environment. Where significant adverse effects cannot be avoided, the agency uses the submitted information as the basis for preparing and circulating to the public an EIS, made available through **Federal Register** notice also filed for comment at the Environmental Protection Agency (EPA). The final EIS including the comments received is reviewed by the agency to weigh environmental costs and benefits in determining whether to pursue the proposed action or some alternative that would reduce expected environmental impact. When the agency finds that no significant environmental effects are expected, the agency prepares a Finding of No Significant Impact (FONSI).

I. Estimated Annual Reporting Burden for Human Drugs

Under 21 CFR 312.23(a)(7)(*e*), 314.50(d)(1)(iii), and 314.94(a)(9)(i), each investigational new drug

application (IND), new drug application (NDA), and abbreviated new drug application (ANDA) must contain a claim for categorical exclusion under § 25.30 or § 25.31 or an EA under § 25.40. In 1998, FDA received 2,427 IND's from 1,874 sponsors, 129 NDA's from 80 applicants, 2,500 supplements to NDA's from 238 applicants, 345 ANDA's from 101 applicants, and 3,713 supplements to ANDA's from 165 applicants. FDA estimates that it receives approximately 9,094 claims for categorical exclusions as required under § 25.15(a) and (d), and 20 EA's as required under § 25.40(a) and (c). Based on information provided by the pharmaceutical industry, FDA estimates that it takes sponsors or applicants approximately 8 hours to prepare a claim for a categorical exclusion and approximately 3,400 hours to prepare an EA.

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN FOR HUMAN DRUGS [1]

21 CFR Section	No. of <Respondents	Annual <Frequency per <Response	Total Annual Responses	Hours per <Response	Total Burden Hours
25.15(a) and (d)	2,039	4.46	9,094	8	72,752
25.40(a) and (c)	20	1	20	3,400	68,000
Total					140,752

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

II. Estimated Annual Reporting Burden for Human Foods

Under 21 CFR 71.1 and 170.39, food additive petitions, color additive petitions, and requests for exemption from regulation as a food additive must contain a claim of categorical exclusion under § 25.30 or § 25.32 or an EA under § 25.40. In 1998, FDA received 57 food additive petitions, 9 color additive petitions, and 26 threshold of regulation exemption requests. FDA estimates that it received approximately 80 claims of categorical exclusions as required under § 25.15(a) and (d), and 12 EA's as required under § 25.40(a) and (c). FDA estimates that it takes petitioners or requestors approximately 8 hours to prepare a claim of categorical exclusion and approximately 210 hours to prepare an EA.

TABLE 2.—ESTIMATED ANNUAL REPORTING BURDEN FOR HUMAN DRUGS [1]

21 CFR Section	No. of <Respondents	Annual <Frequency per <Response	Total Annual Responses	Hours per <Response	Total Burden Hours
25.15(a) and (d)	44	1.8	8.0	8	640
25.40(a) and (c)	11	1.1	12	210	2,520
Total					3,160

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The Food and Drug Administration Modernization Act of 1997 (FDAMA) (Public Law 105–115) amended section 409 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348) to establish a premarket notification process as the primary method for authorizing a new use of a food additive that is a food contact substance. Section 409(h)(6) of the act defines a food contact substance as any substance intended for use as a component of materials used in manufacturing, packing, transporting, or holding food if such use is not intended to have any technical effect in food. Under the notification process, FDA must be notified at least 120 days prior to the marketing of a food contact substance. If FDA does not object within 120 days to the use of a food contact substance that is the subject of a notification, the substance may be legally marketed for the notified use. FDA expects that the majority of new uses of food contact substances that will be the subject of premarket notifications would previously have been regulated under the food additive petition process or exempted from the requirement of a regulation under the threshold of regulation process. FDA has provided in a separate **Federal Register** notice an opportunity for public comment on the collection of information associated with the premarket notification program, including environmental information requirements (64 FR 61648, November 12, 1999).

III. Estimated Annual Reporting Burden for Medical Devices

Under 21 CFR part 814, premarket approvals (original PMA's and supplementals) must contain a claim for categorical exclusion under § 25.30 or § 25.31 or an EA under § 25.40. In 1998, FDA received 568 claims (original PMA's and supplementals) for categorical exclusions as required under § 25.15(a) and (d), and 0 EA's as required under § 25.40(a) and (c). Based on information provided by less than 10 sponsors, FDA estimates that it takes approximately less than 1 hour to prepare a claim for a categorical exclusion and an unknown number of hours to prepare an EA.

TABLE 3.—ESTIMATED ANNUAL REPORTING BURDEN FOR MEDICAL DEVICES [1]

21 CFR Section	No. of <Respondents	Annual <Frequency per <Response	Total Annual Responses	Hours per <Response	Total Burden Hours
25.15(a) and (d)	94	6	568	1	568
25.40(a) and (c)	0	0	0	0	0

TABLE 3.—ESTIMATED ANNUAL REPORTING BURDEN FOR MEDICAL DEVICES [1]—Continued

21 CFR Section	No. of <Respondents	Annual <Frequency per <Response	Total Annual Responses	Hours per <Response	Total Burden Hours
Total					568

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

IV. Estimated Annual Reporting Burden for Biological Products

Under 21 CFR 312.23(a)(7)(iv)(*c*) and 601.2(a), IND and biologics license applications must contain a claim for categorical exclusion under § 25.30 or § 25.31 or an EA under § 25.40. In 1998, FDA received 492 IND's from 278 sponsors, 78 license applications from 20 applicants, and 903 supplements to license applications from 190 applicants. FDA estimates that approximately 10 percent of these supplements would be submitted with a claim for categorical exclusion or an EA.

FDA estimates that it receives approximately 660 claims for categorical exclusion as required under § 25.15(a) and (d), and 2 EA's as required under § 25.40(a) and (c). Based on information provided by industry, FDA estimates that it takes sponsors and applicants approximately 8 hours to prepare a claim for categorical exclusion and approximately 3,400 hours to prepare an EA.

TABLE 4.—ESTIMATED ANNUAL REPORTING BURDEN FOR BIOLOGICAL PRODUCTS [1]

21 CFR Section	No. of <Respondents	Annual <Frequency per <Response	Total Annual Responses	Hours per <Response	Total Burden Hours
25.15(a) and (d)	317	2	660	8	5,280
25.40(a) and (c)	2	1	2	3,400	6,800
Total					12,080

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

V. Estimated Annual Reporting Burden for Animal Drugs

Under 21 CFR 514.1(b)(14) new animal drug applications (NADA's) and abbreviated new animal drug applications (ANADA's), 514.8(a)(1) supplemental NADA's and ANADA's, 511.1(b)(10) investigational new animal drug applications (INADA's), 570.35(c)(1)(viii) generally recognized as safe (GRAS) affirmation petitions, and 571.1(c) food additive petitions must contain a claim for categorical exclusion under § 25.30 or § 25.31 or an EA under § 25.40. Since the last OMB Approval of the subject collections of information, the Center for Veterinary Medicine has received approximately 545 claims for categorical exclusions as required under § 25.15(a) and (d), and 32 EA's as required under § 25.40(a) and (c). Based on information provided by industry, FDA estimates that it takes sponsors/applicants approximately 8 hours to prepare a claim for a categorical exclusion and approximately 2,160 hours to prepare an EA.

TABLE 5.—ESTIMATED ANNUAL REPORTING BURDEN FOR ANIMAL DRUGS [1]

21 CFR Section	No. of <Respondents	Annual <Frequency per <Response	Total Annual Responses	Hours per <Response	Total Burden Hours
25.15(a) and (d)	194	2.8	545	8	4,360
25.40(a) and (c)	29	1.1	32	2,160	69,120
Total					73,480

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on information provided by industry, FDA estimates that the combined burden for the Environmental Impact Considerations—Part 25 are as follows:

TABLE 6.—ENTIRE TOTAL ESTIMATED ANNUAL REPORTING BURDEN FOR ALL CENTERS [1]

21 CFR Section	No. of <Respondents	Annual <Frequency per <Response	Total Annual Responses	Hours per <Response	Total Burden Hours
25.15(a) and ((d)	2,688	17.06	10,875	33	83,600
25.40(a) and (c)	62	4.02	66	9,170	146,440
Total	2,750	21.08	10,941	9,203	230,040

[1] There are no capital costs or operating and maintenance cost associated with this collection of information.

Dated: March 6, 2000.

William K. Hubbard,

Senior Associate Commissioner for Policy, Planning, and Legislation.

[FR Doc. 00–5969 Filed 3–10–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Medwatch/MDR/FDA Website Navigation; Public Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting.

The Food and Drug Administration (FDA) is announcing the following public meeting: Medwatch/Medical Device Reporting (MDR)/FDA Website Navigation. The topics to be discussed are the Medwatch Program, medical device reporting, and the navigation of the FDA website. This public meeting is intended to familiarize the attendees with the Medwatch Program, provide information on the regulations associated with the mandatory medical device reporting system, and furnish training on the navigation of the FDA website.

Date and Time: The public meeting will be held on April 7, 2000, from 9 a.m. to 12 noon.

Location: The public meeting will be held at the Mercy Medical Center Auditorium, 2175 Rosaline Ave., Redding, CA 96049.

Contact: Mary E. Taylor, Food and Drug Administration, 1431 Harbor Bay Pkwy., Alameda, CA 94502–7070, 510–337–6888, FAX 510–337–6708, e-mail: mtaylor1@ora.fda.gov.

Registration: Send registration information (including name, title, firm name, address, telephone, and fax number) to the contact person by March 30, 2000.

If you need special accommodations due to a disability, please contact Mary E. Taylor at least 7 days in advance.

Dated: March 6, 2000.

William K. Hubbard,

Senior Associate Commissioner for Policy, Planning, and Legislation.

[FR Doc. 00–5968 Filed 3–10–00; 8:45 am]

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: Children's Hospital Graduate Medical Education Program—New

Public Law Number 106–129 amended the Public Health Service Act to establish a new program to support graduate medical education (GME) in children's hospitals. The provision authorizes payments in FY 2000 and FY 2001 for direct and indirect expenses associated with operating approved GME programs. Section 340E(c)(1) states that the amount determined under this subsection for payments for direct medical expenses for a fiscal year is equal to the product of: (A) The updated per resident amount as determined, and (B) the average number of FTE residents in the hospital's approved graduate medical residency training programs as determined under section 1886(h)(4) of the Social Security Act during the fiscal year. The statute directs the Secretary to take into account factors identified in section 340E(b)(1)(B) and 340E(d)(2)—case mix, number of FTE residents, treatment of more severely ill patients and the additional costs related to teaching residents.

Administration of the Children's Hospital Graduate Medical Education Program relies on the reporting of the number of full-time equivalent residents in applicant children's hospital training programs to determine the amount of direct and indirect expense payments to participating children's hospitals. Indirect expense payments will also be derived from a formula that requires the reporting of case mix index information from participating children's hospitals.

Hospitals will be requested to submit such information in an annual application. The statute also requires reconciliation of the estimated numbers of residents with the actual number determined after the close of the fiscal year. Participating children's hospitals would be required to complete an adjusted report to correct such information on an annual basis.

ESTIMATES OF ANNUALIZED HOUR BURDEN

Form name	No. of respondents	Responses per respondent	Total responses	Hrs. per response	Total hour burden
Form A	48	1	48	28	1,344

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: March 6, 2000.

Jane Harrison,

Director, Division of Policy Review and Coordination.

[FR Doc. 00–5970 Filed 3–10–00; 8:45 am]

BILLING CODE 4160–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Alternative Medicine; 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 Center for Complementary and Alternative Medicine Special Emphasis Panel, Special Teleconference Review Panel.

Date: March 9, 2000.

Time: 1 pm to 3 pm.

Agenda: To review and evaluate grant applications.

Place: 9000 Rockville Pike, Bldg 31, Room 5B50, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Lawrence R. Haller, National Center for Complementary and Alternative Mecicine, National Institutes of Health, 31 Center Drive, Room 5B50, Bethesda, MD 20892–2182, (301) 402–9011, hallerl@nih.gov.

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.

Dated: March 6, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–6015 Filed 3–10–00; 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 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 Center for Research Special Emphasis Panel, Science Education Partnership Award.

Date: March 17, 2000.

Time: 11 am to 12 pm.

Agenda: To review and evaluate grant applications.

Place: Office of Review, National Center for Research Resources, 6705 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Sybil A. Wellstood, PhD, Scientific Review Administrator, Office of Review, National Center for Research Resources, 6705 Rockledge Drive, MSC 7965, Room 6018, Bethesda, MD 20892–7965, 301–435–0814.

(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: March 6, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–6020 Filed 3–10–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes 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 00–35, Review of R01.

Date: March 24, 2000.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Natcher Building, Rm. 4AN44F, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: H. George Hausch, PhD, 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 00–44, Review of R03s.

Date: March 29, 2000.

Time: 10 a.m. to 11:30 a.m.

Agenda: To review and evaluate grant applications.

Place: Natcher Building, Rm. 4AN44F, Bethesda, MD 20892.

Contact Person: William J. Gartland, PhD, Scientific Review Administrator, Scientific Review Section, National Institute of Dental Research, National Institutes of Health, PHS, DHHS, 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 00–36, Review of R01s.

Date: April 17, 2000.

Time: 10:30 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: Natcher Building, Rm. 4AN44F, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: H. George Hausch, PhD, Chief, 4500 Center Drive, Natcher Building, Rm. 4AN44F, National Institutes of Health, Bethesda, MD 20892, (301) 594–2372.

Name of Committee: National Institute of Dental Research Special Emphasis Panel 00–43, Review of R03 Grant.

Date: April 20, 2000.

Time: 12:05 p.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Natcher Building, Rm. 4AN44F, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: William J. Gartland, PhD, Scientific Review Administrator, Scientific Review Section, National Institute of Dental Research, National Institutes of Health, PHS, DHHS, Bethesda, MD 20892, (301) 594–2372.

Name of Committee: National Institute of Dental Research Special Emphasis Panel 00–42, Review of R03 Grant.

Date: May 10, 2000.

Time: 3 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Natcher Building, Rm. 4AN44F, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: William J. Gartland, PhD, Scientific Review Administrator, Scientific Review Section, National Institute of Dental Research, National Institutes of Health, PHS, DHHS, Bethesda, MD 20892, (301) 594–2372.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: March 6, 2000.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–6016 Filed 3–10–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; 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 Environmental Health Sciences Special Emphasis Panel, Environmental Health Sciences as an Integrative Context for Learning (RFA 99–011).

Date: March 15–17, 2000.

Time: 7 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Radisson Governors Inn, 1–40 & Davis Dr., Exit 280, Research Triangle Park, NC 27709.

Contact Person: J. Patrick Mastin, PhD, Scientific Review Administrator, SRB/DERT, NIEHS, P.O. Box 12233 MD EC–30, Research Triangle Park, NC 27709, (919) 541–1446.

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. 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing; 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences, National Institutes of Health, HHS)

Dated: March 6, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–6017 Filed 3–10–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; 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 Environmental Health Sciences Special Emphasis Panel K08—Progression of Hepatic Neoplasia by PCB/Arsenic Mixtures.

Date: March 31, 2000.

Time: 2 pm to 3 pm.

Agenda: To review and evaluate grant applications.

Place: NIEHS, 79 T. W. Alexander Drive, Building 4401, Conference Room 3446, Research Triangle Park, NC 27709, (Telephone Conference Call).

Contact Person: Linda K. Bass, PhD, Scientific Review Administrator, NIEHS, PO Box 12233 EC–30, Research Triangle Park, NC 27709, (919) 541–1307.

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. 93.113, Biological Response to Environmental Health Hazards; 93.114, Appliced Toxicological Research and Testing; 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences, National Institutes of Health, HHS)

Dated: March 6, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–6018 Filed 3–10–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; 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 Environmental Health Sciences Special Emphasis Panel K08 Grant Reviews.

Date: March 30, 2000.

Time: 2 pm to 3 pm.

Agenda: To review and evaluate grant applications.

Place: NIEHS–East Campus, Building 4401, Conference Room 122, 79 Alexander Drive, Research Triangle Park, NC 27709, (Telephone Conference Call).

Contact Person: Linda K. Bass, PhD, Scientific Review Administrator, NIEHS, PO Box 12233 EC–30, Research Triangle Park, NC 27709, (919) 541–1307.

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 Environmental Health Sciences Special Emphasis Panel K08 Grant Reviews.

Date: March 30, 2000.

Time: 3 pm to 4 pm.

Agenda: To review and evaluate grant applications.

Place: NIEHS–East Campus, Building 4401, Conference Room 122, 79 Alexander Drive, Research Triangle Park, NC 27709, (Telephone Conference Call).

Contact Person: Linda K. Bass, PhD, Scientific Review Administrator, NIEHS, PO Box 12233 EC–30, Research Triangle Park, NC 27709, (919) 541–1307.

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. 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing; 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences, National Institutes of Health, HHS)

Dated: March 6, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–6019 Filed 3–10–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From the Requirements of Title 49 Code of Federal Regulations Part 236

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroads have petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR Part 236 as detailed below.

Docket No. FRA–2000–6812.

Applicant: Union Pacific Railroad Company, Mr. Phil Abaray, Chief Engineer—Signals, 1416 Dodge Street, Room 1000, Omaha, Nebraska 68179–1000.

The Union Pacific Railroad Company (UP) seeks relief from the requirements of the Rules, Standard and Instructions, 49 CFR, Part 236, § 236.110, to the extent that each test record, need not be signed by the person making the test, in lieu of implementing an electronic record system (''STARS'') to record and maintain signal records of tests. The ''STARS'' electronic record system will provide integrity and several levels of security to uniquely identify a person as the author of a specific record, and once the test record is entered, verified, and saved it cannot be modified. Initially, ''STARS'' will not be inclusive of all Part 236 records of tests, and future development may result in the addition of subsequent test records. This petition is associated with UP's request to utilize the ''STARS'' electronic record system for recording and maintaining applicable inspection and test records as defined in 49 CFR, Part 234, subject to approval by the Associate Administrator for Safety, as required by Section 234.273.

Applicant's justification for relief: To provide more flexibility for Federal and State Inspectors who are required to check and inspect records of tests over the UP system.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and contain a concise statement of the interest of the Protestant in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

All communications concerning this proceeding should be identified by the docket number and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, Room PI–401, Washington, D.C. 20590–0001. Communications received within 45 days of the date of this notice will be considered by the FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9:00 a.m.–5:00 p.m.) at DOT Central Docket Management Facility, Room PI–401 (Plaza Level), 400 Seventh Street, S.W., Washington, D.C. 20590–0001. All documents in the public docket are also available for inspection and copying on the internet at the docket facility's Web site at *http://dms.dot.gov.*

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, D.C. on March 8, 2000.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 00–6075 Filed 3–10–00; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Reports, Forms and Record Keeping Requirements—Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (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 collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on October 27, 1999 [64 FR 57924–57925].

DATES: Comments must be submitted on or before April 12, 2000.

FOR FURTHER INFORMATION CONTACT: Sharon Vaughn at the National Highway Traffic Safety Administration, Office of Chief Counsel (NCC–30), 202–366–1834, 400 Seventh Street, SW, Room 5219, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: Designation of Agent.

OMB Number: 2127–0040.

Type of Request: Extension of a currently approved collection.

Abstract: This collection of information applies to motor vehicle and motor vehicle equipment manufacturers located outside of the United States (foreign manufacturers). Every manufacturer offering a motor vehicle or item of motor vehicle equipment for importation into the United States is statutorily required to designate in writing an agent upon whom service of all administrative and judicial processes, notices, orders, decisions and requirements may be made for and on behalf of the manufacturer.

Affected Public: Foreign manufacturers of motor vehicles and motor vehicle equipment located

outside of the United States, which are importing these items into the United States.

Estimated Total Annual Burden: 70.

Address: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street, NW, Washington, D.C. 20503, Attention: NHTSA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Departments estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued in Washington, D.C., on March 3, 2000.

Herman L. Simms,

Associate Administrator for Administration.

[FR Doc. 00–6060 Filed 3–10–00; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2000–6992; Notice 1]

Blue Bird Body Company; Receipt of Application for Decision of Inconsequential Noncompliance

Blue Bird Body Company (Blue Bird), 402 N. Camellia Blvd., P.O. Box 937, Fort Valley, Georgia 31030, has determined that 25,839 model TC/2000 Conventional and MiniBird school buses do not meet the 60 percent tensile strength requirements of 49 CFR 571.221, Federal Motor Vehicle Safety Standard (FMVSS) No. 221, ''School bus Body Joint Strength,'' and has filed an appropriate report pursuant to 49 CFR part 573, ''Defect and Noncompliance Reports.'' Blue Bird has also applied to be exempted from the notification and remedy requirements of 49 U.S.C. Chapter 301—''Motor Vehicle Safety'' on the basis that the noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of an application is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgement concerning the merits of the application.

FMVSS No. 221, S5 requires that when tested in accordance with the test procedures of S6., each body panel joint shall be capable of holding the body panel to the member to which it is joined when subjected to a force of 60 percent of the tensile strength of the weakest joined body panel determined pursuant to S6.2.

Blue Bird has notified the National Highway Traffic Safety Administration that the subject school buses were manufactured at their Mount Pleasant, Iowa, plant between November 1, 1993 through December 6, 1999. The noncompliance involves a failure to meet the 60 percent joint strength requirements on certain 8 inch segments of the exterior roof joints. Agency compliance tests, performed by General Testing Laboratories (GTL), determined that the tensile strength of the roof joint tested was 54.9 percent of the required load. Blue Bird stated that a variance in rivet spacing in the vicinity of the roof stringers occurred as some assembly workers at this plant without authorization, departed from manufacturing procedures of using the pre-punched holes in the roof bows as drill guides to control fastener spacing and, as a result, there are fewer than the six (6) rivets required by Blue Bird in certain eight (8) inch segments of the roof joints in the affected buses.

Blue Bird supported its application for inconsequential noncompliance with the following:

I. Overall Joint and Body Strength

The stated purpose of the School Bus Body Joint Strength Standard No. 221 is ''* * * to reduce deaths and injuries resulting from the structural collapse of school bus bodies during crashes.'' In Docket No. 7334: Notice 1, **Federal Register**, Vol. 39, No. 15—Tuesday, January 22, 1974, the agency observed that FMVSS 221 ''derives from section 5.6 of the Vehicle Equipment Safety Commission's Regulation VESC–6 * * * '' Docket No. 73–34 went on to state that,

> ''In order to bring the basic VESC—6 requirement into a form that satisfied the legal and operational requirements of the motor vehicle safety standards, the agency has included a test procedure to make possible an objective determination of a joint's strength.''

The selected test procedure established the use of a twelve (12) inch wide test specimen necked down to eight (8) inches at the center, such that the strength of the joint is evaluated by tensile testing of a randomly selected eight (8) inch long segment of the joint being evaluated. Later in the docket NHTSA outlined its regulatory objective:

> ''The agency therefore anticipates that the procedure will permit the overall strength of a bus's joints to be determined without resorting to an unduly burdensome amount of testing.''

Blue Bird concludes from the above discussion that the strength of the overall joint and consequently the strength of the overall bus body is the safety objective of standard 221 and that the measured performance of an eight (8)-inch long joint segment is merely a procedure chosen to evaluate the overall joint in a practical manner.

During a December 2, 1999 Blue Bird personnel visit to the GTL facility in Leedstown, VA, the 1998 Blue Bird test bus was inspected and photographed. Paper tape was secured at each roof joint and the location of each rivet in each joint was marked on the tape. Blue Bird thereafter analyzed each tape and the length of each joint and the total number of fasteners in each joint were determined. On average, the seven (7) roof joints on the test bus had 6.76 rivets per eight (8) inches of length. Based on the reported test results of 6220 pounds for the roof joint tested that had five (5) rivets, the strength per rivet is 1244 pounds per rivet, and for the average joint with 6.76 rivets, this equates to a strength of 8409 pounds per eight (8) inch length which far exceeds the required strength of 6788 pounds. This 8409 pound strength equates to a 73.3 percent efficiency as compared to the 60 percent required by Standard 221.

Similarly, the worst case roof joint on the test bus had 6.62 rivets per eight (8) inches of length, which equates in a similar manner to 8239 pounds per eight (8) inch length for an efficiency of 72.8 percent. Here again, this comfortably exceeds the 60 percent requirement of Standard 221.

This analysis shows that the overall strengths of the roof joints on the subject test bus not only meet—but comfortably exceed the strength performance requirements of FMVSS 221. Consequently, Blue Bird believes that the noncompliance of several small selected segments of these roof joints is not representative of actual, overall bus body strength performance and is inconsequential as it relates to motor vehicle safety.

II. Occupants Not Exposed to Roof Joints

In reviewing the regulatory history of FMVSS 221, Blue Bird notes that this rulemaking had a complementary purpose to minimize the likelihood of sharp edges of sheet metal being

produced by joint separations or gross body deformation in crashes. For interior panel joints it could be argued that the eight (8) inch joint segment length was also chosen to help accomplish this purpose. However, in a crash, vehicle occupants are not exposed to exterior joints like the roof joint in question, and the interior panel sheet metal concern would not be applicable. Also of importance is the fact that the few small segments of exterior roof joints believed to be in noncompliance are completely separated from the occupant compartment by headlining panels with joints in full compliance (71.3%) with FMVSS 221 requirements.

III. Interior Headlining Joint and Overall Bus Body Joint Strength

For school bus bodies, Blue Bird reiterates that the overall strength of the joints is of critical importance with regard to the purpose of Standard 221. Blue Bird notes and emphasizes that the GTL test results showed that the headlining joint performance was 71.3 percent vs. the 60 percent requirement. Extending the analysis in I above, if the strength of the entire body joint consisting of both the interior headlining joint and the exterior roof joint were to be analyzed together, the overall performance of the joint would be 62.4 percent, which exceeds the 60 percent requirement of FMVSS 221 and satisfies the stated purpose and safety objectives of the standard.

IV. The Remedy in this Case Could Result in Degradation and Leakage of Bus Body Panels

There is no safety need to require notification and remedy of the subject school buses to add additional fasteners. Blue Bird believes that in reality, a recall of the subject buses would be counterproductive to safety in that the resulting inconvenience to the owners/operators of the buses could disrupt the service they provide, resulting in the use of much less safe means of transportation.

Equally important, the only feasible remedy on completed buses is the addition of blind repair (pop type) rivets in the areas where there are less than six (6) rivets in each eight (8) inch segment. Blind rivets are susceptible to water leaks and the installation of these rivets could result in mechanical damage to the roof joint sealer and possible damage to the exterior body paint. Water leaks and/or possible corrosion could occur as a result of the mechanical damage done during drilling and rivet installation.

V. The Current Status of FMVSS 221 Indicates That Curved Joints Are Not a Safety Concern

The current version of FMVSS 221, which permitted optional early compliance as of November 5, 1998, provides an instructive insight into the agency's position with respect to curved joint testing. The November 1998 final rule (see Reference 3), in § S5.2.2, appears to exclude all curved and complex joints from the 60 percent strength. requirements of § S5.1.2.

While in a technical sense this revised Standard 221 does not apply to the September 1998 test bus, Blue Bird notes that (1) the GTL test occurred one year after the revised FMVSS 221 became optionally effective, and (2) the roofjoint tested in November 1999 by GTL was in fact a curved panel joint.

To Blue Bird, the thinking and intent of the agency to exclude all curved joints from the joint tensile strength requirements of revised Standard 221 was unambiguous, as borne out by the following statements from the rule's preamble:

''This rule excludes from the joint tensile strength requirement joints from which a test sample cannot be obtained because of the size of the joint or the curvature of the panels comprising the joint.''

''NHTSA recognizes that the curved shape of such joints poses difficulty in obtaining accurate test results. The application of force on a curved surface would cause the surface to flatten, thus misrepresenting the actual force loading on the panel.'' ''Since the agency is not aware of any data indicating that injuries have been caused disproportionately by curved joint separation, NHTSA believes that the potential costs and technical difficulty of testing curved joints more than outweigh any potential safety benefits.''

''Accordingly, NHTSA has decided that test specimens from joints with discrete fasteners will be taken from 305 mm (12 inch) segments (203 mm (8 inches) at the neck) of only flat body panels.''

''While curved, small and complex joints are excluded from the tensile test requirement because they cannot be accommodated on the test apparatus, they are nevertheless subject to the requirement in S5. 1.1 that no body panel, when joined to another body panel, shall have an unattached segment at the joint longer than 203 mm. (8 inches). Presumably rivets or other fasteners will be used. This requirement helps ensure that the joints will maintain their integrity in a crash.''

Based on the belief that the final rule excluded all curved joints, and for other reasons, Blue Bird first initiated an urgent meeting with NHTSA in early December 1998, then petitioned the agency in a December 16, 1998 letter to reconsider the final rule and thereafter attended a second meeting with NHTSA and other major school bus manufacturers in January 1999. In each instance, Blue Bird urged the agency to properly address the issue of curved joints, including properly defining them and/or showing side and end views of Figure I with tolerances. The meetings and petitions also pointed out other problems with the final rule. In Blue Bird's December 16, 1998 Petition for Reconsideration, the Company went so far as to provide the recommended regulatory text needed to properly amend the final rule. Even so, this final rule has been allowed to stand without corrective amendment or extension for approximately fifteen (15) months despite the objections, petitions and continued urging from the industry.

Until the standard properly defines what does or does not constitute a ''curved joint,'' the actual requirements that roof and ceiling joints must meet will continue to be unclear. By not taking action to correct or clarify the final rule, Blue Bird believes that the agency is saying that one rivet per eight inch segment is sufficiently safe for these joints, as well as other curved, complex and small joints, and is allowing school buses to be manufactured in this manner. Since no action has been forthcoming, we must conclude that curved joints, including roof and ceiling joints, do not constitute enough of a safety issue to warrant making corrections and/or clarifications to the final rule of Reference 3.

VI. There Have Been No Roof Joint Failures in the Field

Blue Bird has never had a field complaint regarding the strength of roof joints and is not aware of any accidents or crash tests which resulted in roof joint separations within the scope of the Standard. The NHTSA test bus from which the subject roof joint was obtained had other joints tested and all were found to be in full compliance with all FMVSS 221 requirements. Further, the same bus had previously been tested and found to be compliant with the agency's other school bus body construction standard, FMVSS 220—School Bus Roll Over Protection.

VII. Blue Bird's Corrective Actions Were Immediate on Learning of the Test Failure

Blue Bird responded quickly to the reported test failure. An internal review was initiated immediately and field inspection and analysis of vehicles in service was conducted to determine the potential scope of the reported test failure. A visit to the General Testing Laboratories facility in Leedstown, Virginia, to gather testing details and

related vehicle information was immediately requested and quickly accomplished. All production facilities were alerted of the situation so assembly procedures would be checked and any required corrective action taken.

The Company's internal review, field inspection and analysis showed that the departure from manufacturing procedures that resulted in the reported test failure was limited to Blue Bird's Midwest Plant in Mount Pleasant, Iowa, during the period beginning November 1, 1993 and ending when corrective action was implemented in early December 1999. All other plants reported ongoing conformance with assembly instructions, such that all such bus roof and other joints were manufactured in compliance with FMVSS 221 requirements.

Blue Bird Midwest initiated corrective procedures in its assembly processes immediately upon notification of the test failure. All units placed in assembly on or after December 6, 1999, have roof joint rivets spaced in conformance with assembly procedures to assure compliance with FMVSS 221 joint strength performance requirements. Further, once a determination of noncompliance was made, a stop delivery order was issued to insure that all units still in Blue Bird Midwest's possession and control were corrected prior to delivery to distributors.

Conclusion

The above facts and discussion have described a noncompliance that has been determined to exist on certain Blue Bird school buses. The Company does not in any way wish to discredit or minimize the performance requirements or test procedures of FMVSS 221 because of this noncompliance. Blue Bird takes full responsibility for the noncompliance that occurred and has explained how it occurred, why the noncompliance is not a safety problem and that corrective action to prevent future occurrences has been taken.

Blue Bird firmly believes that the noncompliance is inconsequential and in no way compromises the safety of the subject school buses and that the disruption of our customers and likely degradation of these buses by the indicated remedy is not in the public interest. For the reasons provided herein, Blue Bird respectfully requests that its petition for exemption be granted.

Interested persons are invited to submit written data, views, and arguments on the application of described above. Comments should refer to the docket number and be submitted to: U.S. Department of Transportation Docket Management, Room PL–401, 400 Seventh Street, SW, Washington, DC 20590. It is requested, but not required, that two copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date, will also be filed and will be considered to the extent possible. When the application is granted or denied, notice will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: April 12, 2000. (49 U.S.C. 30118 and 30120; delegations of authority at 49 CFR 1.50 and 501.8)

Issued on: March 8, 2000.

Stephen R. Kratzke,

Acting Associate Administrator for Safety Performance Standards.

[FR Doc. 00–6062 Filed 3–10–00; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

March 6, 2000.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before April 12, 2000 to be assured of consideration.

U.S. Customs Service (CUS)

OMB Number: 1515–0046.

Form Number: Customs Form 3485.

Type of Review: Extension.

Title: Lien Notice.

Description: The Lien Notice enables the carriers, cartmen, and similar businesses to notify Customs that a lien exists against an individual/business for non-payment of freight charges, *etc.,* so that Customs will not permit delivery of the merchandise from public stores or a bonded warehouse until the lien is satisfied or discharged.

Respondents: Business or other for-profit, Not-for-profit institutions.

Estimated Number of Respondents: 2,000.

Estimated Burden Hours Per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 8,497 hours.

OMB Number: 1515–0091.

Form Number: None.

Type of Review: Extension.

Title: Importers of Merchandise Subject to Actual Use Provisions.

Description: The Importers or Merchandise Subject to Actual Use Provision is part of the regulation which provides that certain items may be admitted duty-free such as farming implements, seed, potatoes, etc., providing the importer can prove these items were actually used as contemplated by law. The importer must maintain detailed records and furnish a statement of use.

Respondents: Business or other for-profit, Individuals or households, Not-for-profit institutions.

Estimated Number of Recordkeepers: 12,000.

Estimated Burden Hours Per Recordkeeper: 1 hour.

Frequency of Response: On occasion.

Estimated Total Recordkeeping Burden: 13,000 hours.

OMB Number: 1515–0093.

Form Number: Customs Form 300.

Type of Review: Extension.

Title: Bonded Warehouse Proprietor's Submission.

Description: Customs Form 300 is prepared by Bonded Warehouse Proprietor's submitted to the Customs Service annually. The document reflects all bonded merchandise entered, released, and manipulated, and includes beginning and ending inventories.

Respondents: Individuals or households, Business or other for-profit.

Estimated Number of Respondents: 1,800.

Estimated Burden Hours Per Respondent: 132 hours.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 36,000 hours.

OMB Number: 1515–0109.

Form Number: None.

Type of Review: Extension.

Title: Proof of Use Rates of Duty Dependent on Actual Use.

Description: The Proof of Use Rates of Duty Dependent on Actual Use declaration is needed to ensure Customs control over merchandise which is duty free. The declaration shows proof of use and must be submitted within 3 years of the date of entry or withdrawal for consumption.

Respondents: Business or other for-profit, Individuals or households, Not-for-profit institutions.

Estimated Number of Respondents: 10,500.

Estimated Burden Hours Per Respondent: 20 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 3,500 hours.

OMB Number: 1515–0135.
Form Number: None.
Type of Review: Extension.
Title: Required Records for Smelting and Refining Warehouses.
Description: Each manufacturer engaged in smelting or refining must file an annual statement showing any material change in the character of the metal-bearing materials used or changes in the method of smelting or refining. Also, the records must show the receipt and disposition of each shipment.
Respondents: Business or other for-profit, Not-for-profit institutions.
Estimated Number of Respondents: 15.
Estimated Burden Hours Per Respondent: 85 hours.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 156 hours.

OMB Number: 1515–0137.
Form Number: None.
Type of Review: Extension.
Title: Declaration of Persons Who Perform Repairs or Alterations.
Description: The Declaration of Persons Who Perform Repairs or Alterations.
Respondents: Business or other for-profit, Individuals or households, Not-for-profit institutions.
Estimated Number of Respondents: 10,236.
Estimated Burden Hours Per Respondent: 30 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 10,236 hours.

OMB Number: 1515–0154.
Form Number: Customs Form 339.
Type of Review: Extension.
Title: User Fees.
Description: The user Fees, Customs Form 339, information is necessary for Customs to effectively collect fees from private and commercial vessels, private aircraft, operators of commercial trucks, and passenger and freight railroad cars entering the United States and recipients of certain dutiable mail entries for certain official services.
Respondents: Business or other for-profit, Individuals or households, Not-for-profit institutions.
Estimated Number of Respondents: 60,000.
Estimated Burden Hours Per Respondent: 16 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 16,000 hours.

OMB Number: 1515–0163.
Form Number: None.
Type of Review: Extension.
Title: Country of Origin Marking Requirements for Containers or Holders.
Description: Containers or Holders imported into the United States destined for an ultimate purchaser must be marked with the English name of the country of origin at the time of importation into Customs territory.
Respondents: Business or other for-profit, Not-for-profit institutions.
Estimated Number of Respondents: 250.
Estimated Burden Hours Per Respondent: 15 seconds.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 41 hours.

Clearance Officer: J. Edgar Nichols (202) 927–1426, U.S. Customs Service, Printing and Records Management Branch, Ronald Reagan Building, 1300 Pennsylvania Avenue, N.W., Room 3.2.C, Washington, DC 20229.
OMB Reviewer: Alexander T. Hunt (202) 395–7860, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 00–6021 Filed 3–10–00; 8:45 am]

BILLING CODE 4820–02–U

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

March 6, 2000.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before April 12, 2000 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1347.
Regulation Project Number: FI–7–94 and FI–36–92 Final.
Type of Review: Extension.
Title: Arbitrage Restrictions on Tax-Exempt Bonds.
Description: The Code limits the ability of state and local government issuers of tax-exempt bonds to earn and/or keep arbitrage profits earned with bond proceeds. This regulation requires recordkeeping of certain interest rate hedges so that the hedges are taken into account in determining those profits.
Respondents: State, Local or Tribal Government.
Estimated Number of Respondents/Recordkeepers: 3,100.
Estimated Burden Hours Per Respondent/Recordkeeper: 14 hr., 34 min.
Frequency of Response: On occasion.
Estimated Total Reporting/Recordkeeping Burden: 42,050 hours.

Clearance Officer: Garrick Shear, Internal Revenue Service, Room 5244, 1111 Constitution Avenue, NW, Washington, DC 20224.
OMB Reviewer: Alexander T. Hunt, (202) 395–7860, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 00–6022 Filed 3–10–00; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Customs Service

Suspension of Operations and Development of the General Test Regarding the International Trade Prototype

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice announces that Customs is suspending operations and development of the general test regarding the International Trade Prototype (ITP) due to lack of funding. The ITP was most recently announced in the **Federal Register** on July 27, 1999. Upon prototype suspension, ITP participants must cease entering goods and transmitting data under ITP procedures. This notice identifies instructions to participants on procedures for processing outstanding prototype entries.

DATES: Suspension of the ITP will be effective as of April 12, 2000.

FOR FURTHER INFORMATION CONTACT: Comments regarding the suspension of this prototype should be directed to Daniel Buchanan, U.S. Customs Service at (617) 565–6236, or Pamela McGuyer, U.S. Customs Service at (202) 927–0279.

SUPPLEMENTARY INFORMATION:

Background

The ITP concept has been under consideration by both the U.S. Customs Service (USCS) and Her Majesty's Custom and Excise (HMCE) since 1996. The nucleus of this program is an extension of ideas developed in partnership with the trade community by various members of the Trans-Atlantic Team, primarily comprised of USCS and HMCE officers. The ITP concept also addressed issues raised by international traders, the World Customs Organization (WCO), the United Nations Conference on Trade and Development (UNCTAD), G–7 and other international organizations.

The concept was intended to simplify and standardize Customs processes and procedures in order to facilitate trade while maintaining effective and efficient control.

Additional information on the ITP has been published in the **Federal Register** (63 FR 68353 on December 31, 1997; 63 FR 30288 on June 3, 1998); and (64 FR 40643 on July 27, 1999).

This notice serves to inform the public that the ITP test announced in the aforementioned Notices is suspended due to lack of funding.

Procedures

The ITP system involves initiation of import clearance processing on the basis of an Inter-Customs Advice (ICA) message sent from the export customs authority to the import customs authority.

For all outstanding ITP U.S. import shipments for which an ICA message from HMCE has been received prior to the date of publication of this Notice, USCS will complete processing under ITP procedures. All processing for such shipments must be completed within 30 days following the date of publication of this Notice.

On or after the date of publication of this Notice, USCS will no longer process ICA messages for either U.S. exports or U.S. imports. Participants must revert to non-ITP processing for all cargo shipments.

Dated: March 8, 2000.

Robert J. McNamara,

Acting Assistant Commissioner, Office of Field Operations.

[FR Doc. 00–6114 Filed 3–10–00; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; Report of Amended Matching Program

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Department of Veterans Affairs (VA) intends to conduct a recurring computer program matching Social Security Administration (SSA) records with VA compensation, pension and dependency and indemnity compensation (DIC) records.

The goal of this match is to provide VA with information to identify those who are confined for a period exceeding 60 days due to a conviction for a felony or misdemeanor. VA has the obligation to reduce or suspend compensation, pension, and dependency and indemnity compensation benefit payments to veterans and VA beneficiaries on the 61st day following conviction and incarceration in a Federal, State, or local institution for a felony or misdemeanor. Veterans Benefits Administration also has the obligation to reduce educational assistance to any recipient who is incarcerated for a felony conviction.

VA plans to match records of VA beneficiaries with those reported by SSA as being incarcerated and to adjust their VA benefits accordingly. VA will use the SSA records provided in the match to update the master records of VA beneficiaries and to adjust their VA benefits, accordingly, if needed.

RECORDS TO BE MATCHED: The VA records involved in the match are the VA system of records, Compensation, Pension, Education and Rehabilitation Records—VA (58 VA 21/22) first published at 41 FR 9294, March 3, 1976 and last amended at 63 FR 37941 (July 14, 1998). SSA's system of records and corresponding routine uses allowing the release of records for this purpose are the Master Beneficiary Record, SSA/OSR, 09–60–0090, Routine Use Number 24; Supplemental Security Income Record, SSA/OSR, 09–60–0103, Routine Use Number 19; Master Files of Social Security Number (SSN) Holders and SSN Applications SSA/OSR, 09–60–0058, Routine Use Number 15 (sub-systems are also referred to as the Enumeration Verification System (EVS), the Alphident or the NUMIDENT), Prisoner Update Payment System (PUPS) and the Incarceration Report Control System (IRCS). For each aspect of this program, the EVS will be accessed. In accordance with Title 5 U.S.C. subsection 552a(o)(2) and (r), copies of the agreement are being sent to both Houses of Congress and to the Office of Management and Budget (OMB).

This notice is provided in accordance with the provisions of the Privacy Act of 1974 as amended by Public Law 100–503.

DATES: The match will start no sooner than April 12, 2000, and end not more than 18 months after the agreement is properly implemented by the parties. The involved agencies' Data Integrity Boards (DIB) may extend this match for 12 months provided the agencies certify to their DIBs within three months of the ending date of the original match that the matching program will be conducted without change and that the matching program has been conducted in compliance with the original matching program.

ADDRESSES: Interested individuals may submit written comments to the Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 1154, Washington, DC 20420. Comments will be available for public inspection at the above address in the Office of Regulations Management, Room 1158, between 8:00 a.m. and 4:30 p.m., Mondays through Fridays, except holidays.

FOR FURTHER INFORMATION CONTACT: Kathleen Grill (212), (202) 273–7234.

SUPPLEMENTARY INFORMATION: This information is required by Title 5 U.S.C. subsection 552a(e)(12), the Privacy Act of 1974. A copy of this notice has been provided to both Houses of Congress and OMB.

Approved: February 28, 2000.

Togo D. West, Jr.,

Secretary of Veterans Affairs.

[FR Doc. 00–6067 Filed 3–10–00; 8:45 am]

BILLING CODE 8320–01–U

Federal Register

Monday,
March 13, 2000

Part II

Department of Energy

48 CFR Chapter 9

Department of Energy Acquisition Regulation; Rewrite of Regulations Governing Management and Operating Contracts; Proposed Rule

DEPARTMENT OF ENERGY

48 CFR Chapter 9

RIN 1991–AB49

Department of Energy Acquisition Regulation; Rewrite of Regulations Governing Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) proposes to amend its Acquisition Regulation to streamline the policies, procedures, provisions and clauses that are applicable to its management and operating contracts. This rulemaking proposes to eliminate coverage that is obsolete or which duplicates the Federal Acquisition Regulation (FAR), and retain only that coverage which either implements or supplements the FAR for the award and administration of the Department's management and operating contracts. The rule also proposes the addition of four new clauses, and amendments to several existing clauses which will promote more uniform application of the Department's award and administration policies for management and operating contracts.

DATES: Written comments (see Section III., Public Comments) must be submitted no later than May 12, 2000.

ADDRESSES: Comments (3 copies) should be addressed to: John R. Bashista, Office of Procurement and Assistance Management, Office of Procurement and Assistance Policy (MA–51), Department of Energy, 1000 Independence Avenue SW., Washington, D.C. 20585.

FOR FURTHER INFORMATION CONTACT: John R. Bashista (202) 586–8192; e-mail john.bashista@pr.doe.gov; fax (202) 586–0545.

SUPPLEMENTARY INFORMATION:

I. Background
II. Section by Section Analysis
III. Public Comments
IV. Procedural Requirements
A. Review Under Executive Order 12866
B. Review Under Executive Order 12988
C. Review Under the Regulatory Flexibility Act
D. Review Under the Paperwork Reduction Act
E. Review Under the National Environmental Policy Act
F. Review Under Executive Order 12612
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act, 1999

I. Background

Over the past several years, DOE has achieved significant improvements in the way it conducts business with its management and operating (M&O) contractors. Contract management policies and practices have been strengthened and new processes implemented throughout the Department complex. In its report entitled ''Making Contracting Work Better and Cost Less,'' dated February 1994, the DOE Contract Reform Team recommended a number of changes for improving the Department's acquisition system. New policies were implemented in the Department of Energy Acquisition Regulation (DEAR) to provide for a more uniform contract management approach in the award and administration of the Department's major contracts.

The Department's Office of Procurement and Assistance Management recently completed a review of additional policies and procedures which had been in place for decades. These policies had been developed over many years to provide contract terms and conditions applicable to the unique M&O contracting environment. Further, these policies implement and supplement Subpart 17.6 of the FAR. The purpose of the review was to determine whether the Department's unique regulatory coverage for M&O contracts is still necessary, and if so, what improvements are required to maintain the credibility of the system.

In general, the conclusion of the review was that DEAR Part 970 should be retained and that most of the Department's procurement regulations pertaining to the award and administration of its M&O contracts implement statutory, regulatory or current DOE policy requirements that are not addressed in other Federal regulations. However, the review also concluded that certain policy and procedural requirements should be eliminated, and that several contract clauses are considered unnecessary or redundant of coverage already prescribed in the FAR. Notable recommendations include: (1) Developing guidance and establishing an internal control system to better manage deviations from or modifications to regulatorily prescribed clauses while ensuring that the flexibility exists to do so when necessary; (2) eliminating most of the DOE cost principles that are used for determining the allowability of costs under M&O contracts as they are largely redundant of the cost principles set forth in the FAR; (3) clarifying the applicability of the Uniform Contract Format for M&O contracts pursuant to FAR requirements; (4) clarifying the applicability of FAR provisions, and developing a clause matrix to be used by DOE's contracting professionals as the primary source of guidance for determining the applicability of FAR and DEAR clauses to M&O contracts; and (5) codifying commonly used, but unprescribed, terms and conditions unique to M&O contracts. Implementation of the recommendations resulting from the review will be accomplished through the issuance of internal Departmental guidance, as well as through amendment of the DEAR.

This rule proposes to rewrite DEAR Part 970, in its entirety, to streamline the policies, procedures, provisions and clauses that are applicable to the Department's M&O contracts. The rule proposes to eliminate coverage that is obsolete or that unnecessarily duplicates coverage contained in the FAR. The rule also proposes updates and revisions to the prescriptions and text of certain clauses that will provide greater flexibility for DOE contracting personnel to make administrative modifications to the text of these clauses and to eliminate the need for commonly used deviations to such clauses. Four new clauses are also proposed for inclusion in the DEAR. The new clauses will prescribe uniform Departmental policies concerning: (1) Cooperation between the Department and its contractors in disseminating information to the public; (2) technical direction provided to contractors by a designated Contracting Officer's Representative; (3) collaborating to identify, evaluate, and institutionalize processes that will improve the effectiveness or efficiency of any aspect of contract performance, and collaboration regarding such improvements with the Department and other major site and facility management contractors; (4) implementation of FAR 35.017 regarding the establishment, use, review, and termination of Federally Funded Research and Development Centers which are sponsored by the Department; and (5) outreach to the local communities in which DOE conducts business.

Moreover, it is proposed that Part 970 be reorganized and renumbered so that the coverage corresponds, to the extent practicable, with the FAR Part, subpart, section, and subsection(s) being implemented or supplemented, as appropriate, in Part 970. Accordingly, technical and conforming amendments to DEAR Part 970 and other DEAR Parts are also proposed.

A separate rulemaking will be issued to implement certain recommendations concerning the amendment or removal

of certain DEAR Part 970 cost principles and related provisions and clause. It is anticipated that the final rules for both proposed rulemakings will be issued concurrently.

II. Section by Section Analysis

1. Several sections of Parts 901 through 952 are amended to revise cross-references to coverage that is contained in Part 970 to conform with the new Part 970 numbering system proposed in this rule.

2. Section 902.200 is amended by correcting paragraph citations, and adding a sentence that authorizes the contracting officer to include additional definitions to those contained in the prescribed clause.

3. Part 903 is amended by adding subpart 903.9 to relocate and consolidate coverage currently contained in subpart 922.71 and section 970.2274. New subpart 903.9 will include new section 903.902, which provides a cross-reference to the definition for Contractor which is contained in 10 CFR 708.2, and which is specific to DOE's Employee Protection Program.

4. Subpart 904.72 is added to prescribe a uniform Departmental policy regarding the release of unclassified information relating to M&O contracts to the public and the news media.

5. Section 911.604 is amended to revise the prescription for the use of the clauses at 48 CFR 952.211–70 and 48 CFR 952.211–71 to conform to changes proposed to 48 CFR 970.5204–33.

6. Subsection 915.408–70 is added to prescribe the use of a new clause at 48 CFR 952.215–70, Key Personnel. The new clause will accommodate both M&O and other than M&O contracts, thus replacing the two clauses currently prescribed at 48 CFR 952.235–70 (for other than M&O contracts) and 48 CFR 970.5204–42 (for M&O contracts).

7. Section 917.600 is amended to clarify the scope of Subpart 917.6.

8. Section 917.601 is amended to revise the definition of performance-based contracting to cross-reference the definition of the term that is already contained in the FAR.

9. Section 917.602 is amended to add a new paragraph (a), which contains certain text that is currently contained in section 970.0000 that implements FAR 17.602.

10. Section 917.604 is removed as unnecessary.

11. Section 917.605 is removed and the coverage is relocated to proposed new subsection 970.1706–1(c) consistent with the reorganization and renumbering of Part 970.

12. Subpart 922.71 is removed due to amendments addressed in paragraph 3.

13. Section 927.303 is amended by revising paragraph (a) to prescribe the use of the clauses at 952.227–11 and 952.227–13 for M&O contracts pursuant to the removal of sections 970.5204–71 and 970.5204–72 from Part 970 proposed in this rule. Proposed new Alternate I to the clause at 952.227–11, and proposed new Alternate I for the clause at 952.227–13 contain, verbatim, the text currently in 970.5204–71 and 970.5204–72, respectively.

14. Section 935.070 is removed due to the amendments addressed in paragraph 6.

15. Subpart 942.2 is added to prescribe uniform DOE policy regarding technical direction that is provided to contractors by a designated Contracting Officer's Representative.

16. Subpart 947.70 is added to incorporate guidance in the DEAR regarding contractor foreign travel and to add a prescription for the use of the clause that is currently contained in section 952.247–70, Foreign Travel. Currently, there is no policy section in the regulation to prescribe the basis and use of the existing clause.

17. Section 952.203–70 is added to accommodate the proposed redesignation of section 970.5204–59 as section 952.203–70.

18. Section 952.204–75 is added to prescribe a uniform clause pertaining to the dissemination of unclassified information relating to M&O contracts to the public and the news media (see paragraph 4.).

19. Section 952.215–70 is added to provide for a single clause which will accommodate M&O and other than M&O contracts (see paragraph 6.).

20. Section 952.222–70 is removed due to amendments addressed in paragraph 3.

21. Section 952.227–11 is amended by revising the prescription and clause date and adding an Alternate I to provide a single clause for M&O and other than M&O contracts (see paragraph 13.).

22. Section 952.227–13 is amended by revising the prescription and clause date and adding an Alternate I to provide a single clause for M&O and other than M&O contracts (see paragraph 13.).

23. Section 952.242–70 is added to prescribe a uniform clause pertaining to Contracting Officer's Representative authorities and limitations in providing technical direction to DOE contractors (see paragraph 15.).

24. Section 952.247–70 is amended by revising the prescription in the preface to the clause pursuant to the addition of new Subpart 947.70 (see paragraph 16.).

25. Section 952.250–70 is amended to revise an incorrect clause reference in paragraph (h) of the clause.

26. The table below provides a crosswalk reflecting, by section, the proposed reorganization and redesignation of Part 970, and descriptions of the amendments being proposed. The Department is seeking comments on only those changes marked with an ''✔'' in the comments column. The ''Remarks'' column of the table explains the specific changes to the section. Comments are not solicited on the amendments addressed in the table which are not marked with an ''✔'' since they are technical and conforming changes only.

PART 970 REWRITE

New citation	Current citation	Title	Remarks	Comments
970.01	N/A	Management and Operating Contract Regulatory System.	Subpart number and title are added for organizational purposes.	✔
970.0100	970.0000	Scope of Part	970.0000 is redesignated as 970.0100 and the text revised to clarify the scope of Part 970.	✔
N/A	970.0001	[Reserved]	Section is removed as unnecessary.	✔
970.0103	N/A	Publication and Codification	Section number, title and text are added. The new coverage in this section supplements FAR 1.303 to describe the new organization and numbering system for Part 970.	✔

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.03	970.03 [Note: Current 970.03 is reserved].	Improper Business Practices and Personal Conflicts of Interest.	Subpart number and title are added for organizational purposes.	✔
970.0309	970.2274	Whistleblower Protection of Contractor Employees.	970.2274 is redesignated as 970.0309..	
970.0309–1	970.2274–1(a)	Applicability	Section is added to prescribe the applicability of the coverage contained in new subpart 903.9, as proposed in this rule, to management and operating contracts. New subpart 903.9 contains coverage currently contained in sections 970.2274–1 and 970.2274–2 which is proposed for relocation to subpart 903.9.	✔
970.0370	970.0901 (Title)	Management Controls and Improvements	970.0901 (Title only) is redesignated as 970.0370 and amended. The new subsections of this section contain the text of 970.0901 as described below.	
970.0370–1	970.0901(a), (b), and (c).	Policy	970.0901, paragraphs (a), (b) and (c), is redesignated as 970.0370–1. The subsection is also amended to add new paragraph (d) to implement new DOE policy to facilitate collaboration of improvements in any aspect of performance among the contractor, DOE, and other major facility contractors.	✔
970.0370–2	N/A	Contract Clause	Subsection is added to prescribe the use of the existing clause at 970.5204–20, Management Controls. Although use of the clause is prescribed in the preface to the clause itself, there is no coverage in the policy section of the regulation to prescribe the basis and use of the clause. The subsection also prescribes the use of new clause 970.5203–2, Performance Improvement and Collaboration, to implement the policy proposed at new 970.0370–1(d).	✔
970.0371	970.2272 (Title)	Conduct of Employees of DOE Management and Operating Contractors.	970.2272 (Title only) is redesignated as 970.0371 and modified to remove the term ''Consultants.'' The subsections of this section contain the text of 970.2272, as amended (see following subsections for summary of amendments).	✔
970.0371–1	970.2272(a)	Scope of Section	Contains coverage codified at 970.2272, paragraph (a).	✔
970.0371–2	970.2272(b)(1)	Applicability	Contains coverage codified at 970.2272, subparagraph (b)(1). The text is revised to remove the prescription for the use of DEAR clauses 970.5204–27(a) and (b) which are proposed for removal.	✔
970.0371–3	N/A	Definition	Subsection is added to clarify the definition of ''Employee'' for the purposes of the policies contained in section 970.0371.	✔
970.0371–4	970.2272(c)	Gratuities	Contains coverage codified at 970.2272, paragraph (c). Text is revised to remove the reference to ''41 U.S.C. 51–54'' and to substitute in lieu thereof a reference to ''FAR 3.502.''	✔
970.0371–5	970.2272(d)	Use of Privileged Information	Contains coverage codified at 970.2272, paragraph (d).	✔
970.0371–6	970.2272(g)	Incompatibility Between Regular Duties and Private Interests.	Contains coverage codified at 970.2272, paragraph (g).	✔
970.0371–7	970.2272(e)	Outside Employment of Contractor Employees.	Contains coverage codified at 970.2272, paragraph (e).	✔

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.0371–8	970.2272(f)	Employee Disclosure Concerning Other Employment Service.	Contains coverage codified at 970.2272, paragraph (f). Title and text are revised to prescribe a requirement for a disclosure (previously required by 970.5204–27) in lieu of an information statement.	✔
970.0371–9	970.2272(b)(2) and (3).	Contract Clause	Contains coverage codified at 970.2272, subparagraph (b)(2). Prescription at 970.2272(b)(3) is removed.	✔
970.04	970.04	Administrative Matters	No change.	
970.0404	970.0404	Safeguarding Classified Information	No change.	
970.0404–1	970.0404–1	Definitions	No change.	
970.0404–2	970.0404–2	General	No change.	
970.0404–3	970.0404–3 (a) and (b) 970.0404–4 (d).	Responsibilities of Contracting Officers	970.0404–3, paragraphs (a) and (b) are unchanged. 970.0404–4, paragraph (d) is redesignated as 970.0404–3, paragraph (c).	
970.0404–4	970.0404–4 (a), (b) and (c).	Solicitation Provision and Contract Clauses.	Subsection is amended to revise the title, and to: (a) remove the redundant prescription for the use of several DEAR 952 clauses which are already prescribed in 904.404 and 904.7103; and (b) substitute a cross-reference to these sections. The prescription for the clause entitled Counterintelligence is retained.	✔
N/A	970.0406	[Reserved]	Section is removed	
970.0407	N/A	Contractor Records Retention	Section number and title are added for organizational purposes. The subsections of this section contain coverage relocated from 970.0407.	
970.0407–1	970.0407	Applicability	970.0407 is redesignated as 970.0407–1 and the title revised to conform with related FAR coverage.	
970.0407–1–1	970.0407–1	Alternate Retention Schedules	970.0407–1 is redesignated as 970.0407–1–1and revised to update the DOE directive reference.	
970.0407–1–2	970.0407–2	Access to and Ownership of Records	970.0407–2 is redesignated as 970.0407–1–2.	
970.0407–1–3	970.0407–3	Contract Clause	970.0407–3 is redesignated as 970.0407–1–3.	
970.0470	970.0470	Department of Energy Directives	No change.	
970.0470–1	970.0470–1	General	Subsection is revised to prescribe DOE policy pertaining to requirements addressed in paragraphs (a) and (c) of the clause at 970.5204–78, Laws, Regulations and DOE Directives. Current coverage addresses only requirements addressed in paragraph (b) of the clause.	✔
970.0470–2	970.0470–2	Contract Clause	No change.	
970.08	970.08	Required Sources of Supplies and Services.	No change	
970.0801	970.0801 (Title)	Excess Personal Property	No change (Title only).	
970.0801–1	970.0801 (Text)	Policy	Section and title are added. Contains text of coverage currently codified at 970.0801.	
970.0808	N/A	Acquisition of Printing.	Section number and title are added for organizational purposes. Currently, there is no coverage in the policy section of the regulation to prescribe the basis and use of the clause entitled ''Printing.''.	
970.0808–1	N/A	Scope of Section	Section number and title are added for organizational purposes (see 970.0808 above).	
970.0808–2	N/A	Policy	Section number and title are added for organizational purposes (see 970.0808 above).	
970.0808–3	N/A	Contract Clause	Section number and title are added (see 970.0808 above).	
970.09	970.09	Contractor Qualifications	No change.	

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.0905	970.0905	Organizational Conflicts of Interest	No change.	
970.0970	N/A	Performance Guarantees	Section number and title are added for organizational purposes.	
970.0970–1	970.0902(a), (b) and (c).	Determination of Responsibility	970.0902, paragraphs (a), (b) and (c) are redesignated as 970.0970–1.	
970.0970–2	970.0902(d)	Solicitation Provision	970.0902, paragraph (d), is redesignated as 970.0970–2.	
970.11	970.10	Describing Agency Needs	970.10 is redesignated as 1970.11.	
970.1100	N/A	Policy	Section number and title are added for organizational purposes.	
970.11.00–1	970.1001	Performance-based Contracting	970.1001 is redesignated as 970.1100–1.	
970.11.00–2	970.1002	Additional Considerations	970.1002 is redesignated as 970.1100–2.	
970.15	970.15	Contracting by Negotiation	No change.	
970.1504	N/A	Contract Pricing	Section number and title are added for organizational purposes.	
970.1504–1	N/A	Price Analysis	Subsection number and title are added for organizational purposes.	
970.1504–1–1	970.15404–4	Fees for Management and Operating Contracts.	970.15404–4 is redesignated as 970.1504–1–1.	
970.1504–1–2	970.15404–4–1	Fee Policy	970.15404–4–1 is redesignated as 970.1504–1–2.	
970.1504–1–3	970.15404–4–2	Special Considerations: Laboratory Management and Operation.	970.15404–4–2 is redesignated as 970.1504–1–3.	
970.1504–1–4	970.15404–4–3	Types of Contracts and Fee Arrangements.	970.15404–4–3 is redesignated as 970.1504–1–4.	
970.1504–1–5	970.15404–4–4	General Considerations and Techniques for Determining Fixed Fees.	970.15404–4–4 is redesignated as 970.1504–1–5.	
970.1504–1–6	970.15404–4–5	Calculating Fixed Fee	970.15404–4–5 is redesignated as 970.1504–1–6.	
970.1504–1–7	970.15404–4–6	Fee Base	970.15404–4–6 is redesignated as 970.1504–1–7.	
970.1504–1–8	970.15404–4–7	Special Equipment Purchases	970.15404–4–7 is redesignated as 970.1504–1–8.	
970.1504–1–9	970.15404–4–8	Special Considerations: Cost-plus-award-fee.	970.15404–4–8 is redesignated as 970.1504–1–9.	
970.1504–1–10	970.15404–4–9	Special Considerations: Fee Limitations	970.15404–4–9 is redesignated as 970.1504–1–10.	
970.1504–1–11	970.15404–4–10	Documentation	970.15404–4–10 is redesignated as 970.1504–1–11.	
970.1504–2	970.15405	Price Negotiation	970.15405 is redesignated as 970.1504–2.	
970.1504–3	N/A	Documentation	Subsection number and title are added for organizational purposes.	
970.1504–3–1	970.15406–2	Cost or Pricing Data	970.15406–2 is redesignated as 970.1504–3–1.	
970.1504–4	N/A	Special Cost or Pricing Areas	Subsection number and title are added for organizational purposes.	
970.1504–4–1	970.15407–2	Make-Or-Buy Plans	970.15407–2 is redesignated as 970.1504–4–1.	
970.1504–4–2	970.15407–2–1	Policy	970.15407–2–1 is redesignated as 970.1504–4–2.	

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.1504–4–3	970.15407–2–2	Requirements	970.15407–2–2 is redesignated as 970.1504–4–3. The section is also amended in paragraph (a) to specifically assign to the Head of the Contracting Activity (HCA) the responsibility for ensuring that program specific make-or-buy criteria are developed and provided to the contractor for use in its make-or-buy plan administration activities for the facility, site, or specific program, as appropriate. It is recognized that the HCA must rely on program, technical, and business specialists within the agency for the actual development of the program specific make-or-buy criteria so that the criteria appropriately reflect program considerations applicable to the contractor's make-or-buy decisions. The section also is being amended by adding language recognizing the collaboration needed to develop effective program specific make-or-buy criteria.	✔
970.1504–5	970.15404–4–11, 970.15407–2–3.	Solicitation Provision and Contract Clauses.	970.15404–11 is redesignated as 970.1504–5, paragraphs (a), (c), (d) and (e). 970.15407–2–3 is redesignated as 970.1504–5, paragraph (b), and amended to revise the clause prescription to authorize an administrative modification to the clause.	
970.17	970.17	Special Contracting Methods	No change.	
970.1706	N/A	Management and Operating Contracts	Section number and title are added for organizational purposes.	
970.1706–1	970.1702–1	Award, Renewal, and Extension	970.1702–1, paragraphs (a) and (b), is redesignated as 970.1706–1, paragraphs (a) and (b), and the title revised. Coverage contained at 917.605 is redesignated as 970.1706–1, paragraph (c).	
970.1706–2	970.1702–2	Contract Clause	970.1702–2 is redesignated as 970.1706–2 and the title revised. The subsection is further revised to: (a) remove the prescription for use of the provision at 970.5204–73 and the clause at 970.5204–74, which are proposed for removal under this rule; and (b) add supplemental coverage to FAR 17.208(g) to prescribe the use of FAR clause 52.217–9 in DOE M&O contracts..	✔
970.19	970.19	Small, Small Disadvantaged and Women-owned Small Business Concerns.	No change.	
970.1907	N/A	Subcontracting with Small Business, Small Dis-advantaged Business and Woman-owned Small Business Concerns.	Section number and title are added for organizational purposes.	
970.1907–1	970.1901	Subcontracting Plan Requirements	970.1901 is redesignated as 970.1907–1. Section is revised to remove paragraph (a) in favor of existing FAR coverage (FAR 19.708)..	✔
N/A	970.20	[Reserved]	Subpart is removed.	
970.22	970.22	Application of Labor Policies	No change.	
970.2200	N/A	Scope of Subpart	Section number and title are added for organizational purposes.	
970.2201	970.2201	Basic Labor Policies.	No change.	
970.2201–1	N/A	Labor Relations	Section number and title are added for organizational purposes.	
970.2201–1–1	970.2201(a)	General	Contains coverage codified at 970.2201, paragraph (a).	

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.2201–1–2	970.2201(b)	Policies	Contains coverage codified at 970.2201, paragraph (b).	
970.2201–1–3	970.2201(b)(5) (ii)	Contract Clause	Contains coverage codified at 970.2201, last sentence of paragraph (b)(5)(ii).	
970.2201–2	970.2275	Overtime Management	970.2275 is redesignated as 970.2201–2.	
970.2201–2–1	970.2275–1	Policy.	970.2275–1 is redesignated as 970.2201–2–1.	
970.2201–2–2	970.2275–2	Contract Clause	970.2275–2 is redesignated as 970.2201–2–2.	
N/A	970.2206	Walsh-Healey Public Contracts Act	Section is removed. Coverage to be re-issued as internal DOE guidance..	✔
970.2204	N/A	Labor Standards for Contracts Involving Construction.	Subpart number and title are added for organizational purposes. The subordinate sections/subsections of this Subpart contain coverage codified at 970.2273. These changes conform the numbering of supplemental DEAR coverage with related FAR coverage to the extent practicable.	
970.2204–1	N/A	Statutory and Regulatory Requirements	Section number and title are added for organizational purposes.	
970.2204–1–1	970.2273	Administrative Controls and Criteria for Application of the Davis-Bacon Act in Operational or Maintenance Activities.	Section 970.2273 is redesignated as 970.2204–1–1.	
970.2208	970.2208	Equal Employment Opportunity	No change.	
970.2210	970.2210	Service Contract Act	No change.	
970.2270	970.2270	Unemployment Compensation	No change.	
970.23	970.23	Environmental, Conservation, and Occupational Safety Programs.	No change.	
970.2303	970.2303	Hazardous Materials Identification and Material Safety.	No change.	
970.2303–1	970.2303–1	General	No change.	
970.2303–2	970.2303–2	Clauses	No change.	
970.2304	970.2304	Use of Recovered/Recycled Materials	No change.	
970.2304–1	970.2304–1	General	No change.	
970.2304–2	970.2304–2	Contract Clause	No change.	
970.2305	970.2305	Workplace Substance Abuse Programs—Management and Operating Contracts.	No change.	
970.2305–1	970.2305–1	General	No change.	
970.2305–2	970.2305–2	Applicability	No change.	
970.2305–3	970.2305–3	Definitions	No change.	
970.2305–4	970.2305–4	Solicitation Provision and Contract Clause.	No change.	
970.2306	970.2305–5	Suspension of Payments, Termination of Contract, and Debarment and Suspension Actions.	970.2305–5 is redesignated as 970.2306.	
N/A	970.25	Foreign Acquisition	Subpart is removed. The coverage codified at 970.2501 is relocated to new subsection 970.3701–1(see below).	
970.26	970.26	Other Socioeconomic Programs	No change.	
970.2670	970.2601 (Title)	Implementation of Section 3021 of the Energy Policy Act of 1992.	970.2601 (Title only) is redesignated as 970.2670. The text of 970.2601 is contained in new subsections 970.2670–1 and 970.2671–1,as noted below.	
970.2670–1	970.2601(a)	Requirements	Contains coverage codified at 970.2601, paragraph (a).	
970.2671	N/A	Diversity	Section number and title are added for organizational purposes.	
970.2671–1	970.2601(b)	Policy	Contains coverage codified at 970.2601, paragraph (b).	
970.2671–2	970.2602–2(b)	Contract Clause	Contains coverage codified at 970.2602–2, paragraph (b).	
970.2672	970.2602–1	Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.	970.2602–1 (Title only) is redesignated as 970.2672. The text of 970.2602–1 is contained in new subsections 970.2672–1 and 970.2672–2 as noted below.	
970.2672–1	970.2602–1(a)	Policy	Contains coverage codified at 970.2602–1, paragraph (a).	

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.2672–2	970.2602–1(b)	Requirements	Contains coverage codified at 970.2602–1, paragraph (b).	
970.2672–3	970.2602–2(a)	Contract Clause	Contains coverage codified at 970.2602–2, paragraph (a).	
970.2673	N/A	Regional Partnerships	New section number and title are added	✔
970.2673–1	N/A	Policy	New subsection added to prescribe DOE policy concerning the establishment of constructive business partnerships in geographic regions in which DOE conducts business.	✔
970.2673–2	N/A	Contract Clause	Prescribes the use of new contract clause 970.5226–3, Community Commitment.	✔
970.27	970.27	Patents, Data, and Copyrights	No change.	
970.2701	970.2701 (Title)	General	No change (Title)	
970.2701–1	970.2701 (Text)	Applicability	Contains the text of the coverage codified at 970.2701.	
970.2703	970.2702 (Title)	Patent Rights	970.2702 (Title only) is redesignated as 970.2703	
970.2703–1	970.2702 (Text)	Policy	Contains the text of the coverage codified at 970.2702.	
970.2703–2	970.2704	Contract Clauses	970.2704 is redesignated as 970.2703–2. Section is revised to remove existing coverage pursuant to amendments to 927.303, 952.227–11 and 952.227–13 proposed in this rule, and to add a cross-reference to 927.303.	✔
970.2704	N/A	Rights in Data	Section number and title are added for organizational purposes.	
970.2704–1	970.2705	General	970.2705 is redesignated as 970.2704–1 and the title revised.	
970.2704–2	970.2706	Procedures	970.2706 is redesignated as 970.2704–2 and the title revised.	
970.2704–3	970.2707	Contract Clauses	970.2707 is redesignated as 970.2704–3 and the title revised.	
970.2770	970.73	Technology Transfer	970.73 is redesignated as 970.2770.	
970.2770–1	970.7310	General	970.7310 is redesignated as 970.2770–1.	
970.2770–2	970.7320	Policy	970.7320 is redesignated as 970.2770–2.	
970.2770–3	970.2703	Technology Transfer and Data Rights	970.2703 is redesignated as 970.2770–3 and the title revised.	
970.2770–4	970.7330	Contract Clause	970.7330 is redesignated as 970.2770–4.	
970.28	970.28	Bonds and Insurance	No change.	
970.2803	N/A	Insurance	Section number and title are added for organizational purposes.	
970.2803–1	970.2271	Workers' Compensation Insurance	970.2271 is redesignated as 970.2803–1.	
970.2803–2	970.2830	Contract Clause	970.2830 is redesignated as 970.2803–2.	
970.29	970.29	Taxes	No change.	
970.2902	N/A	Federal Excise Taxes	Section number and title are added for organizational purposes.	
970.2902–1	970.2901	Exemptions from Federal Excise Taxes	970.2901 is redesignated as 970.2902–1.	
970.2903	N/A	State and Local Taxes	Section number and title are added for organizational purposes.	
970.2903–1	970.2902	Applicability of State and Local Taxes to the Government.	970.2902 is redesignated as 970.2903–1 and the title revised.	
970.2904	N/A	Contract Clauses	Section number and title are added for organizational purposes.	
970.2904–1	970.2903	Management and Operating Contracts	970.2903 is redesignated as 970.2904–1 and revised to add a prescription for the modification of the clause at 48 CFR 52.229–10 for management and operating contracts.	✔
970.30	970.30	Cost Accounting Standards	No change.	
970.3002	970.3001	CAS Program Requirements	970.3001 is redesignated as 970.3002 and the title revised.	
970.3002–1	970.3001–1	Applicability	970.3001–1 is redesignated as 970.3002–1.	

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.3002–2	970.3001–2	Limitations	970.3001–2 is redesignated as 970.3002–2.	
970.31	970.31	Contract Cost Principles and Procedures	No change.	
970.3100	970.3100	Scope of Subpart	The section title is revised.	
970.3100–1	970.3100–1	Definitions	No change.	
970.3100–2	970.3100–2	Responsibilities	No change.	
970.3101	N/A	Applicability	Section number and title are added for organizational purposes.	
970.3101–1	970.3100–3	Objectives	970.3100–3 is redesignated as 970.3101–1 and the title revised.	
970.3101–2	970.3101–6	Advance Agreements	970.3101–6 is redesignated as 970.3101–2 and the title revised.	
970.3101–3	970.3101–7	Cost Certification and Penalties on Unallowable Costs.	970.3101–7 is redesignated as 970.3101–3 and the title revised.	
970.3102	N/A	Contracts with Management and Operating Contractors.	Section number and title are added for organizational purposes.	
970.3102–1	970.3101	General	970.3101 is redesignated as 970.3102–1 and the title revised.	
970.3102–1–1	970.3101–1	Actual Cost Basis	970.3101–1 is redesignated as 970.3102–1–1.	
970.3102–1–2	970.3102	Application of Cost Principles	970.3102 is redesignated as 970.3102–1–2.	
970.3102–1–3	970.3101–3	General Basis for Reimbursement of Costs.	970.3101–3 is redesignated as 970.3102–1–3.	
970.3102–1–4	970.3101–4	Cost Determination Based on Audit	970.3101–4 is redesignated as 970.3102–1–4.	
970.3102–1–5	970.3101–5	Contractor's System of Accounting	970.3101–5 is redesignated as 970.3102–1–5.	
970.3102–2	970.3101–2	Direct and Indirect Costs	970.3101–2 is redesignated as 970.3102–2.	
970.3102–3	N/A	Selected Costs	Section number and title are added for organizational purposes.	
970.3102–3–1	970.3102–19	Public Relations and Advertising	970.3102–19 is redesignated as 970.3102–3–1.	
970.3102–3–2	970.3102–2	Compensation for Personal Services	970.3102–2 is redesignated as 970.3102–3–2.	
970.3102–3–3	970.3102–3	Cost of Money	970.3102–3 is redesignated as 970.3102–3–3.	
970.3102–3–4	970.3102–4	Depreciation	970.3102–4 is redesignated as 970.3102–3–4.	
970.3102–3–5	970.3102–5	Employee Morale, Health, Welfare, Food Service, and Dormitory Costs.	970.3102–5 is redesignated as 970.3102–3–5.	
970.3102–3–6	970.3102–21	Fines, Penalties, and Mischarging Costs	970.3102–21 is redesignated as 970.3102–3–6.	
970.3102–3–7	970.3102–7	Lobbying and Political Activity Costs	970.3102–7 is redesignated as 970.3102–3–7 and the title revised.	
970.3102–3–8	970.3102–1	General and Administrative Expenses	970.3102–1 is redesignated as 970.3102–3–8.	
970.3102–3–9	970.3102–12	Plant Reconversion Costs	970.3102–12 is redesignated as 970.3102–3–9.	
970.3102–3–10	970.3102–13	Precontract Costs	970.3102–13 is redesignated as 970.3102–3–10.	
970.3102–3–11	970.3102–9	Professional and Consultant Service Costs.	970.3102–9 is redesignated as 970.3102–3–11.	
970.3102–3–12	970.3102–16	Relocation Costs	970.3102–16 is redesignated as 970.3102–3–12.	
970.3102–3–13	970.3102–8	Trade, Business and Professional Activity Costs.	970.3102–8 is redesignated as 970.3102–3–13 and the title revised.	
970.3102–3–14	970.3102–17	Travel Costs	970.3102–17 is redesignated as 970.3102–3–14.	
970.3102–3–15	970.3102–20	Cost Related to Legal and Other Proceedings.	970.3102–20 is redesignated as 970.3102–3–15 and the title revised.	
970.3102–3–16	970.3102–10	Overtime, Shift, and Holiday Premiums	970.3102–10 is redesignated as 970.3102–3–16.	
970.3102–3–17	970.3102–11	Page Charges in Scientific Journals	970.3102–11 is redesignated as 970.3102–3–17.	
970.3102–3–18	970.3102–14	Preparatory and Make-Ready Costs	970.3102–14 is redesignated as 970.3102–3–18.	
970.3102–3–19	970.3102–6	Facilities (Plant and Equipment)	970.3102–6 is redesignated as 970.3102–3–19.	
970.3102–3–20	970.3102–18	Special Funds in the Construction Industry.	970.3102–18 is redesignated as 970.3102–3–20.	

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.3102–3–21	970.3102–15	Procurement: Subcontracts, Contractor-Affiliated Sources, and Leases.	970.3102–15 is redesignated as 970.3102–3–21.	
970.3170	970.3103	Contract Clauses	970.3103 is redesignated as 970.3170.	
970.32	970.32	Contract Financing	No change.	
970.3200	970.3201	Policy	970.3201 is redesignated as 970.3200 and the title revised.	
970.3200–1	970.3272(a) and (b)	Reduction or Suspension of Advance, Partial, or Progress Payments.	970.3272, paragraphs (a) and (b) are redesignated as 970.3200–1.	
970.3200–1–1	970.3272 (c)	Contract Clause	970.3272, paragraph (c) is redesignated as 970.3200–1–1.	
970.3204	970.3202 (Title)	Advance Payments	970.3202 (Title only) is redesignated as 970.3204.	
970.3204–1	970.3202 (Text)	Applicability	Contains the text of the coverage codified at 970.3204–1.	
970.3204–2	970.3171	Special Bank Account Agreement	970.3171 is redesignated as 970.3204–2.	
970.3204–3	970.3170	Contract Clause	970.3170 is redesignated as 970.3204–3 and the title revised.	
970.3270	N/A	Standard Financial Management Clauses	Section number and title are added for organizational purposes. The section consolidates the prescriptions for certain financial management clauses contained in subpart 970.52.which are now only prescribed in the preface of each clause.	✔
970.34	970.70	Major System Acquisition	970.70 is redesignated as 970.34 and the title revised	
970.3400	N/A	General Requirements	Section number and title are added for organizational purposes.	
970.3400–1	970.7000	Mission-oriented Solicitation	970.7000 is redesignated as 970.3400–1.	
970.35	N/A	Research and Development Contracting	Subpart number and title are added to prescribe uniform policies and procedures for DOE implementation of FAR 35.017.	✔
970.3500	N/A	Scope of Subpart	Section number and title are added to prescribe the scope of new Subpart 970.35.	✔
970.3501	N/A	Federally Funded Research and Development Centers.	Section number and title are added for organizational purposes.	✔
970.3501–1	N/A	Sponsoring Agreements	Subsection number and title are added to prescribe implementing requirements for FAR 35.017–1.	✔
970.3501–2	N/A	Using an FFRDC	Subsection number and title are added to prescribe implementing requirements for FAR 35.017–3.	✔
970.3501–3	N/A	Reviewing FFRDC's	Subsection number and title are added to prescribe implementing requirements for FAR 35.017–4.	✔
970.3501–4	N/A	Contract Clause	Subsection number and title are added to prescribe a uniform clause for implementing Subpart 970.35.	✔
970.36	970.36	Construction and Architect-Engineer Contracts.	No change.	
970.3605	N/A	Contract Clauses	Section number and title are added for organizational purposes.	
970.3605–1	970.5204–43	Other Contracts	970.5204–43 is redesignated as 970.3605–1and the title and text revised. The DOE clause is removed and a supplement to the FAR prescription for the use of FAR clause 52.236–8 is added..	✔
970.3605–2	970.3601	Special Construction Clause for Operating Contracts.	970.3601 is redesignated as 970.3605–2.	
970.37	N/A	Facilities Management Contracting	Subpart number and title are added for organizational purposes.	
970.3701	N/A	General	Section number and title are added for organizational purposes.	
970.3701–1	970.2501	Severance Payments for Foreign Nationals.	970.2501 is redesignated as 970.3701–1.	
970.3701–1–1	970.2501(a)	Waiver of Cost Allowability Provisions	Contains coverage codified at 970.2501, paragraph (a).	

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.3701–1–2	970.2501(b)	Solicitation Provision and Contract Clause.	Contains coverage codified at 970.2501, paragraph (b).	
970.3770	970.72	Facilities Management	970.72 is redesignated as 970.3770.	
970.3770–1	970.7201	Policy	970.7201 is redesignated as 970.3770–1 (except the clause prescription).	
970.3770–2	970.7201	Contract Clause	970.7201 (clause prescription) is redesignated as 970.3770–2.	
970.41	970.41	Acquisition of Utility Services	No change.	
970.4102	N/A	Acquiring Utility Services	Section number and title are added for organizational purposes.	
970.4102–1	970.4100	Policy	970.4100 is redesignated as 970.4102–1 and the title revised.	
970.43	N/A	Contract Modifications	Subpart number and title are added for organizational purposes.	
970.4302	N/A	Changes	Section number and title are added for organizational purposes.	
970.4302–1	N/A	Contract Clause	Section number and title are added for organizational purposes. Subsection prescribes the use of existing DEAR clause entitled ''Changes.'' Currently, there is no coverage in the policy section of the regulation to prescribe the basis and use of the clause.	
970.44	970.71	Management and Operating Contractor Purchasing.	970.71 is redesignated as 970.44.	
970.4400	N/A	Scope	Section number and title are added for organizational purposes.	
970.4401	N/A	Responsibilities	Section number and title are added for organizational purposes.	
970.4401–1	970.7102	General	970.7102 is redesignated as 970.4401–1 and the title and text revised. Paragraph (b)(4) is revised to provide for two alternative methods which may be used by the contracting officer for conducting periodic appraisals of the contractor's purchasing function.	✔
970.4401–2	970.7108	Review and Approval	970.7108 is redesignated as 970.4401–2.	
970.4401–3	970.7109	Advance Notification	970.7109 is redesignated as 970.4401–3.	
970.4402	N/A	Contractor Purchasing System	Section number and title are added for organizational purposes.	
970.4402–1	970.7101	Policy	970.7101 is redesignated as 970.4402–1 and the title revised.	
970.4402–2	970.7103	General Requirements	970.7103 is redesignated as 970.4402–2 and the title revised. The subsection is also revised to add new paragraph (d)(9) to emphasize the Department's policy regarding the maximization of opportunities for small, small disadvantaged, and woman-owned small business concerns in the performance of its major site and facility management contracts.	✔
970.4402–3	970.7105	Purchasing From Contractor-Affiliated Sources.	970.7105 is redesignated as 970.4402–3.	
970.4402–4	970.7110	Nuclear Material Transfers	970.7110 is redesignated as 970.4402–4.	
970.4403	N/A	Contract Clause	Section number and title are added for organizational purposes. Subsection prescribes the use of existing DEAR clause entitled ''Contractor Purchasing System.'' Currently, there is no coverage in the policy section of the regulation to prescribe the basis and use of the clause.	
970.45	970.45	Government Property	No change.	
970.4501	N/A	General	Section number and title are added for organizational purposes.	

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.4501–1	970.4501	Contract Clause	970.4501 is redesignated as 970.4501–1 and amended to authorize the contracting officer to list specific managerial personnel in paragraph (j) of the clause.	✔
970.49	970.49	Termination of Contracts	No change.	
970.4905	N/A	Contract Termination Clause	Section number and title are added for organizational purposes.	
970.4905–1	970.4901 and 970.4902.	Termination for Convenience and Default.	970.4901 and 970.4902 are redesignated as 970.4905–1 and the coverage revised to reflect the removal of the clause at 970.5204–45 in favor of FAR clause 52.249–6.	✔
970.50	N/A	Extraordinary Contractual Actions	Subpart number and title are added for organizational purposes.	
970.5070	970.2870 (Title)	Indemnification	970.2870 (Title only) is redesignated as 970.5070. The text of 970.2870 is contained in the subordinate subsections to this new section 970.5070 as noted below.	
970.5070–1	970.2870(a) and (b)	Scope and Applicability	Contains coverage codified at 970.2870, paragraphs (a) and (b).	
970.5070–2	970.2870(e)	General	Contains coverage codified at 970.2870, paragraph (e).	
970.5070–3	970.2870(c) and (d)	Contract Clauses	Contains coverage codified at 970.2870, paragraphs (c) and (d).	
N/A	970.51	Use of Government Sources by Contractors.	Subpart and subordinate sections are removed. Coverage to be reissued as internal DOE guidance.	✔
970.52	970.52	Solicitation Provisions and Contract Clauses for Management and Operating Contracts.	No change.	
970.5200	970.5201	Scope of Subpart	970.5201 is redesignated as 970.5200 and the title and text revised. The section is revised to clarify the use of the clauses prescribed in the Subpart in relation to the clauses prescribed in the FAR and in DEAR part 952.	✔
N/A	970.5203	Modifications and Notes to Far Clauses	Section is removed as the coverage contained in the subordinate sections are unnecessarily duplicative of FAR coverage.	✔
970.5201	970.5204	Text of Provisions and Clauses	970.5204 is redesignated as 970.5201 and the title is revised.	
970.5203–1	970.5204–20	Management Controls	970.5204–20 is redesignated as 970.5203–1. The text of paragraph (a) has been divided into paragraphs (a)(1) through (a)(4). The text of current paragraph (a) is unchanged except that paragraph (a)(2) contains new coverage to contractually implement the requirement that is already prescribed at current 970.0901(b)(10) (which is redesignated as 970.0371–1 in this rule), but which was not previously set forth in the clause. Paragraph (b) of the clause is unchanged.	✔
970.5203–2	N/A	Performance Improvement and Collaboration.	Subsection is added for proposed new clause. The new clauses implement new DOE policy to facilitate collaboration of improvements in any aspect of performance among the contractor, DOE, and other major facility contractors.	✔

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.5203–3	970.5204–12	Contractor's Organization	970.5204–12 is redesignated as 970.5203–3. The clause is further amended to remove alternate paragraph (c) of the current clause, and to add a new paragraph (d) to the standard clause to contractually implement the requirements set forth in proposed new section 970.0371.	✔
970.5204–1	970.5204–1	Counterintelligence	970.5204–1 is redesignated as 970.5204–1 and the title and text revised. The section is revised to remove paragraph (a), which is unnecessarily duplicative of the prescription at DEAR 904.404 for the use of certain DEAR clauses. The coverage in paragraph (b) of the section is retained with technical and conforming amendments	✔
970.5204–2	970.5204–78	Laws, Regulations, and DOE Directives	970.5204–78 is redesignated as 970.5204–2 and amended to add a new paragraph (d) to merge the substance of the clause at 970.5204–29 (which is proposed for removal), and to redesignated current paragraph (d) as paragraph (e). The clause is also revised to clarify applicability of requirements to subcontracts.	✔
970.5204–3	970.5204–79	Access to and Ownership of Records	970.5204–79 is redesignated as 970.5204–3. The clause is further amended in paragraph (b)(1) to recognize non-employee patient medical/health related records as property of the contractor, and to update a DOE directive reference in paragraph (f).	✔
970.5208–1	970.5204–19	Printing	970.5204–19 is redesignated as 970.5208–1 and the title revised.	
970.5209–1	970.5204–89	Requirement for Guarantee of Performance.	970.5204–89 is redesignated as 970.5209–1.	
970.5215–1	970.5204–54	Total Available Fee: Base Fee Amount and Performance Fee Amount.	970.5204–54 is redesignated as 970.5215–1.	
970.5215–2	970.5204–76	Make-or-Buy Plan	970.5204–76 is redesignated as 970.5215–2.	
970.5215–3	970.5204–86	Conditional Payment of Fee, Profit, or Incentives.	970.5204–86 is redesignated as 970.5215–3.	
970.5215–4	970.5204–87	Cost Reduction	970.5204–87 is redesignated as 970.5215–4.	
970.5215–5	970.5204–88	Limitation on Fee	970.5204–88 is redesignated as 970.5215–5.	
970.5222–1	970.5204–63	Collective Bargaining Agreements—Management and Operating Contracts.	970.5204–63 is redesignated as 970.5222–1.	
970.5222–2	970.5204–80	Overtime Management	970.5204–80 is redesignated as 970.5222–2.	
970.5223–1	970.5204–2	Integration of Environment, Safety and Health into Work Planning and Execution.	970.5204–2 is redesignated as 970.5223–1. The clause is also revised to clarify applicability of requirements to subcontracts.	
970.5223–2	970.5204–39	Acquisition and Use of Environmentally Preferable Products and Services.	970.5204–39 is redesignated as 970.5223–2. The clause is amended in paragraph (a)(1) to update the reference to the applicable Executive Order.	
970.5223–3	970.5204–57	Agreement Regarding Workplace Substance Abuse Programs at DOE Facilities.	970.5204–57 is redesignated as 970.5223–3.	
970.5223–4	970.5204–58	Workplace Substance Abuse Programs at DOE Sites.	970.5204–58 is redesignated as 970.5223–4.	
970.5226–1	970.5204–81	Diversity Plan	970.5204–81 is redesignated as 970.5226–1.	
970.5226–2	970.5204–77	Workforce Restructuring under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.	970.5204–77 is redesignated as 970.5226–2.	

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.5227–1	970.5204–82	Rights in Data–Facilities	970.5204–82 is redesignated as 970.5227–1.	
970.5227–2	970.5204–83	Rights in Data–Technology Transfer	970.5204–83 is redesignated as 970.5227–2.	
970.5227–3	970.5204–40	Technology Transfer Mission	970.5204–40 is redesignated as 970.5227–3.	
970.5228–1	970.5204–31	Insurance—Litigation and Claims	970.5204–31 is redesignated as 970.5228–1. The clause is also amended in paragraph (h) by removing the words ''including employees'' from the phrase ''contractor's liabilities to third persons'' for clarification and consistency with paragraphs (a) and (e)(2) of the clause.	✔
970.5229–1	970.5204–23	State and Local Taxes	970.5204–23 is redesignated as 970.5229–1, and the title revised.	
970.5231–1	970.5204–13	Allowable Costs and Fee (Management and Operating Contracts).	970.5204–13 is redesignated as 970.5231–1. Amended to convert the ''Notes'' to ''Alternates.'' The title is also amended to accommodate other types of fee (see Alternate I of the clause).	
970.5231–2	970.5204–17	Political Activity Cost Prohibition	970.5204–17 is redesignated as 970.5231–2.	
970.5231–3	970.5204–61	Cost Prohibitions Related to Legal and Other Proceedings.	970.5204–61 is redesignated as 970.5231–3.	
970.5231–4	970.5204–75	Preexisting Conditions	970.5204–75 is redesignated as 970.5231–4.	
970.5232–1	970.5204–85	Reduction or Suspension of Advance, Partial, or Progress Payments upon Finding of Substantial Evidence of Fraud.	970.5204–85 is redesignated as 970.5232–1.	
970.5232–2	970.5204–16	Payments and Advances	970.5204–16 is redesignated as 970.5232–2. The clause is amended to convert the ''Notes'' to ''Alternates.'' The clause is also amended in paragraphs (b) and (e) and in paragraph (a) of Alternate II to update and conform the clause with the recently amended DOE fee policy (64 FR 12220)—e.g., update certain terms pertaining to fee, negotiated fixed amounts, and other items specifically approved by the contracting officer.	✔
970.5232–3	970.5204–9	Accounts, Records, and Inspection	970.5204–9 is redesignated as 970.5232–3. The clause is amended to convert the ''Notes'' to ''Alternates.'' The clause is also amended in paragraph (a) to address ''negotiated fixed amounts'', which are authorized and frequently included in M&O contracts.	✔
970.5232–4	970.5204–15	Obligation of Funds	970.5204–15 is redesignated as 970.5232–4. Amended to convert the ''Notes'' to ''Alternates.''	
970.5235–1	N/A	Federally Funded Research and Development Center.	Section is added to add a uniform clause to implement the requirements prescribed at 970.35.	✔
970.5236–1	970.5204–38	Government Facility Subcontract Approval.	970.5204–38 is redesignated as 970.5236–1 and the title revised.	
970.5237–1	970.5204–84	Waiver of Limitations on Severance Payments to Foreign Nationals.	970.5204–84 is redesignated as 970.5237–1.	
970.5237–2	970.5204–60	Facilities Management	970.5204–60 is redesignated as 970.5237–2.	
970.5243–1	970.5204–11	Changes	970.5204–11 is redesignated as 970.5243–1.	

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
970.5244–1	970.5204–22	Contractor Purchasing System	970.5204–22 is redesignated as 970.5244–1. Paragraph (a) is revised to provide for two alternative methods which may be used by the contracting officer for conducting periodic appraisals of the contractor's purchasing function. The clause is also amended to add paragraph (x), which incorporates certain coverage from 970.5204–44, which is proposed for removal in this rule. Amended coverage addresses subcontract flowdown requirements which are not otherwise required by the terms and conditions of the prime contract.	✔
970.5245–1	970.5204–21	Property	970.5204–21 is redesignated as 970.5245–1. Amended to convert the ''Notes'' to ''Alternates.''	
N/A	970.5204–3	Buy American Act—Construction Materials.	Section is removed in favor of existing FAR coverage (FAR 52.225–5).	✔
N/A	970.5204–4	New Mexico Gross Receipts and Compensating Tax.	Section is removed. The prescription for modified text of FAR clause 52.229–10 is located at new 970.2904–1(a).	✔
N/A	970.5204–5	Disclosure of Information	Section is removed in favor of existing DEAR coverage (DEAR 952.204–72).	✔
N/A	970.5204–6	Nuclear Hazards Indemnity	Section is removed in favor of existing DEAR coverage (DEAR 952.250–70).	✔
N/A	970.5204–7	Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment.	Section is removed in favor of existing FAR coverage. (FAR 52.209–6).	✔
N/A	970.5204–8	Indemnity Assurance to Architect-Engineer or Supplier Prior to Operation of a Nuclear Facility.	Section is removed in favor of existing DEAR coverage (DEAR 952.250–70).	✔
N/A	970.5204–10	Foreign Ownership, Control, or Influence over Contractors (FOCI).	Section is removed in favor of existing DEAR coverage (DEAR 952.204–73).	✔
N/A	970.5204–14	Allowable Costs and Fixed-fee (Support Contracts).	Section is removed as obsolete	✔
N/A	970.5204–25	Workmanship and Materials	Section is removed in favor of existing FAR coverage (FAR 52.211–5).	✔
N/A	970.5204–27	Consultant or Other Comparable Employment Services of Contractor Employees.	Section is removed pursuant to changes proposed to 970.2272 (redesignated as 970.0371) and 970.5204–12 (redesignated as 970.5203–3).	✔
N/A	970.5204–28	Assignment	Section is removed in favor of existing FAR coverage (FAR 52.232–23 and 52.232–24).	✔
N/A	970.5204–29	Permits or Licenses	Section is removed and the substance of the clause incorporated into new paragraph (d) of the clause at 970.5204–78 (redesignated as 970.5204–2).	✔
N/A	970.5204–30	Notice of Labor Disputes	Section is removed in favor of existing FAR coverage (FAR 52.222–1).	✔
N/A	970.5204–33	Priorities and Allocations	Section is removed in favor of existing DEAR coverage (DEAR 952.211–71).	✔
N/A	970.5204–35	Controls in the National Interest (Unclassified Contracts with Educational Institutions).	Section is removed in favor of existing DEAR coverage (see DEAR 970.5204–78, redesignated as 970.5204–2 in this rule).	✔
N/A	970.5204–36	Preventing Conflicts of Interest in University Research.	Section is removed as obsolete	✔
N/A	970.5204–37	Statement of Work (Management and Operating Contracts).	Section is removed as obsolete	✔
N/A	970.5204–42	Key Personnel	Section is removed pursuant to the consolidation of the clauses at 952.235–70 and 970.5204–42 into a single clause, as proposed in this rule.	✔
N/A	970.5204–43	Other Government Contractors	Section is removed in favor of existing FAR coverage (FAR 52.236–8); see proposed new subsection 970.3605–1.	✔

PART 970 REWRITE—Continued

New citation	Current citation	Title	Remarks	Comments
N/A	970.5204–44	Flowdown of Contract Requirements to Subcontracts.	Section is removed as unnecessary. Certain portions of the coverage in this section are incorporated into 970.5204–22, redesignated as 970.5244–1 in this rule.	✔
N/A	970.5204–45	Termination	Section is removed in favor of existing FAR coverage (FAR 52.249–6).	✔
N/A	970.5204–52	Foreign Travel	Section is removed in favor of existing DEAR coverage (DEAR 952.247–70).	✔
N/A	970.5204–53	Contractor Employee Travel Discounts	Section is removed in favor of existing DEAR coverage (DEAR 952.251–70).	✔
952.203–70	970.5204–59	Whistleblower Protection for Contractor Employees.	Section 970.5204–59 is redesignated as 952.203–70.	✔
N/A	970.5204–71	Patent Rights-nonprofit Management and Operating Contractors.	Section is removed pursuant to amendments to 927.303 and 952.227–11 proposed in this rule.	✔
N/A	970.5204–72	Patent Rights-profit-making Management and Operating Contractors.	Section is removed pursuant to amendments to 927.303 and 952.227–13 proposed in this rule.	✔
N/	A970.5204–73	Notice Regarding Options	Section is removed in favor of existing FAR coverage (FAR 52.217–9).	✔
N/A	970.5204–74	Option to Extend the Term of the Contract.	Section is removed in favor of existing FAR coverage (FAR 52.217–9).	✔

III. Public Comments

The amendments proposed in this rulemaking constitute primarily technical and conforming changes resulting from the reorganization of Part 970 and the elimination of coverage determined to be obsolete or unnecessarily duplicative of other governing regulations. Because these amendments involve extensive changes to the composition of the existing regulation, Part 970 is being republished, in its entirety, for the convenience of the reader. This rule also proposes to amend the text of several clauses and add material in order to ensure that uniform DOE policies and procedures are prescribed for certain issues. Interested persons are invited to submit comments regarding the proposed reorganization and numbering system for Part 970. Comments are also solicited regarding those amendments described in Section II., Section by Section Analysis, paragraphs 1. through 25., and to those amendments addressed in the table contained in paragraph 26., which are marked with a ''✔''

Three copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice. All comments received will be available for public inspection in the DOE Reading Room, Room lE–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585, between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. All written comments received by the date indicated in the ''**DATES**'' section of this notice and all other relevant information in the record will be carefully assessed and fully considered prior to publication of the final rule. Any information considered to be confidential must be so identified and submitted in writing, one copy only. DOE reserves the right to determine the confidential status of the information and to treat it according to our determination (See 10 CFR 1004.11).

The Department has concluded that this proposed rule does not involve a substantial issue of fact or law and that the proposed rule should not have substantial impact on the nation's economy or a large number of individuals or businesses. Therefore, pursuant to Public Law 95–91, the DOE Organization Act, and the Administrative Procedure Act (5 U.S.C. 553), the Department does not plan to hold a public hearing on this proposed rule.

IV. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under 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. The Department of Energy has completed the required review and determined that, to the extent permitted by law, the proposed regulation meets the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This proposed rule was reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. Today's proposed rule streamlines the Department's policies, procedures, provisions and clauses that apply to its M&O contracts. M&O contractors are not small entities. Accordingly, DOE certifies that this proposed regulation will not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

D. Review Under the Paperwork Reduction Act

No new information or recordkeeping requirements are imposed by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this proposed rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations (10 CFR Part 1021, Subpart D) implementing the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). Specifically, this rule is categorically excluded from NEPA review because the proposed amendments to the DEAR do not change the environmental effect of the rule being amended (categorical exclusion A5). Therefore, this proposed rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

F. Review Under Executive Order 12612

Executive Order 12612 (52 FR 41685, October 30, 1987) requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among the various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires the preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. This proposed rule, when finalized, will revise certain policy and procedural requirements. States which contract with DOE will be subject to this rule. However, DOE has determined that this rule will not have a substantial direct effect on the institutional interests or traditional functions of the States.

G. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires a Federal agency to perform a detailed assessment of costs and benefits of any rule imposing a Federal Mandate with costs to state, local or tribal governments, or to the private sector, of $100 million or more. This rulemaking affects private sector entities, and the impact is less than $100 million.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. No. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's proposal would 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.

List of Subjects in 48 CFR Parts 901, 902, 903, 904, 909, 911, 915, 917, 922, 923, 927, 941, 942, 947, 952 and 970.

Government procurement.

Issued in Washington, D.C. on February 15, 2000.

Richard H. Hopf,

Director, Office of Procurement and Assistance Management.

For the reasons set out in the preamble, Chapter 9 of Title 48 of the Code of Federal Regulations is proposed to be amended as set forth below.

1. The authority citations for parts 901, 902, 903, 904, 909, 911, 915, 917, 922, 923, 941, 942, 947 and 952 continue to read as follows:

Authority: 42 U.S.C. 7254; 40 U.S.C. 486(c).

PART 901—FEDERAL ACQUISITION REGULATIONS SYSTEM

901.105 [Amended]

2. Section 901.105 is amended in the second sentence by revising ''(see 48 CFR (DEAR) 970.5204–76)'' to read ''(see 48 CFR 970.5215–2)'', and revising ''(see 48 CFR (DEAR) 970.5204–2)'' to read ''(see 48 CFR 970.5223–1).''

PART 902—DEFINITIONS OF WORDS AND TERMS

3. Section 902.200 is revised to read as follows:

902.200 Definitions clause.

As prescribed by 48 CFR subpart 2.2, insert the clause at 48 CFR 52.202–1, Definitions, but modify the clause to limit the definition at paragraph (a) to encompass only the Secretary, Deputy Secretary, or Under Secretary of the Department of Energy, and the Chairman, Federal Energy Regulatory Commission. The contracting officer shall also add a paragraph at the end of the clause that defines ''DOE'' as meaning the United States Department of Energy and ''FERC'' as meaning the Federal Energy Regulatory Commission. Additional definitions may be included, provided they are consistent with the clause, the Federal Acquisition Regulation and this Department of Energy Acquisition Regulation.

PART 903—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

4. Subpart 903.9 is added to read as follows:

Subpart 903.9—Whistleblower Protection for Contractor Employees

Sec.

903.901 Scope.
903.902 Definition.
903.903 Applicability
903.970 Remedies
903.971 Contract clause.

Subpart 903.9—Whistleblower Protection for Contractor Employees

903.901 Scope.

This subpart implements the DOE Contractor Employee Protection Program as set forth at 10 CFR part 708. Part 708 establishes criteria and procedures for the investigation, hearing, and review of allegations from DOE contractor employees of employer reprisal resulting from employee disclosure of information to DOE, to members of Congress, or to the contractor; employee participation in proceedings before Congress or pursuant to this rule; or employee refusal to engage in illegal or dangerous activities, when such disclosure, participation, or refusal pertains to employer practices which the employee believes to be unsafe; to violate laws, rules, or regulations; or to involve fraud, mismanagement, waste, or abuse.

903.902 Definition.

Contractor, as used in this subject, has the meaning contained in 10 CFR 708.2

903.903 Applicability.

10 CFR part 708 is applicable to complaints of retaliation filed by employees of contractors, and subcontractors, performing work on behalf of DOE directly related to DOE-owned or leased facilities, if the complaint stems from a disclosure, participation, or refusal described in 10 CFR 708.5.

903.970 Remedies.

(a) Contractors found to have retaliated against an employee in reprisal for such disclosure, participation or refusal are required to provide relief in accordance with decisions issued under 10 CFR part 708.

(b) 10 CFR part 708 provides that for the purposes of the Contract Disputes Act (41 U.S.C. 605 and 606), a final decision issued pursuant to 10 CFR part 708 shall not be considered to be a claim by the Government against a contractor or a decision by the contracting officer subject to appeal. However, a contractor's disagreement and refusal to comply with a final decision could result in a contracting officer's decision to disallow certain costs or to terminate the contract for default. In such case, the contractor could file a claim under the Disputes clause of the contract regarding the disallowance of cost or the termination of the contract.

903.971 Contract clause.

The contracting officer shall insert the clause at 952.203–70, Whistleblower Protection for Contractor Employees, in management and operating contracts.

PART 904—ADMINISTRATIVE MATTERS

5. Subpart 904.72 is added as follows:

Subpart 904.72—Public Affairs

Sec.
904.7200 Purpose.
904.7201 Contract clause.

904.7200 Purpose.

It is the policy of the Department of Energy to provide to the public and the news media, accurate and timely unclassified information on Departmental policies, programs, and activities. The Department's contractors share the responsibility for releasing unclassified information related to efforts under their contracts and must coordinate the release of unclassified information with the cognizant contracting officer and appropriate DOE Public Affairs personnel.

904.7201 Contract clause.

The contracting officer shall insert the clause at 952.204–75 in solicitations and contracts that require the contractor to release unclassified information related to efforts under its contract regarding DOE policies, programs, and activities.

PART 909—CONTRACTOR QUALIFICATIONS

6. Subsection 909.104–1 is amended by revising ''48 CFR 970.5204–57'' to read ''48 CFR 970.5223–3.''

PART 911—DESCRIBING AGENCY NEEDS

7. Section 911.604 is amended by revising paragraphs (d) and (e) to read as follows:

911.604 Solicitation provision and contract clause.

* * * * *

(d) The contracting officer shall insert the provision at 952.211–70, Priorities and Allocations (Domestic Energy Supplies), with its Alternate I, in solicitations that may result in the placement of rated orders for authorized energy programs, and in all management and operating contracts.

(e) The contracting officer shall insert the clause at 952.211–71, Priorities and Allocations (Domestic Energy Supplies), with its Alternate I, if it is believed the contract involves a program the purpose of which is to maximize domestic energy supplies, and in all management and operating contracts.

PART 915—CONTRACTING BY NEGOTIATION

8. Subsection 915.408–70 is added to read as follows:

915.408–70 Solicitation provision and contract clause.

The contracting officer shall insert the clause at 48 CFR 952.215–70, Key Personnel, in contracts under which performance is largely dependent on the expertise of specific key personnel.

PART 917—SPECIAL CONTRACTING METHODS

9. Section 917.600 is revised to read as follows:

917.600 Scope of subpart.

(a) This subpart implements 48 CFR subpart 17.6, Management and Operating Contracts. Departmental policies, procedures, provisions and clauses to be used in the award and administration of management and operating contracts that either implement or supplement the Federal Acquisition Regulation and parts 901 through 952 of this Chapter are contained in 48 CFR part 970.

(b) The requirements of this subpart apply to any Department of Energy management and operating contract, including performance-based management contracts as defined in 48 CFR 917.601. References in this Subpart to ''management and operating contracts'' include performance-based management contracts.

10. Section 917.601 is amended by revising the definition of performance-based contracting as follows:

917.601 Definitions.

Performance-based contracting has the meaning contained in 48 CFR 37.101.

* * * * *

11. Section 917.602 is revised to read as follows:

917.602 Policy.

(a) The use of a management and operating contract must be authorized by the Secretary, Deputy Secretary or Under Secretary.

(b) It is the policy of the Department of Energy to provide for full and open competition in the award of management and operating contracts, including performance-based management contracts.

(c) A management and operating contract may be awarded or extended at the completion of its term without providing for full and open competition only when such award or extension is justified under one of the statutory authorities identified in 48 CFR 6.302 and only when authorized by the Head of the Agency. Documentation and processing requirements for justifications for the use of other that full and open competition shall be accomplished in accordance with internal agency procedures

917.604 and 917.605 [Removed]

12. Sections 917.604 and 917.605 are removed.

PART 922—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

922.71 [Removed]

13. Subpart 922.71 is removed.

PART 923—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY AND DRUG-FREE WORKPLACE

923.570–2 [Amended]

14. Subsection 923.570–2 is amended in paragraph (a) by revising ''48 CFR 970.5204–57'' to read ''48 CFR 970.5223–3''; and in paragraph (b) by revising ''970.5204–58'' to read ''48 CFR 970.5223–4.''

923.570–3 [Amended]

15. Subsection 923.570–3 is amended in paragraph (a) by revising ''970.5204–58'' to read ''48 CFR 970.5223–4'', and in paragraph (b)(2) by revising ''970.5204–57'' to read ''970.5223–3.''

PART 927—PATENTS, DATA, AND COPYRIGHTS

16. The authority citation for part 927 continues to read as follows:

Authority: Sec. 644 of the Department of Energy Organization Act, Pub. L. 95–91 (42 U.S.C. 7254); Sec. 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168); Federal Nonnuclear Energy Research and Development Act of 1974, Sec. 9 (42 U.S.C. 5908); Atomic Energy Act of 1954, as amended, Sec. 152 (42 U.S.C. 2182); Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1987, as amended, Sec. 3131(a), (42 U.S.C. 7261a.).

17. Section 927.303 is amended by revising paragraph (a) to read as follows:

927.30 Contract clauses.

(a) In solicitations and contracts for experimental, research, developmental, or demonstration work (but see 48 CFR 27.304–3 regarding contracts for construction work or architect-engineer services), and all management and operating contracts, the contracting officer shall include the following clauses:

(1) Insert the clause at 48 CFR 952.227–11, Patent Rights by the Contractor (Short Form), in contracts in which the contractor is a domestic small business or nonprofit organization as defined at 48 CFR 27.301, except where the work of the contract is subject to an Exceptional Circumstances Determination by DOE. In contracts with nonprofit entities for the management and operation of DOE laboratories and production facilities, the contracting officer shall insert the clause with its Alternate I.

(2) Insert the clause at 48 CFR 952.227–13, Patent Rights Acquisition by the Government, in all contracts other than those described in paragraph (a)(1) of this section. In contracts with profit-making entities for the management and operation of DOE laboratories and production facilities, the contracting officer shall insert the clause with its Alternate I.

* * * * *

927.402–1 [Amended]

18. Subsection 927.402–1 is amended in paragraph (b) by revising ''(see 970.2705)'' to read ''(see 48 CFR 970.2704)'', and by revising ''970.5204–82'' to read ''48 CFR 970.5227–1.''

927.404 [Amended]

19. Section 927.404 is amended in paragraph (g)(4) by revising ''970.5204–82'' to read ''48 CFR 970.5227–2.''

20. Section 927.409 is amended in paragraph (a)(2)(vi) by revising ''(See 970.2705)'' to read ''(see 48 CFR 970.2704).''

PART 935—RESEARCH AND DEVELOPMENT CONTRACTING

935.070 [Removed]

21. Section 935.070 is removed.

PART 941—ACQUISITION OF UTILITY SERVICES

22. Subsection 941.201–71 is amended by revising ''48 CFR 970.0803'' to read ''48 CFR 970.4102–1.''

PART 942—CONTRACT ADMINISTRATION

23. Subpart 942.2 is added as follows:

Subpart 942.2—Contract Administration Services

9427.2–1 Contract Administration Services.

942.270–1 Contracting officer's representatives.

In accordance with internal agency procedures, a contracting officer may designate other qualified personnel to be the Contracting Officer's Representative (COR) for the purpose of performing certain technical functions in administering a contract. These functions include, but are not limited to, technical monitoring, inspection, approval of shop drawings, testing, and approval of samples. The COR acts solely as a technical representative of the contracting officer and is not authorized to perform any function that results in a change in the scope, price, terms or conditions of the contract. COR designations must be made in writing by the contracting officer, and shall identify the responsibilities and limitations of the designation. A copy of the COR designation must be furnished to the contractor and the contract administration office.

942.270–2 Contract clause.

The clause at 952.242–70 may be inserted in solicitations and contracts when a designated Contracting Officer's Representative will issue technical direction to the contractor under the contract.

PART 947—TRANSPORTATION

24. Subpart 947.70 is added to read as follows:

Subpart 947.70—Foreign Travel

Sec.
947.7000 Definition.
947.7001 Policy.
947.7002 Contract clause.

947.70—Foreign Travel

947.7000 Definition.

Foreign travel, for purposes of this subpart, means any travel outside of Canada, Mexico and the United States and its territories and possessions.

947.7001 Policy.

Prior approval of the contracting officer is required by the contractor when foreign travel by contractor personnel will be charged directly to a DOE contract. Such approval shall be required for each separate trip regardless of whether funds for such travel are contained in an approved budget.

947.7002 Contract clause.

When foreign travel may be required under the contract, the contracting officer shall insert the clause at 48 CFR 952.247–70, Foreign Travel.

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

25. Section 952.203–70 is added to read as follows:

952.203–70 Whistleblower protection for contractor employees.

As prescribed in 48 CFR 903.971, insert the following clause:

Whistleblower Protection for Contractor Employees (Month and Year TBE)

(a) The contractor shall comply with the requirements of ''DOE Contractor Employee Protection Program'' at 10 CFR part 708 for work performed on behalf of DOE directly related to activities at DOE-owned or -leased sites.

(b) The contractor shall insert or have inserted the substance of this clause, including this paragraph (b), in subcontracts at all tiers, for subcontracts involving work performed on behalf of DOE directly related to activities at DOE-owned or -leased sites.

(End of Clause)

26. Section 952.204–75 is added as follows:

952.204–75 Public affairs.

As prescribed in 48 CFR 904.7201, insert the following clause.

Public Affairs (Month and Year TBE)

(a) The Contractor must cooperate with the Department in releasing unclassified information to the public and news media regarding DOE policies, programs, and activities relating its effort under the contract. The responsibilities under this clause must be accomplished through

coordination with the Contracting Officer and appropriate DOE public affairs personnel.

(b) The Contractor is responsible for the development, planning, and coordination of proactive approaches for the timely dissemination of unclassified information regarding DOE activities onsite and offsite, including, but not limited to, operations and programs. Proactive public affairs programs may utilize a variety of communication media, including public workshops, meetings or hearings, open houses, newsletters, press releases, conferences, audio/visual presentations, speeches, forums, tours, and other appropriate stakeholder interactions.

(c) The Contractor's internal procedures must ensure that all releases of information to the public and news media are coordinated through, and approved by, a management official at an appropriate level within the Contractor's organization.

(d) The Contractor must comply with established DOE procedures for obtaining advance clearances on all oral, written, and audio/visual informational material prepared for public dissemination or use.

(e) Unless prohibited by law, the Contractor must notify the Contracting Officer and appropriate DOE public affairs personnel of any communications or contacts with Members of Congress relating to the effort performed under the contract.

(f) The Contractor must notify the Contracting Officer and appropriate DOE public affairs personnel of any activities or situations that may attract regional or national news media attention and of non-routine inquiries from national news media relating to the effort performed under the contract.

(g) In releases of information to the public and news media, the Contractor must fully and accurately identify the Contractor's relationship to the Department and fully and accurately credit the Department for its role in funding programs and projects resulting in scientific, technical, and other achievements.

27. Section 952.215–70 is added as follows:

952.215–70 Key Personnel.

As prescribed in 48 CFR 915.408–70(a), the contracting officer shall insert the following clause:

Key Personnel (Month and Year TBE)

(a) The personnel listed below or elsewhere in this contract [Insert cross-reference, if applicable] are considered essential to the work being performed under this contract. Before removing, replacing, or diverting any of the listed or specified personnel, the Contractor must: (1) Notify the Contracting Officer reasonably in advance; (2) submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on this contract; and (3) obtain the Contracting Officer's written approval.

(b) The list of personnel may, with the consent of the contracting parties, be amended from time to time during the course of the contract to add or delete personnel.

[Insert List of Key Personnel unless listed elsewhere in the contract]

(End of clause)

952.222–70 [Removed]

28. Section 952.222–70 is removed.

952.223–71 [Removed]

29. Section 952.223–71 is amended by revising ''970.5204–2'' to read ''48 CFR 970.5223–1.''

30. Section 952.227–11 is amended by revising the prescription and clause date, and adding Alternate I as follows:

952.227–11 Patent rights—retention by the contractor (short form).

As prescribed in 48 CFR 927.303(a)(1), the contracting officer shall insert the following clause:

Patent Rights—Retention by the Contractor (Short Form) (Month and Year TBE)

* * * * *

Alternate I (Month and Year TBE). As prescribed in 48 CFR 927.303(a)(1), replace paragraph (e)(1) with the following paragraph (e)(1), and add the following paragraphs (m) and (n):

(e)(1) The contractor may request the right to reserve a revocable, nonexclusive, royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. When DOE approves such reservation, the contractor's license will extend to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the contractor is a party and includes the right to grant sublicenses of the same scope to the extent the contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE, except when transferred to the successor of that part of the contractor's business to which the invention pertains.

(m) Transfer to successor contractor. (1) In the event of termination or expiration of this contract, the contractor shall transfer any unexpended balance of income received relating to intellectual property, in accordance with instructions from the contracting officer, to a successor contractor, or in the absence of a successor contractor, to such other entity as designated by the contracting officer. The contractor shall also transfer title, as one package, in all patents and patent applications, license agreements, accounts containing royalty revenues from such license agreements, including equity positions in third-party entities, and other intellectual property that arose under the performance of this contract, to the successor contractor or to the Government, as directed by the contracting officer. (2) The Government agrees that the recipient of such title shall assume any remaining obligations and liabilities in connection with the patents and patent applications.

(n) Facilities license. In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility (1) to practice or have practiced by or for the Government at the facility, and (2) to transfer such license with the transfer of that facility. The acceptance or exercise by the Government of these rights shall not prevent the Government at any time from contesting the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

31. Section 952.227–13 is amended by revising the prescription and clause date, and adding Alternate I as follows:

952.227–13 Patent rights—acquisition by the Government.

As prescribed in 48 CFR 927.303(a)(2), the contracting officer shall insert the following clause:

Patent Rights—Acquisition by the Government (Month and Year TBE)

* * * * *

Alternate I (Month and Year TBE). As prescribed in 48 CFR 927.303(a)(2), add the following paragraphs (j) and (k):

(j) Transfer to successor contractor. (1) In the event of termination or expiration of this contract, the contractor shall transfer any unexpended balance of income received relating to intellectual property, in accordance with instructions from the contracting officer, to a successor contractor, or in the absence of a successor contractor, to such other entity as designated by the contracting officer. The contractor shall also transfer title, as one package, in all patents and patent applications, license agreements, accounts containing royalty revenues from such license agreements, including equity positions in third-party entities, and other intellectual property that arose under the performance of this contract, to the successor contractor or to the Government, as directed by the contracting officer.

(2) The Government agrees that the recipient of such title shall assume any remaining obligations and liabilities in connection with the patents and patent applications.

(k) Facilities License. In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility (1) to practice or have practiced by or for the

Government at the facility, and (2) to transfer such license with the transfer of that facility. The acceptance or exercise by the Government of these rights shall not prevent the Government at any time from contesting the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

32. Section 952.242–70 is added as follows:

952.242–70 Technical Direction

As prescribed in 48 CFR 942.270–2, insert the following clause.

Technical Direction (Month and Year TBE)

(a) Performance of the work under this contract shall be subject to the technical direction of the DOE Contracting Officer's Representative (COR). The term ''technical direction'' is defined to include, without limitation:

(1) Providing direction to the contractor that redirects contract effort, shift work emphasis between work areas or tasks, require pursuit of certain lines of inquiry, fill in details, or otherwise serve to accomplish the contractual Statement of Work.

(2) Providing written information to the contractor that assists in interpreting drawings, specifications, or technical portions of the work description.

(3) Reviewing and, where required by the contract, approving, technical reports, drawings, specifications, and technical information to be delivered by the contractor to the Government.

(b) The contractor will receive a copy of the written COR designation from the contracting officer. It will specify the extent of the COR's authority to act on behalf of the contracting officer.

(c) Technical direction must be within the scope of work stated in the contract. The COR does not have the authority to, and may not, issue any technical direction that:

(1) Constitutes an assignment of additional work outside the Statement of Work;

(2) Constitutes a change as defined in the contract clause entitled ''Changes;''

(3) In any manner causes an increase or decrease in the total estimated contract cost, the fee (if any), or the time required for contract performance;

(4) Changes any of the expressed terms, conditions or specifications of the contract; or

(5) Interferes with the contractor's right to perform the terms and conditions of the contract.

(d) All technical direction shall be issued in writing by the COR.

(e) The contractor must proceed promptly with the performance of technical direction duly issued by the COR in the manner prescribed by this clause and within its authority under the provisions of this clause. If, in the opinion of the contractor, any instruction or direction by the COR falls within one of the categories defined in (c)(1) through (c)(5) of this clause, the contractor must not proceed and must notify the Contracting Officer in writing within five (5) working days after receipt of any such instruction or direction and must request the Contracting Officer to modify the contract accordingly. Upon receiving the notification from the contractor, the Contracting Officer must:

(1) Advise the contractor in writing within thirty (30) days after receipt of the contractor's letter that the technical direction is within the scope of the contract effort and does not constitute a change under the Changes clause of the contract; or

(2) Advise the contractor in writing within a reasonable time that the Government will issue a written change order.

(f) A failure of the contractor and Contracting Officer either to agree that the technical direction is within the scope of the contract or to agree upon the contract action to be taken with respect to the technical direction will be subject to the provisions of the clause entitled ''Disputes.''

(End of Clause)

33. Section 952.247–70 is amended by revising the prescription to read as follows:

952.247–70 Foreign travel.

As prescribed in 48 CFR 947.7002, insert the following clause:

* * * * *

952.250–70 [Amended]

34. Section 952.250–70 is amended in paragraph (h) by revising ''Audit and records—Negotiation'', to read ''Accounts, records, and inspection.''

35. The authority citation for Part 970 continues to read as follows:

Authority: Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201), sec. 644 of the Department of Energy Organization Act, Public Law 95–91 (42 U.S.C. 7254).

36. Part 970 is revised to read as follows:

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

Sec.

Subpart 970.01—Management and Operating Contract Regulatory System

970.0100 Scope of part.
970.0103 Publication and codification.

Subpart 970.03—Improper Business Practices and Personal Conflicts of Interest

970.0309 Whistleblower protection of contractor employees.
970.0309–1 Applicability.
970.0370 Management controls and improvements.
970.0370–1 Policy.
970.0370–2 Contract clause.
970.0371 Conduct of employees of DOE management and operating contractors.
970.0371–1 Scope of section.
970.0371–2 Applicability.
970.0371–3 Definition.
970.0371–4 Gratuities.
970.0371–5 Use of privileged information.
970.0371–6 Incompatibility between regular duties and private interests.
970.0371–7 Outside employment of contractor employees.
970.0371–8 Employee disclosure concerning other employment services.
970.0371–9 Contract clause.

Subpart 970.04—Administrative Matters

970.0404 Safeguarding classified information.
970.0404–1 Definitions.
970.0404–2 General.
970.0404–3 Responsibilities of contracting officers.
970.0404–4 Solicitation provision and contract clauses.
970.0407 Contractor records retention.
970.0407–1 Applicability.
970.0407–1–1 Alternate retention schedules.
970.0407–1–2 Access to and ownership of records.
970.0407–1–3 Contract clause.
970.0470 Department of Energy directives.
970.0470–1 General.
970.0470–2 Contract clause.

Subpart 970.08—Required Sources of Supplies and Services

970.0801 Excess personal property.
970.0801–1 Policy.
970.0808 Acquisition of printing.
970.0808–1 Scope of section.
970.0808–2 Policy.
970.0808–3 Contract clause.

Subpart 970.09—Contractor Qualifications

970.0905 Organizational conflicts of interest.
970.0970 Performance guarantees.
970.0970–1 Determination of responsibility.
970.0970–2 Solicitation provision.

Subpart 970.11—Describing Agency Needs

970.1100 Policy.
970.1100–1 Performance-based contracting.
970.1100–2 Additional considerations.

Subpart 970.15—Contracting by Negotiation

970.1504 Contract pricing.
970.1504–1 Price analysis.
970.1504–1–1 Fees for management and operating contracts.
970.1504–1–2 Fee policy.
970.1504–1–3 Special considerations: Laboratory management and operation.
970.1504–1–4 Types of contracts and fee arrangements.
970.1504–1–5 General considerations and techniques for determining fixed fees.
970.1504–1–6 Calculating fixed fee.
970.1504–1–7 Fee base.
970.1504–1–8 Special equipment purchases.
970.1504–1–9 Special considerations: Cost-plus-award-fee.
970.1504–1–10 Special considerations: Fee limitations.
970.1504–1–11 Documentation.
970.1504–2 Price negotiation.
970.1504–3 Documentation.
970.1504–3–1 Cost or pricing data.
970.1504–4 Special cost or pricing areas.
970.1504–4–1 Make-or-Buy Plans.
970.1504–4–2 Policy.
970.1504–4–3 Requirements.
970.1504–5 Solicitation provision contract clauses.

Subpart 970.17—Special Contracting Methods

970.1706 Management and operating contracts.

970.1706–1 Award, renewal, and extension.
970.1706–2 Contract clause.

Subpart 970.19—Small, Small Disadvantaged and Women-Owned Small Business Concerns

970.1907 Subcontracting with Small Business, Small Disadvantaged Business and Woman-owned Small Business Concerns.
970.1907–1 Subcontracting plan requirements.

Subpart 970.22—Application of Labor Policies

970.2200 Scope of subpart.
970.2201 Basic labor policies.
970.2201–1 Labor relations.
970.2201–1–1 General.
970.2201–1–2 Policies.
970.2201–1–3 Contract clause.
970.2201–2 Overtime management.
970.2201–2–1 Policy.
970.2201–2–2 Contract clause.
970.2204 Labor standards for contracts involving construction.
970.2204–1 Statutory and regulatory requirements.
970.2204–1–1 Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities.
970.2208 Equal employment opportunity.
970.2210 Service Contract Act.
970.2270 Unemployment compensation.

Subpart 970.23—Environmental, Conservation, and Occupational Safety Programs

970.2303 Hazardous materials identification and material safety.
970.2303–1 General.
970.2303–2 Contract clauses.
970.2304 Use of recovered/recycled materials.
970.2304–1 General.
970.2304–2 Contract clause.
970.2305 Workplace substance abuse programs—management and operating contracts.
970.2305–1 General.
970.2305–2 Applicability.
970.2305–3 Definitions.
970.2305–4 Solicitation provision and contract clause.
970.2306 Suspension of payments, termination of contract, and debarment and suspension actions.

Subpart 970.26—Other Socioeconomic Programs

970.2670 Implementation of section 3021 of the Energy Policy Act of 1992.
970.2670–1 Requirements.
970.2671 Diversity.
970.2671–1 Policy.
970.2671–2 Contract clause.
970.2672 Implementation of section 3161 of the National Defense Authorization Act for Fiscal Year 1993.
970.2672–1 Policy.
970.2672–2 Requirements.
970.2672–3 Contract clause.
970.2673 Regional partnerships.
970.2673–1 Policy.
970.2673–2 Contract clause.

Subpart 970.27—Patents, Data, and Copyrights

970.2701 General.
970.2701–1 Applicability.
970.2703 Patent rights.
970.2703–1 Policy.
970.2703–2 Contract clauses.
970.2704 Rights in data.
970.2704–1 General.
970.2704–2 Procedures.
970.2704–3 Contract clauses.
970.2770 Technology transfer.
970.2770–1 General.
970.2770–2 Policy.
970.2770–3 Technology transfer and patent rights.
970.2770–4 Contract clause.

Subpart 970.28—Bonds and Insurance

970.2803 Insurance.
970.2803–1 Workers' compensation insurance.
970.2803–2 Contract clause.

Subpart 970.29—Taxes

970.2902 Federal Excise Taxes.
970.2902–1 Exemptions from Federal Excise Taxes.
970.2903 State and Local Taxes.
970.2903–1 Applicability of State and Local Taxes to the Government.
970.2904 Contract clauses.
970.2904–1 Management and operating contracts.

Subpart 970.30—Cost Accounting Standards

970.3002 CAS Program Requirements.
970.3002–1 Applicability.
970.3002–2 Limitations.

Subpart 970.31—Contract Cost Principles and Procedures

970.3100 Scope of Subpart.
970.3100–1 Definitions
970.3100–2 Responsibilities.
970.3101 Applicability.
970.3101–1 Objectives.
970.3101–2 Advance agreements.
970.3101–3 Cost certification and penalties on unallowable costs.
970.3102 Contracts with Management and Operating Contractors.
970.3102–1 General.
970.3102–1–1 Actual Cost Basis.
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Subpart 970.01—Management and Operating Contract Regulatory System

970.0100 Scope of Part.

This part provides Departmental policies, procedures, provisions, and clauses that implement and supplement the Federal Acquisition Regulation (FAR) and other parts of the Department of Energy Acquisition Regulation (DEAR) for the award and administration of the Department's management and operating contracts, as defined at 48 CFR subpart 17.6.

970.0103 Publication and codification.

(a) Organization of Part 970. (1) To the extent possible, the titles and text of the subparts, sections, and subsections of this part are numbered to correspond with related material that is contained in the FAR.

(2) The number to the left of the decimal point represents the DEAR Part number (i.e., 970). The numbers to the right of the decimal point and to the left of the dash represent, in order, the DEAR subpart (first two digits), and the DEAR section number (second two digits). The numbers to the right of the dash represent the DEAR subsection. A second dash may follow the DEAR subsection number. As applicable, numbers to the right of the second dash represent subordinate subsections.

(3) To the extent practicable, the subpart number corresponds with the FAR part which contains related coverage, and the section number corresponds with the FAR subpart which contains related coverage (e.g., the coverage contained in DEAR 970.0309 corresponds with material contained in FAR 3.9).

(4) Where the FAR does not contain related coverage on a particular subject, the DEAR section number will be numbered using numbers of 70 and up (e.g., 970.0370).

(b) Special note regarding clause numbering. The section number for clauses prescribed in part 970 are numbered to correspond with the subpart in which the clause is prescribed (e.g., 970.5203–1 is prescribed for use at subpart 970.03).

Subpart 970.03—Improper Business Practices and Personal Conflicts of Interest

970.0309 Whistleblower Protection for Contractor Employees.

970.0309–1 Applicability.

The contracting officer shall refer to 48 CFR subpart 903.9 regarding the applicability of the DOE Employee Protection Program to management and operating contracts.

970.0370 Management Controls and Improvements.

970.0370–1 Policy.

(a) Management and operating contractors shall develop and maintain systems of management and quality control to discourage waste, fraud and abuse; and to ensure that components, products, and services that are provided to DOE satisfy the contractor's obligations under the contract.

(b) As a part of the required overall management structure, the contractor must maintain management control systems which, in compliance with the requirements of the clause at 48 CFR 970.5203–1:

(1) Are documented and satisfactory to DOE;

(2) Ensure that all levels of management are accountable for effective management systems and internal controls within their areas of assigned responsibility;

(3) Cover both programmatic and administrative functions;

(4) Provide reasonable assurance that Government resources are safeguarded against theft, fraud, waste, and unauthorized use;

(5) Promote efficient and effective operations;

(6) Ensure that all obligations and costs incurred are in compliance with the intended purposes and the terms and conditions of the contract;

(7) Properly record, manage, and report all revenues, expenditures, transactions and assets;

(8) Maintain financial, statistical and other reports necessary to maintain accurate, reliable, and timely accountability and management controls;

(9) Are periodically reviewed to ensure that the systems provide reasonable assurance that the objectives of the system are being accomplished and that these controls are working effectively;

(10) Are in accordance with the Comptroller General's standards for internal controls, as set forth in the General Accounting Office Policy and Procedures Manual For Guidance To Federal Agencies, (Oct 1984), as amended.

(c) Management and operating contractors shall also develop and maintain a baseline program of quality assurance that will implement documented performance and quality standards, and management controls and assessment techniques to ensure components, services, and products meet DOE's, design criteria and other governing and applicable specifications.

(d) DOE expects all its contractors to seek to identify improvements in any aspect of performance. Management and operating contracts are very large and complex; therefore, the opportunities to identify changes in performance that will increase the effectiveness or efficiency of contract performance are more prevalent than under other contracts. The clause at 48 CFR 970.5203–2 requires DOE management and operating contractors to affirmatively seek to identify, evaluate, and institute, where appropriate, processes that will improve the effectiveness or efficiency of any aspect of contract performance. It further requires the contractor to communicate any such improvements to DOE, other management and operating contractors, and DOE major facilities contractors. The contractor is required to participate in efforts by those contractors to address common problems or the institution of improvements. It allows the contractor to enlist the aid of the DOE contracting officer where necessary to institute or communicate the improvements. The obligations under the clause in no way affect the contractor's obligations under other provisions of the contract to notify or acquire the approval of the contracting officer.

970.0370–2 Contract clause.

(a) The contracting officer shall insert the clause at 970.5203–1, Management Controls, in all management and operating contracts.

(b) The contracting officer shall insert the clause at 970.5203–2, Performance Improvement and Collaboration, in all management and operating contracts.

970.0371 Conduct of employees of DOE management and operating contractors.

970.0371–1 Scope of section.

This section establishes the policies for maintaining satisfactory standards of conduct on the part of individuals employed by DOE management and operating contractors.

970.0371–2 Applicability.

The policies in this section are applicable to all DOE management and operating contractors.

970.0371–3 Definition.

Employees, as used in this section, are defined to mean individuals employed by the contractor, both full and part-time, who are assigned to work under a DOE management and operating contract.

970.0371–4 Gratuities.

Employees of a management and operating contractor shall not, under circumstances which might reasonably be interpreted as an attempt to influence the recipients in the conduct of their duties, accept any gratuity or special favor from individuals or organizations with whom the contractor is doing business, or proposing to do business, in accomplishing the work under the contract. Reference is made to the requirements prescribed in 48 CFR 3.502.

970.0371–5 Use of privileged information.

Management and operating contractor employees shall not use privileged information for personal gain, or make other improper use of privileged information which is acquired in connection with their employment on contract work. For the purposes of this subsection, the term ''privileged information'' includes but is not limited to, unpublished information relating to technological and scientific developments; medical, personnel, or security records of individuals; anticipated materials' requirements or pricing action; possible new sites for DOE program operations; and knowledge of selections of contractors or subcontractors in advance of official announcement.

970.0371–6 Incompatibility between regular duties and private interests.

Employees of a management and operating contractor shall not be permitted to make or influence any decisions on behalf of the contractor which directly or indirectly affect the interest of the Government, if the employee's personal concern in the matter may be incompatible with the interest of the Government. For example: An employee of a contractor will not negotiate, or influence the award of, a subcontract with a company in which the individual has an employment relationship or significant financial interest; and an employee of a contractor will not be assigned the preparation of an evaluation for DOE or for any DOE contractor of some technical aspect of the work of another organization with which the individual has an employment relationship, or significant financial interest, or which is a competitor of an organization (other than the contractor who is the individual's regular employer) in which the individual has an employment relationship or significant financial interest. The contractor shall be responsible for informing employees that they are expected to disclose any incompatibilities between duties performed for the contractor and their private interests and to refer undecided questions to the contractor.

970.0371–7 Outside employment of contractor employees.

Employees of a management and operating contractor are entitled to the same rights and privileges with respect to outside employment as other citizens. Therefore, there is no general prohibition against contractor employees having outside employment. However, no employee of a contractor performing work on a full or part-time basis under a DOE management and operating contract may engage in employment outside official hours of duty or while on leave if such employment will:

(a) In any manner interfere with the proper and effective performance of the duties of the position;

(b) Appear to create a conflict-of-interest situation, or

(c) Appear to subject DOE or the contractor to public criticism or embarrassment.

970.0371–8 Employee disclosure concerning other employment services.

(a) Management and operating contractors are responsible for requiring its employees to file with the contractor, a written disclosure statement concerning outside employment

services which involve the use of information in the area of the employee's employment with the contractor. The disclosure shall contain such information concerning the outside employment as the contractor may prescribe. At a minimum, the employee's disclosure shall:

(1) Acknowledge that the employee has read and is familiar with:

(i) The requirements and restrictions prescribed in this section,

(ii) DOE publication entitled, ''Reporting Results of Scientific and Technical Work Funded by DOE'', and

(iii) The requirements of the contractor's contract with DOE relating to patents.

(2) Include information concerning any rate of remuneration significantly in excess of the employee's regular rate of remuneration;

(3) Identify any actual or potential conflicts with DOE's policies regarding conduct of employees of DOE's contractors set forth in this section;

(4) Address any potential impacts that such employment may have on the contractor's responsibility to report fully and promptly to DOE all significant research and development information; and

(5) Identify any potential conflicts such employment may have with the patent provisions of the contractor's contract with DOE.

(b) The contractor shall provide a copy of all disclosures to the contracting officer.

970.0371–9 Contract clause.

The contracting officer shall insert the clause at 970.5203–3, Contractor's Organization, in all management and operating contracts.

Subpart 970.04—Administrative Matters

970.0404 Safeguarding classified information.

970.0404–1 Definitions.

Classified information means any information or material that is owned by or produced for, or is under the control of the United States Government, and determined pursuant to provisions of Executive Order 12356, April 2, 1982 (47 FR 14874, April 6, 1982), or prior orders, or as authorized under the Atomic Energy Act of 1954, as amended, to require protection against unauthorized disclosure, and is so designated.

Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communication security programs.

Restricted data means data which is defined, in section 11, of the Atomic Energy Act of 1954, as amended, as ''all data concerning:

(1) Design, manufacture, or utilization of atomic weapons;

(2) The production of special nuclear material; or

(3) The use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142.''

970.0404–2 General.

(a) The basis of DOE's security requirements is the Atomic Energy Act of 1954, as amended.

(b) DOE regulations concerning national security information are codified at 10 CFR parts 1045 and 710. Supplemental security material is found in the DOE Directives system. Foreign ownership, control, or influence over contractors as it relates to security is discussed at 48 CFR 904.70 also applies to management and operating contracts. Regulations pertaining to the protection of restricted data are found under 10 CFR part 1016.

(c) Statutory requirements to be observed in connection with the release of Restricted Data to foreign governments are contained in the Atomic Energy Act of 1954, Sections 141 and 144 (42 U.S.C. 2161 and 2164).

(d) Section 148 of the Atomic Energy Act (42 U.S.C. 2168) prohibits the unauthorized dissemination of unclassified nuclear information with respect to the atomic energy defense programs pertaining to:

(1) The design of production facilities or utilization facilities;

(2) Security measures (including security plans, procedures, and equipment) for the physical protection of:

(i) Production or utilization facilities,

(ii) Nuclear material contained in such facilities, or

(iii) Nuclear materials in transit; or

(3) The design, manufacture, or utilization of any atomic weapon or component if the design, manufacture, or utilization of such weapon or component was contained in any information declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act (42 U.S.C. 2162).

(e) Executive Order 12333, United States Intelligence Activities, provides for the organization and control of United States foreign intelligence and counterintelligence activities. In accordance with this Executive Order, DOE has established a counterintelligence program which is described in DOE Order 5670.3 (as amended). All DOE elements, including management and operating contractors and other contractors managing DOE-owned facilities which require access authorizations, should undertake the necessary precautions to ensure that DOE and covered contractor personnel, programs and resources are properly protected from foreign intelligence threats and activities.

970.0404–3 Responsibilities of contracting officers.

(a) If access to Restricted Data may be required during the solicitation process for a management and operating contract, security clearances shall be obtained in accordance with applicable DOE Directives in the safeguards and security series.

(b) Management and operating contracts which may require the processing or storage of Restricted Data or Special Nuclear Material require application of the applicable DOE Directives in the safeguards and security series.

(c) The contracting officer shall refer to 48 CFR 904.71 for guidance concerning the prohibition on award of a DOE contract under a national security program to a company owned by an entity controlled by a foreign government when access to proscribed information is required to perform the contract.

970.0404–4 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the clause at 970.5204–1, Counterintelligence, into all management and operating contracts and other contracts for the management of DOE-owned facilities which include the security and classification/declassification clauses.

(b) The contracting officer shall refer to 48 CFR 904.404 and 48 CFR 904.7103 for the prescription of solicitation provisions and contract clauses relating to safeguarding classified information and foreign ownership, control, or influence over contractors.

970.0407 Contractor records retention.

970.0407–1 Applicability.

970.0407–1–1 Alternate retention schedules.

Records produced under the Department's contracts involving management and operation

responsibilities relative to DOE-owned or—leased facilities are to be retained and disposed of in accordance with the guidance contained in DOE G 1324.5B, Records Management Program and DOE Records Schedules (see current version), rather than those set forth at 48 CFR subpart 4.7, Contractor Records Retention.

970.0407–1–2 Access to and ownership of records.

Contracting officers may agree to contractor ownership of certain categories of records designated in the instruction contained in paragraph (b) of the clause at 48 CFR 970.5204–3, Access to and Ownership of Records, provided the Government's rights to inspect, copy, and audit these records are not limited. These rights must be retained by the Government in order to carry out the Department's statutory responsibilities required by the Atomic Energy Act and other statutes for oversight of its contractors, including compliance with the Department's health, safety and reporting requirements, and protection of the public interest.

970.0407–1–3 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5204–3, Access to and Ownership of Records, in management and operating contracts.

970.0470 Department of Energy Directives.

970.0470–1 General.

(a) The contractor is required to comply with the requirements of applicable Federal, State and local laws and regulations, unless relief has been granted by the appropriate authority. For informational purposes, the contracting officer may append the contract with a list of applicable laws or regulations (see 970.5204–2, Laws, Regulations, and DOE Directives, paragraph (a)).

(b) The Department of Energy Directives System is a system of instructions, including orders, notices, manuals, guides, and standards, for Departmental elements. In certain circumstances, requirements contained in these directives may apply to a contractor through operation of a contract clause. Program and requirements personnel are responsible for identifying requirements in the Directives System which are applicable to a contract, and for developing a list of applicable requirements and providing it to the contracting officer for inclusion in the contract.

(c) Where directives requirements are established using either the Standards/Requirements Identification Process or the Work Smart Standards Process, the applicable process should also be used to establish the environment, safety, and health portion of the list identified in paragraph (b) of this section.

(d) Environmental, safety, and health (ES&H) requirements appropriate for work conducted under a management and operating contract may be determined by a DOE approved process to evaluate the work and the associated hazards, and identify an appropriately tailored set of standards, practices, and controls, such as a tailoring process included in a DOE approved Safety Management System implemented under 48 CFR 970.5223–1, Integration of Environment, Safety, and Health into Work Planning and Execution. When such a process is used, the contracting officer shall ensure that the set of tailored requirements, as approved by DOE pursuant to the process, is incorporated into the list identified in paragraph (b) of this section. These requirements shall supersede, in whole or in part, the contractual environmental, safety, and health requirements previously made applicable to the contract by List B. If the tailored set of requirements identifies an alternative requirement which varies from an ES&H requirement of an otherwise applicable law or regulation, the contractor must request an exemption or other appropriate regulatory relief that may be specified in the governing regulation.

970.0470–2 Contract clause.

The contracting officer shall insert the clause at DEAR 970.5204–2, Laws, Regulations, and DOE Directives, in management and operating contracts.

Subpart 970.08—Required Sources of Supplies and Services

970.0801 Excess personal property.

970.0801–1 Policy.

The provisions of 48 CFR subpart 8.1 (Federal Acquisition Regulation), 41 CFR 101–43 (Federal Property Management Regulation), and 41 CFR 109–43 (DOE Property Management Regulation) apply to DOE's management and operating contracts.

970.0808 Acquisition of printing.

970.0808–1 Scope of section.

This section prescribes the Department's policy concerning duplicating or printing services which may be required in the performance of management and operating contracts.

970.0808–2 Policy.

Management and operating contractors shall provide or secure duplication and printing services in accordance with the Government Printing and Binding Regulations, Title 44 of the U.S. Code, and applicable DOE Directives.

970.0808–3 Contract clause.

The contracting officer shall insert the clause at 970.5208–1, Printing, in all management and operating contracts.

Subpart 970.09—Contractor Qualifications

970.0905 Organizational conflicts of interest.

Management and operating contracts shall contain an organizational conflict of interest clause substantially similar to the clause at 48 CFR 952.209–72, Organizational Conflicts of Interest, and which is appropriate to the statement of work of the individual contract. In addition, the contracting officer shall assure that the clause contains appropriate restraints on intra-corporate relations between the contractor's organization and personnel operating the Department's facility and its parent corporate body and affiliates. Such retrains shall include personnel access to the facility, technical transfer of information from the facility, and the availability from the facility of other advantages flowing from performance of the contract. The contracting officer is responsible for ensuring that M&O contractors adopt policies and procedures in the award of subcontracts that will meet the Department's need to safeguard against a biased work product and an unfair competitive advantage. To this end, the organizational conflicts of interest clause in management and operating contracts shall include Alternate I.

970.0970 Performance Guarantees.

970.0970–1 Determination of Responsibility.

(a) In the award of a management and operating contract, the contracting officer shall determine that the prospective contractor is a responsible contractor and is capable of providing all necessary financial, personnel, and other resources in performance of the contract.

(b) DOE contracts with entities that have been created solely for the purpose of performing a specific management and operating contract. Generally, such newly created entities will have very limited financial and other resources. In such instances, when making the determination of responsibility required under this section, the contracting officer may evaluate the financial resources of other entities only to the

extent that those entities are legally bound, jointly and severally if more than one, by means of a performance guarantee or other equivalent enforceable commitment to supply the necessary resources to the prospective contractor and to assume all contractual obligations of the prospective contractor. A performance guarantee should be the means used unless an equivalent degree of commitment can be obtained by an alternative means.

(c) The guaranteeing corporate entity(ies) must be found to have sufficient resources in order to satisfy its guarantee.

970.0970–2 Solicitation provision.

The contracting officer shall insert the provision at 48 CFR 970.5209–1, Requirement for Guarantee of Performance, in solicitations when the awardee will be required to be organized solely for performance of the requirement.

Subpart 970.11—Describing Agency Needs

970.1100 Policy.

970.1100–1 Performance-based contracting.

(a) It is the policy of the Department of Energy to use, to the maximum extent practicable, performance-based contracting methods in its management and operating contracts. Office of Federal Procurement Policy Letter 91–2 provides guidance concerning the development and use of performance-based contracting concepts and methodologies that may be generally applied to management and operating contracts. Performance-based contracts: describe performance requirements in terms of results rather than methods of accomplishing the work; use measurable (*i.e.,* terms of quality, timeliness, quantity) performance standards and objectives and quality assurance surveillance plans; provide performance incentives (positive or negative) where appropriate; and specify procedures for award or incentive fee reduction when work activities are not performed or do not meet contract requirements.

(b) The use of performance-based statements of work, where feasible, is the preferred method for establishing work requirements. Such statements of work and other documents used to establish work requirements (such as work authorization directives) should describe performance requirements and expectations in terms of outcome, results, or final work products, as opposed to methods, processes, or design.

(c) Contract performance requirements and expectations should be consistent with the Department's strategic planning goals and objectives, as made applicable to the site or facility through Departmental programmatic and financial planning processes. Measurable performance criteria, objective measures, and where appropriate, performance incentives, shall be structured to correspond to the performance requirements established in the statement of work and other documents used to establish work requirements.

(d) Quality assurance surveillance plans shall be developed to facilitate the assessment of contractor performance and ensure the appropriateness of any award or incentive fee payment. Such plans shall be tailored to the contract performance objectives, criteria, and measures, and shall, to the maximum extent practicable, focus on the level of performance required by the performance objectives rather than the methodology used by the contractor to achieve that level of performance.

970.1100–2 Additional considerations.

(a) While it is not feasible to set forth standard language which would apply to every contract situation, language must be designed for inclusion in a management and operating contract to describe clearly the work being undertaken; the controls, as appropriate, to be exercised by DOE over the performance of that work; and the relationship contemplated between the parties.

(b) The language shall also include the following with respect to subcontracting performance of the work described pursuant to paragraph (a) of this section: ''The contractor shall, when directed by DOE and may, but only when authorized by DOE, enter into subcontracts for the performance of any part of the work under this clause.''

(c) The provisions required in paragraphs (a) and (b) of this section shall be set forth in the statement of work of the contract.

Subpart 970.15—Contracting by Negotiation

970.1504 Contract pricing.

970.1504–1 Price analysis.

970.1504–1–1 Fees for management and operating contracts.

This subsection sets forth the Department's policies on fees for management and operating contracts and may be applied to other contracts as determined by the Procurement Executive, or designee.

970.1504–1–2 Fee policy.

(a) DOE management and operating contractors may be paid a fee in accordance with the requirements of this subsection.

(b) There are three basic principles underlying the Department's fee policy:

(1) The amount of available fee should reflect the financial risk assumed by the contractor.

(2) It is the policy of the Department, when work elements cannot be fixed price, incentive fees (including award fees) tied to objective measures should be used to the maximum extent appropriate.

(3) When work elements cannot be fixed price and award fees are employed, they should be tied to either objective or subjective measures. Each measure should, to the maximum extent appropriate, be directly tied to a specific portion of the fee pool.

(c) Fee objectives and amounts are to be determined for each contract. Standard fees or across-the-board fee agreements will not be used or made. Due to the nature of funding management and operating contracts, it is anticipated that fee shall be established in accordance with the annual funding cycle; however, with the prior approval of the Procurement Executive, or designee, a longer period may be used where necessary to incentivize performance objectives that span funding cycles or to optimize cost reduction efforts.

(d) Annual fee amounts shall be established in accordance with this subsection. Annual amounts shall not exceed maximum amounts derived from the appropriate fee schedule (and Classification Factor, if applicable) unless approved in advance by the Procurement Executive, or designee. In no event shall any fee exceed statutory limits imposed by 41 U.S.C. 254(b).

(e)(1) Contracting Officers shall include negative fee incentives in contracts when appropriate. A negative fee incentive is one in which the contractor will not be paid the full target fee amount when the actual performance level falls below the target level established in the contract.

(2) Negative fee incentives may only be used when:

(i) A target level of performance can be established, which the contractor can reasonably be expected to reach;

(ii) The value of the negative incentive is commensurate with the lower level of performance and any additional administrative costs;

(iii) Factors likely to prevent attainment of the target level of performance are clearly within the control of the contractor; and

(iv) The contract indicates clearly a level below which performance is not acceptable.

(f) Prior to the issuance of a competitive solicitation or the initiation of negotiations for an extension of an existing contract, the HCA shall coordinate the maximum available fee, as allowed by 48 CFR 970.1504–1–1, and the fee amount targeted for negotiation, if less, with the Procurement Executive, or designee. Solicitations shall identify maximum available fee under the contract and may invite offerors to propose fee less than the maximum available.

(g) When a contract subject to this subsection requires a contractor to use its own facilities or equipment, or other resources to make its own cost investment for contract performance (e.g., when there is no letter-of-credit financing), consideration may be given, subject to approval by the Procurement Executive, or designee, to increasing the total available fee amount above that otherwise provided by this subsection.

(h) Multiple fee arrangements should be used in accordance with 48 CFR 970.1504–1–4.

970.1504–1–3 Special considerations: Laboratory management and operation.

(a) For the management and operation of a laboratory, the contracting officer shall consider whether any fee is appropriate. Considerations should include:

(1) The nature and extent of financial or other liability or risk assumed or to be assumed under the contract;

(2) The proportion of retained earnings (as established under generally accepted accounting methods) that are utilized to fund the performance of work related to the DOE contracted effort;

(3) Facilities capital or capital equipment acquisition plans;

(4) Other funding needs, to include contingency funding, working capital funding, and provision for funding unreimbursed costs deemed ordinary and necessary;

(5) The utility of fee as a performance incentive; and

(6) The need for fee to attract qualified contractors, organizations, and institutions.

(b) In the event fee is considered appropriate, the contracting officer shall determine the amount of fee in accordance with this subsection.

(1) Costs incurred in the operation of a laboratory that are allowable and allocable under the cost principles (i.e., commercial using 48 CFR 31.2, nonprofit using OMB Circular A–122, or university-affiliated using OMB Circular A–21), regulations, or statutes applicable to the operating contractor should be classified as direct or indirect (overhead or G&A) charges to the contract and not included as proposed fee. Exceptions must be approved by the Procurement Executive, or designee.

(2) Except as specified in 48 CFR 970.1504–1–3(c)(3), the maximum total amount of fee shall be calculated in accordance with 48 CFR 970.1504–1–5 or 48 CFR 970.1504–1–9, as appropriate. The total amount of fee under any laboratory management and operating contract or other designated contract shall not exceed, and may be significantly less than, the result of that calculation. In determining the total amount of fee, the contracting officer shall consider the evaluation of the factors in paragraph (a) of this subsection as well as any benefits the laboratory operator will receive due to its tax status.

(c) In the event fee is considered appropriate, the contracting officer shall establish the type of fee arrangement in accordance with this subsection.

(1) The amount of fee may be established as total available fee with a base fee portion and a performance fee portion. Base fee, if any, shall be an amount in recognition of the risk of financial liability assumed by the contractor and shall not exceed the cost risk associated with those liabilities or the amount calculated in accordance with 48 CFR 970.1504–1–5, whichever is less. The total available fee, excepting any base fee, shall normally be associated with performance at or above the target level of performance as defined by the contract. If performance in either of the two general work categories appropriate for laboratories (science/technology and support) is rated at less than the target level of performance, the total amount of the available fee shall be subject to downward adjustment. Such downward adjustment shall be subject to the terms of the clause at 48 CFR 970.5215–3, Conditional Payment of Fee, Profit, or Incentives, if contained in the contract.

(2) The amount of fee may be established as a fixed fee in recognition of the risk of financial liability to be assumed by the contractor, with such fixed fee amount not exceeding the cost risk associated with the liabilities assumed or the amount of fee calculated in accordance with 48 CFR 970.1504–1–5, whichever is less.

(3) If the fixed fee or total available fee exceeds 75% of the fee that would be calculated per 48 CFR 970.1504–1–5 or 48 CFR 970.1504–1–9; or if a fee arrangement other than one of those set forth in paragraphs (c) (1) or (2) of this subsection is considered appropriate, the approval of the Procurement Executive, or designee, shall be obtained prior to its use.

(4) Fee, if any, as well as the type of fee arrangement, will normally be established for the life of the contract. It will be established at time of award, as part of the extend/compete decision, at the time of option exercise, or at such other time as the parties can mutually reach agreement, e.g., negotiations. Such agreement shall require the approval of the Procurement Executive, or designee.

(5) Fee established for longer than one year shall be subject to adjustment in the event of a significant change (greater than +/−10% or a lessor amount if appropriate) to the budget or work scope.

(6) Retained earnings (reserves) shall be identified and a plan for their use and disposition developed.

(7) The use of retained earnings as a result of performance of laboratory management and operation may be restricted if the operator is an educational institution.

970.1504–1–4 Types of contracts and fee arrangements.

(a) Contract types and fee arrangements suitable for management and operating contracts may include cost, cost-plus-fixed-fee, cost-plus-award-fee, cost-plus-incentive-fee, fixed-price incentive, firm-fixed-price or any combination thereof (see 48 CFR 16.1). In accordance with 48 CFR 970.1504–1–2(b)(1), the fee arrangement chosen for each work element should reflect the financial risk for project failure that contractors are willing to accept. Contracting officials shall structure each contract and the elements of the work in such a manner that the risk is manageable and, therefore, assumable by the contractor.

(b) Consistent with the concept of a performance-based management contract, those contract types which incentivize performance and cost control are preferred over a cost-plus-fixed-fee arrangement. Accordingly, a cost-plus-fixed-fee contract in instances other than those set forth in 48 CFR 970.1504–1–3(c)(2) may only be used when approved in advance by the Procurement Executive, or designee.

(c) A cost-plus-award-fee contract is generally the appropriate contract type for a management and operating contract.

(1) Where work cannot be adequately defined to the point that a fixed price contract is acceptable, the attainment of acquisition objectives generally will be enhanced by using a cost-plus-award-fee contract or other incentive fee

arrangement to effectively motivate the contractor to superior performance and to provide the Department with flexibility to evaluate actual performance and the conditions under which it was achieved.

(2) The construct of fee for a cost-plus-award-fee management and operating contract is that total available fee will equal a base fee amount and a performance fee amount. The total available fee amount including the performance fee amount the contractor may earn, in whole or in part during performance, shall be established annually (or as otherwise agreed to by the parties and approved by the Procurement Executive, or designee), in an amount sufficient to motivate performance excellence.

(3) However, consistent with concepts of performance-based contracting, it is Departmental policy to place fee at risk based on performance. Accordingly, a base fee amount will be available only when approved in advance by the Procurement Executive, or designee, except as permitted in 48 CFR 970.1504–1–3(c)(1). Any base fee amount shall be fixed, expressed as a percent of the total available fee at inception of the contract, and shall not exceed that percent during the life of the contract.

(4) The performance fee amount may consist of an objective fee component and a subjective fee component. Objective performance measures, when appropriately applied, provide greater incentives for superior performance than do subjective performance measures and should be used to the maximum extent appropriate. Subjective measures should be used when it is not feasible to devise effective predetermined objective measures applicable to cost, technical performance, or schedule for particular work elements.

(d) Consistent with performance-based contracting concepts, performance objectives and measures related to performance fee should be as clearly defined as possible and, where feasible, expressed in terms of desired performance results or outcomes. Specific measures for determining performance achievement should be used. The contract should identify the amount and allocation of fee to each performance result or outcome.

(e) Because the nature and complexity of the work performed under a management and operating contract may be varied, opportunities may exist to utilize multiple contract types and fee arrangements. Consistent with paragraph (a) of this subsection and 48 CFR 16.1, the contracting officer should apply that contract type or fee arrangement most appropriate to the work component. However, multiple contract types or fee arrangements:

(1) Must conform to the requirements of 48 CFR part 915 and 48 CFR parts 15 and 16, and

(2) Where appropriate to the type, must be supported by:

(i) Negotiated costs subject to the requirements of the Truth in Negotiations Act,

(ii) A pre-negotiation memorandum, and

(iii) A plan describing how each contract type or fee arrangement will be administered.

(f) Cost reduction incentives are addressed in the clause at 48 CFR 970.5215–4, Cost Reduction. This clause provides for incentives for quantifiable cost reductions associated with contractor proposed changes to a design, process, or method that has an established cost, technical, and schedule baseline, is defined, and is subject to a formal control procedure. The clause is to be included in management and operating contracts as appropriate. Proposed changes must be: initiated by the contractor, innovative, applied to a specific project or program, and not otherwise included in an incentive under the contract. Such cost reduction incentives do not constitute fee and are not subject to statutory or regulatory fee limitations; however, they are subject to all appropriate requirements set forth in this subpart.

(g) Operations and field offices shall take the lead in developing and implementing the most appropriate pricing arrangement or cost reduction incentive for the requirements. Pricing arrangements which provide incentives for performance and cost control are preferred over those that do not. The operations and field offices are to ensure that the necessary resources and infrastructure exist within both the contractor's and government's organizations to prepare, evaluate, and administer the pricing arrangement or cost reduction incentive prior to its implementation.

970.1504–1–5 General considerations and techniques for determining fixed fees.

(a) The Department's fee policy recognizes that fee is remuneration to contractors for the entrepreneurial function of organizing and managing resources, the use of their resources (including capital resources), and, as appropriate, their assumption of the risk that some incurred costs (operating and capital) may not be reimbursed.

(b) Use of a purely cost-based structured approach for determining fee objectives and amounts for DOE management and operating contracts is inappropriate considering the limited level of contractor cost, capital goods, and operating capital outlays for performance of such contracts. Instead of being solely cost-based, the desirable approach calls for a structure that allows evaluation of the following eight significant factors, as outlined in order of importance, and the assignment of appropriate fee values (subject to the limitations on fixed fee in 48 CFR 970.1504–1–6):

(1) The presence or absence of financial risk, including the type and terms of the contract;

(2) The relative difficulty of work, including specific performance objectives, environment, safety and health concerns, and the technical and administrative knowledge, and skill necessary for work accomplishment and experience;

(3) Management risk relating to performance, including:

(i) Composite risk and complexity of principal work tasks required to do the job;

(ii) Labor intensity of the job;

(iii) Special control problems; and

(iv) Advance planning, forecasting and other such requirements;

(4) Degree and amount of contract work required to be performed by and with the contractor's own resources, as compared to the nature and degree of subcontracting and the relative complexity of subcontracted efforts, subcontractor management and integration;

(5) Size and operation (number of locations, plants, differing operations, etc.);

(6) Influence of alternative investment opportunities available to the contractor (i.e., the extent to which undertaking a task for the Government displaces a contractor's opportunity to make a profit with the same staff and equipment in some other field of activity);

(7) Benefits which may accrue to the contractor from gaining experience and knowledge of how to do something, from establishing or enhancing a reputation, or from having the opportunity to hold or expand a staff whose loyalties are primarily to the contractor; and

(8) Other special considerations, including support of Government programs such as those relating to small and minority business subcontracting, energy conservation, etc.

(c) The total fee objective for a particular annual fixed fee negotiation is established by evaluating the factors in this subsection, assigning fee values to them, and totaling the resulting amounts

(subject to limitations on total fixed fee in 48 CFR 970.1504–1–6).

970.1504–1–6 Calculating fixed fee.

(a) In recognition of the complexities of the fee determination process, and to assist in promoting a reasonable degree of consistency and uniformity in its application, the following fee schedules set forth the maximum amounts of fee that contracting activities are allowed to award for a particular fixed fee transaction calculated annually.

(b) Fee schedules representing the maximum allowable annual fixed fee available under management and operating contracts have been established for the following management and operating contract efforts:

(1) Production;

(2) Research and Development; and

(3) Environmental Management.

(c) The schedules are:

PRODUCTION EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
Up to $1 Million	.....	.....	7.66
1,000,000	$76,580	7.66	6.78
3,000,000	212,236	7.07	6.07
5,000,000	333,670	6.67	4.90
10,000,000	578,726	5.79	4.24
15,000,000	790,962	5.27	3.71
25,000,000	1,161,828	4.65	3.35
40,000,000	1,663,974	4.16	2.92
60,000,000	2,247,076	3.75	2.57
80,000,000	2,761,256	3.45	2.34
100,000,000	3,229,488	3.23	1.45
150,000,000	3,952,622	2.64	1.12
200,000,000	4,510,562	2.26	0.61
300,000,000	5,117,732	1.71	0.53
400,000,000	5,647,228	1.41	0.45
500,000,000	6,097,956	1.22	.....
Over $500 Million	6,097,956	.....	0.45

RESEARCH AND DEVELOPMENT EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
Up to $1 Million	.....	.....	8.42
1,000,000	$84,238	8.42	7.00
3,000,000	224,270	7.48	6.84
5,000,000	361,020	7.22	6.21
10,000,000	671,716	6.72	5.71
15,000,000	957,250	6.38	4.85
25,000,000	1,441,892	5.77	4.22
40,000,000	2,075,318	5.19	3.69
60,000,000	2,813,768	4.69	3.27
80,000,000	3,467,980	4.33	2.69
100,000,000	4,006,228	4.01	1.69
150,000,000	4,850,796	3.23	1.14
200,000,000	5,420,770	2.71	0.66
300,000,000	6,083,734	2.03	0.53
400,000,000	6,667,930	1.67	0.50
500,000,000	7,172,264	1.43	.....
Over $500 Million	7,172,264	.....	0.50

ENVIRONMENTAL MANAGEMENT EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
Up to $1 Million	.....	.....	7.33
1,000,000	$73,298	7.33	6.49
3,000,000	203,120	6.77	5.95
5,000,000	322,118	6.44	5.40
10,000,000	592,348	5.92	4.83
15,000,000	833,654	5.56	4.03
25,000,000	1,236,340	4.95	3.44
40,000,000	1,752,960	4.38	3.29
60,000,000	2,411,890	4.02	3.10
80,000,000	3,032,844	3.79	2.49
100,000,000	3,530,679	3.53	1.90
150,000,000	4,479,366	2.99	1.48
200,000,000	5,219,924	2.61	1.12

ENVIRONMENTAL MANAGEMENT EFFORTS—Continued

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
300,000,000	6,337,250	2.11	0.88
400,000,000	7,219,046	1.80	0.75
500,000,000	7,972,396	1.59	0.58
750,000,000	9,423,463	1.26	0.55
1,000,000,000	10,786,788	1.08	.....
Over $1.0 Billion	10,786,788	.....	0.55

970.1504–1–7 Fee Base.

(a) The fee base is an estimate of necessary allowable costs, with some exclusions. It is used in the fee schedules to determine the maximum annual fee for a fixed fee contract. That portion of the fee base that represents the cost of the Production, Research and Development, or Environmental Management work to be performed, shall be exclusive of the cost of source and special nuclear materials; estimated costs of land, buildings and facilities whether to be leased, purchased or constructed; depreciation of Government facilities; and any estimate of effort for which a separate fee is to be negotiated.

(b) Such portion of the fee base, in addition to the adjustments in paragraph (a) of this subsection, shall exclude:

(1) Any part of the estimated cost of capital equipment (other than special equipment) which the contractor procures by subcontract or other similar costs which is of such magnitude or nature as to distort the technical and management effort actually required of the contractor;

(2) At least 20% of the estimated cost or price of subcontracts and other major contractor procurements;

(3) Up to 100% of the estimated cost or price of subcontracts and other major contractor procurements if they are of a magnitude or nature as to distort the technical and management effort actually required of the contractor;

(4) Special equipment as defined in 48 CFR 970.1504–1–8;

(5) Estimated cost of Government-furnished property, services and equipment;

(6) All estimates of costs not directly incurred by or reimbursed to the operating contractor;

(7) Estimates of home office or corporate general and administrative expenses that shall be reimbursed through the contract;

(8) Estimates of any independent research and development cost or bid and proposal expenses that may be approved under the contract;

(9) Any cost of work funded with uncosted balances previously included in a fee base of this or any other contract performed by the contractor;

(10) Cost of rework attributable to the contractor; and

(11) State taxes.

(c) In calculating the annual fee amounts associated with the Production, Research and Development, or Environmental Management work to be performed, the fee base is to be allocated to the category reflecting the work to be performed and the appropriate fee schedule utilized.

(d) The portion of the fee base associated with the Production, Research and Development, or Environmental Management work to be performed and the associated schedules in this part are not intended to reflect the portion of the fee base or related compensation for unusual architect-engineer, construction services, or special equipment provided by the management and operating contractor. Architect-engineer and construction services are normally covered by special agreements based on the policies applying to architect-engineer or construction contracts. Fees paid for such services shall be calculated using the provisions of 48 CFR 91504–1–5 relating to architect-engineer or construction fees and shall be in addition to the operating fees calculated for the Production, Research and Development, or Environmental Management work to be performed. Special equipment purchases shall be addressed in accordance with the provisions of 48 CFR 970.1504–1–8 relating to special equipment.

(e) No schedule set forth in 48 CFR 915.404–4–71–5 or 48 CFR 970.1504–1–6 shall be used more than once in the determination of the fee amount for an annual period, unless prior approval of the Procurement Executive, or designee, is obtained.

970.1504–1–8 Special equipment purchases.

(a) Special equipment is sometimes procured in conjunction with management and operating contracts. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the equipment which shall not exceed the maximum fee allowable as established using the schedule in 48 CFR 915.404–4–71–5(h).

(b) In determining appropriate fees, factors such as complexity of equipment, ratio of procurement transactions to volume of equipment to be purchased and completeness of services should be considered. Where possible, the reasonableness of the fees should be checked by their relationship to actual costs of comparable procurement services.

(c) For purposes of this subsection, special equipment is equipment for which the purchase price is of such a magnitude compared to the cost of installation as to distort the amount of technical direction and management effort required of the contractor. Special equipment is of a nature that requires less management attention. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the equipment using the schedule in 48 CFR 915.404–4–71–5(h). The determination of specific items of equipment in this category requires application of judgment and careful study of the circumstances involved in each project. This category of equipment would generally include:

(1) Major items of prefabricated process or research equipment; and

(2) Major items of preassembled equipment such as packaged boilers, generators, machine tools, and large electrical equipment. In some cases, it would also include special apparatus or devices such as reactor vessels and reactor charging machines.

970.1504–1–9 Special Considerations: Cost-plus-award-fee.

(a) When a management and operating contract is to be awarded on a cost-plus-award-fee basis, several special considerations are appropriate.

(b) All annual performance incentives identified under these contracts are funded from the annual total available fee, which consists of a base fee amount (which may be zero) and a performance fee amount (which typically will consist of an incentive fee component for

objective performance requirements, an award fee component for subjective performance requirements, or both).

(c) The annual total available fee for the contract shall equal the product of the fee(s) that would have been calculated for an annual fixed fee contract and the classification factor(s) most appropriate for the facility/task. If more than one fee schedule is applicable to the contract, the annual total available fee shall be the sum of the available fees derived proportionately from each fee schedule; consideration of significant factors applicable to each fee schedule; and application of a Classification Factor(s) most appropriate for the work.

(d) Classification Factors applied to each Facility/Task Category are:

Facility/task category	Classification factor
A	3.0
B	2.5
C	2.0
D	1.25

(e) The contracting officer shall select the Facility/Task Category after considering the following:

(1) Facility/Task Category A. The main focus of effort performed is related to:

(i) The manufacture, assembly, retrieval, disassembly, or disposal of nuclear weapons with explosive potential;

(ii) The physical cleanup, processing, handling, or storage of nuclear radioactive or toxic chemicals with consideration given to the degree the nature of the work advances state of the art technologies in cleanup, processing or storage operations and/or the inherent difficulty or risk of the work is significantly demanding when compared to similar industrial/DOE settings (i.e., nuclear energy processing, industrial environmental cleanup);

(iii) Construction of facilities such as nuclear reactors, atomic particle accelerators, or complex laboratories or industrial units especially designed for handling radioactive materials;

(iv) Research and development directly supporting paragraphs (e)(1)(i), (ii), or (iii) of this subsection and not conducted in a laboratory, or

(v) As designated by the Procurement Executive, or designee. (Classification factor 3.0)

(2) Facility/Task Category B. The main focus of effort performed is related to:

(i) The safeguarding and maintenance of nuclear weapons or nuclear material;

(ii) The manufacture or assembly of nuclear components;

(iii) The physical cleanup, processing, handling, or storage of nuclear radioactive or toxic chemicals, or other substances which pose a significant threat to the environment or the health and safety of workers or the public, if the nature of the work uses state of the art technologies or applications in such operations and/or the inherent difficulty or risk of the work is more demanding than that found in similar industrial/DOE settings (i.e., nuclear energy, chemical or petroleum processing, industrial environmental cleanup);

(iv) The detailed planning necessary for the assembly/disassembly of nuclear weapons/components;

(v) Construction of facilities involving operations requiring a high degree of design layout or process control;

(vi) Research and development directly supporting paragraphs (e)(2)(i), (ii), (iii), (iv) or (v) of this subsection and not conducted in a laboratory; or

(vii) As designated by the Procurement Executive, or designee. (Classification factor 2.5)

(3) Facility/Task Category C. The main focus of effort performed is related to:

(i) The physical cleanup, processing, or storage of nuclear radioactive or toxic chemicals if the nature of the work uses routine technologies in cleanup, processing or storage operations and/or the inherent difficulty or risk of the work is similar to that found in similar industrial/DOE settings (*i.e.,* nuclear energy, chemical processing, industrial environmental cleanup);

(ii) Plant and facility maintenance;

(iii) Plant and facility security (other than the safeguarding of nuclear weapons and material);

(iv) Construction of facilities involving operations requiring normal processes and operations; general or administrative service buildings; or routine infrastructure requirements;

(v) Research and development directly supporting paragraphs (e)(3)(i), (ii), (iii) or (iv) of this subsection and not conducted in a laboratory; or

(vi) As designated by the Procurement Executive, or designee. (Classification factor 2.0)

(4) Facility/Task Category D. The main focus of the effort performed is research and development conducted at a laboratory. (Classification factor 1.25)

(f) Where the Procurement Executive, or designee, has approved a base fee, the Classification Factors shall be reduced, as approved by the Procurement Executive, or designee.

(g) Any risks which are indemnified by the Government (for example, by the Price-Anderson Act) will not be considered as risk to the contractor.

(h) All management and operating contracts awarded on a cost-plus-award-fee basis shall set forth in the contract, or the Performance Evaluation and Measurement Plan(s) required by the contract clause at 48 CFR 970.5215–1, Total Available Fee: Base Fee Amount and Performance Fee Amount, a site specific method of rating the contractor's performance of the contract requirements and a method of fee determination tied to the method of rating.

(i) Prior approval of the Procurement Executive, or designee, is required for an annual total available fee amount exceeding the guidelines in paragraph (c) of this subsection.

(j) DOE Operations/Field Office Managers must ensure that all important areas of contract performance are specified in the contract or Performance Evaluation and Measurement Plan(s), even if such areas are not assigned specific weights or percentages of available fee.

970.1504–1–10 Special considerations: Fee limitations.

In situations where the objective performance incentives are of unusual difficulty or where the successful completion of the performance incentives would provide extraordinary value to the Government, fees in excess of those allowed under 48 CFR 970.1504–1–5 and 48 CFR 970.1504-1–9 may be allowed with the approval of the Procurement Executive, or designee. Requests to allow fees in excess of those provided under other provisions of this fee policy must be accompanied by a written justification with detailed supporting rationale as to how the specific circumstances satisfy the two criteria listed in this subsection.

970.1504–1–11 Documentation.

The contracting officer shall tailor the documentation of the determination of fee prenegotiation objective based on 48 CFR 15.406–1, Prenegotiation objectives, and the determination of the negotiated fee in accordance with 48 CFR 15.406–3, Documenting the negotiation. The contracting officer shall include as part of the documentation: the rationale for the allocation of cost and the assignment of Facility/Task Categories; a discussion of the calculations described in 48 CFR 970.1504–1–5; and discussion of any other relevant provision of this subsection.

970.1504–2 Price negotiation.

(a) Management and operating contract prices (fee) and DOE

obligations to support contract performance shall be governed by:

(1) The level of activity authorized and the amount of funds appropriated for DOE approved programs by specific program legislation;

(2) Congressional budget and reporting limitations;

(3) The amount of funds apportioned to DOE;

(4) The amount of obligational authority allotted to program officials and Approved Funding Program limitations; and

(5) The amount of funds actually available to the DOE operating activity as determined in accordance with applicable financial regulations and directives.

(b) Funds shall be obligated and made available by contract provision or modification after the funds become available for obligation for payment to support performance of DOE approved projects, tasks, work authorizations, or services.

(c) Contractor expenditures shall be limited to the overall amount of funds available and obligated on the contract. As prescribed at 48 CFR 970.3270(b), the clause at 48 CFR 970.5232–4, Obligation of Funds, is used for this purpose.

970.1504–3 Documentation.

970.1504–3–1 Cost or pricing data.

(a) The certification requirements of 48 CFR 15.406–2 are not applied to DOE cost-reimbursement management and operating contracts.

(b) The contracting officer shall ensure that management and operating contractors and their subcontractors obtain cost or pricing data prior to the award of a negotiated subcontract or modification of a subcontract in accordance with 48 CFR 15.406–2, and incorporate appropriate contract provisions similar to those set forth at 48 CFR 52.215–10 and 48 CFR 52.215–11 that provide for the reduction of a negotiated subcontract price by any significant amount that the subcontract price was increased because of the submission of defective cost or pricing data by a subcontractor at any tier.

(c) The clauses at 48 CFR 52.215–12 and 48 CFR 52.215–13 shall be included in management and operating contracts.

970.1504–4 Special cost or pricing areas.

970.1504–4–1 Make-or-buy plans.

970.1504–4–2 Policy.

(a) Contracting officers shall require management and operating contractors to develop and implement make-or-buy plans that establish a preference for providing supplies or services (including construction and construction management) on a least-cost basis, subject to program specific make-or-buy criteria. The emphasis of this make-or-buy structure is to eliminate bias for in-house performance where an activity may be performed at less cost or otherwise more efficiently through subcontracting.

(b) A work activity, supply or service is provided at ''least cost'' when, after consideration of a variety of appropriate programmatic, business, and financial factors, it is concluded that performance by either ''in-house'' resources or by contracting out is likely to provide the property or service at the lowest overall cost. Programmatic factors include, but are not limited to, program specific make-or-buy criteria established by the Department of Energy, the impact of a ''make'' or a ''buy'' decision on mission accomplishment, and anticipated changes to the mission of the facility or site. Business factors pertain to such elements as market conditions, past experience in obtaining similar supplies or services, and overall operational efficiencies that might be available through either in-house performance or contracting out. Among the financial factors that may be considered to determine a least-cost alternative in a make-or-buy analysis are both recurring and one-time costs attributable to either retaining or contracting out a particular item, financial risk, and the anticipated contract price.

(c) In developing and implementing its make-or-buy plan, a contractor shall be required to assess subcontracting opportunities and implement subcontracting decisions in accordance with the following:

(1) The contractor shall conduct internal productivity improvement and cost-reduction programs so that in-house performance options can be made more efficient and cost-effective.

(2) The contractor shall consider subcontracting opportunities with the maximum practicable regard for open communications with potentially affected employees and their representatives. Similarly, a contractor will communicate its plans, activities, cost-benefit analyses, and decisions with those stakeholders likely to be affected by such decisions, including representatives of the community and local businesses.

970.1504–4–3 Requirements.

(a) Development of program-specific make-or-buy criteria.

(1) Program specific make-or-buy criteria are those factors that reflect specific mission or program objectives (including operational efficiency, contractor diversity, environment, safety and health, work force displacement and restructuring, and collective bargaining agreements) and that, upon their application to a specific work effort, would override a decision based on a purely economic rationale. These criteria are to be used to assess each work effort identified in a facility's or site's make-or-buy plan to determine the appropriateness of a contractor's make-or-buy decisions.

(2) Heads of Contracting Activities shall ensure that program specific make-or-buy criteria are developed and provided to the contractor for use in its make-or-buy plan administration activities for the facility, site, or specific program, as appropriate. Although the Head of the Contracting Activity has the responsibility for ensuring that the program-specific make-or-buy criteria are developed and provided to the contractor, the actual development of the program specific make or buy criteria should be accomplished by the appropriate collaboration of headquarters and field office program, technical, and business specialists. Accordingly, these organizations and individuals should be relied on for the development of the program specific make or buy criteria so that they appropriately reflect program considerations applicable to the contractor's make-or-buy decisions.

(b) Make-or-buy plan property and services. Supplies or services estimated to cost less than one (1) percent of the estimated total operating cost for a year or $1 million for the same year, whichever is less, need not be included in the contractor's make-or-buy plan. However, adjustments may be made to these thresholds where programmatic or cost considerations would indicate that a particular supply or service should be included in the make-or-buy plan.

(c) Competitive solicitation requirements. (1) To the extent practicable, a competitive solicitation for the management and operation of a Department of Energy facility or site should:

(i) Identify those programs, projects, work areas, functions or services that the Department intends for the successful offeror to include in any make-or-buy plan; and

(ii) Require the submission of a preliminary make-or-buy plan for the period of performance of the contract from each offeror as part of its proposal submitted in response to the competitive solicitation.

(2) If the requirement for each offeror to submit a preliminary make-or-buy plan as part of its proposal is

impractical or otherwise incompatible with the acquisition strategy, consideration should be given to structuring the evaluation criteria for the competitive solicitation in such a manner as to permit the evaluation of an offeror's approach to conducting its make-or-buy program within the context of the contractual requirements.

(3) The successful offeror's preliminary make-or-buy plan shall be submitted for final approval within 180 days after contract award, consistent with the requirements of 48 CFR 970.5215–2(c), Make-or-Buy Plan.

(d) Evaluation of the contractor's make-or-buy plan. In evaluating the contractor's make-or-buy plan, the contracting officer shall consider the following factors:

(1) The program specific make-or-buy criteria (such as operational efficiency, contractor diversity, environment, safety and health, work force displacement and restructuring, and collective bargaining agreements) with particular attention to the effect of a ''buy'' decision on the contractor's ability to maintain core competencies needed to accomplish mission-related programs and projects;

(2) The impact of a ''make'' or ''buy'' decision on contract cost, schedule, and performance and financial risk;

(3) The potential impact of a ''make'' or ''buy'' decision on known future mission or program activities at the facility or site;

(4) Past experience at the facility or site regarding ''make-or-buy'' decisions for the same, or similar, supplies or services;

(5) Consistency with the contractor's approved subcontracting plan, as required by the clause entitled ''Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan'' (48 CFR 52.219–9), and implementation of Section 3021 of the Energy Policy Act of 1992.

(6) Local market conditions, including contractor work force displacement and the availability of firms that can meet the work requirements with regard to quality, quantity, cost, and timeliness;

(7) Where the construction of new or additional facilities is required, that the cost of such facilities is in the Government's best interest when compared to subcontracting or privatization alternatives; and

(8) Whether all relevant requirements and costs of performing the work by the contractor and through subcontracting are considered and any different requirements for the same work are reconciled.

(e) Approval. The contracting officer shall approve all plans and revisions thereto. Once approved, a make-or-buy plan shall remain effective for the term of the contract (up to a period of five years), unless circumstances warrant a change.

(f) Administration. The contractor's performance against the approved make-or-buy plan shall be monitored to ensure that:

(1) The contractor is complying with the plan;

(2) Items identified for deferral decisions are addressed in a timely manner; and

(3) The contractor periodically updates the make-or-buy plan based on changed circumstances or significant new work.

970.1504–5 Solicitation provision contract clauses.

(a) The contracting officer shall insert the clause at 48 CFR 970.5215–1, Total Available Fee: Base Fee Amount and Performance Fee Amount, in management and operating contracts, and other contracts determined by the Procurement Executive, or designee, that include cost-plus-award-fee arrangements.

(1) The contracting officer shall include the clause with its Alternate I when the award fee cycle consists of two or more evaluation periods.

(2) The contracting officer shall include the clause with its Alternate II when the award fee cycle consists of one evaluation period.

(3) The contracting officer shall include the clause with its Alternate III when the DOE Operations/Field Office Manager, or designee, requires the contractor to submit a self-assessment.

(4) The contracting officer shall include the clause with its Alternate IV when the DOE Operations/Field Office Manager, or designee, permits the contractor to submit a self-assessment at the contractor's option.

(b) The contracting officer shall insert the clause at 48 CFR 970.5215–2, Make-or-Buy Plan, in management and operating contracts. The contracting officer may add a sentence at the end of paragraph (d) of the clause to identify where in the contract the make-or-buy plan is located.

(c) The contracting officer shall insert the clause at 48 CFR 970.5215–3, Conditional Payment of Fee, Profit, or Incentives, in management and operating contracts, and other contracts determined by the Procurement Executive, or designee. The contracting officer shall include the clause with its Alternate I in contracts awarded on cost-plus-award-fee, multiple fee, or incentive fee basis which may include various types of fee and incentive arrangements.

(d) The contracting officer shall insert the clause at 48 CFR 970.5215–4, Cost Reduction, in management and operating contracts, and other contracts determined by the Procurement Executive, or designee, if cost savings programs are contemplated.

(e) The Contracting officer shall insert the provision at 48 CFR 970.5215–5, Limitation on Fee, in solicitations for management and operating contracts, and other contracts determined by the Procurement Executive, or designee.

Subpart 970.17—Special Contracting Methods

970.1706 Management and operating contracts.

970.1706–1 Award, renewal, and extension.

(a) Contract term. Effective work performance under a management and operating contract is facilitated by the use of a relatively long contract term of up to ten (10) years. Accordingly, management and operating contracts shall provide for a basic contract term not to exceed five (5) years and may include an option(s) to extend the term for additional periods; provided, that no one option period exceeds five (5) years in duration and the total term of the contract, including any options exercised, does not exceed ten (10) years. The specific term of the base period and of any options periods shall be determined at the time of the authorization to compete or extend the contract. The term ''option'' as used herein means a unilateral right in the contract by which the Government can extend the term of the contract. Accordingly, except as may be provided for through the inclusion of an option(s) in the contract to extend the term, any extension to continue the contract with the incumbent contractor beyond its term shall only occur when such extension can be justified under one of the statutory authorities identified in 48 CFR 6.302 and when authorized by the Head of the Agency.

(b) Exercise of option. As part of the review required by 48 CFR 17.605(b), the contracting officer shall assess whether competing the contract will produce a more advantageous offer than exercising the option. The incumbent contractor's past performance under the contract, the extent to which performance-based management contract provisions are present, or can be negotiated into, the contract, and the impact of a change in a contractor on the Department's discharge of its programs are considerations that shall

be addressed in the contracting officer's decision that the exercise of the option is in the Government's best interest. The contracting officer's decision shall be approved by the Procurement Executive and the cognizant Assistant Secretary(s).

(c) Conditional authorization of non-competitive extension made pursuant to authority under CICA. Authorization to extend a management and operating contract by the Head of the Agency shall be considered conditional upon the successful negotiation of the contract to be extended in accordance with the Department's negotiation objectives. The Head of the Contracting Activity shall advise the Procurement Executive no later than 6 months after receipt of the conditional authorization as to whether the Department's objectives will be met and, if not, the contracting activity's plans for competing the requirement.

970.1706–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 52.217–9, Option to Extend the Term of the Contract, in all management and operating contracts when the inclusion of an option is appropriate.

Subpart 970.19—Small, Small Disadvantaged and Women-Owned Small Business Concerns

970.1907 Subcontracting with Small Business, Small Disadvantaged Business and Woman-Owned Small Business Concerns.

970.1907–1 Subcontracting plan requirements.

Pursuant to the clause at 48 CFR 52.219–9, Small, Small Disadvantaged and Woman-Owned Small Business Subcontracting Plan, which is required for all management and operating contracts, each management and operating contract shall include a subcontracting plan which is effective for the term of the contract. Goals for the contract shall be negotiated annually when revised funding levels are determined. The plan should include provisions for revising the goals or any other sections of the plan. Such revisions shall be in writing, approved by the contracting officer, and shall be specifically made a material part of the contract.

Subpart 970.22—Application of Labor Policies

970.2200 Scope of Subpart.

This Subpart prescribes Department of Energy labor policies pertaining to the award and administration of management and operating contracts.

970.2201 Basic labor policies.

970.2201–1 Labor relations.

970.2201–1–1 General.

Contracting officers shall, in appropriate circumstances, follow the guidance in 48 CFR subpart 22.1, as supplemented in this section, in the award and administration of management and operating contracts.

970.2201–1–2 Policies.

(a) The extent of Government ownership of the nation's energy plant and materials, and the overriding concerns of national defense and security, impose special conditions on personnel and labor relations in the energy program. Such special conditions include the need for continuity of vital operations at DOE installations; retention by DOE of absolute authority on all questions of security; and DOE review of labor expenses under management and operating contracts as a part of its responsibility for assuring judicious expenditure of public funds. It is the intent of DOE that personnel and labor policies throughout the energy program reflect the best experience of American industry in aiming to achieve the type of stable labor-management relations that are essential to the proper development of the energy program. The following enunciates the principles upon which the DOE policy is based:

(1) Employment standards. (i) Management and operating contractors are expected to bring experienced, proven personnel from their private operations to staff key positions on the contract work and to recruit other well-qualified personnel as needed. Such personnel should be employed and treated during employment without discrimination by reason of race, color, religion, sex, or national origin. Contractors shall be required to take affirmative action to achieve these objectives.

(ii) The job qualifications and suitability of prospective employees should be established by the contractor prior to employment by careful personnel investigations. Such personnel investigations should include, as appropriate: a credit check; verification of high school degree/diploma or degree/diploma granted by an institution of higher learning within the last 5 years; contacts with listed personal references; contacts with listed employers for the past 3 years (excluding employment of less than 60 days duration, part-time employments, and craft/union employments); and local law enforcement checks when such checks are not prohibited by State or local law or regulation, and when the individual resides in the jurisdiction where the contractor is located. When a DOE access authorization (security clearance) will be required, the aforementioned preemployment checks must be conducted and the applicant's job qualifications and suitability must be established before a request is made to the DOE to process the applicant for access authorization. Evidence must be furnished to the DOE with the applicant's security forms that specify: the date each check was conducted, the entity contacted that provided information concerning the applicant, a synopsis of the information provided as a result of each contact, and a statement that all information available has been reviewed and favorably adjudicated in accordance with the contractor's personnel policies. When an applicant is being hired specifically for a position which requires a DOE access authorization, the applicant shall not be placed in that position prior to the access authorization being granted by the DOE unless an exception has been obtained from the Head of the Contracting Activity, or designee. If an applicant is placed in that position prior to access authorization being granted by the DOE, the applicant may not be afforded access to classified matter or special nuclear materials (in categories requiring access authorization) until the DOE notifies the employer that access authorization has been granted. Management and operating contractors and other contractors operating DOE facilities may include the requirements set forth in this subsection in subcontracts (appropriately modified to identify the parties) wherein subcontract employees will be required to hold DOE access authorization in order to perform on-site duties, such as protective force operations.

(iii) Consistent with the policies set forth in this subpart, the contractor is responsible for maintaining satisfactory standards for employee qualifications, performance, conduct, and business ethics under its own personnel policies.

(2) Security. On all matters of security at its facilities, DOE retains absolute authority and neither the regulations and policies pertaining to security, nor their administration, are matters for collective bargaining between the contractor's management and labor. Insofar as DOE security regulations affect the collective bargaining process, the security policies and regulations will be made known to both parties. To the fullest extent feasible, DOE will consult with representatives of the contractor's management and labor when formulating security regulations

and policies that may affect the collective bargaining process.

(3) Wages, salaries, and employee benefits. (i) Wages, salaries, and employee benefits shall be administered in a manner designated to adapt the normal practices and conditions of industry or institutions of higher education to the contract work, and to provide for appropriate review by DOE. Area practices, valid patterns, and well-established commercial or academic practices of the contractors, as appropriate, form the criteria for the establishment and adjustment of compensation schedules.

(ii) The aspects of wages, hours, and working conditions which are the substance of collective bargaining in normal organized industries will be left to the orderly processes of negotiation and agreement between DOE contractor management and employee representatives with maximum possible freedom from Government interference.

(4) Employee relations. The handling of employee relations on contract work, including such matters as the conduct and discipline of the work force and the handling of employee grievances, is part of the normal management responsibility of the contractor.

(5) Collective bargaining. (i) DOE review of collective bargaining practices will be premised on the view that management's trusteeship for the operation of the Government facilities includes the duty to adopt practices which are fundamental to the friendly adjustment of disputes, and which experience has shown, promote orderly collective bargaining relationships. Practices inconsistent with this view may be objected to if not found to be otherwise clearly warranted.

(ii) Consistent with the policy of assuring continuity of operation of vital facilities, all collective bargaining agreements at DOE-owned facilities should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout, or other interruption of normal operations. For this purpose, each collective bargaining agreement entered into during the period of performance of this contract should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operation for the term of the collective bargaining agreement.

(iii) DOE expects its management and operating contractors and the unions representing the contractor's employees to cooperate fully with the Federal Mediation and Conciliation Service.

(6) Personnel training. DOE encourages and supports personnel training programs aimed at improving work efficiency or developing needed skills which are not otherwise obtainable.

(7) Working conditions. Accident, fire, health, and occupational hazards associated with DOE activities will be held to a practical minimum level and controlled in the interest of maintenance of health and prevention of accidents. Subject to DOE control, contractors shall be required to maintain comprehensive continuous preventive and protective programs appropriate to the particular activities throughout all operations. Appropriate financial protection in case of occupational disability must be provided to employees on DOE projects.

(c) Title to payroll and associated records under certain contracts for the management and operation of DOE facilities, and for necessary miscellaneous construction incidental to the function of these facilities, shall vest in the Government. Such records are to be disposed of in accordance with DOE directions. For such contracts, the Solicitor of Labor has granted a tolerance from the Department of Labor Regulations to omit from the prescribed labor clauses the requirement for the retention of payrolls and associated records for a period of three years after completion of the contract. Under this tolerance, the records retention requirements for all labor clauses in the contract and the Fair Labor Standards Act are satisfied by disposal of such records in accordance with applicable DOE directives.

970.2201–1–3 Contract clause.

In addition to the clause at 48 CFR 52.222–1, Notice to the Government of Labor Disputes, the contracting officer shall insert the clause at 970.5222–1, Collective Bargaining Agreements' Management and Operating Contracts, in all management and operating contracts.

970.2201–2 Overtime management.

970.2201–2–1 Policy.

Contracting officers shall ensure that management and operating contractors manage overtime cost effectively and use overtime only when necessary to ensure performance of work under the contract.

970.2201–2–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5222–2, Overtime Management, in management and operating contracts.

970.2204 Labor standards for contracts involving construction.

970.2204–1 Statutory and regulatory requirements.

970.2204–1–1 Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities.

(a) Particular work items falling within one or more of the following criteria normally will be classified as noncovered by the Davis-Bacon Act, hereinafter referred to in this section as the ''Act.''

(1) Individual work items estimated to cost $2,000 or less. The total dollar amount of the management and operating contract is not a factor to be considered and bears no relation to individual work items classified as construction, alteration and/or repair, including painting and decorating. However, no item of work, the cost of which is estimated to be in excess of $2,000, shall be artificially divided into portions less than $2,000 for the purpose of avoiding the application of the Act.

(2) Work and services that are a part of operational and maintenance activities or which, being very closely and directly involved therewith, are more in the nature of operational activities than construction, alteration, and/or repair work. This includes work and services which would involve a material risk to continuity of operations, to life or property, or to DOE operating requirements, if performed by persons other than the contractor's regular production and maintenance forces. However, any decision that contracts or work items are noncovered for these reasons must be made by the Head of the Contracting Activity without power of delegation.

(3) Assembly, modification, setup, installation, replacement, removal, rearrangement, connection, testing, adjustment, and calibration of machinery and equipment. However, it is noted that these activities are covered if they are part of, or would be a logical part of, the construction of a facility, or if construction-type work which is not ''incidental'' to the overall effort is involved.

(4) Experimental development of equipment, processes, or devices, including assembly, fitting, installation, testing, reworking, and disassembly. This refers to equipment, processes, and devices which are assembled for the purpose of conducting a test or experiment. The design may be only conceptual in character, and professional personnel who are responsible for the experiment participate in the assembly. Specifically

excluded from the category of experimental development are buildings and building utility services, as distinguished from temporary connections thereto. Also specifically excluded from this category is equipment to be used for continuous testing (*e.g.,* a machine to be continuously used for testing the tensile strength of structural members).

(5) Experimental work in connection with peaceful uses of nuclear energy. This refers to equipment, processes and devices which are assembled and/or set in place and interconnected for the purpose of conducting a test or experiment. The nature of the test or experiment is such that professional personnel who are responsible for the test or experiment and/or data to be derived therefrom must, by necessity, participate in the assembly and interconnections. Specifically excluded from experimental work are buildings, building utility services, structural changes, drilling, tunneling, excavation, and back-filling work which can be performed according to customary drawings and specifications, and utility services of modifications to utility services, as distinguished from temporary connections thereto. Work in this category may be performed in mines or in other locations specifically constructed for tests or experiments.

(6) Emergency work to combat the effects of fire, flood, earthquake, equipment failure, accident, or other casualties, and to restart the operational activity following the casualty. Work which is not directly related to restarting the activity or which involves rebuilding or replacement of a structure, structural components, or equipment is excluded from this category.

(7) Decontamination, including washing, scrubbing, and scraping to remove contamination; removal of contaminated soil or other material; and painting or other resurfacing, provided that such painting or resurfacing is an integral part of the decontamination activity and performed by the employees of the contractors performing the decontamination.

(8) Burial of contaminated soil waste or contained liquid; however, initial preparatory work readying the burial ground for use (*e.g.,* any grading or excavating that is a part of initial site preparation, fencing, drilling wells for continued monitoring of contamination, construction of guard or other office space) is covered. Work performed subsequent to burial which involves the placement of concrete or other like activity is also covered.

(b) The classification of a contract as a contract for operational or maintenance activities does not necessarily mean that all work and activities at the contract location are classifiable as outside coverage of the Act since it may be necessary to separate work which should be classified as covered. Therefore, the Heads of Contracting Activities shall establish and maintain controls for the careful scrutiny of proposed work assignments under such contracts to assure that:

(1) Contractors whose contracts do not contemplate the performance of work covered by the Act with the contractor's own forces are neither asked nor authorized to perform work within the scope of the Act. If the actual work assignments do involve covered work, the contract should be modified to include applicable provisions of the Act.

(2) Where covered work is performed by a contractor whose contract contains provisions required by the Act, such work is performed as required by law and the contract. After the contractor has been informed, as provided in paragraph (b)(3) of this subsection, that certain work is covered, the responsibilities of the Head of the Contracting Activity to assure compliance is the same as it would be if the work were being performed under a separate construction contract.

(3) Controls provided for above include consideration by the Head of the Contracting Activity and the contractor, before work is begun or contracted out, of the relation of the Act to (i) the annual programming of work; (ii) the contractor's work orders; and (iii) work contracted out in excess of $2,000. The Head of the Contracting Activity may, if consistent with DOE's responsibilities as described in this subsection, prescribe from time to time classes of work as to which applicability or nonapplicability of the Act is clear, for which the Head of the Contracting Activity will require no further DOE determination on coverage in advance of the work. For all work, controls to be established by the Head of the Contracting Activity should provide for notification to the contractor before work is begun as to whether such work is covered. The Head of the Contracting Activity is responsible for submitting to the Wage and Hours Division, Employment Standards Administration, Department of Labor, Washington, D.C. 20210, all DOE requests for project area or installation wage determinations, or individual determinations, or extensions or modification thereto. Requests for such determinations shall be made on Standard Form 308, at least 30 calendar days before they are required for use in advertising for bids or requests for proposals.

(c) Experimental installations. Within DOE programs, a variety of experiments are conducted involving materials, fuels, coolants, and processing equipment. Certain types of situations where tests and experiments have presented coverage questions are described as follows:

(1) Set-ups of device and/or processes. The proving out of investigative findings and theories of a scientific and technical nature may require the set-up of various devices and/or processes at an early, pre-prototype stage of development. These may range from laboratory bench size to much larger set-ups. As a rule, these set-ups are made within established facilities (normally laboratories), required utility connections are made to services provided as a part of the basic facilities, and the activity as a whole falls within the functional purpose of the facility. Such set-ups are generally not covered. However, the erection of structures which are public works is covered if construction type work, other than incidental work, is involved. Preparatory work for the set-up requiring structural changes or modifications of basic utility services, as distinguished from connections thereto, is covered. The following are illustrations of noncovered set-ups of devices and/or processes:

(i) Assembly of piping and equipment within existing ''hot cell'' facilities for proving out a conceptual design of a chemical processing unit;

(ii) Assembly of equipment, including adaptation and modification thereof, in existing ''hot cell'' facilities to prove out a conceptual design for remotely controlled machining equipment;

(iii) Assembly of the first graphite pile in a stadium at Stagg Field in Chicago;

(iv) Assembly of materials and equipment for particular aspects of the direct current thermonuclear experiments to explore feasibility and to study other ramifications of the concept of high energy injection and to collect data thereon.

(2) Loops. Many experiments are carried on in equipment assemblies, called loops, in which liquids or gases are circulated under monitored and controlled conditions. For purposes of determining coverage under the Act, loops may be classed as loop facilities or as loop set-ups. Both of these classes of loops can include in-reactor loops and out-of-reactor loops. In differentiating between clearly identified loop set-ups and loop facilities, an area exists in which there have been some questions of coverage,

such as certain loops at the Material Test Reactor and at Engineering Test Reactor and the Idaho National Engineering and Environmental Laboratory site. Upon clarification of this area, further illustrations will be added. In the meantime, the differentiation between loop set-ups and loop facilities must be made on a case-by-case basis, taking into account the total criteria set forth in this subpart.

(i) Loop set-ups. The assembly, erection, modification, and disassembly of a loop set-up is noncovered. A noncontroversial example of a loop set-up is one which is assembled in a laboratory, *e.g.,* Oak Ridge National Laboratory, Argonne National Laboratory, or Lawrence Livermore National Laboratory, for a particular test and thereafter disassembled. However, preparatory work for a loop set-up requiring structural changes or modifications of basic utility services as distinguished from connections thereto is covered, as are material and equipment that are installed for a loop set-up which is a permanent part of the facility or which is use for a succession of experimental programs.

(ii) Loop facilities. A loop facility differs from a loop set-up in that it is of a more permanent character. It is usually, but not always, of greater size. It normally involves the building or modification of a structure. Sometimes it is installed as a part of construction of the facility. It may be designed for use in a succession of experimental programs over a longer period of time. Examples of loop facilities are the in-reactor ''K'' loops at Hanford and the large Aircraft Nuclear Propulsion loop at the Idaho National Engineering and Environmental Laboratory site. The on-site assembly and erection of such loop facilities are covered. However, once a loop facility is completed and becomes operational, the criteria set forth above for operational and maintenance activities apply.

(3) Reactor component experiments. Other experiments are carried on by insertion of experimental components within reactor systems without the use of a loop assembly. An example of reactor facilities erected for such experimental purposes are the special power excursion test reactors (SPETRs) at the National Reactor Test Site which are designed for studying reactor behavior and performance characteristics of certain reactor components. Such a facility may consist of a reactor vessel, pressurizing tank, coolant loops, pumps, heat exchangers, and other auxiliary equipment as needed. The facility also may include sufficient shielding to permit work on the reactor to proceed following a short period of power interruption, and buildings as needed to house the reactor and its auxiliary equipment. The erection and on-site assembly of such a reactor facility is covered, but the components whose characteristics are under study are excluded from coverage. To illustrate, one of the SPETRs planned for studies of nuclear reactor safety is designed to accommodate various internal fuel and control assemblies. The internal structure of the pressure vessel is designed so that cores of different shapes and sizes may be placed in the vessel for investigation, or the entire internal structure may be easily removed and replaced by a structure which will accept a different core design. Similarly, the control rod assembly is arranged to provide for flexibility in the removal of instrument leads and experimental assemblies from within the core.

(4) Tests or experiments in peaceful uses of nuclear energy. These tests or experiments are varied in nature and some are only in a planning stage. They consist of one or more nuclear or nonnuclear detonations for the purposes of acquiring data. The data can include seismic effects, radiation effects, amount of heat generated, amount of material moved and so forth. Some of these tests are conducted in existing mines, while others are conducted in facilities specifically constructed for the tests or experiments. In general, all work which can be performed in accordance with customary drawings and specifications, as well as other work in connection with preparation of facilities is treated as covered work. Such work includes tunneling, drilling, excavation and back-filling, erection of buildings or other structures, and installation of utilities. The installation of the nonnuclear material or nuclear device to be detonated, and the instrumentation and connection between such material or device and the instrumentation are treated as noncovered work.

(5) Tests or experiments in military uses of nuclear energy. As in 970.2204–1–1(c)(4), these tests or experiments can be varied in nature. However, under this category it is intended to include only detonation of nonnuclear material or nuclear devices. The material or devices can be detonated either underground, at ground level, or above the ground. These tests or experiments have been conducted in, on, or in connection with facilities specifically constructed for such tests or experiments. As in tests or experiments in peaceful uses of nuclear energy, all work which can be performed in accord with customary drawings and specifications, as well as other work in connection with preparation of facilities are treated as covered work. Such work includes building towers or similar structures, tunneling, drilling, excavation and backfilling, erection of buildings or other structures, and installation of utilities. The installation of the nonnuclear material or nuclear devices and instrumentation are treated as noncovered work.

(d) Construction site contiguous to an established manufacturing facility. As DOE-owned property sometimes encompasses several thousand acres of real estate, a number of separate facilities may be located in areas contiguous to each other on the same property. These facilities may be built over a period of years, and established manufacturing activities may be regularly carried on at one site at the same time that construction of another facility is underway at another site. On occasion, the regular manufacturing activities of the operating contractor at the first site may include the manufacture, assembly, and reconditioning of components and equipment which in other industries would normally be done in established commercial plants. While the manufacture of components and equipment in the manufacturing plant is noncovered, the installation of any such manufactured items on a construction job is covered.

970.2208 Equal employment opportunity.

The equal employment opportunity provisions of 48 CFR subpart 22.8 and subpart 922.8 of this chapter, including Executive Order 11246 and 41 CFR part 60, are applicable to DOE management and operating contracts.

970.2210 Service Contract Act.

The Service Contract Act of 1965 is not applicable to contracts for the management and operation of DOE facilities.

970.2270 Unemployment compensation.

(a) Each state has its own unemployment compensation system to provide payments to workers who become unemployed involuntarily and through no fault of their own. Funds are provided for unemployment compensation benefits through a payroll tax on employers. Most DOE contractors are subject to the unemployment compensation tax laws of the states in which they are located. It is the policy to assure, both in the negotiation and administration of cost-reimbursement type contracts, that economical and practical arrangements are made and

practiced with respect to unemployment compensation.

(b) Contract exempt from state laws. (1) Some contractors are exempt from state unemployment compensation laws, usually on grounds that they are nonprofit organizations or subdivisions of State governments. Most states, however, permit such employers to elect unemployment compensation coverage on a voluntary basis. Under such circumstances, all existing or prospective cost-reimbursement contractors shall be encouraged to provide unemployment compensation coverage or equivalent substitutes.

(2) It is also DOE policy that, prior to the award or extension of a management and operating contract, exempt contractors or prospective contractors shall be required to submit to the contracting officer a statement that they will either elect coverage or provide equivalent substitutes for unemployment compensation, or in the alternative, submit evidence that it is impractical to do so. If any exempt contractor or prospective contractor submits that it is impractical to elect coverage or to provide an equivalent substitute, appropriate Office of Contract and Resource Management, within the Headquarters procurement organization, staff shall review that position prior to recommending an award or extension of the contract. If there are substantial reasons for not electing coverage or for not providing equivalent substitutes, a contract may be awarded or extended. Headquarters' staff review and recommendation shall be based on such factors as:

(i) The specific provisions of the unemployment compensation law of the State;

(ii) The extent to which the establishment of special conditions on DOE work may have an adverse effect on the contractor's general policies and operating costs in its private operations;

(iii) The numerical relationship between the contractor's private work force and its employees performing only work for DOE;

(iv) The contractor's record with respect to work force stability and the general outlook with respect to future work force stability;

(v) In a replacement contractor situation, whether or not the prior contractor had coverage or suitable substitutes; and

(vi) The particular labor relations implications involved.

Subpart 970.23—Environmental, Conservation, and Occupational Safety Programs

970.2303 Hazardous materials identification and material safety.

970.2303–1 General.

(a) The Department of Energy regulates the nuclear safety of its major facilities under its own statutory authority derived from the Atomic Energy Act and other legislation. The Department also regulates, under certain specific conditions, the use by its contractors of radioactive materials and ionizing radiation producing machines.

(b) The inclusion of environmental, safety and health clauses in DOE contracts shall be made by the contracting officer in accordance with this subpart and in consultation with appropriate environmental, safety and health program management personnel.

970.2303–2 Contract clauses.

(a) When work under management and operating contracts and subcontracts thereunder is to be performed at a facility where DOE will exercise its statutory authority to enforce occupational safety and health standards applicable to the working conditions of the contractor and subcontractor employees at such facility, the clause at 48 CFR 970.5223–1, Integration of Environment, Safety and Health into Work Planning and Execution, shall be used in such contract or subcontract and made applicable to the work if conditions in paragraphs (a)(1) through (3) of this section, are satisfied:

(1) DOE work is segregated from the contractor's or subcontractor's other work;

(2) The operation is of sufficient size to support its own safety and health services; and

(3) The facility is government-owned, or leased by or for the account of the government.

(b) The clause set forth in 952.223–72, Radiation Protection and Nuclear Criticality, shall be included in those contracts or subcontracts for, and be made applicable to, work to be performed at a facility where DOE does not elect to assert its statutory authority to enforce occupational safety and health standards applicable to the working conditions of contractor and subcontractor employees, but does need to enforce radiological safety and health standards pursuant to provisions of the contract or subcontract rather than by reliance upon Nuclear Regulatory Commission licensing requirements (including agreements with States under section 274 of the Atomic Energy Act).

970.2304 Use of recovered/recycled materials.

970.2304–1 General.

The policy for the acquisition and use of environmentally preferable products and services is described at 48 CFR subpart 923.4.

970.2304–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5223–2, Acquisition and Use of Environmentally Preferable Products and Services, in management and operating contracts.

970.2305 Workplace substance abuse programs—management and operating contracts.

970.2305–1 General.

(a) The Department of Energy (DOE), as part of its overall responsibilities to protect the environment, maintain public health and safety, and safeguard the national security, has established policies, criteria, and procedures for management and operating contractors to develop and implement programs that help maintain a workplace free from the use of illegal drugs.

(b) Regulations concerning DOE's management and operating contractor workplace substance abuse programs are promulgated at 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

970.2305–2 Applicability.

(a) All management and operating contracts awarded under the authority of the Atomic Energy Act of 1954, as amended, are required to implement the policies, criteria, and procedures of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

(b) Except as otherwise provided for in this subpart, management and operating contracts subject to the requirements of 10 CFR part 707 and this subpart shall not be subject to 48 CFR 23.5, Drug Free Workplace.

970.2305–3 Definitions.

Terms and words relating to DOE's Workplace Substance Abuse Programs, as used in this section, have the same meanings assigned to such terms and words in 10 CFR part 707.

970.2305–4 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 48 CFR 970.5223–3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites, in solicitations for the management and operation of DOE-owned or -controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended.

(b) The contracting officer shall insert the clause at 970.5223–4, Workplace Substance Abuse Programs at DOE Sites, in contracts for the management and operation of DOE-owned or -controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended.

970.2306 Suspension of payments, termination of contract, and debarment and suspension actions.

(a) The contracting officer shall comply with the procedures of 48 CFR 23.506 regarding the suspension of contract payments, the termination of the contract for default, and the debarment and suspension of a contractor relative to failure to comply with the clause at 48 CFR 970.5223–4, Workplace Substance Abuse Programs at DOE Sites.

(b) For purposes of 10 CFR part 707, the specific causes for suspension of contract payments, termination of the contract for default, and debarment and suspension of the contractor are:

(1) The contractor fails to either comply with the requirements of 10 CFR part 707 or perform in a manner consistent with its approved program;

(2) The contractor has failed to comply with the terms of the provision at 48 CFR 970.5223–3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites;

(3) Such a number of contractor employees having been convicted of violations of criminal drug statutes for violations occurring on the DOE-owned or -controlled site, as to indicate that the contractor has failed to make a good faith effort to provide a drug free workplace; or,

(4) The offeror has submitted a false certification in response to the provision at 48 CFR 970.5223–3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites.

Subpart 970.26—Other Socioeconomic Programs

970.2670 Implementation of Section 3021 of the Energy Policy Act of 1992.

970.2670–1 Requirements.

The goal requirements of Section 3021 of the Energy Policy Act of 1992, and the attendant reporting requirements shall be included in the subcontracting plan for the management and operating contract and shall apply to the annual dollar obligations specifically provided to the contractor for competitively awarded subcontracts that fulfill Energy Policy Act requirements.

970.2671 Diversity.

970.2671–1 Policy.

Department of Energy policy recognizes that full utilization of the talents and capabilities of a diverse work force is critical to the achievement of its mission. The principal goals of this policy are to foster and enhance partnerships with small, small disadvantaged, women-owned small businesses, and educational institutions; to match capabilities with existing opportunities; to track small, small disadvantaged, women-owned small business, and educational activity; and to develop innovative strategies to increase opportunities.

970.2671–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5226–1, Diversity Plan, in all management and operating contracts.

970.2672 Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.

970.2672–1 Policy.

Consistent with the objectives of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, 42 U.S.C. 7274h, in instances where the Department of Energy has determined that a change in work force at a DOE Defense Nuclear Facility is necessary, DOE contractors and subcontractors at DOE Defense Nuclear Facilities shall accomplish work force restructuring or displacement so as to mitigate social and economic impacts and in a manner consistent with any DOE work force restructuring plan in effect for the facility or site. In all cases, mitigation shall include the requirement for hiring preferences for employees whose positions have been terminated (except for termination for cause) as a result of changes to the work force at the facility due to restructuring accomplished under the requirements of Section 3161. Where applicable, contractors may take additional actions to mitigate consistent with the Department's Workforce Restructuring Plan for the facility or site.

970.2672–2 Requirements.

The requirements set forth in 48 CFR 926.71, Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, for contractors and subcontractors to provide a hiring preference for employees under Department of Energy contracts whose employment in positions at a Department of Energy Defense Nuclear Facility is terminated (except for a termination for cause) applies to management and operating contracts.

970.2672–3 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5226–2, Workforce Restructuring Under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, in contracts for the management and operation of Department of Energy Defense Nuclear Facilities and, as appropriate, in other contracts that include site management responsibilities at a Department of Energy Defense Nuclear Facility.

970.2673 Regional partnerships.

970.2673–1 Policy.

It is the policy of the DOE to be a constructive partner in the geographic region in which DOE conducts its business. The basic elements of this policy include:

(1) Recognizing the diverse interests of the region and its stakeholders,

(2) Engaging regional stakeholders in issues and concerns of mutual interest, and

(3) Recognizing that giving back to the community is a worthwhile business practice.

970.2673–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5226–3, Community Commitment, in all management and operating contracts.

Subpart 970.27—Patents, Data, and Copyrights

970.2701 General.

970.2701–1 Applicability.

This Subpart applies to negotiation of patent rights and rights in technical data provisions for the Department of Energy contracts for the management and operation of its research and development and production facilities.

970.2703 Patent rights.

970.2703–1 Policy.

(a) Whenever a contract has as a purpose, the design, construction, or operation of a Government-owned research, development, demonstration or production facility, it is necessary that the Government be accorded certain rights with respect to further use of the facility by or on behalf of the Government upon termination of the contract, including the right to make, use, transfer, or otherwise dispose of all articles, materials, products, or processes embodying inventions or discoveries used or embodied in the facility regardless of whether or not conceived or first actually reduced to

practice under or in the course of such a contract. Thus, both versions of the Department's clauses which address patent rights for management and operating contracts (952.227–11, Alternate I, and 952.227–13, Alternate I) contain a facilities license.

(b) In the case of contractors operating and managing DOE research and development or production facilities that are not the beneficiaries of the Bayh-Dole Act (35 U.S.C. 200, *et. seq.,* as amended), the Department is statutorily obligated to take title to inventions conceived or first actually reduced to practice in the performance of the contracts. Here, as in all other circumstances in which the Department takes title to inventions by statute, the contractors may request a waiver at the time of contracting for a class of inventions or during contract performance for identified inventions. DOE includes the considerations at 42 U.S.C. 5908 in its determination as to whether to approve the request.

(c) While no contractor that manages and operates a DOE research and development or production facility is a small business, several have historically been nonprofit organizations. As such, they are the beneficiaries of the Bayh-Dole Act (35 U.S.C. 200 *et seq.*, as amended) and, therefore, receive the right to retain title to inventions conceived or first actually reduced to practice in the performance of their contracts with the Department, except in areas of technology covered by Exceptional Circumstances Determinations made by DOE or of nuclear weapons and naval nuclear propulsion. In these latter two areas, the contractor may request that the Department waive its title and, therefore, subject to the exceptions identified in the subsection below, may be granted title to inventions conceived or first actually reduced to practice in the performance of its contract with the Department.

(d) DOE has exercised the statutory authority granted under 35 U.S.C. 202(a)(ii) and 202(a)(iv). In accordance with 35 U.S.C. 202(a)(ii), DOE has issued several Exceptional Circumstances Determinations pursuant to which DOE nonprofit management and operating contractors have no right to elect title to inventions conceived or first actually reduced to practice in the course of or under their contracts within covered areas of technology. However, those contractors may be given some lesser property right in an invention within limits set by DOE in a particular Exceptional Circumstances Determination so that the contractor can effectively assist with a mission of DOE, such as technology transfer. As new technologies evolve, DOE may issue additional Exceptional Circumstances Determinations, as appropriate.

(e) In accordance with 35 U.S.C. 202(a)(iv), DOE has exempted its weapons-related and naval nuclear propulsion programs from the broad Bayh-Dole right of its nonprofit management and operating contractors to elect title to inventions conceived or first actually reduced to practice in the course of or under their contracts. The effect of this exemption is that, if the contractors want to acquire title, they must request title to covered inventions. DOE may then grant the request subject to a case-by-case determination that the contractor has met all procedural requirements unilaterally set by DOE to insure that all national security concerns of DOE relating to the contractor's use of an invention in either of these two areas for commercialization have been met.

970.2703–2 Contract clauses.

The contracting officer shall refer to 48 CFR 927.303 for guidance concerning the use of clauses in management and operating contracts addressing patent rights.

970.2704 Rights in data.

970.2704–1 General.

(a) Rights in data relating to the performance of the contract and to all facilities are significant in assuring continuity of the management and operation of DOE facilities. It is crucial in assuring DOE's continuing ability to perform its statutory missions that DOE obtain rights to all data produced or specifically used by its management and operating contractors and appropriate subcontractors. In order to obtain the necessary rights in technical data, DOE contracting officers shall assure that management and operating contracts contain either the Rights in Data clause at 48 CFR 970.5227–1, Rights in Data-Facilities, or the clause at 48 CFR 970.5227–2, Rights in Data-Technology Transfer. Selection of the appropriate clause is dependent upon whether technology transfer is a mission of the management and operating contract pursuant to the National Competitiveness Technology Transfer Act of 1989, Public Law 101–189, (15 U.S.C. 3711 *et seq.*, as amended). If technology transfer is not a mission of the management and operating contract, the clause at 48 CFR 970.5227–1, Rights in Data-Facilities, shall be used. In those instances in which technology transfer is a mission of the contract, the clause at 48 CFR 970.5227–2, Rights in Data-Technology Transfer, shall be used.

(b) Employees of the management and operating contractor may not be used to assist in the preparation of a proposal or bid for services which are similar or related to those being performed under the contract, which are to be performed by the contractor or its parent or affiliate organization for commercial customers unless the employee has been separated from work under the DOE contract for such period as the Head of the Contracting Activity or designee shall have directed.

970.2704–2 Procedures.

(a) The clauses at 48 CFR 970.5227–1, Rights in Data-Facilities, and 48 CFR 970.5227–2, Rights in Data-Technology Transfer, both provide generally for Government ownership and for unlimited rights in the Government for all data first produced in the performance of the contract and unlimited rights in data specifically used in the performance of the contract. Both clauses provide that, subject to patent, security, and other provisions of the contract, the contractor may use contract data for its private purposes. The contractor, under either clause, must treat any data furnished by DOE or acquired from other Government agencies or private entities in the performance of their contracts in accordance with any restrictive legends contained therein.

(b) Since both clauses secure access to and, if requested, delivery of technical data used in the performance of the contract, there is generally no need to use the Additional Technical Data Requirements clause at 48 CFR 52.227–16 in the management and operating contract.

(c)(1) Paragraph (d) of the clause at 48 CFR 970.5227–1, Rights in Data-Facilities, and paragraph (f) of the clause at 48 CFR 970.5227–2, Rights in Data-Technology Transfer, provide for the inclusion in subcontracts of the Rights in Technical Data-General clause at 48 CFR 52.227–14, with Alternate V, and modified in accordance with DEAR 927.409. Those clauses also provide for the inclusion in appropriate subcontracts Alternates II, III, and IV to the clause at 48 CFR 52.227–14 with DOE's prior approval and the inclusion of the Additional Technical Data Requirements clause at 48 CFR 52.227–16 in all subcontracts for research, development, or demonstration and all other subcontracts having special requirements for the production or delivery of data. In subcontracts, including subcontracts for related support services, involving the design or

operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated by the contractor under its contract with DOE, the management and operating contractor shall use the Rights in Data-Facilities clause at 48 CFR 970.5227–1.

(2) Where, however, a subcontract is to be awarded by the management and operating contractor in connection with a program, as discussed at 927.404–70, which provides statutory authority to protect from public disclosure, data first produced under contracts awarded pursuant to the program, contracting officers shall ensure that the management and operating contractor includes in that subcontract the rights in data clause provided by DOE Patent Counsel, consistent with any accompanying guidance.

(3) Management and operating contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data or restricted computer software for their private use, nor may they acquire rights in a subcontractor's limited rights data or restricted computer software except through the use of Alternate II or III to the clause at 48 CFR 52.227–14, respectively, without the prior approval of DOE Patent Counsel.

(d)(1) Paragraphs (e) and (f) of the clause at 48 CFR 970.5227–1, Rights in Data-Facilities, and paragraphs (g) and (h) of the clause at 48 CFR 970.5227–2, Rights in Data-Technology Transfer, provide for the contractor's granting a nonexclusive license in any limited rights data and restricted computer software specifically used in performance of the contract.

(2) In certain instances the objectives of DOE would be frustrated if the Government did not obtain, at the time of contracting, limited license rights on behalf of responsible third parties and the Government, and to limited rights data or restricted computer software or both necessary for the practice of subject inventions or data first produced or delivered in the performance of the contract. This situation may arise in the performance of management and operating contracts and contracts for the management or operation of a DOE facility or site. Contracting officers should consult with program officials and Patent Counsel. No such rights should be obtained from a small business or non-profit organization, unless similar rights in background inventions of the small business or non-profit organization have been authorized in accordance with 35 U.S.C. 202(f). Where such a background license is in DOE's interest, a provision that provides substantially as Alternate VI at 48 CFR 952.227–14 should be added to the appropriate clause, 48 CFR 970.5227–1, Rights in Data-Facilities, or 48 CFR 970.5227–2, Rights in Data-Technology Transfer.

(e) The Rights in Data-Technology Transfer clause at 48 CFR 970.5227–2 differs from the clause at 48 CFR 970.5227–1, Rights in Data'Facilities, in the context of its more detailed treatment of copyright. In management and operating contracts that have technology transfer as a mission, the right to assert copyright in data first produced under the contract will be a valuable right, and commercialization of such data, including computer software, will assist the management and operating contractor in advancing the technology transfer mission of the contract. The clause at 48 CFR 970.5227–2, Rights in Data-Technology Transfer, provides for DOE approval of DOE's taking a limited copyright license for a period of five years, and, in certain rare cases, specified longer periods in order to contribute to commercialization of the data.

(f) Contracting officers should consult with Patent Counsel to assure that requirements regarding royalties and conflicts of interest associated with asserting copyright in data first produced under the contract are appropriately addressed in the Technology Transfer Mission clause (48 CFR 970.5227–3) of the management and operating contract. Where it is not otherwise clear which DOE program funded the development of a computer software package, such as where the development was funded out of a contractor's overhead account, the DOE program which was the primary source of funding for the entire contract is deemed to have administrative responsibility. This issue may arise, among others, in the decision whether to grant the contractor permission to assert copyright. See paragraph (e) of the Rights in Data-Technology Transfer clause at 970.5227–2.

(g) In management and operating contracts involving access to DOE-owned Category C–24 restricted data, as set forth in 10 CFR part 725, DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related restricted data and technology. Alternate I to each clause shall be used where access to Category C–24 restricted data is contemplated in the performance of a contract.

970.2704–3 Contract clauses.

(a) The contracting officer shall insert the clause at 48 CFR 970.5227–1, Rights in Data-Facilities, in management and operating contracts which do not contain the clause at 48 CFR 970.5227–2, Rights in Data-Technology Transfer Mission. The contracting officer shall include the clause with its Alternate I in contracts where access to Category C–24 restricted data, as set forth in 10 CFR part 725, is to be provided to contractors.

(b) The contracting officer shall insert the clause at 970.5227–2, Rights in Data-Technology Transfer, in management and operating contracts which contain the clause at 970.5227–3, Technology Transfer Mission. The contracting officer shall include the clause with its Alternate I in contracts where access to Category C–24 restricted data, as set forth in 10 CFR part 725, is to be provided to contractors.

970.2770 Technology transfer.

970.2770–1 General.

This subpart prescribes policies and procedures for implementing the National Competitiveness Technology Transfer Act of 1989, Public Law 101–189, (15 U.S.C. 3711 *et seq.*, as amended). The Act requires that technology transfer be established as a mission of each Government-owned laboratory operated under contract by a non-Federal entity. The National Defense Authorization Act for Fiscal Year 1994 expanded the definition of ''laboratory'' to include weapon production facilities that are operated for national security purposes and are engaged in the production, maintenance, testing, or dismantlement of a nuclear weapon or its components.

970.2770–2 Policy.

All new awards for or extensions of existing DOE laboratory or weapon production facility management and operating contracts shall have technology transfer, including authorization to award Cooperative Research and Development Agreements (CRADAs), as a laboratory or facility mission under Section 11(a)(1) of the Stevenson-Wydler Technology Innovation Act of 1980, Public Law 96–480 (15 U.S.C. 3701 *et seq.*, as amended). A management and operating contractor for a facility not deemed to be a laboratory or weapon production facility may be authorized on a case-by-case basis to support the DOE technology transfer mission including, but not limited to, participating in CRADAs awarded by DOE laboratories and weapon production facilities.

970.2770–3 Technology transfer and patent rights.

The National Competitiveness Technology Transfer Act of 1989 (NCTTA) established technology transfer as a mission for Government-owned, contractor-operated laboratories, including weapons production facilities, and authorizes those laboratories to negotiate and award cooperative research and development agreements with public and private entities for purposes of conducting research and development and transferring technology to the private sector. In implementing the NCTTA, DOE has negotiated technology transfer clauses with the contractors managing and operating its laboratories. Those technology transfer clauses must be read in concert with the patent rights clause required by this subpart. Thus, each management and operating contractor holds title to subject inventions for the benefit of the laboratory or facility being managed and operated by that contractor.

970.2770–4 Contract clause.

(a) The contracting officer shall insert the clause at 970.5227–3, Technology Transfer Mission, in each solicitation for a new or an extension of an existing laboratory or weapon production facility management and operating contract.

(b) If the contractor is a nonprofit organization or small business eligible under 35 U.S.C. 200 *et seq.*, to receive title to any inventions under the contract and proposes to fund at private expense the maintaining, licensing, and marketing of the inventions, the contracting officer shall use the basic clause with its Alternate I.

(c) If the facility is operated for national security purposes and engaged in the production, maintenance, testing, or dismantlement of a nuclear weapon or its components, the contracting officer shall use the basic clause with its Alternate II.

Subpart 970.28—Bonds and Insurance

970.2803 Insurance.

970.2803–1 Workers' compensation insurance.

(a) Policies and requirements. (1) Workers' compensation insurance protects employers against liability imposed by workers' compensation laws for injury or death to employees arising out of, or in the course of, their employment. This type of insurance is required by state laws unless employers have acceptable programs of self-insurance.

(2) Special requirements. Certain workers' compensation laws contain provisions which result in limiting the protection afforded persons subject to such laws. The policy with respect to these limitations as they affect persons employed by management and operating contractors is set forth as follows:

(i) Elective provisions. Some worker's compensation laws permit an employer to elect not to be subject to its provisions. It is DOE policy to require these contractors to be subject to workers' compensation laws in jurisdictions permitting election.

(ii) Statutory immunity. Under the provisions of some workers' compensation laws, certain types of employers; *e.g.,* nonprofit educational institutions, are relieved from liability. If a contractor has a statutory option to accept liability, it is DOE policy to require the contractor to do so.

(iii) Limited medical benefits. Some workers' compensation laws limit the liability of the employer for medical care to a maximum dollar amount or to a specified period of time. In such cases, a contractor's workers' compensation insurance policy should contain a standard extrastatutory medical coverage endorsement.

(iv) Limits on occupational disease coverage and employers' liability. Some workers' compensation laws do not provide coverage for all occupational diseases. In such situations, a contractor's workers' compensation insurance policy should contain voluntary coverage for all occupational diseases.

(3) Contractor ''employees' benefit plan''—self-insurers. The policies and requirements set forth in paragraph (a)(2) of this section apply where management and operating contractors purchase workers' compensation insurance. With respect to self-insured contractors, the objectives specified in paragraph (a)(2) also shall be met through primary or excess workers' compensation and employers' liability insurance policy(ies) or an approved combination thereof. ''Employees' benefit plans'' which were established in prior years may be continued to contrast termination at existing benefit levels.

(b) Assignment of responsibilities. (1) Office of Contract and Resource Management, within the Headquarters procurement organization, other officials, and the Heads of Contracting Activities, consistent with their delegations of responsibility, shall assure management and operating contracts are consistent with the policies and requirements of paragraph (a) of this section.

(2) In discharging assigned responsibility, the Heads of Contracting Activities shall:

(i) Periodically review workers' compensation insurance programs of management and operating contractors in the light of applicable workers' compensation statutes to assure conformance with the requirements of paragraph (a) of this section.

(ii) Evaluate the adequacy of coverage of ''self-insured'' workers' compensation programs;

(iii) Provide arrangements for the administration of any existing ''employees' benefit plans until such plans'' are terminated; and

(iv) Submit to the Office of Contract and Resource Management, within the Headquarters procurement organization, all proposals for the modification of existing ''employees' benefit plans.''

(3) The Office of Contract and Resource Management, within the Headquarters procurement organization, is responsible for approving management and operating contractor ''employees' benefit plans.''

970.2803–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5228–1, Insurance—Litigation and Claims, in all management and operating contracts. Paragraphs (h)(3) and (j)(2) apply to a nonprofit contractor only to the extent specifically provided in the individual contract.

Subpart 970.29—Taxes

970.2902 Federal excise taxes.

970.2902–1 Exemptions from Federal Excise Taxes.

(a) The exemption respecting taxes on communication services or facilities has been held to extend to such services when furnished to DOE management and operating contractors who pay for such services or facilities from advances made to them by DOE under their contracts.

(b) Where it is considered that a request for an additional exemption in the performance of a management and operating contract would be justified, a recommendation that such a request be made should be forwarded to the Chief Financial Officer, Headquarters.

(c) Where tax exemption certificates are required in connection with the foregoing taxes, the Head of the Contracting Activity will supply standard Government forms (SF 1094, U.S. Tax Exemption Certificate) on request.

970.2903 State and local taxes.

970.2903–1 Applicability of state and local taxes to the Government.

It is DOE policy to secure those immunities or exemptions from state and local taxes to which it is entitled under the Federal Constitution or state laws. In carrying out this policy, the Heads of Contracting Activities shall:

(a) Take all necessary steps to preclude payment of any taxes for which any of the foregoing immunities or exemptions are available. Advice of Counsel should be sought as to the availability of such immunities or exemptions;

(b) Acquire directly and furnish to contractors as Government furnished property, equipment, material, or services when, in the opinion of the Head of the Contracting Activity:

(1) Such direct acquisition will result in substantial savings to the Government, taking into consideration any additional administrative costs;

(2) Such direct acquisition will not have a substantial adverse effect on the relationship between DOE and its contractor; and

(3) Such direct acquisition will not have a substantial adverse effect on the DOE program or schedules.

970.2904 Contract clauses.

970.2904–1 Management and operating contracts.

(a) Pursuant to 48 CFR 29.401–6(b), the clause at 48 CFR 52.229–10, State of New Mexico Gross Receipts And Compensating Tax, is applicable to all management and operating contracts. For all DOE management and operating contracts, the contracting officer shall modify paragraph (b) of the clause to replace the phrase ''Allowable Cost and Payment clause'' with the phrase ''Allowable Costs and Fixed Fee Clause.''

(b) Contracting officers shall include the clause at 48 CFR 970.5229–1, State and Local Taxes, in management and operating contracts.

Subpart 970.30—Cost Accounting Standards

970.3002 CAS program requirements.

970.3002–1 Applicability.

The provisions of 48 CFR part 30 and 48 CFR 9904.414 shall be followed for management and operating contracts.

970.3002–2 Limitations.

Cost of money as an element of the cost of facilities capital (CAS 414) and as an element of the cost of capital assets under construction (CAS 417) is not recognized as an allowable cost under management and operating contracts (see 970.3102–3–3).

Subpart 970.31—Contract Cost Principles and Procedures

970.3100 Scope of subpart.

The cost principles, procedures and general policy for the determination of reimbursable costs that are applicable to the administration of management and operating contracts are set forth in this subpart. The terms ''reimbursement'' and ''reimbursable'' are used interchangeably as they pertain to ''allowable costs'' as a matter of editorial convenience. No ''reimbursement'' is actually involved in those situations where the cost-type contractor makes payments for ''allowable cost'' from Government funds advanced to the contractor by DOE.

970.3100–1 Definitions.

Off-site work is contract required work (under a contract covered by 48 CFR subpart 17.6) performed in contractor-owned facilities, such as a central or branch office.

On-site work (under a contract covered by 48 CFR subpart 17.6) is work performed at the Government site.

Direct costs of a management and operating contract are defined as follows:

(a) With respect to on-site work, ''direct costs'' technically include all performance costs; i.e., such costs are identified specifically for, or account of, the contract. However, in some circumstances it may be desirable or necessary because of the requirements of the contract to distinguish between direct and indirect types of costs. ''Direct costs,'' when the foregoing circumstances apply, are those which are identified as having been incurred specifically for, or on account of a designated cost objective, such as a particular product (or groups of similar products), work order, job, project, program or contract. Materials, labors or expenses which relate specifically and solely to the manufacture of a particular product or to the performance of a distinct job or work are broad examples of direct costs. Direct costs are not limited to items incorporated in an end product.

(b) With respect to ''off-site'' work, ''direct costs'' are as defined in 48 CFR 31.202 and discussed in other sections of this subpart. ''Indirect costs'' of a management and operating contract are defined as follows:

(1) With respect to ''on-site'' work, when it is desirable or necessary to distinguish them from direct costs, ''indirect costs'' are those items of material, labor, and expenses not directly identified with a single final cost accumulation point, but identified with applicability to two or more objectives or with at least one intermediate cost objective.

(2) With respect to ''off-site'' work, ''indirect cost'' are as defined in 48 CFR 31.203 and discussed in other sections of this subpart.

970.3100–2 Responsibilities.

(a) The Senior Procurement Executive is responsible for developing and revising the policy and procedures for the determination of allowable costs reimbursable under a management and operating contract, and for seeing that they are properly coordinated with other Headquarters' offices having joint interests.

(b) The Head of the Contracting Activity is responsible for following the policy, principles and standards set forth herein in establishing the compensation provisions of contracts and subcontracts and for submission of deviations for Headquarters consideration.

970.3101 Applicability.

970.3101–1 Objectives.

Deviations from the policies and principles set forth in this subpart shall not be made unless authorized by the Senior Procurement Executive on the basis of a written justification stating clearly the special circumstances involved. As appropriate, approved deviations shall be reflected in the compensation provisions of the contract.

970.3101–2 Advance agreements.

(a) In order to avoid the potential for subsequent disallowance or dispute of certain costs, it is important that agreement between DOE and its management and operating contractors be reached in advance of the incurrence of costs in categories where reasonableness as to amounts, or allocability of costs to the management and operating contract are difficult to determine. Any such agreement should be incorporated in the contract. However, the absence of such agreement on any element of cost will not, in itself, serve to make the element either allowable or unallowable. Examples of costs on which advance agreements may be particularly important are:

(1) Deferred maintenance costs;

(2) Precontract costs;

(3) Professional or technical consulting services;

(4) Reconversion costs;

(5) Research and development costs;

(6) Royalties;

(7) Selling and distribution costs;

(8) Unemployment insurance experience ratings;

(9) Employee compensation, including amounts of money or percentage of payment authorized to be expended annually for groups of employees for all types of wage and salary increases, travel, relocation expenses and other personnel costs.

(10) Lobbying costs;

(11) Public relations and advertising; and

(12) Travel and relocation costs as related to special or mass personnel movements and as related to travel via contractor-owned leased, or chartered aircraft.

(b) Generally, DOE utilizes the following two basic methods of achieving and recording understandings with contractors regarding the allowability of employee compensation, travel, relocation, and other personnel costs: Negotiation of a personnel appendix to the contract, which sets forth the policies, programs, and schedules which are accepted as the basis for determining the allowability of costs; or reviewing and reaching agreements on established policies, programs, and schedules (and any changes thereto during the contract term) that are applicable to the contractor's private operations which are acceptable for contract work and which will be consistently followed throughout the contractor's organization. A personnel appendix to the contract setting forth advance understandings covering compensation for personal services shall be utilized in management and operating contracts when one or more of the following circumstances exist: when policies, programs, and schedules are established specifically for contract work; when the contractor's work is predominantly or exclusively made up of negotiated Government contract work; when contract work is so different from the organization's private work that existing established policies, programs, and schedules cannot reasonably be extended to and consistently applied on contract work; or, when established policies, programs, and schedules proposed for contract work are not sufficiently definitive to permit a clear advance mutual understanding of allowable costs and to provide a basis for audit. The Head of the Contracting Activity is authorized to select the alternative method of achieving and recording advance understandings that they find most appropriate pursuant to the facts of the particular contract situation.

(c) With regard to the costs described in paragraph (a)(9) of this subsection:

(1) Compensation for personal services includes wages and salaries, bonuses and incentives, premium payments, pay for time not worked, and supplementary compensation and benefits, such as pension and retirement, group insurance, severance pay plans, and other forms of compensation covered by 970.3102–3–2.

(2) Employee travel costs include transportation expenses incurred while on official business, within the U.S. or outside the U.S. as necessary. Travel of executive officers is covered in 970.3102–3–14. Contractor travel policies must be acceptable to the Department, and result in reasonable cost necessary for contract performance. To avoid disputes and to clearly state the treatment that applies to travel cost, advance understandings should be reached with the management and operating contractor. They should be sufficiently definitive to evidence the contractor's responsibility to minimize costs consistent with contract performance. The allowability to certain travel costs, such as air travel, are specifically limited by Department policy. For example, the added cost of first class air travel is prohibited as a reimbursable cost, except under stringent conditions, which must be justified in writing. Contractually enforceable understandings concerning the allowability and reimbursement of other potentially significant travel costs (such as the use of Government-furnished automobiles or Government-contract provided rental automobiles) should be reached with the contractor. A reasonable basis for such understandings is the Federal travel policy applicable to Government and directly paid contractor employees.

(3) Other personnel costs include:

(i) Morale, health, welfare, food service and dormitory costs covered in 970.3102–3–5;

(ii) Training and education costs covered in 970.5231–1;

(iii) Relocation costs for relocating employees as discussed in 970.3102–3–12; and special or mass personnel movement covered in 970.3102–3–2(i).

970.3101–3 Cost certification and penalties on unallowable costs.

(a) The contracting officer shall require that management and operating contractors provide a submission for settlement of costs incurred during the period stipulated on the submission and a certification that the costs included in the submission are allowable. The contracting officer shall assess a penalty if unallowable costs are included in the submission. Unallowable costs are either expressly unallowable or determined unallowable.

(1) An expressly unallowable cost is a particular item or type of cost which, under the express provisions of an applicable law, regulation, or this contract, is specifically named and stated to be unallowable.

(2) A cost determined unallowable is one which, for that contractor:

(i) Was subject to a contracting officer's final decision and not appealed;

(ii) The Department's Board of Contract Appeals or a court has previously ruled as unallowable; or

(iii) Was mutually agreed to be unallowable.

(b) If, during the review of the submission, the contracting officer determines that the submission contains an expressly unallowable cost or a cost determined to be unallowable prior to the submission, the contracting officer shall assess a penalty.

(c) If the contracting officer determines that a cost submitted by the contractor in its submission for settlement is:

(1) Expressly unallowable, then the contracting officer shall assess a penalty in an amount equal to the disallowed cost allocated to this contract plus interest on the paid portion of the disallowed cost. Interest shall be computed from the date of overpayment to the date of repayment using the interest rate specified by the Secretary of the Treasury pursuant to 26 U.S.C. 6621(a)(2).

(2) Determined unallowable, then the contracting officer shall assess a penalty in an amount equal to two times the amount of the disallowed cost allocated to this contract.

(d) The contracting officer may waive the penalty provisions when:

(1) The contractor withdraws the submission before the formal initiation of an audit of the submission and submits a revised submission;

(2) The amount of the unallowable costs allocated to covered contracts is $10,000 or less; or

(3) The contractor demonstrates to the contracting officer's satisfaction that:

(i) It has established appropriate policies, personnel training, and an internal control and review system that provides assurances that unallowable costs subject to penalties are precluded from the contractor's submission for settlement of costs; and

(ii) The unallowable costs subject to the penalty were inadvertently incorporated into the submission.

(e) The Head of the Contracting Activity may waive the certification when:

(1) It is determined that it would be in the best interest to waive such certification; and

(2) The Head of the contracting Activity states in writing the reasons for that determination and makes such determination available to the public.

970.3102 Contracts with management and operating contractors.

970.3102–1 General.

The cost policies of the DOE regarding management and operating contracting are as discussed in this subsection.

970.3102–1–1 Actual cost basis.

(a) DOE shall reimburse its contractors for costs incurred in the performance of a management and operating contract in accordance with its terms and the provisions of this subpart. Such costs are those allowable costs provided for in the contract to the extent that they are necessary or incident, and either directly attributable or equitably allocable to the work under the contract. This broad expression of the DOE's cost-reimbursement policy is further developed and elaborated upon throughout this subpart.

(b) DOE uses retrospective or after-the-fact determination, usually called the actual cost basis, to establish the amount reimbursable. This general policy precludes the use of predetermined fixed percentage rates except for provisional payments.

(c) When a fixed compensation for any otherwise allowable cost is separately negotiated, the items of such costs covered by the fixed amount shall be identified with maximum clarity and set forth in an appropriate appendix to the contract as an amount otherwise exclusive of other reimbursable costs (this is done in order to distinguish between those allowable costs subject to reimbursement and those costs which are covered by the negotiated fixed amount).

970.3102–1–2 Application of cost principles.

(a) The incurred costs of performing management and operating contracts shall be reimbursed to the extent they are reasonable, allocable, and determined to be allowable under the provisions of this Subpart and the terms of the contract.

(b) This subsection does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable. The determination of allowability shall be based on the principles and standards in this subpart and the treatment of similar or related items. When more than one paragraph in this subsection is relevant to a contractor cost, the cost shall be apportioned among the applicable subsections, and the determination of allowability of each portion shall be based on the guidance contained in the applicable subsection. As an example, the cost of meals while in a travel status would normally be allowable if reasonable. However, the cost of alcoholic beverages associated with a meal would be unallowable. In no case shall costs made specifically unallowable under one cost principle be made allowable under another cost principle.

970.3102–1–3 General basis for reimbursement of costs.

(a) The total reimbursable cost of a DOE management and operating contract is the sum of the allowable direct costs necessary or incident to the performance of the contract, plus any properly allocable portion of allowable indirect costs, (including corporate or home office G&A expense, or branch office indirect expenses), if any, less applicable income and other credits. In determining allowability and reimbursability of costs, the following shall be considered:

(1) Allowability and reasonableness in accordance with 48 CFR 31.201-2(d) and 31.201–3;

(2) Allocability of a cost to management and operating contract. A cost is allocable if it is assignable or chargeable for work and performance of the contract in accordance with the relative benefits received or other equitable relationship;

(3) Application of generally accepted accounting principles and practices appropriate to identifying and measuring costs of performing the contract in accordance with this subpart;

(4) All exclusions of and limitations of types and amounts of items of cost set forth in the contract;

(5) Approvals by the contracting officer required under the contract terms; and

(6) Cost accounting standards if applicable.

(b) A contracting officer shall not resolve any questioned costs until the contracting officer has obtained:

(1) Adequate documentation with respect to such costs; and

(2) The opinion of the Department of Energy's auditor on the allowability of such costs.

(c) The contracting officer shall ensure that the documentation supporting the final settlement addresses the amount of the questioned costs and the subsequent disposition of such questioned costs.

(d) The contracting officer shall ensure, to the maximum extent practicable, that the Department of Energy's auditor is afforded an opportunity to attend any negotiation or meeting with the contractor regarding a determination of allowability.

970.3102–1–4 Cost determination based on audit.

The amount reimbursable under management and operating contracts shall be determined in accordance with the principles set forth in this subpart and in accordance with the terms of the respective contract on the basis of audit. In the event that the contractual terms differ, or are inconsistent with (see 48 CFR 970.3101–1 for approval of deviations) the principles stated in this subpart, the contractual terms control; however, it is expected that contractual terms be based on the principles stated in the subpart. The audit may be performed directly by DOE, or by the cognizant Federal agency pursuant to arrangements made by the DOE.

970.3102–1–5 Contractor's system of accounting.

(a) Careful DOE study of a management and operating contractor's usual accounting procedures shall be made prior to arriving at an understanding with the contractor as to the accounting system to be employed by the contractor during the period of contract performance.

(b) A contractor's customary accounting practices are usually accepted for management and operating contracts if they conform to generally accepted accounting principles, produce equitable results, are consistently applied, are not in conflict with the provisions of this subpart, are conducive to accurate costing of the contract work, and produce reports required by the DOE.

970.3102–2 Direct and indirect costs.

(a) Direct costs identified specifically with a management and operating contract are direct cost of performing that contract and are to be charged directly thereto. All costs specifically identified with other final cost objectives of the management and operating contractor are direct cost of those cost objectives and are not to be charged to the contract directly or indirectly. For reasons of practicality, any direct cost of minor dollar amount may be treated as an indirect cost if the accounting treatment.

(1) Is consistently applied; and

(2) Produces substantially the same results as treating the cost as a direct cost.

(b) Indirect cost are not subject to treatment as a direct cost and thus directly chargeable to a contract. After direct costs have been determined and charged directly to the contract or other work, indirect costs are those remaining to be allocated from an appropriate indirect cost accumulation account. The following principles and procedures shall apply to indirect costs to the extent that they are incurred under management and operating contracts.

(1) Indirect costs to the extent required to be or otherwise incurred in the accounting system of the operating contractor shall be accumulated by logical cost groupings with due consideration of the reasons for incurring such costs. Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the cost objectives to which it is to be allocated. Generally, overhead and general and administrative (G&A) expenses are separately grouped. Similarly, the particular case may require subdivision of these groupings; *e.g.,* building occupancy costs might be separable from those of personnel administration within a specific overhead group such as manufacturing overhead. This necessitates selecting a distribution base common to all cost objectives to which the grouping is to be allocated. The base should be selected so as to permit allocation of the grouping on the basis of the benefits accruing to the cost objectives. The number and composition of cost groupings should be governed by practical considerations and should not unduly complicate the allocation.

(2) Once an appropriate base for distributing indirect costs has been accepted, it shall not be fragmented by removing individual elements. For example, when a cost input base is used for the distribution of G&A costs, all items that would properly be part of the costs input base, whether allowable or unallowable, shall be included in the base and bear their pro rata share or G&A costs.

(3) The method of allocating indirect costs shall be in accordance with generally accepted accounting principles which are consistently applied.

(4) A base period for allocating indirect costs is the cost accounting period during which such costs are incurred and accumulated for distribution to work performed in that period.

970.3102–3 Selected costs.

970.3102–3–1 Public relations and advertising.

(a) *Public relations* means all functions and activities dedicated to:

(1) Maintaining, protection, and enhancing the image of a concern or its products; or

(2) Maintaining or promoting reciprocal understanding and favorable relations with the public at large, or any segment of the public. The term ''public relations'' includes activities associated with areas such as advertising, customer relations, community service, etc.

(b) *Advertising* means the use of media to promote the sale of products or services and to accomplish the activities referred to in paragraph (d) of this subsection regardless of the medium employed, when the advertiser has control over the form and content of what will appear, the media in which it will appear, and when it will appear. Advertising media include but are not limited to conventions, exhibits, free goods, samples, magazines, trade papers, direct mail, dealer cards, window displays, outdoor advertising, radio, and television.

(c) Public relations and advertising costs include the costs of media time and space, purchased services performed by outside organizations, as well as the applicable portion of salaries, travel, and fringe benefits of employees engaged in the functions and activities identified in paragraphs (a) and (b) of this section.

(d) The only advertising costs that are allowable are those specifically required by contract, approved in advance by the contracting officer, or that arise from requirements of the contract and that are exclusively for the following to the extent that they are determined by the contracting officer to be reasonable, necessary, and incident to contract performance:

(1) Recruiting personnel required for contract performance;

(2) Acquiring scarce items for contract performance;

(3) Disposing of scrap or surplus materials acquired for contract performance;

(4) The transfer of federally owned or originated technology to State and local governments and to the private sector; or

(5) Obtaining supplies and services including contract-required equipment, leases, banking services, etc.

(e) Allowable public relations costs include the following:

(1) Costs specifically required by contract, or approved in advance by the contracting officer.

(2) Costs of:

(i) Responding to inquiries on company policies and activities.

(ii) Communicating with the public, press, stockholders creditors, local communities, and customers, including responses to inquiries from and initiation of press releases and other communications with the news media.

(iii) Conducting general liaison with news media and government public relations officers, to the extent that such activities are limited to communication and liaison necessary to keep the public informed matters of public concern such as notice of contract awards, plant closures or openings, employee layoffs or rehires, financial information environmental impact of plant operations, etc.

(3) Costs of participation in community service activities (*e.g.,* blood bank drives, charity drives, savings bond drives, disaster assistance, outreach programs, etc.), exclusive of contractor cash contributions and donations which are unallowable. The contractor's cost of services or contractor-owned property provided to support community service activities (*e.g.,* the contractor's cost of making payroll deductions for employee contributions to a charity, cost of employee services provided to community organizations, or other similar, nominal in-kind participation) is allowable.

(4) Costs of plant tours, visitors centers, and open houses (but see paragraph (f)(5) of this section).

(f) Unallowable public relations and advertising costs include the following activities except when the principal purpose of the activity or event is to disseminate technical information or stimulate production in accordance with contract requirements:

(1) All advertising costs other than those specified in paragraph (d) of this section.

(2) Costs of air shows and other special events, such as conventions and trade shows including:

(i) Costs of displays, demonstrations and exhibits;

(ii) Costs of meeting rooms, hospitality suites, and other special facilities used in conjunction with shows and other special events; and

(iii) Salaries and wages of employees engaged in setting up and displaying exhibits, making demonstrations, and providing briefings.

(3) Costs of sponsoring meetings, symposia, seminars, and other special events.

(4) Costs of ceremonies such as corporate celebrations and new product announcements.

(5) Costs of promotional material, motion pictures, videotapes, brochures, handouts, magazines, and other media that are designed to benefit the contractor's organization by calling favorable public attention to contractor activities.

(g) Unallowable public relations and advertising costs include the following:

(1) Costs of souvenirs, models, imprinted clothing, buttons, and other mementos provided to customers or the public.

(2) Cost of memberships in civic and community organizations.

(3) All advertising and public relations costs, other than as specified in paragraphs (d), (e) and (f) of this section, whose primary purpose is to benefit the contractor's organization by promoting the sale of products or services by stimulating interest in a product or product line or by disseminating messages calling favorable attention to the contractor for purposes of enhancing the company image to sell the company's products or services unless such sales activities are required under the management and operating contract to support the DOE mission. Nothing in this paragraph (g)(3) modifies the express unallowability of costs listed in paragraphs (f), (g)(1) and (g)(2) of this section. The purpose of this paragraph is to provide criteria for determining whether advertising and public relations costs not specifically identified should be unallowable.

970.3102–3–2 Compensation for personal services.

(a) General. Compensation for personal services includes all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor during the period of contract performance (except as otherwise provided for severance pay costs in paragraph (b)(4)(i) of this subsection and for pension cost in paragraph (b)(1) of this subsection). It includes, but is not limited to, salaries; wages; directors' and executive committee members' fees; bonuses (including stock bonuses); incentive awards; employee stock options, stock appreciation rights, and stock ownership plans; employee insurance; fringe benefits; contributions to pension, annuity, and management employee incentive compensation plans; and allowances for off-site pay, incentive pay, location allowances, hardship pay, severance pay, and cost of living differential.

(b) Allowability. Reimbursable costs for compensation for personal services are to be set forth in a personnel appendix in the contract as discussed at 970.3101–2. This personnel appendix shall be negotiated using the principles and policies of this 970.3102–3–2, and other pertinent parts of the DEAR. However, costs that are unallowable pursuant to other paragraphs of 970.3102–3 or contract terms shall not be allowable under this 970.3102–3–2 on the basis they constitute compensation for personnel services. Costs of compensation for personal services are reimbursable to the extent that:

(1) The compensation is for personal services work performed by the employee in the current year and must not represent a retroactive adjustment of prior year's salaries or wages (but see 970.3102–3–2(i), (j), (l), (m), and (n));

(2) The compensation in total is reasonable for the work performed; however, specific restrictions on individual compensation elements must be observed where they are prescribed;

(3) The compensation is based upon and conforms to the terms and conditions of the contractor's established compensation plan or practice followed so consistently as to imply, in effect, an agreement to make the payment;

(4) Any approvals prescribed by this 970.3102–3–2 are obtained. No assumption of allowability will exist where the contractor introduces major revisions of existing compensation plans or new plans and the contractor.

(i) Has not notified the cognizant contracting officer of the changes either before their implementation, or within a reasonable period after their implementation, and

(ii) Has not provided the Government, either before implementation or within a reasonable period after it, an opportunity to review the allowability of the changes.

(5) Costs that are unallowable under the contract terms or other paragraphs of this 970.3102–3 shall not be allowable under this 970.3102–3–2 solely on the basis that they constitute compensation for personal services.

(c) *Reasonableness.* Subject to 970.3102–3–2(d) of this subsection, compensation for personal services will be considered reasonable if the total compensation conforms generally to compensation paid by other firms of the same size, in the same industry, or in the same geographic area for similar services or work performed. This does not preclude the Government from challenging the reasonableness of an individual element of compensation where costs are excessive in comparison with compensation paid by other firms of the same size, same industry, or in the same geographic area for similar services. In administering this principle, it is recognized that not every compensation case need be subjected in detail to these requirements. The requirements need be applied only when a general review reveals amounts or types of compensation that appear unreasonable or unjustified. In questionable cases, the contractor has responsibility to support the reasonableness of compensation in relation to the effort performed. Compensation costs under certain conditions give rise to the need for special consideration. Among such conditions are the following:

(1) Compensation to owners of closely held corporations, partners, sole proprietors, or members of their immediate families, or persons who are contractually committed to acquire a substantial financial interest in the contractor's enterprise. Determination should be made that salaries are reasonable for the personal services rendered rather than being a distribution of profits. Compensation in lieu of salary for services rendered by partners and sole proprietors will be allowed to the extent that it is reasonable and does not constitute a distribution of profits. For closely held corporations, compensation costs covered by this paragraph shall not be recognized in amounts exceeding those costs that are deductible as compensation under the Internal Revenue Code and its regulations.

(2) Any change in a contractor's compensation policy that results in a substantial increase in the contractor's level of compensation, particularly when it was concurrent with an increase in the ratio of Government contracts to other business, or any change in the treatment of allowability of specific types of compensation due to changes in the treatment of allowability of specific types of compensation due to changes in Government policy. No presumption of reasonableness will exist where major revisions of existing compensation plans or new plans are introduced by the contractor; and the contractor.

(i) Has not notified the cognizant contracting officer of the change either before their implementation or within a reasonable period after their implementation; and

(ii) Has not provided the Government, either before implementation or within a reasonable period after it, an opportunity to review the reasonableness of the changes.

(3) The contractor's business is such that its compensation levels are not subject to the restraints that normally

occur in the conduct of competitive business.

(4) The contractor incurs costs for compensation in excess of the amounts which are deductible under the Internal Revenue Code and its regulations.

(d) *DOE review and approval of compensation paid individual employees.* In determining the reasonableness of compensation, the compensation of each individual contractor employee normally need not be subjected to review and approval. Generally, the compensation paid individual employees should be left to the judgment of contractors subject to the limitations of DOE-approved compensation policies, programs, classification systems, and schedules, and amounts of money authorized for wage and salary increases for groups of employees. However, all compensation due an individual of $80,000 or more shall require the contracting officer's or designee's review and approval. In addition, it will often be necessary that employee compensation be subjected to review and approval on an individual basis at a level below $80,000, when the contracting officer finds it appropriate for the particular situation. The contract shall specifically provide for the approval by the contracting officer of the cost of compensating an individual contractor employee above the level determined by the contracting officer, if a total of 50 percent or more of such compensation is reimbursed under DOE cost-type contracts. For purposes of determining the level for individual review and approval, total compensation as used in this paragraph includes only the employee's salary and bonus or incentive compensation. As in the case of other personnel and compensation costs, it is intended that contracting officer review and approval of individual compensation normally will be prior to incurrence of costs.

(e) Labor-management agreements. Notwithstanding any other DOE requirements, costs of compensation are not allowable to the extent that they result from provisions of labor-management agreements that, as applied to work in performing Government contracts, are determined to be unreasonable because they are either unwarranted by the character and circumstances of the work or discriminatory against the Government. The application of the provisions of a labor-management agreement designed to apply to a given set of circumstances and conditions of employment (*e.g.,* work involving extremely hazardous activities or work not requiring recurrent use of overtime) is unwarranted when applied to a Government contract involving significantly different circumstances and conditions of employment (*e.g.,* work involving less hazardous activities or work continually requiring use of overtime). It is discriminatory against the Government if it results in employee compensation (in whatever form or name) in excess of that being paid for similar non-Government work under comparable circumstances. Disallowance of costs will not be made under this paragraph (e) unless:

(1) The contractor has been permitted an opportunity to justify the costs; and

(2) Due consideration has been given to whether unusual conditions pertain to Government contract work, imposing burdens, hardships, or hazards on the contractor's employees, for which compensation that might otherwise appear unreasonable is required to attract and hold necessary personnel.

(f) Salaries and wages. Salaries and wages for current services include gross compensation paid to employees in the form of cash, stock (see paragraph (h)(2) of this subsection regarding valuation), products, or services, and are allowable.

(g) Domestic and foreign differential pay. When personal services are performed in a foreign country, compensation may also include a differential that may properly consider all expenses associated with foreign employment such as housing, cost of living adjustments, transportation, bonuses, additional Federal, state, local or foreign income taxes resulting from foreign assignment, and other related expenses.

(h) *Bonuses and incentive compensation.* Incentive compensation and cash bonuses based on production, cost reduction or efficient performance, suggestion awards, and safety awards are to be treated as allowable, to the extent that the contractor's overall compensation plan is determined to be reasonable and such costs are paid or accrued, pursuant to an agreement entered into in good faith between the contractor and the employees before the services were rendered, or pursuant to an established plan followed by the contractor so consistently as to imply, in effect, an agreement to make such payment (see 970.3101–2). In determining reasonableness, it will be necessary to take into account, not only bonuses and incentive compensation payments charged directly to the contract, but also payments charged indirectly to the contract through overhead. Bonuses, awards, and incentive compensation, when any of them are deferred, are to be treated as allowable to the extent provided in paragraph (m) of this subsection.

(1) Bonuses and incentive compensation paid to employees other than those whose pay is directly reimbursed will not be made allowable in on-site construction and management and operating contracts, where home office general and administrative expense is unallowable.

(2) When the costs of bonuses and incentive compensation are paid in the stock of the contractor or of an affiliate, the following additional restrictions apply:

(i) Valuation placed on the stock shall be the fair market value on the measurement date (*i.e.,* the first date the number of shares awarded is known) determined upon the most objective basis available; and

(ii) Accruals for the cost of stock before issuing the stock to the employees shall be subject to adjustment according to the possibilities that the employees will not receive the stock and that their interest in the accruals will be forfeited.

(3) When the bonus and incentive compensation payments are deferred, the costs are subject to the requirements of paragraph (h)(1) of this subsection and of paragraph (m) of this subsection.

(i) Severance pay. (1) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages by contractors to workers whose employment is being involuntarily terminated. Payments for early retirement incentive plans are covered in paragraph (l)(6) of this subsection.

(2) Severance pay to be allowable must meet the general allowability criteria in paragraph (i)(2)(i) of this subsection, and, depending upon whether the severance is normal or abnormal, criteria in paragraph (i)(2)(ii) of this subsection for normal severance pay or paragraph (i)(2)(iii) of this subsection for abnormal severance pay also apply. In addition, paragraphs (i)(2)(iv) and (v) of this subsection apply if the severance cost is for foreign nationals employed outside the United States.

(i) Severance pay is allowable only to the extent that, in each case, it is required by law, employer-employee agreement, established policy that constitutes, in effect, an implied agreement on the contractor's part, or circumstances of the particular employment. Payments made in the event of employment with a replacement contractor where continuity of employment with credit for prior length of service is preserved under substantially equal conditions of employment, or continued employment by the contractor at another facility,

subsidiary, affiliate, or parent company of the contractor are not severance pay and are unallowable.

(ii) Actual normal turnover severance payments shall be allocated to all work performed in the contractor's plant, or where the contractor provides for accrual of pay for normal severances, that method will be acceptable if the amount of the accrual is reasonable in light of payments actually made for normal severances over a representative past period and if amounts accrued are allocated to all work performed at the facility.

(iii) Abnormal or mass severance pay is of such a conjectural nature that measurement of costs by means of an accrual will not achieve equity to both parties. Thus, accruals for this purpose are not allowable. However, the Government recognizes its obligation to participate, to the extent of its fair share, in any specific payment. Thus, allowability will be considered on a case-by-case basis.

(iv) Notwithstanding the provision of paragraph (c) of this subsection, which references geographic area, under 41 U.S.C. 256(e)(1)(M), the costs of severance payments to foreign nationals employed under a service contract performed outside the United States are unallowable to the extent that such payments exceed amounts typically paid to employees providing similar services in the same industry in the United States.

(v) Further, under 41 U.S.C. 256(e)(1)(N), the costs of severance payments referred to in paragraph (i)(2)(iv) of this subsection are unallowable if the termination of employment is the result of the closing of, or curtailment of, activities at a United States facility in that country at the request of the government of that country.

(vi) The Head of the Contracting Activity may waive the application of the provisions of paragraphs (i)(2)(iv) and (v) of this subsection under the conditions specified in subpart 970.37.

(3) Subject to paragraph (a) of this subsection, the following standards apply in determining allowability of costs for severance pay plans of management and operating contractors:

(i) Payments should be made only upon involuntary termination by reduction in force (RIF) of an employee which results in a permanent separation from the employment of the contractor. However, payments may also be made upon voluntary separation of an employee within a RIF grouping, but not otherwise scheduled for termination, which thereby eliminates the need for terminating another employee involuntarily.

(ii) Payments should not be provided for in the event of temporary layoffs; employment or offer of employment with a replacement contractor (employer) where continuity of employment with credit for prior length of service is preserved under substantially equal conditions of employment; early or normal retirement; or continued employment by the contractor at another facility, subsidiary, affiliate, or parent company of the contractor. Contractor employees should not have the option of refusing employment to receive severance pay.

(j) Backpay. (1) Backpay resulting from violations of Federal labor laws or the Civil Rights Act of 1964. Backpay may result from a negotiated settlement, order, or court decree that resolves a violation of Federal labor laws or the Civil Rights Act of 1964. Such backpay falls into two categories: one requiring the contractor to pay employees additional compensation for work performed for which they were underpaid, and the other resulting from other violations, such as when the employee was improperly discharged, discriminated against, or other circumstances for which the backpay was not additional compensation for work performed. Backpay resulting from underpaid work is compensation for the work performed and is allowable. All other backpay resulting from willful violation of Federal labor laws or the Civil Rights Act of 1964 is unallowable.

(2) Other backpay. Backpay may also result from payments to union employees (union and non-union) for the difference in their past and current wage rates for working without a contract or labor agreement during labor management negotiations. Such backpay is allowable. Backpay to nonunion employee based upon results of union agreement negotiations is allowable only if:

(i) A formal agreement or understanding exists between management and the employees concerning these payments, or

(ii) An established policy or practice exists and is followed by the contractor so consistently as to imply, in effect, an agreement to make such payment.

(k) Stock options, stock appreciation rights, and phantom stock plans. (1) The cost of stock options awarded to employees to purchase stock of the contractor or of an affiliate will be treated as deferred compensation and must comply with the requirements of paragraph (m) of this subsection and with the allowability criteria contained in paragraph (k)(2) of this subsection. The allowable cost of stock appreciation rights, whether offered separately or combined with stock options, will be determined in the same manner as stock options.

(2) The allowable costs of stock options and stock appreciation rights will be limited to the difference between the option price or stock-appreciation-right price and the market price of the stock on the measurement date (i.e., the first date on which both the number of shares and the option or stock-appreciation-right price are known). Accordingly, when the option or stock-appreciation-right price is equal to or greater than the market price on the measurement date, then no costs are allowed for contract costing purposes.

(3) In phantom-stock-type plans, contractors assign or attribute contingent shares of stock to employees as if the employees own the stock, even though the employees neither purchase the stock nor receive title to it. Under these plans, an employee's account may be increased by the equivalent of dividends issued and any appreciation in the market price of the stock over the price of the stock on the measurement date (*i.e.,* the first date the number of shares awarded is known). Such increases in employee accounts for dividend equivalents and market price appreciation are unallowable.

(l) *Pension costs.* (1) A pension plan is a deferred compensation plan that is established and maintained by one or more employers to provide systematically for paying benefits to plan participants after their retirement, provided that the benefits are paid for life or are payable for life at the option of the employee. Additional benefits such as permanent and total disability and death payments and survivorship payments to beneficiaries of deceased employees may be treated as pension costs, provided the benefits are an integral part of the pension plan and meet all the criteria pertaining to pension costs.

(2) Pension plans are normally segregated into two types of plans: defined benefit or defined contribution pension plans. Except as provided by other DOE directives, the cost of all defined benefit pension plans shall be measured, allocated, and accounted for in compliance with the provisions of CAS 412, Composition and Measurement of Pension Costs, and CAS 413, Adjustment and Allocation of Pension Cost. The costs of all defined contribution pension plans shall be measured, allocated, and accounted for in accordance with the provisions of CAS 412. Pension costs are allowable subject to directives issued by the Office

of Contract and Resource Management, within the Headquarters procurement organization, the referenced standards and the cost limitations and exclusions set forth below in this paragraph and in paragraphs (l)(3), (4), (5), (6), and (7) of this subsection.

(i) To be allowable in the current year, pension costs must be funded by the time set for filing the Federal income tax return or any extension thereof. Pension costs assigned to the current year, but not funded by the tax return time, shall not be allowable in any subsequent year.

(ii) Pension payments must be reasonable in amount and be paid pursuant to: an agreement entered into in good faith between the contractor and employees before the work or services are performed and the terms and conditions of the established plan. The cost of changes in pension plans which are discriminatory to the Government or are not intended to be applied consistently for all employees under similar circumstances in the future are not allowable.

(iii) Except as provided for early retirement benefits in paragraph (1)(6) of this subsection, one-time-only pension supplements not available to all participants of the basic plan are not allowable as pension costs unless the supplemental benefits represent a separate pension plan and the benefits are payable for life at the option of the employee.

(iv) Increases in payments to previously retired plan participants covering cost-of-living adjustments are allowable if paid in accordance with a policy or practice consistently followed.

(3) *Defined benefit pension plans.* This paragraph covers pension plans in which the benefits to be paid or the basis for determining such benefits are established in advance and the contributions are intended to provide the stated benefits. The cost limitations and exclusions pertaining to defined benefit plans are as follows:

(i) Normal costs of pension plans not funded in the year incurred, and all other components of pension costs (see CAS 412.40(a)(1)) assignable to the current accounting period but not funded during it, shall not be allowable in subsequent years (except that a payment made to a fund by the time set for filing the Federal income tax return or any extension thereof is considered to have been made during such taxable year). However, any part of a pension cost that is computed for a cost accounting period that is deferred pursuant to a waiver granted under the provisions of the Employee's Retirement Income Security Act of 1974 (ERISA) (see CAS 412.50(c)(3)), will be allowable in those future accounting periods in which the funding does occur. The allowability of these deferred contributions will be limited to the amounts that would have been allowed had the funding occurred in the year the costs would have been assigned except for the waiver.

(ii) Any amount paid or funded before the time it becomes assignable and allowable shall be applied to future years, in order of time, as if actually paid and deductible in those years. The interest earned on such premature funding, based on the valuation rate of return, may be excluded from future years' computations of pension costs in accordance with CAS 412.50(a)(7).

(iii) Increased pension costs caused by delay in funding beyond 30 days after each quarter of the year to which they are assignable are unallowable. If a composite rate is used for allocating pension costs between the segments of a company and if, because of differences in the timing of the funding by the segments, an inequity exists, allowable pension costs for each segment will be limited to that particular segment's calculation of pension costs as provided for in CAS 413.50(c)(5). Determination of unallowable costs shall be made in accordance with the actuarial method used in calculating pension costs.

(iv) Allowability of the cost of indemnifying the Pension Benefit Guaranty Corporation (PBGC) under ERISA section 4062 or 4064 arising from terminating an employee deferred compensation plan will be considered on a case-by-case basis; provided that if insurance was required by the PBGC under ERISA section 4023, it was so obtained and the indemnification payment is not recoverable under the insurance. Consideration under the foregoing circumstances will be primarily for the purpose of appraising the extent to which the indemnification payment is allocable to Government work. If a beneficial or other equitable relationship exists, the Government will participate in the indemnification payment to the extent of its fair share.

(4) Defined contribution pension plans. This paragraph covers those pension plans in which the contributions to be made are established in advance and the level of benefits is determined by the contributions made. It also covers profit sharing, savings plans, and other such plans provided the plans fall within the definition of a pension plan in paragraph (l)(1) of this subsection.

(i) The pension cost assignable to a cost accounting period is the net contribution required to be made for that period after taking into account dividends and other credits, where applicable. However, any portion of pension cost computed for a cost accounting period that is deferred pursuant to a waiver granted under the provisions of ERISA (see CAS 412.50(c)(3)) will be allowable in those future accounting periods when the funding does occur. The allowability of these deferred contributions will be limited to the amounts that would have been allowed had the funding been made in the year the costs would have been assigned except for the waiver.

(ii) Any amount paid or funded to the trust before the time it becomes assignable and allowable shall be applied to future years, in order of time, as if actually paid and deductible in such years.

(iii) The provisions of paragraph (l)(3)(vi) of this subsection concerning payments to PBGC apply to defined contribution plans.

(5) Pension plans using pay-as-you-go methods. A pension plan using pay-as-you-go methods is a plan in which the contractor recognizes pension cost only when benefits are paid to retired employees or their beneficiaries. Regardless of whether the payment of pension benefits contribution can or cannot be compelled, allowable costs for these types of plans shall not exceed an amount computed as follows:

(i) Compute, by using an actuarial cost method, the plan's actuarial liability for benefits earned by plan participants. This entire liability is always unfunded for a pay-as-you-go plan.

(ii) Compute a level amount which, including an interest equivalent, would amortize the unfunded actuarial liability over a period of no less than 10 or more than 40 years from the inception of the liability.

(iii) Compute, by using an actuarial cost method, a normal cost for the period.

(iv) The sum of paragraphs (l)(5) (i), (ii), and (iii) of this subsection represents the amount of pension costs assignable to the current period. This amount, however, is limited to the amount paid in the year.

(v) For purposes of determining contract cost where a pay-as-you-go plan is initiated as either a supplemental plan or an additional but separate plan to a basic funded plan, the plans will be treated as one plan; e.g., the actuarial cost method, past service amortization period, etc., of the basic plan will be used on the supplemental or additional pay-as-you-go plan in determining the proper costs assignable to the current period. Any costs in excess of those determined by using the actuarial cost method and assumptions

of the basic plan are unallowable. However, where assumption for salary progressions, mortality rates of the participants, and so forth are significantly different, the assumptions used for the basic and supplemental plan may be different.

(vi) The requirements of paragraphs (l)(3) (i) through (iv) of this subsection are also applicable to pay-as-you-go plans.

(6) Early retirement incentive plans. An early retirement incentive plan is a plan under which employees receive a bonus or incentive, over and above the requirement of the basic pension plan, to retire early. These plans normally are not applicable to all participants of the basic plan and do not represent life income settlements, and as such would not qualify as pension costs. However, for contract costing purposes, early retirement incentive payments are allowable subject to pension criteria contained in paragraphs (l)(3)(i) through (iv) provided:

(i) The costs are accounted for and allocated in accordance with the contractor's system of accounting for pension costs (see paragraph (l)(5)(v) of this subsection for supplemental pension benefits);

(ii) The payments are made in accordance with the terms and conditions of the contractor's plan;

(iii) The plan is applied only to active employees. The cost of extending the plan to employees who retired or were terminated before the adoption of the plan is unallowable; and

(iv) The total of the incentive payments to any employee may not exceed the amount of the employee's annual salary for the previous fiscal year before the employee's retirement.

(7) Employee stock ownership plans (ESOP). (i) An ESOP is an individual stock bonus plan designed specifically to invest in the stock of the employer corporation. The contractor's contributions to an Employee Stock Ownership Trust (ESOT) may be in the form of cash, stock, or property. Costs of ESOP's are allowable subject to the following conditions:

(A) Contributions by the contractor in any one year may not exceed 15 percent (25 percent when a money purchase plan is included) of salaries and wages of employees participating in the plan in any particular year.

(B) The contribution rate (ratio of contribution to salaries and wages of participating employees) may not exceed the last approved contribution rate except when approved by the contracting officer based upon justification provided by the contractor. When no contribution was made in the previous year for an existing ESOP, or when a new ESOP is first established, and the contractor proposes to make a contribution in the current year, the contribution rate shall be subject to the contracting officer's approval.

(C) When a plan or agreement exists wherein the liability for the contribution can be compelled for a specific year, the expense associated with that liability is assignable only to that period. Any portion of the contribution not funded by the time set for filing of the Federal income tax return for that year or any extension thereof shall not be allowable in subsequent years.

(D) When a plan or agreement exists wherein the liability for the contribution cannot be compelled, the amount contributed for any year is assignable to that year provided the amount is funded by the time set for filing of the Federal income tax return for that year.

(E) When the contribution is in the form of stock, the value of the stock contribution shall be limited to the fair market value of the stock on the date that title is effectively transferred to the trust. Cash contributions shall be allowable only when the contractor furnishes evidence satisfactory to the contracting officer demonstrating that stock purchases by the ESOT are or will be at a fair market price; *e.g.,* makes arrangements with the trust permitting the contracting officer to examine purchases of stock by the trust to determine that prices paid are at fair market value. When excessive prices are paid, the amount of the excess will be credited to the same indirect cost pools that were charged for the ESOP contributions in the year in which the stock purchase occurs. However, when the trust purchases the stock with borrowed funds which will be repaid over a period of years by cash contributions from the contractor to the trust, the excess price over fair market value shall be credited to the indirect cost pools pro rata over the period of years during which the contractor contributes the cash used by the trust to repay the loan. When the fair market value of unissued stock or stock of a closely held corporation is not readily determinable, the valuation will be made on a case-by-case basis taking into consideration the guidelines for valuation used by the IRS.

(ii) Amounts contributed to an ESOP arising from either:

(A) An additional investment tax credit (see 1975 Tax Reduction Act); or

(B) A payroll-based tax credit (see Economic Recovery Tax Act of 1981) are unallowable.

(iii) The requirements of paragraphs (l)(3)(ii) of this subsection are applicable to Employee Stock Ownership Plans.

(m) *Deferred compensation.* (1) Deferred compensation is an award given by an employer to compensate an employee in a future cost accounting period or periods for services rendered in one or more cost accounting periods before the date of receipt of compensation by the employee. Deferred compensation does not include the amount of year-end accruals for salaries, wages, or bonuses that are paid within a reasonable period of time after the end of a cost accounting period. Subject to 970.3102–3–2(a), deferred awards are allowable when they are based on current or future services. Awards made in periods subsequent to the period when the work being remunerated was performed are not allowable.

(2) The costs of deferred awards shall be measured, allocated, and accounted for in compliance with the provisions of CAS 415, Accounting for the Cost of Deferred Compensation.

(3) Deferred compensation payments to employees under awards made before the effective date of CAS 415 are allowable to the extent they would have been allowable under prior acquisition regulations.

(n) *Fringe benefits.* Fringe benefits are allowances and services provided by the contractor to its employees, as compensation, in addition to regular wages and salaries. Subject to the determination that total compensation is reasonable in accordance with this 970.3102–3–2, costs of fringe benefits such as pay for vacations, holidays, sick leave, military leave, employee insurance, pension, retirement plans, and supplemental unemployment benefit plans are to be treated as allowable, provided such fringe benefits meet the following conditions:

(1) The benefits contribute to the performance of contract work and are appropriate for reimbursement from public funds;

(2) Such benefit plans as exist in the contractor's private operations that are inconsistent with DOE published requirements are appropriately modified or disallowed;

(3) Employee benefit plans especially established to meet the particular needs of the contract are in conformity with published DOE policy and standards;

(4) Appropriate controls under the contract are established to assure that employees on contract work are treated no more or no less favorably than employees in the contractor's private operation, except to the extent that

paragraphs (n)(2) and (3) of this subsection apply;

(5) To the fullest extent possible, definite limitations or terminal points are established for each of the various benefit plans, so that DOE's full liability with respect thereto is established under the contract; and

(6) DOE has access to all information necessary to complete understanding of the means of computing or determining the cost of the benefits afforded contract employees and their dependents under the benefit plans.

(o) Training and education expenses. See 970.5231–1.

(p) Special compensation. The following costs are unallowable:

(1) Special compensation to employees pursuant to agreements which permit payments in excess of the contractor's normal severance pay practices, if their employment terminates following a change in the management control over, or ownership of, the contractor or a substantial portion of its assets.

(2) Special compensation to employees pursuant to agreements which permit payments resulting from a change, whether actual or prospective, in the management control over, or ownership of, the contractor or a portion of its assets which is contingent upon the employee remaining with the contractor for a stated period of time.

(*q*) *Limitation on allowability of compensation for certain contractor personnel.* Costs incurred for compensation of a senior executive in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy, are unallowable. Allowable costs of executive compensation shall be determined pursuant to Federal Acquisition Regulation 31.205–6(p).

970.3102–3–3 Cost of money.

Cost of money as an element of the cost of facilities capital (CAS 414) and cost of capital assets under construction (CAS 417) is not an allowable cost under DOE management and operating contracts. Under the provisions of CAS 414 and CAS 417, cost of money is an imputed cost applicable to contractor owned and financed tangible capital assets employed in contract performance or being constructed, fabricated, or developed for ultimate employment in contract performance. Cost of money is not applicable to DOE management and operating contracts since the Government provides for assets used, or under construction for use in performance of its contracts (such as through Government furnished or contractor-acquired Government property contract provisions and/or through granting cash advances, including letters-of-credit.)

970.3102–3–4 Depreciation.

(a) Depreciation is allowable subject to the following:

(1) The charge represents normal depreciation on a contractor's plant and equipment used in performance of management and operating work.

(2) The charge to current operations is a distribution of the cost of acquisition of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset, in a systematic and logical manner.

(3) Any generally accepted accounting method consistently applied to assets concerned having the approval of the Internal Revenue Service for Federal income tax purposes, if subject to the Internal Revenue Code of 1954, as amended, may be used including:

(i) The straight-line method;

(ii) The declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (a)(3)(i) of this subsection;

(iii) The sum-of-the-years digits method;

(iv) Any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the use of the property and including the current year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used, had such allowances been computed under the method described in paragraph (a)(3)(ii) of this subsection.

(4) If a nonprofit or tax-exempt organization, the method shall be such that it could have had the approval of the Internal Revenue Service, had the organization been subject to the Internal Revenue Code of 1954, as amended.

(5) The contractor must use the same approved method of depreciation for costing its contract work as for costing its other work at the same facility.

(6) The method of depreciation shall produce equitable and reasonable results.

(b) Depreciation of the following is unallowable:

(1) Idle or excess facilities (machinery and equipment), other than reasonable standby facilities;

(2) Assets fully amortized or depreciated on the contractor's books;

(3) Unrealized appreciation of values of assets; and

(4) Accelerated amortization under Certificates of Necessity or other system in excess of normal depreciation, as computed under paragraph (a) of this subsection.

(c) In entering into contracts involving the use of ''special facilities'' under section 161 of the Atomic Energy Act of 1954, as amended (section 7 of Public Law 85–681 approved Aug. 19, 1958), the percentage of the total cost of such special facilities devoted to contract performance and chargeable to the DOE should not exceed the ratio between the period of contract deliveries and the anticipated useful life of such facilities.

970.3102–3–5 Employee morale, health, welfare, food service, and dormitory costs.

(a) Employee morale, health, and welfare activities are those services or benefits provided by the contractor to its employees to improve working conditions, employer-employee relations, employee morale, and employee performance. These activities include such items as house or employee publications, health or first-aid clinics, wellness/fitness centers, employee counseling services, awards for performance or awards made in recognition of employee achievements pursuant to an established contractor plan or policy, and, for the purpose of this subsection, food service and dormitory costs. However, these activities do not include, and should be differentiated from compensation for personal services as defined in 970.3102–3–2. Food and dormitory services include operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations, or similar types of services for the contractor's employees at or near the contractor's facilities or site of the contract work.

(b) Costs of recreation, registration fees of employees participating in competitive fitness promotions, team activities, and sporting events are unallowable, except for the costs of employees' participation in company sponsored intramural sports teams or employee' organizations designed to improve company loyalty, team work, or physical fitness.

(c) Except as limited by paragraph (d) of this subsection, the aggregate of costs incurred on account of all activities mentioned in paragraph (a) of this subsection, less income generated by all such activities, is allowable to the extent that the net aggregate cost of all such activities, as well as the net cost of each individual activity, is reasonable and allocable to the contract work. Additionally, advance understandings

with respect to the costs mentioned in paragraph (a) of this subsection are to be reached prior to the incurrence of these costs as required in 48 CFR 970.3101–2.

(d) Losses from the operation of food or dormitory services may be included as costs incurred under paragraph (c) of this subsection only if the contractor's objective is to operate such services at least on a break-even basis. Losses sustained because food services or lodging accommodations are furnished without charge or at prices or rates which obviously would not be conducive to operation on a break-even basis are not allowable, except in those instances where the contractor can demonstrate that unusual circumstances exist, such that, even with efficient management, operation of the services on a break-even basis would require charging inordinately high prices, or prices or rates higher than those charged by commercial establishments offering the same services in the same geographical areas. Typical examples of such unusual circumstances are:

(1) Where the contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available, or (2) Where it is necessary to operate a facility at a lower volume than the facility could economically support. Cost of food and dormitory services shall include an allocable share of indirect expenses pertaining to these activities.

(e) In those situations where the contractor has an arrangement authorizing an employee association to provide or operate a service such as vending machines in the contractor's plant, and retain the profits derived therefrom, such profits shall be treated in the same manner as if the contractor were providing the service, except as provided in paragraph (f) of this subsection.

(f) Contributions by the contractor to an employee organization, including funds set over from vending machines receipts or similar sources, may be included as cost incurred under paragraph (c) of this subsection, only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable, if incurred by the contractor directly.

970.3102–3–6 Fines, penalties and mischarging costs.

It is Department of Energy policy not to reimburse management and operating contractors for fines and penalties except as provided in 48 CFR 970.5231–1(e)(12), Allowable Costs and Fixed Fee (Management and Operating Contracts), and 48 CFR 970.5231–4, Preexisting Conditions.

970.3102–3–7 Lobbying and political activity Costs.

The following costs are unallowable, except for costs associated with providing information pursuant to 970.5231–2, Political Activity Cost Prohibition, unless approved by the contracting officer. Contractor costs incurred to influence either directly or indirectly:

(a) Legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State; or

(b) Federal, State, or executive body of a political subdivision of a State action on regulatory and contract matters.

970.3102–3–8 General and administrative expenses.

(a) For on-site work, the DOE considers that its fee allowance for management and operating contracts provides for the recognition of appropriate compensation for home or corporate office general and administrative expenses incurred in the general management of the contractor's business as a whole.

(b) The policy in paragraph (a) of this subsection is intended to preclude the payment of general and administrative expenses merely because they are incurred or accounted for at or by a contractor's home or corporate office and not the operating site. The DOE recognizes some benefit of such cost to the DOE program. The basis of recognition through fee allowance is associated with the difficulty of determining and assessing the dollar value of such expenses that might be applicable to or have benefit to a management and operating contract. Conventional allocation techniques; *i.e.,* total operating costs, labor dollars or hours, etc., are generally not considered appropriate because they normally distribute such expenses over a base representative of contractor investment (in terms of its own resources, including labor, material, overhead, etc.). Contractor investments and home office contributions are minimal under DOE's operating and management contracts in as much as they are totally financed and supported by DOE advance payments under the letter-of-credit method and by DOE's provision of government-owned and project-exclusive facilities, property, and other needed resources.

(c) Notwithstanding the concept in paragraph (a) of this subsection, it is recognized that from time to time the fee amounts established for a management and operating contract, to meet the purpose cited in 970.1504–1–2 and consideration of the factors in 970.1504–1–5, may be considered insufficient to adequately recognize a contractor's general and administrative expenses incurred in general management and administration of the contractor's business as a whole and which appear to have a directly benefitting relationship to the DOE program. Such recognitions may be the basis of requesting fee amounts in excess of the limitations set forth in 970.1504–1–6 or alternatively, in any particular case, the contractor may be compensated on the basis of cost in accordance with 970.3102–1–1 if the Head of the Contracting Activity or other approving contract official authorizes or approves the procedure and a fair and reasonable amount can be agreed upon. Such amount shall normally be in addition to the applicable fee amounts.

(d) The DOE allows company general and administrative expenses under off-site architect-engineer, supply and research contracts with commercial contractors performing the work in their own facilities. Contractor's general and administrative expenses, may, however, be included for reimbursement under such DOE off-site architect-engineer, supply and research contracts, only to the extent that they are established, after careful examination, to be allowable in nature an properly allocable to the work. Work performed in a contractor's own facilities under a management and operating or construction contract may likewise be allowed to bear the properly allocable portion of allowable company general and administrative expense.

970.3102–3–9 Plant reconversion costs.

Plant reconversion costs are those incurred in the restoration of the contractor's facilities to approximately the same condition existing immediately prior to the commencement of the contract work, fair wear and tear excepted.

970.3102–3–10 Precontract costs.

Precontract costs are those incurred prior to the effective date of the contract directly pursuant to the negotiation and in anticipation of the award of the contract, where such incurrence is necessary to comply with the proposed contract delivery schedule. Such costs are allowable to the extent that they would have been allowable if incurred after the effective date of the contract. They do not include costs of preparing bids or of participation in the negotiation. The allowability of

precontract costs is dependent upon appropriate coverage in the contract.

970.3102–3–11 Professional and consultant service costs.

Technical and professional consultants, as used in this subpart, refer to private individuals acting in their own behalf, who make their services available on a fee or per diem basis. It does not refer to employees of firms acting in the firm's behalf whose services may be made available by the firm on, for example, a fixed rate basis. Consultant arrangements may permit bringing to contract work, the services of outstanding specialists who would not be available on a full-time basis, or whose employment on a full-time basis would not be economically feasible. Costs of such outside consultant services are normally allowable (however, see 970.5231–1 regarding compensation of an individual who is employed by another contractor and concurrently performing work on a full-time annual basis under a DOE cost-type contract), provided that the services are essential to, and will make a material contribution to, the performance of contract work; the services may be performed more economically or more successfully by a consultant than by the contractor's regular personnel; the fee or per diem charged is reasonable; and, when approved by the contracting officer. If the cost of such services is charged directly to the DOE contract, the cost of like items properly chargeable only to other work of the contractor must be eliminated from indirect costs allocable to the DOE contract (see 970.3102–2).

970.3102–3–12 Relocation costs.

(a) Relocation costs are costs incident to the permanent change of duty assignment (for an indefinite period or for a stated period of not less than 12 months) of an existing employee or upon recruitment of a new employee. The following types of costs are allowable as noted, subject to provisions of paragraphs (b), (c), and (d) of this subsection.

(1) Costs of travel of the employee and members of his/her immediate family and transportation of household and personal effects to the new location.

(2) Costs of finding a new home, such as advance trips by employees and spouses to locate living quarters, and temporary lodging during the transition periods, not exceeding separate cumulative totals of 60 days for employees and 45 days for spouses and dependents, including advance trip time.

(3) Closing costs (*i.e.,* brokerage fees, legal fees, appraisal fees, points, finance charges, *etc.*) incident to the disposition of actual residence owned by the employee when notified of transfer; Provided that closing costs when added to the continuing costs described in (a)(6) of this subsection shall not exceed 14% of the sales price of the property sold.

(4) Other necessary and reasonable miscellaneous expenses incident to relocation, such as disconnection and connecting household appliances; automobile registration; drivers license and use taxes; cutting and fitting rugs, draperies, and curtains; forfeited utility fees and deposits; and purchase of insurance against damage to or loss of personal property while in transit.

(5) Costs incident to the acquisition of a home in a new location, except that these costs will not be allowable for existing employees or newly recruited employees who prior to the relocation were not homeowners and the total costs shall not exceed 5% of the purchase price of the new home.

(6) Continuing costs of ownership of the vacant former actual residence being sold, such as maintenance of building and grounds (exclusive of fixing up expenses), utilities, taxes, property insurance, mortgage interest, *etc.,* after settlement date or lease date of new permanent residence; provided that when added to the closing costs described in (a)(3) of this subsection, the costs shall not exceed 14% of the sales price of the property sold.

(7) Mortgage interest differential payments, except that these costs are not allowable for existing or newly recruited employees who prior to the relocation were not homeowners, and the total payments are limited to an amount determined as follows:

(i) Difference between the mortgage interest rates of the old and new residence times the current balance of the old mortgage times 3 years; and

(ii) When mortgage differential payments are made on a lump sum basis and the employee leaves or is transferred again in less than 3 years, the amount initially recognized shall be proportionately adjusted to reflect payments only for the actual time of the relocation.

(8) Rental differential payments covering situations where relocated employees retain ownership of a vacated home in the old location and rent at the new location. The rented quarters at the new location must be comparable to those vacated, and the allowable differential payment may not exceed the actual rental costs for the new home, less the fair market rent for the vacated home times 3 years.

(9) Cost of canceling an unexpired lease.

(b) The costs described in paragraph (a) of this subsection must also meet the following criteria to be considered allowable.

(1) The move is for the benefit of the Government.

(2) Reimbursement must be in accordance with an established policy or practice and program that is consistently followed and is designed to motivate employees to relocate promptly and economically.

(3) Amounts to be reimbursed do not exceed the employee's actual expenses, except that for miscellaneous costs of the type discussed in paragraph (a)(4) of this subsection, a flat amount, not to exceed $1,000, may be paid in lieu of actual costs.

(c) The following types of costs are not allowable:

(1) Loss on sale of a home.

(2) Continuing mortgage principle payments on residence being sold.

(3) Cost incident to the acquisition of a home in a new location as follows:

(i) Real estate brokers fees and commissions;

(ii) Costs of litigation;

(iii) Real and personal property insurance against damage or loss of property;

(iv) Mortgage life insurance;

(v) Owner's title policy insurance when such insurance was not previously carried by the employees on the old residence (however, costs of a mortgage title policy is allowable) and;

(vi) Property taxes and operating or maintenance costs.

(4) Payments for employee's income taxes or FICA (social security taxes) incident to reimbursed relocation costs.

(5) Costs incident to furnishing equity or nonequity loans to employees or making arrangements with lenders for employees to obtain lower-than-market rate mortgage loans.

(d) If relocation costs for an employee have been allowed and the employee resigns within 12 months for reasons within the employee's control, it is expected the contractor shall refund or credit the relocation costs to the Government.

(e) Contractor payments to an independent relocation assistance firm handling acquisitions and sales of houses of transferred employees are allowable in amounts which otherwise represent payment for itemized cost which are allowable in accordance with the provisions of this subsection.

970.3102–3–13 Trade, business, technical and professional activity costs.

(a) The costs of memberships in trade, business and technical organizations are unallowable, except as approved by the contracting officer.

(b) In considering approval of membership dues, the contracting officer shall:

(1) Ensure that dues payments to an organization are clearly justified and provide necessary and specific agency benefit;

(2) Do not constitute payments for, or in support of partisan and political activity; and,

(3) Are solely for purposes of enhancing trade, business, or technical knowledge necessary for, and related to, performance of DOE contracts.

970.3102–3–14 Travel costs.

(a)(1) Commercial air travel. It is the policy of the DOE to require management and operating contractors to use the lowest commercial airfare accommodations for all necessary travel under the contract, except when such accommodations are not reasonably available. Airfare costs in excess of the lesser of the lowest available commercial discount airfare, Government contract airfare, or customary standard (coach or equivalent) airfare, shall be disallowed except where the use of such accommodations would: require circuitous routing; require travel during unreasonable hours; excessively prolong travel; result in increased cost that would offset transportation savings; would offer accommodations not reasonably adequate for the physical or medical needs of the traveler; or are not reasonably available to meet necessary mission requirements. The contractor shall be required to establish appropriate airfare travel policies and procedures requiring the use of the lowest available commercial airfare consistent with this paragraph and prudent travel management. Where a contractor can reasonably demonstrate to the contracting officer, or designee, the nonavailability of discount airfare or Government contract airfare for a particular trip or, on an overall basis, that it is the contractor's practice to make routine use of such airfare, specific contractor determinations of nonavailability should generally not be questioned, unless a pattern of avoidance is detected. However, in order for airfare costs in excess of the customary standard commercial airfare to be allowable; *e.g.,* use of first-class airfare, the contractor must be able to justify and document on a case-by-case basis the applicable condition(s) set forth in this paragraph.

(2) Air travel by other than commercial carrier. ''Cost of travel by contractor-owned, -leased, or -chartered aircraft,'' as used in this paragraph, includes the cost of lease, charter, operation (including personnel costs), maintenance, depreciation, insurance and other related costs. Costs of travel via contractor-owned, -leased, and -chartered aircraft shall not exceed the cost of commercial air travel accommodations, unless the management and operating contractor can demonstrate that costs in excess of such amounts are necessary for contract performance and that the increase in cost, if any, in comparison with alternative means of transportation is commensurate with the advantage gained.

(b) Government-owned, commercial rental, and company-furnished vehicles. Commercial rental automobile costs in excess of the cost of a Government-furnished automobile or, when a Government-furnished automobile is not available, the cost of a Government-contract rental automobile available under a GSA Federal Supply Schedule contract, is unallowable unless:

(1) A Government-furnished or a Government contract rental automobile is not reasonably available to the traveler, or

(2) The traveler's use and the cost of a commercial rental automobile are justified and authorized as more advantageous to the Government.

(3) The costs of contractor-owned or -leased vehicles include the costs of lease, operation, maintenance, depreciation, insurance, and other similar costs. These costs are unallowable except as approved by the contracting officer. That portion of the cost of company-furnished automobiles that relates to personal use by employees, including transportation to and from work is unallowable.

(c) *Lodging, meals and incidental expenses.* (1) Costs for lodging, meals, and incidental expenses incurred by management and operating contractor personnel traveling on official business in the performance of contract work are allowable costs but subject to the limitations set forth in this subsection. Payments for lodging, meals, and incidental expenses may be based on per diem, actual expenses, or a combination thereof, provided the method used results in a reasonable cost to DOE.

(2) Except as provided in paragraph (c)(3) of this subsection, management and operating contractor payments for lodging, meals, and incidental expenses (as defined in the regulations cited in paragraphs (c)(2) (i) through (iii) of this subsection) shall be considered to be reasonable and allowable cost only to the extent that they do not exceed, on a daily basis, the maximum per diem rates in effect at the time of travel as set forth in the:

(i) Federal Travel Regulation (41 CFR Chapters 300 through 304) prescribed by the General Services Administration, for travel in the conterminous 48 United States.

(ii) Joint Travel Regulations, Volume 2, DOD Civilian Personnel, Appendix A. prescribed by the Department of Defense, for travel in Alaska, Hawaii, the Commonwealth of Puerto Rico, and territories and possessions of the United States; or

(iii) Standardized Regulations (Government Civilians, Foreign Areas), section 925, ''Maximum Travel Per Diem Allowances for Foreign Areas,'' prescribed by the Department of State, for travel in areas not covered in paragraphs (c)(2) (i) and (ii) of this subsection.

(3) In special or unusual situations, management and operating contractor personnel may be paid for actual expenses in excess of the above-referenced maximum per diem rates provided such payments do not exceed the higher amounts authorized for Federal civilian employees as permitted in the regulations referenced in paragraph (c)(2) (i), (ii) or (iii) of this subsection and all of the following conditions are met:

(i) One of the conditions warranting approval of the actual expense method, as set forth in the regulations referenced in paragraph (c)(2) (i), (ii) or (iii) of this subsection exist.

(ii) A written justification for payment of the higher amounts is approved by an officer or appropriate official of the management and operating contractor's organization.

(iii) Documentation exists to support the payment of actual expenses incurred and each employee expenditure in excess of $25.00 is supported by a receipt. The approved justification required by paragraph (c)(3)(ii) and, if applicable, DOE advance approvals required under paragraph (c)(5) of this subsection must also be retained.

(4) Paragraphs (c)(2) and (c)(3) of this subsection do not incorporate the regulations cited in paragraphs (c)(2) (i), (ii) and (iii) of this subsection in their entirety. Only the coverage in the referenced regulations dealing with special or unusual situations, the maximum per diem rates and the definitions of lodging, meals and

incidental expenses are to be applied to management and operating contractors.

(5) An advance agreement with respect to compliance with paragraphs (c)(2) and (c)(3) of this subsection will be established in the personnel appendix of the contract. The management and operating contractor shall also be required to obtain advance approval from DOE, if it becomes necessary for the contractor to exercise the authority to make payments based in the higher actual expense method repetitively or on a continuing basis in a particular area. It is not intended that individual contractor authorizations to pay actual expenses in excess of applicable maximum per diem rates be approved in advance by DOE. Such before the fact, case-by-case approvals should only be invoked when the management and operating contractor does not have acceptable travel cost policies, procedures or practices in effect.

(6)(i) The maximum per diem rates referenced in paragraph (c)(2) of this subsection generally would not constitute a reasonable daily charge:

(A) When no lodging costs are incurred; and/or

(B) On partial travel days (*e.g.,* same day of departure and return).

(ii) Appropriate downward adjustments from the maximum per diem rates would normally be required under these circumstances. While these adjustments need not be calculated pursuant to the Federal Travel Regulation, Joint Travel Regulations, or Standardized Regulations, they must result in a reasonable charge.

970.3102–3–15 Cost related to legal and other proceedings.

(a) Contractor costs incurred in connection with a criminal, civil or administrative proceeding involving contractor violation of, or failure to comply with, a Federal, State, local or foreign statute or regulation are subject to the allowable costs limitations established in section 8 of The Major Fraud Act of 1988, Public Law 100–700 (41 U.S.C. 256).

(b) Implementation of the Major Fraud Act's contract cost limitations is specified in the applicable cost principles clauses at 970.5231–1(e)(33). Definitive cost principle criteria for determining the allowability of an M&O contractor's costs incurred in connection with a criminal, civil or administrative proceeding are set forth in the contract clause at 970.5231–3, Cost Prohibitions Related to Legal and Other Proceedings. Any change made to the cost principle criteria specified therein constitutes a deviation requiring Senior Procurement Executive approval pursuant to 970.3101–1.

970.3102–3–16 Overtime, shift, and holiday premiums.

(a) Overtime, shift, and holiday premiums are allowable only to the extent provided in the contract or approved by the contracting officer. The amount of such premiums charged to a management and operating contract shall be equitable in relation to the amount of such costs charged to other work currently performed in the contractor's plant and the factors which necessitate incurrence of the costs. When the necessity for overtime, shift, and holiday work arises from inadequacy of the contractor's plant or department to perform its total workload on a purely straight-time basis, inclusions in overhead for apportionment to all work of the plant or department, as the case may be, appears appropriate. When particular work, DOE or other, is being specially expedited to a point that its fair share of the contractor's purely straight-time efforts on a single-shift basis will not get the particular job completed within the time desired, direct charging of the related premiums appears appropriate.

(b) When premiums for overtime, shift, and holiday work are charged direct to the work concerned, if the operating overhead of the plant or related department is distributed on the basis of direct labor (cost or hours), the premiums should be excluded from the direct labor base for purposes of overhead distribution. That is, the direct labor base should be, as appropriate, direct labor straight-time cost or direct labor hours actually worked. While the premiums for authorized overtime, shift, and holiday work are acceptable as reimbursable costs, it is generally recognized that direct labor hours worked on an overtime, shift, or holiday basis should participate in indirect costs to the same extent as hours worked on a straight-time basis.

970.3102–3–17 Page charges in scientific journals.

It is a policy of the DOE to permit DOE contractors to budget for and pay page charges for scientific journal publication, as a necessary part of research costs, in all cases where:

(a) The research papers report work supported by the Government.

(b) The charges are levied impartially on all research papers published by the journal, whether by non-Government or by Government authors.

(c) Payment of such charges is in no sense a condition for acceptance of manuscripts by the journal.

(d) The journals involved are not operated for profit.

(e) The author does not receive an emolument from the journal for the research paper.

970.3102–3–18 Preparatory and make-ready costs.

Since indirect costs are usually apportioned to individual jobs wholly or substantially on the basis of the direct labor applied to the particular job, a contract will absorb no overhead by apportionment prior to the inception of the actual performance of direct work on the contract. The effort of the contractor's overhead organization in preparing for one job and in getting it underway, will thus be absorbed by jobs previously commenced and still being performed; later, the job, which in its initial stages of preparation and make-ready was relieved of expenses that were actually applicable to it, will partially absorb, through their apportionment as overhead, similar costs equally applicable in fact to other, subsequently undertaken jobs. This procedure is in accordance with generally accepted accounting practices and normally is reasonably equitable in its results. The initial advantages and subsequent disadvantages to the individual contract that result from consistent application of the procedure tend to offset each other and balance out. It is quite appropriate, however, to employ the direct charge method in connection with overhead costs in preparing for actual performance by segregating such preparatory and make-ready costs and identifying them specifically with the contract to which the effort actually pertains. However, if preparatory and make ready costs are charged direct to a DOE contract, care must be taken, as performance of the DOE contract work proceeds toward completion, to segregate subsequent indirect expenses similarly applicable to the preparation for, and commencement of, other jobs and to account for them as direct charges to those other jobs.

970.3102–3–19 Facilities (plant and equipment).

(a) *Use of Government-owned facilities.* If the Government furnishes to the contractor, or the contractor acquires at Government expense, Government-owned equipment with which to do all or a significant amount of the work under the DOE contract, on which equipment the Government is bearing the expenses of depreciation, maintenance, insurance, and taxes, appropriate procedures must be established to avoid apportioning to DOE work performed with DOE-owned

equipment, a share of the expenses of depreciation, maintenance, insurance and taxes on the contractor's equipment not used to perform such work. If the Government-owned equipment is placed in a segregated area, that area should be accounted for as a separate department. If the Government-owned equipment is not placed at the separate area, other steps must be taken to avoid what would amount to a double equipment burden on work performed with the Government-owned facilities. Such work shall be so accounted for as to be relieved of charges for expenses related to contractor's equipment not used in its performance.

(b) *Contractor's costs covering plant and equipment.* Charges relating to contractor-owned plant and equipment shall be restricted to the applicable costs, such as depreciation, maintenance, insurance, and taxes, and shall not be on a rental basis. (Compensation in excess of costs is covered by the fixed fee.) Rentals of plant or equipment owned by third parties are normally allowable, if the rates are reasonable in the light of the type, value, condition of the property involved, and option and other provisions of the lease agreement. However, where the plant and equipment used by the contractor is rented by the contractor under a sale and lease-back agreement, only the normal costs (such as depreciation, maintenance, insurance, and taxes) that would have been incurred if the contractor had retained title to the facilities, should be allowed. Allowances for plant and equipment rented under agreements that are not arms-length transactions should be similarly restrictive.

970.3102–3–20 Special funds in the construction industry.

Costs of special ''funds,'' financed by employer contributions, in the construction industry for such purposes as methods and materials research, public and industry relations, market development, disaster relief, etc., are unallowable, except as specifically authorized by the contracting officer and provided for in the contract.

970.3102–3–21 Procurement: Subcontracts, contractor-affiliated sources, and leases.

(a) *Subcontracts.* Award and management policies for subcontracts placed under operating contracts when necessary to the performance of the required services and work efforts of the management and operating contractor are set forth in 970.44. The cost of performing such subcontracts shall be allowable under the DOE contract when:

(1) The award/approval is otherwise in accord with the contract terms and conditions and the provisions of 970.44 and

(2) The reimbursement of subcontractor costs of the management and operating contractor is in accordance with the provisions of the DOE cost principles set forth in 48 CFR part 31, as appropriate to the type of subcontractor being selected; i.e., commercial, educational, state/local government, or nonprofit organization.

(b) Procurement or transfer from contractor-affiliated sources (See 970.4402–3). Allowance for all equipment, materials, supplies, and services which are sold or transferred between any division, subsidiary, or affiliate of a management and operating contractor under a common control shall be on the basis of cost incurred in accordance with the terms of the contract; except, when it is the established practice of the transferring organization to price inter-organization transfers of equipment, materials, supplies, and services at other than cost for commercial work of the contractor or any division, subsidiary, or affiliate of the contractor under a common control, allowance may be at a price when:

(1) It is based on an ''established catalog or market price of commercial items sold in substantial quantities to the general public'' in accordance with 48 CFR subpart 15.4 or

(2) It is the result of ''adequate price competition'' in accordance with 48 CFR subpart 15.4 and is the price at which an award was made to the affiliated organization, after obtaining quotations of an equal basis from such organization and one or more outside sources which normally produce the item or its equivalent in significant quantity, provided that in either case:

(i) The price is not in excess of the transferor's current sales price to its most favored customer (including any division, subsidiary, or affiliate of the contractor under a common control) for a like quantity under comparable conditions, and

(ii) The price is not determined to be unreasonable by the contracting officer, provided, however, that if the price is determined unreasonable, such determination must be supported by an enumeration of facts on which it is based and approved at a level above the contracting officer. The price determined in accordance with paragraph (a) of this subsection should be adjusted, when appropriate, to reflect the quantities being procured and may be adjusted upward or downward to reflect the actual cost of any modifications necessary because of contract requirements.

(c) Leases. Contractor lease payments will be considered an allowable cost when a leasing arrangement is not prohibited by the contract terms (*e.g.,* see 970.5244–1). If a lease for property, plant or equipment (land and/or depreciable assets) is required to be classified as a capital lease under generally accepted accounting principles (GAAP), imputed interest costs determined in accordance with GAAP for any such contractor lease shall be an allowable contract charge if the following are met:

(1) The specific decision to enter into a capital leasing arrangement is authorized by DOE in accordance with applicable DOE procedures, prior to execution of the lease,

(2) The lease is accounted for in accordance with GAAP, and

(3) The imputed interest costs are separately accounted for in special DOE accounts established for the recordation of such costs.

970.3170 Contract Clauses.

(a) The contracting officer shall insert the clause at 48 CFR 970.5231–1, Allowable Cost and Fixed Fee (Management and Operating Contracts), in all management and operating contracts.

(1) The contracting officer shall include the clause with its Alternate I when necessary to address situations where the fee is for a period of time or different fees are allowed for various phases of the work.

(2) The contracting officer shall include the clause with its Alternate II when personnel costs and related expenses will be incurred by the contractor in accordance with established policies, programs, and schedules that are applicable to the contractor's private operations and consistently followed throughout the contractor's organization.

(3) The contracting officer shall include the clause with its Alternate III if the contractor will perform construction.

(4) The contracting officer shall include the clause with its Alternate IV if no contractor-owned equipment is being utilized in the performance of the contract.

(5) The contracting officer shall include the clause with its Alternate V in contracts with for-profit contractors.

(b) The contracting officer shall insert the clause at 48 CFR 970.5231–2, Political Activity Cost Prohibition, in all management and operating contracts.

(c) The contracting officer shall insert the clause at 48 CFR 970.5231–3, Cost Prohibitions Related to Legal and Other Proceedings, in all management and operating contracts.

(d) The contracting officer shall insert the clause at 48 CFR 970.5231–4, Preexisting Conditions, in all management and operating contracts.

(1) The contracting officer shall include the clause with its Alternate I in contracts with incumbent management and operating contractors.

(2) The contracting officer shall include the clause with its Alternate II in contracts with management and operating contractors not previously working at that particular site or facility.

Subpart 970.32—Contract Financing

970.3200 Policy.

It is the policy of the DOE to finance management and operating contracts through advance payments and the use of special bank accounts. Appropriate procedures for properly managing and controlling funds for obligation and expenditure under a management and operating contract are maintained by the Chief Financial Officer of DOE.

970.3200–1 Reduction or suspension of advance, partial, or progress payments.

(a) The procedures prescribed at 48 CFR 32.006 shall be followed regarding the reduction or suspension of payments under management and operating contracts.

(b) Agency head responsibilities under 48 CFR 32.006 have been delegated to the Senior Procurement Executive.

(c) The remedy coordination official is responsible for receiving, assessing, and making recommendations to the Senior Procurement Executive.

970.3200–1–1 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5232–1, Reduction or suspension of contract payments, in management and operating contracts.

970.3204 Advance payments.

970.3204–1 Applicability.

(a) The Head of the Contracting Activity shall authorize advance payments without interest, and approve the findings, determinations and the contract terms and conditions concerning advance payments in accordance with the procedures set forth in 48 CFR subpart 32.4, Advance Payments, as supplemented by 48 CFR subpart 932.4.

(b) Advance payments shall be made under a letter-of-credit arrangement for deposit in a special bank account.

(c) Prior to providing any advance payments, the contracting officer shall enter into an agreement with the contractor and a financial institution regarding a special bank account where the advanced funds are to be deposited by the Government. Such agreement shall: (1) Provide that DOE shall retain title to the unexpended balance of funds in the special bank account including revenues if any, deposited by the contractor, and that such title shall be superior to any claim or lien of the bank of deposit; and

(2) Incorporate as necessary or appropriate, additional financial provisions required by Treasury or Departmental financial regulations.

(d) Deviations from the requirements cited in paragraph (c) of this subsection shall be considered a deviation requiring approval of the Head of the Contracting Activity.

(e) Letter-of-credit arrangements shall be prepared in accordance with 48 CFR 32.406, Letters of Credit, and shall be coordinated between the procurement and finance organizations.

970.3204–2 Special bank account agreement.

The following agreement shall be used with special bank accounts in accordance with 970.3204–1(c).

Agreement entered into this .. day of ..., 19 ., between the United States of America (hereinafter called the Government) represented herein by the Department of Energy (hereinafter called the ''DOE''), and .... (hereinafter called the ''Contractor,'') a corporation under the laws of the State of ...., and ...., (hereinafter called the ''Bank,'') a banking corporation under the laws of ...., located at .....

Recitals

(a) On the date of ..., 19 ., DOE and the Contractor entered into Contract(s) No. ...., or a supplemental agreement thereto, providing for the making of advances of Government funds to the contractor a copy of such advance provisions has been furnished to the Bank.

(b) DOE requires that amounts advanced to the Contractor under said contract or supplemental agreement be deposited in a Special Bank Account or accounts with a bank designated by the Treasury Department as depositary and financial agent of the Government (Section 10 of the Act of June 11, 1942, 56 Stat. 356; 12 U.S.C. 265), separate from any of the Contractor's general or other funds; and, the Bank being such a bank, the parties are agreeable to so depositing said amounts with the Bank.

(c) This Special Bank Account shall be designated ''... (Name of Contractor), ... (Contract Number), Department of Energy Special Bank Account.''

Covenants

In consideration of the foregoing, and for other good and valuable considerations, it is agreed that,

(1) The Government shall have title to the credit balance in said account to secure the return of all advances made to the contractor, which title shall be superior to any lien or claim of the Bank or others with respect to such account.

(2) The Bank will be bound by the provisions of said contract or contracts relating to the deposit and withdrawal of funds in the above Special Bank Account, but shall not be responsible for the application of funds properly withdrawn from said account. After receipt by the Bank of written directions from the contracting officer, or from the duly authorized representative of the contracting officer, the Bank shall act thereon and shall be under no liability to any party hereto for any action taken in accordance with the said written directions.

(3) The Government, or its authorized representatives, shall have access to the books and records maintained by the Bank with respect to such Special Bank Account at all reasonable times and for all reasonable purposes, including, without limitation, the inspection or copying of such books and records and any and all memoranda, checks, correspondence, or documents pertaining thereto. Except as agreed upon by the Government and the Bank, all books and records pertaining to the Special Bank Account in the possession of the Bank relating to the Special Bank Account agreement shall be preserved by the Bank for a period of three (3) years after final payment under the contract to which the Special Bank Account agreement pertains or otherwise disposed of in such manners as may be agreed upon by the Government and the Bank.

(4) In the event of the services of any writ of attachment, levy of execution, or commencement of garnishment proceedings with respect to the Special Bank Account, the Bank will promptly notify the Head of the Contracting Activity, DOE.

In witness whereof the parties hereto have caused this Agreement to be executed, as of the day and year first above written.

(Signatures and Official Titles) _____

970.3204–3 Contract clause.

The clause at 970.5232–2, Payments and Advances, shall be included in management and operating contracts when advances of funds are to be placed in a special bank account.

(a) The contracting officer shall insert the basic clause with its Alternate I if a separate fixed-fee is provided for a separate item of work.

(b) The contracting officer shall insert the basic clause with its Alternate II when award-fee provisions in the basic clause are used.

(c) The contracting officer shall insert the basic clause with its Alternate III in management and operating contracts with integrated contractors.

970.3270 Standard financial management clauses.

(a) The contracting officer shall insert the clause at 48 CFR 970.5232–3, Accounts, Records, and Inspection, in all management and operating contracts.

(1) If the contract includes the clause at 48 CFR 52.215–22, Price Reduction for Defective Cost or Pricing Data, the contracting officer shall use the clause with its Alternate I.

(2) If the contract is a cost-reimbursement contract involving an estimated cost exceeding $5 million and expected to run for more than 2 years, or any other cost-reimbursement contract determined by the Head of the Contracting Activity in which the contractor has an established internal audit organization, the contracting officer shall insert the clause with its Alternate II.

(b) The contracting officer shall insert the clause at 48 CFR 970.5232–4, Obligation of funds, in all management and operating contracts. The contracting officer may use the clause with its Alternate I in contracts which, expressly or otherwise, provide a contractual basis for equivalent controls in a separate clause.

Subpart 970.34—Major System Acquisition

970.3400 General requirements.

970.3400–1 Mission-oriented solicitation.

Contractors shall be required to promptly advise the DOE contracting officer of any advance notices of, or solicitations for, requirements which would logically involve DOE facilities or resources operated or managed by the contractor, which are received from another agency pursuant to 48 CFR 34.005. Management and operating contracts shall provide that the contractor shall not respond or otherwise propose to participate in response to the requirements of such solicitations unless the contractor has obtained the prior written approval of the DOE manager of the field activity having cognizance over the contract. Such approval shall not be given except in compliance with applicable DOE directives, and with the concurrence of the cognizant Senior Program Official.

970.35—Research and development contracting

970.3500 Scope of Subpart.

This subpart implements 48 CFR 35.017 regarding the establishment, use, review, and termination of Federally Funded Research and Development Centers (FFRDCs) sponsored by the Department of Energy.

970.3501 Federally funded research and development centers.

970.3501–1 Sponsoring agreements.

(a) The contract award document constitutes the sponsoring agreement between the Department of Energy and the contractor operating an FFRDC.

(b) The contract statement of work shall define the purpose and mission of the FFRDC.

(c) Other elements of the sponsoring agreement which shall be incorporated into the contract include:

(1) The appropriate termination clause of the contract (as prescribed in 48 CFR Subpart 49.5).

(2) The plan for the identification, use, and disposition of retained earnings developed pursuant to 48 CFR 970.1504–1–3(c)(6), if applicable;

(3) The clause entitled ''Federally Funded Research and Development Center Sponsoring Agreement,'' which, in part, prescribes limitations on the FFRDC competing with the private sector, and requirements for the FFRDC's acceptance of work from a nonsponsor; and

(4) Other terms and conditions considered necessary for the particular circumstances of the FFRDC (e.g., advance understandings on particular cost items).

970.3501–2 Using an FFRDC.

The contractor may only accept work from a nonsponsor (as defined in 48 CFR 35.017) in accordance with the requirements of DOE Order 481.1, Work for Others (Non-Department of Energy Funded Work).

970.3501–3 Reviewing FFRDC's.

(a) All Department of Energy sponsored FFRDC's are operated by management and operating contractors.

(b) Coincident with the review required by 48 CFR 17.605(b) and 48 CFR 970.1702–1(b) regarding the decision to extend or compete a management and operating contract, the contracting officer shall, in accordance with internal Departmental procedures:

(1) Conduct the review required by 48 CFR 35.017–4 concerning the use and need for the FFRDC; and

(2) Recommend for Secretarial approval, the continuation or termination of the Department's sponsorship of an FFRDC at the time authorization is required to extend or compete a management and operating contract.

970.3501–4 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5235–1, Federally Funded Research and Development Center Sponsoring Agreement, in all solicitations and contracts for the management and operation of an FFRDC sponsored by the Department of Energy.

Subpart 970.36—Construction and Architect-Engineer Contracts

970.3605 Contract clauses.

970.3605–1 Other contracts.

The clause in 48 CFR 52.236–8, Other Contracts, shall be used in all management and operating contracts.

970.3605–2 Special construction clause for operating contracts.

The clause in 48 CFR 970.5236–1, Government Facility Subcontract Approval, shall be used in management and operating contracts when the contractor will not perform covered work with its own forces but may procure construction by subcontract.

Subpart 970.37 Facilities Management Contracting

970.3701 General.

970.3701–1 Severance payments to foreign nationals.

970.3701–1–1 Waiver of cost allowability provisions.

(a) The Head of the Contracting Activity may waive the application of the provisions of 48 CFR 970.3102–3–2(i)(2)(iv) and (v) in accordance with 41 U.S.C. 256(e)(2) if:

(1) The application of the provisions would adversely affect the continuation of a program, project, or activity that provides significant support services for Department of Energy employees posted outside the United States;

(2) The contractor has taken, or plans to take, appropriate actions within its control to minimize the amount and number of incidents of payment of severance pay to employees under the contract who are foreign nationals; and

(3) The payment of severance pay under the contract is necessary to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services or is necessary to comply with a collective bargaining agreement.

(b) [Reserved]

970.3701–1–2 Solicitation provision and contract clause.

(a) The solicitation provision at 970.5237–1, Waiver of Limitations on Severance Payments to Foreign Nationals, shall be included in solicitations and resulting contracts involving support services for Department of Energy operations

outside of the United States expected to exceed $500,000, when, prior to the solicitation, the limitations on severance to foreign nationals has been waived.

(b) The contracting officer shall use the clause with its Alternate I when the Head of the Contracting Activity may waive the limitations on severance to foreign nationals after contract award.

970.3770 Facilities management.

970.3770–1 Policy.

Contractors managing DOE facilities shall be required to comply with the DOE Directives applicable to facilities management.

970.3770–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5237–2, Facilities Management, in all management and operating contracts.

Subpart 970.41—Acquisition of Utility Services

970.4102 Acquiring utility services.

970.4102–1 Policy.

(a) Utility services defined at 48 CFR 41.101 for the furnishing of electricity, gas (natural or manufactured), steam, water, and/or sewerage to facilities owned or leased by DOE shall be acquired directly by DOE and not by a contractor using a subcontractor arrangement, except as provided in paragraph (b) of this subsection.

(b) Where it is determined to be in the best interest of the Government, a DOE contracting activity may authorize a management and operating contractor for a facility to acquire such utility service for the facility, after requesting and receiving concurrence to make such an authorization from the Director, Public Utilities Branch, Headquarters. Any request for such concurrence should be included in the Utility Service Requirements and Options Studies required by DOE directives in subseries 4540 (Public Services). Alternatively, it may be made in a separate document submitted to the Director of that office early in the acquisition cycle. Any request shall set forth why it is in the best interest of the DOE to acquire utility service(s) by subcontract, *i.e.,* what the benefits are, such as economic advantage.

(c) The requirements of 48 CFR part 41, this section, and DOE directives in subseries 4540 shall be applied to a subcontract level acquisition for furnishing utility services to a facility owned or leased by DOE.

Subpart 970.43—Contract Modifications

970.4302 Changes.

970.4302–1 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5243–1, Changes, in all management and operating contracts.

Subpart 970.44—Management and Operating Contractor Purchasing

970.4400 Scope.

This subpart prescribes policies and procedures concerning the purchasing systems and activities of management and operating contractors.

970.4401 Responsibilities.

970.4401–1 General.

(a) In the Department of Energy, overall responsibility for the oversight of the performance of management and operating contractors, including their purchasing activities, rests with the cognizant DOE contracting activity and, in particular, the Head of the Contracting Activity (HCA). Contracting officers are responsible for the management and operating contractors' conformance with this subpart and the applicable terms and conditions of their contracts, and for determining whether those purchasing activities provide timely and effective support to DOE programs.

(b) In carrying out their overall responsibilities, HCAs shall:

(1) Require management and operating contractors to maintain written descriptions of their individual purchasing systems and methods and further require that, upon award or extension of the contract, the entire written description be submitted to the contracting officer for review and acceptance;

(2) Require that any changes to the management and operating contractor's written description having any substantive impact upon the contractor's purchasing system and methods be submitted to the contracting officer for review and acceptance prior to issuance;

(3) Ensure the review of individual purchasing actions of certain types, or above stated dollar levels, by the contracting officer pursuant to 48 CFR Subpart 44.2 or as set forth in the contractor's approved system and methods; and

(4) Ensure that periodic appraisals of the contractor's management of all facets of the purchasing function, including compliance with the contractor's approved system and methods, are performed by the contracting officer. Such appraisals shall be performed through either of the following methodologies:

(i) Contractor Purchasing System Reviews, conducted in accordance with 48 CFR Subpart 44.3; or

(ii) When approved by the contracting officer, contractor participation in the conduct of the Balanced Scorecard performance measurement and performance management system.

(c) In performing the reviews required by paragraphs (b)(1) and (2), and the appraisals required by paragraph (b)(4) of this subsection, HCAs shall assure that contracting officers determine that the contractors' written systems and methods are consistent with this subpart and the applicable terms and conditions of their contracts.

970.4401–2 Review and approval.

(a) The Heads of the Contracting Activities shall establish thresholds, by subcontract type and dollar level, for the review and approval of proposed subcontracting actions by each management and operating contractor under their cognizance. Such thresholds may not exceed the authority delegated to the Head of the Contracting Activity by the Senior Procurement Executive. In establishing these thresholds, the Heads of the Contracting Activities should consider such factors as the following:

(1) The nature of work to be performed under the management and operating contract;

(2) The size, experience, ability, reliability, and organization of the management and operating contractor's purchasing function;

(3) The internal controls, procedures, and organizational stature of the management and operating contractor's purchasing function; and

(4) Policies with respect to such reviews and approvals established by the Senior Procurement Executive.

(b) Prior approval shall be required for the subcontracting of any work a contractor is obligated to perform under a contract entered into under section 41, entitled Production of Special Nuclear Material, of the Atomic Energy Act of 1954, as amended.

(c) The Heads of the Contracting Activities shall take such action as may be required to insure compliance with the procedure for purchasing from contractor-affiliated sources or the purchase of specific items, or classes of items, which by the terms of the contract may require DOE approval.

(d) The Heads of the Contracting Activities may raise or lower the review and approval thresholds established pursuant to paragraph (a) of this

subsection at any time. Such action may be considered upon the periodic review of the contractor's purchasing system, but in any case those adjusted thresholds may not exceed the approval authority delegated to the Head of the Contracting Activity by the Senior Procurement Executive.

(e) DOE approvals of specific proposed purchases pursuant to this Subpart shall communicate that such approval does not relieve the management and operating contractor of any obligation under its prime contract with DOE; is given without prejudice to any rights or claims of the Government thereunder; creates no obligation on the part of the Government to the subcontractor, and is not a predetermination of the allowability of costs to be incurred under the subcontract.

(f) Contracting officers shall assure that management and operating contractors establish and maintain subcontract files which contain those documents essential to present an accurate and adequate record of all purchasing transactions.

(g) Contracting officers shall assure that management and operating contractors document purchases in writing, setting forth the information and data used in determining that the purchases are in the best interest of the Government. The scope and detail of this documentation shall be consistent with the nature, dollar value, and complexity of the purchase.

(h) The Heads of the Contracting Activities shall assure that the contracting activity establishes and maintains files of the documents associated with the review and approval of subcontract actions subject to DOE review and approval. Those files shall include, among other necessary documentation, an appraisal of the proposed action by the contracting activity and a copy of the approving or disapproving document forwarded to the management and operating contractor, including a listing of any deficiencies, a listing of any required corrective actions, any suggestions, or other relevant comments.

970.4401–3 Advance notification.

(a) Contracting officers shall assure that the written description of the management and operating contractor's purchasing system and methods provides for advance notice to the DOE contracting officer of the proposed award of the following specified types of subcontracts, except as stated in paragraph (b) of this subsection:

(1) Pursuant to section 304(b) of the Federal Property and Administrative Service Act of 1949, as amended (41 U.S.C. 254(b)):

(i) Cost reimbursement-type subcontracts of any award value; and

(ii) Fixed price-type subcontracts which exceed the simplified acquisition threshold, or 5 percent of the total estimated cost of the prime contract.

(2) Purchases from contractor-affiliated sources over a value established by the HCA.

(b) Pursuant to section 602(d)13 of the Act (40 U.S.C. 474(13)) referred to in paragraph (a) of this section, the advance notification requirement for the types of purchases listed in paragraphs (a) (1) and (2) of this subsection shall not apply to subcontracts relating to functions derived from the Atomic Energy Commission.

(c) The advance notice shall contain, at a minimum, a description of work, estimated cost, type of contract or reimbursement provisions, and extent of competition, or justification for a noncompetitive purchase procurement. The contracting officer may at any time request additional information that must be furnished promptly and prior to award of the subcontract.

970.4402 Contractor purchasing system.

970.4402–1 Policy.

(a) DOE contracts for the management and operation of its facilities, the design and production of nuclear weapons, energy research and development, and the performance of other services. These management and operating (M&O) contractors have been selected for their technical and managerial expertise and are expected to bring to bear these technical and managerial skills to accomplish the significant Federal mission(s) described in their contracts with, and work plans approved by, DOE.

(b) Purchasing done by management and operating contractors is one area in which the particular skills of the contractors will be brought to bear in order to more readily accomplish the contractors' assigned missions. The contracting procedures of the contractor's organization, therefore, form the basis for the development of a purchasing system and methods that will comply with its contract with DOE and this subpart.

970.4402–2 General requirements.

The following shall apply to the purchasing systems of management and operating contractors:

(a) The objective of a management and operating contractor's purchasing system is to deliver to its customers on a timely basis those best value products and services necessary to accomplish the purposes of the Government's contract. To achieve this objective, contractors are expected to use their experience, expertise and initiative consistent with this subpart.

(b) The purchasing systems and methods used by management and operating contractors shall be well-defined, consistently applied, and shall follow purchasing practices appropriate for the requirement and dollar value of the purchase. It is anticipated that purchasing practices and procedures will vary among contractors and according to the type and kinds of purchases to be made.

(c) Contractor purchases are not Federal procurements, and are not directly subject to the Federal Acquisition Regulations in 48 CFR. Nonetheless, certain Federal laws, Executive Orders, and regulations may affect contractor purchasing, as required by statute, regulation, or contract terms and conditions.

(d) Contractor purchasing systems shall identify and apply the best in commercial purchasing practices and procedures (although nothing precludes the adoption of Federal procurement practices and procedures) to achieve system objectives. Where specific requirements do not otherwise apply, the contractor purchasing system shall provide for appropriate measures to ensure the:

(1) Acquisition of quality products and services at fair and reasonable prices;

(2) Use of capable and reliable subcontractors who either:

(i) Have track records of successful past performance, or

(ii) Can demonstrate a current superior ability to perform;

(3) Minimization of acquisition lead-time and administrative costs of purchasing;

(4) Use of effective competitive techniques;

(5) Reduction of performance risks associated with subcontractors, and facilitation of quality relationships which can include techniques such as partnering agreements, ombudsmen, and alternative disputes procedures;

(6) Use of self-assessment and benchmarking techniques to support continuous improvement in purchasing;

(7) Maintenance of the highest professional and ethical standards;

(8) Maintenance of file documentation appropriate to the value of the purchase and which is adequate to establish the propriety of the transaction and the price paid; and

(9) Maximization of opportunities for small business, HUBZone small

business, small disadvantaged business, and woman-owned small business concerns to participate in contract performance.

970.4402–3 Purchasing from contractor-affiliated sources.

(a) A management and operating contractor may purchase from sources affiliated with the contractor (any division, subsidiary, or affiliate of the contractor or its parent company) in the same manner as from other sources, provided:

(1) The management and operating contractor's purchasing function is independent of the proposed contractor-affiliated source;

(2) The same terms and conditions would apply if the purchase were from a third party;

(3) Award is made in accordance with policies and procedures designed to permit effective competition which have been approved by the contracting officer. (This requirement for competition shall not preclude acquisition of technical services from contractor-affiliated entities where those entities have a special expertise, and the basis therefor is documented.); and

(4) The award is legally enforceable where the entities are separately incorporated.

(b) Subcontracts for performance of contract work itself (as distinguished from the purchase of supplies and services needed in connection with the performance of work) require DOE authorization and may involve an adjustment of the contractor's fee, if any. If the management and operating contractor seeks authorization to have some part of the contract work performed by a contractor-affiliated source, and that contractor's performance of that work was a factor in the negotiated fee, DOE approval would normally require:

(1) That the contractor-affiliated source perform such work without fee or profit, or

(2) An equitable downward adjustment to the management and operating contractor's fee, if any.

(c) Determination on cost of money allowance as prescribed at 48 CFR 31.205–10 shall be treated as follows:

(1) When a purchase from a contractor-affiliated source results from competition and is in accord with provisions and conditions of paragraphs (a)(1) through (a)(4) of this subsection, the contractor-affiliated source may include cost of money as an allowable element of the costs of its goods or services supplied to the contractor; provided:

(i) The purchase is based on cost as set forth in 48 CFR 970.3102–3–21 and

(ii) The cost of money amount is computed in accordance with 48 CFR 31.205–10 and related procedures (see 48 CFR 970.30).

(2) When a purchase from a contractor-affiliated source is made non-competitively, cost of money shall not be considered an allowable element of the cost of the contractor-affiliated source purchase.

970.4402–4 Nuclear material transfers.

(a) Management and operating contractors, in preparing subcontracts or other agreements in which monetary payments or credits depend on the quantity and quality of nuclear material, shall be required to assure that each such subcontract or agreement contains a:

(1) Description of the material to be transferred;

(2) Provision specifying the method by which the quantities are to be measured and reported;

(3) Provision specifying the procedures to be used in resolving any differences arising as a result of such measurements;

(4) Provision for the use of an independent third party as an umpire to settle unresolved differences in the analytical samples; and

(5) Provision specifying in detail which party shall bear the costs of resolving a difference and what constitutes such costs.

(b) The provisions providing for resolution of measurement differences must be such that resolution is always accomplished, while at the same time minimizing any advantage one party may have over the other.

970.4403 Contract clause.

The contracting officer shall insert the clause at 970.5244–1, Contractor Purchasing System, in all management and operating contracts.

Subpart 970.45—Government Property

970.4501 General.

970.4501–1 Contract clause.

(a) The contracting officer shall insert the clause at 970.5245–1, Property, in management and operating contracts. Paragraph (f)(1)(iii) of the clause applies to a non-profit contractor only to the extent specifically provided in the individual contract. Specific managerial personnel may be listed in paragraph (j), provided their listing is consistent with the clause and the DEAR.

(b) The contracting officer shall insert the basic clause with its Alternate I in contracts with nonprofit contractors.

Subpart 970.49—Termination of Contracts

970.4905 Contract termination clause.

970.4905–1 Termination for convenience of the Government and default.

(a) The contracting officer shall include the clause at 48 CFR 52.249–6, Termination (Cost Reimbursement), as modified pursuant to paragraph (b) of this subsection, in all cost-reimbursement management and operating contracts, regardless of whether the contract is for production, or research and development with an educational or nonprofit institution.

(b) The contracting officer shall modify paragraph (i) of the clause to insert ''as supplemented in Subpart 970.31 of the Department of Energy Acquisition Regulation,'' after the phrase, ''Part 31 of the Federal Acquisition Regulation.''

Subpart 970.50—Extraordinary Contractual Actions

970.5070 Indemnification.

970.5070–1 Scope and applicability.

(a) Section 170d. of the Atomic Energy Act of 1954, as amended, requires DOE to enter into agreements of indemnity with contractors whose work involves the risk of public liability for the occurrence of a nuclear incident or precautionary evacuation.

(b) Details of such indemnification are discussed at 48 CFR 950.70.

970.5070–2 General.

DOE contractors with whom statutory nuclear hazards indemnity agreements under the authority of section 170d. of the Atomic Energy Act of 1954, as amended, are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability for nuclear incidents. However, if authorized by the DOE Headquarters office having responsibility for contractor casualty insurance programs, DOE contractors may be:

(a) Permitted to furnish financial protection to themselves, or

(b) Permitted to continue to carry such insurance at cost to the Government if they currently maintain insurance for such liability.

970.5070–3 Contract clauses.

(a) The clause at 48 CFR 952.250–70, Nuclear Hazards Indemnity Agreement, shall be included in all management and operating contracts involving the risk of public liability for the occurrence of a nuclear incident or precautionary evacuation arising out of or in

connection with the contract work, including such events caused by a product delivered to a DOE-owned, facility for use by DOE or its contractors. The clause at 48 CFR 952.250–70 also shall be included in any management and operating contract for the design of a DOE facility, the construction or operation of which may involve the risk of public liability for a nuclear incident or a precautionary evacuation.

(b) The clause at 48 CFR 952.250–70 shall not be included in contracts in which the contractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170 c. or k. of the Act for activities to be performed under the contract.

Subpart 970.52—Solicitation Provisions and Contract Clauses for Management and Operating Contracts

970.5200 Scope of subpart.

This subpart prescribes solicitation provisions and contract clauses for use in management and operating contracts. The provisions and clauses contained in this subpart supplement the provisions and clauses prescribed in the FAR and in other parts of the DEAR, and, pursuant to the individual provision or clause prescription, are to be used in addition to or in place of such clauses. To assist Departmental contracting personnel in determining the applicability of FAR and DEAR clauses to management and operating contracts, additional guidance is published and made available by the Office of Procurement and Assistance Policy, within the Headquarters procurement organization.

970.5201 Text of provisions and clauses.

970.5203–1 Management controls

As prescribed in 48 CFR 970.0370–2(a), insert the following clause:

Management Controls (Month and Year TBE)

(a)(1) The contractor shall be responsible for maintaining, as an integral part of its organization, effective systems of management controls for both administrative and programmatic functions. Management controls comprise the plan of organization, methods and procedures adopted by management to reasonably ensure that: the mission and functions assigned to the contractor are properly executed; efficient and effective operations are promoted; resources are safeguarded against theft, fraud, waste, and unauthorized use; all obligations and costs that are incurred under the contract are in compliance with applicable clauses and other current terms, conditions, and intended purposes; all revenues, expenditures, and all other transactions and assets are properly recorded, managed, and reported; and financial, statistical, and other reports necessary to maintain accountability and managerial control are accurate, reliable, and timely.

(2) The systems of controls employed by the contractor shall be documented and satisfactory to DOE, and shall be developed and maintained in accordance with the Comptroller General's standards for internal controls, as set forth in General Accounting Office Policy and Procedures Manual for Guidance to Federal Agencies, (Oct 1984), as amended.

(3) Such systems shall be an integral part of the contractor's management functions, including defining specific roles and responsibilities for each level of management, and holding employees accountable for the adequacy of the management systems and internal controls in their areas of assigned responsibility.

(4) The contractor shall, as part of the internal audit program required elsewhere in this contract, periodically review the management systems and internal controls employed in programs and administrative areas to ensure that they are adequate to provide reasonable assurance that the objectives of the system are being accomplished and that these systems and controls are working effectively.

(b) The contractor shall be responsible for maintaining, as a part of its operational responsibilities, a baseline quality assurance program that implements documented performance, quality standards, and control and assessment techniques.

(End of Clause)

970.5203–2 Performance improvement and collaboration.

As prescribed in 48 CFR 970.0370–2(b), insert the following clause:

Performance Improvement and Collaboration (Month and Year TBE)

(a) The contractor agrees that it shall affirmatively identify, evaluate, and institute practices, where appropriate, that will improve performance in the areas of environmental and health, safety, scientific and technical, security, business and administrative, and any other areas of performance in the management and operation of the contract. This may entail the alteration of existing practices or the institution of new procedures to more effectively or efficiently perform any aspect of contract performance or reduce overall cost of operation under the contract. Such improvements may result from changes in organization, simplification of systems while retaining necessary controls, or any other approaches consistent with the statement of work and performance measures of this contract.

(b) The contractor agrees to work collaboratively with the Department, all other management and operating, DOE major facilities management contractors and affiliated contractors which manage or operate DOE sites or facilities for the following purposes: (i) to exchange information generally, (ii) to evaluate concepts that may be of benefit in resolving common issues, in confronting common problems, or in reducing costs of operations, and (iii) to otherwise identify and implement DOE-complex-wide management improvements discussed in paragraph (a). In doing so, it shall also affirmatively provide information relating to its management improvements to such contractors, including lessons learned, subject to security considerations and the protection of data proprietary to third parties.

(c) The contractor may consult with the contracting officer in those instances in which improvements being considered pursuant to paragraph (a) involve the cooperation of the DOE. The contractor may request the assistance of the contracting officer in the communication of the success of improvements to other management and operating contractors in accordance with paragraph (b) of this clause.

(d) The contractor shall notify the contracting officer and seek approval where necessary to fulfill its obligations under the contract. Compliance with this clause in no way alters the obligations of the Contractor under any other provision of this contract.

(End of Clause)

970.5203–3 Contractor's organization.

As prescribed in 48 CFR 970.0371–9, insert the following clause:

Contractor's Organization (Month and Year TBE)

(a) *Organization chart.* As promptly as possible after the execution of this contract, the contractor shall furnish to the contracting officer a chart showing the names, duties, and organization of key personnel (see 48 CFR 952.215–70) to be employed in connection with the work, and shall furnish from time to time supplementary information reflecting changes therein.

(b) *Supervisory representative of contractor.* Unless otherwise directed by the contracting officer, a competent full-time resident supervisory representative of the contractor satisfactory to the contracting officer shall be in charge of the work at the site, and any work off-site, at all times.

(c) *Control of employees.* The contractor shall be responsible for maintaining satisfactory standards of employee competency, conduct, and integrity and shall be responsible for taking such disciplinary action with respect to its employees as may be necessary. In the event the contractor fails to remove any employee from the contract work whom DOE deems incompetent, careless, or insubordinate, or whose continued employment on the work is deemed by DOE to be contrary to the public interest, the Government reserves the right to require the contractor to remove the employee.

(d) *Standards and procedures.* The contractor shall establish such standards and procedures as are necessary to implement the requirements set forth in 48 CFR 970.0371. Such standards and procedures shall be subject to the approval of the contracting officer.

(End of Clause)

970.5204–1 Counterintelligence.

(a) As prescribed in 48 CFR 970.0404–4(a), insert the following clause in contracts containing the clauses at 48 CFR 952.204–2, Security, and 48 CFR 952.204–70, Classification/Declassification:

Counterintelligence (Month and Year TBE)

(a) The contractor shall take all reasonable precautions in the work under this contract to protect DOE programs, facilities, technology, personnel, unclassified sensitive information and classified matter from foreign intelligence threats and activities conducted for governmental or industrial purposes, in accordance with DOE Order 5670.3, Counterintelligence Program; Executive Order 12333, U.S. Intelligence Activities; and other pertinent national and Departmental Counterintelligence requirements.

(b) The contractor shall appoint a qualified employee(s) to function as the Contractor Counterintelligence Officer. The Contractor Counterintelligence Officer will be responsible for conducting defensive Counterintelligence briefings and debriefings of employees traveling to foreign countries or interacting with foreign nationals; providing thoroughly documented written reports relative to targeting, suspicious activity and other matters of Counterintelligence interest; immediately reporting targeting, suspicious activity and other Counterintelligence concerns to the DOE Headquarters Counterintelligence Division; and providing assistance to other elements of the U.S. Intelligence Community as stated in the aforementioned Executive Order, the DOE Counterintelligence Order, and other pertinent national and Departmental Counterintelligence requirements.

(End of Clause)

970.5204–2 Laws, regulations, and DOE directives.

As prescribed in 48 CFR 970.0470–2, insert the following clause:

Laws, Regulations, and DOE Directives (Month and Year TBE)

(a) In performing work under this contract, the contractor shall comply with the requirements of applicable Federal, State, and local laws and regulations (including DOE regulations), unless relief has been granted in writing by the appropriate regulatory agency. A List of Applicable Laws and Regulations (List A) may be appended to this contract for information purposes. Omission of any applicable law or regulation from List A does not affect the obligation of the contractor to comply with such law or regulation pursuant to this paragraph.

(b) In performing work under this contract, the contractor shall comply with the requirements of those Department of Energy directives, or parts thereof, identified in the List of Applicable Directives (List B) appended to this contract. Except as otherwise provided for in paragraph (d) of this clause, the contracting officer may, from time to time and at any time, revise List B by unilateral modification to the contract to add, modify, or delete specific requirements. Prior to revising List B, the contracting officer shall notify the contractor in writing of the Department's intent to revise List B and provide the contractor with the opportunity to assess the effect of the contractor's compliance with the revised list on contract cost and funding, technical performance, and schedule; and identify any potential inconsistencies between the revised list and the other terms and conditions of the contract. Within 30 days after receipt of the contracting officer's notice, the contractor shall advise the contracting officer in writing of the potential impact of the contractor's compliance with the revised list. Based on the information provided by the contractor and any other information available, the contracting officer shall decide whether to revise List B and so advise the contractor not later than 30 days prior to the effective date of the revision of List B. The contractor and the contracting officer shall identify and, if appropriate, agree to any changes to other contract terms and conditions, including cost and schedule, associated with the revision of List B pursuant to the clause of this contract entitled, ''Changes.''

(c) Environmental, safety, and health (ES&H) requirements appropriate for work conducted under this contract may be determined by a DOE approved process to evaluate the work and the associated hazards and identify an appropriately tailored set of standards, practices, and controls, such as a tailoring process included in a DOE approved Safety Management System implemented under the clause entitled ''Integration of Environment, Safety, and Health into Work Planning and Execution.'' When such a process is used, the set of tailored (ES&H) requirements, as approved by DOE pursuant to the process, shall be incorporated into List B as contract requirements with full force and effect. These requirements shall supersede, in whole or in part, the contractual environmental, safety, and health requirements previously made applicable to the contract by List B. If the tailored set of requirements identifies an alternative requirement varying from an ES&H requirement of an applicable law or regulation, the contractor shall request an exemption or other appropriate regulatory relief specified in the regulation.

(d) Except as otherwise directed by the contracting officer, the contractor shall procure all necessary permits or licenses required for the performance of work under this contract.

(e) Regardless of the performer of the work, the contractor is responsible for compliance with the requirements of this clause. The contractor is responsible for flowing down the requirements of this clause to subcontracts at any tier to the extent necessary to ensure the contractor's compliance with the requirements.

(End of Clause)

970.5204–3 Access to and ownership of records.

As prescribed in 48 CFR 970.0407–1–3, insert the following clause:

Access to and Ownership of Records (Month and Year TBE)

(a) Government-owned records. Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the process of the work or, in any event, as the contracting officer shall direct upon completion or termination of the contract.

(b) Contractor-owned records. The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause. [The contracting officer shall identify which of the following categories of records will be included in the clause.]

(1) Employment-related records (such as workers' compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns, and other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health related records, except for those records described by the contract as being maintained in Privacy Act systems of records.

(2) Confidential contractor financial information, and correspondence between the contractor and other segments of the contractor located away from the DOE facility (*i.e.,* the contractor's corporate headquarters);

(3) Records relating to any procurement action by the contractor, except for records that under 48 CFR 970.5232–3, Accounts, Records, and Inspection, are described as the property of the Government; and

(4) Legal records, including legal opinions, litigation files, and documents covered by the attorney-client and attorney work product privileges; and

(5) The following categories of records maintained pursuant to the technology transfer clause of this contract:

(i) Executed license agreements, including exhibits or appendices containing information on royalties, royalty rates, other financial information, or commercialization plans, and all related documents, notes and correspondence.

(ii) The contractor's protected Cooperative Research and Development Agreement (CRADA) information and appendices to a CRADA that contain licensing terms and conditions, or royalty or royalty rate information.

(iii) Patent, copyright, mask work, and trademark application files and related contractor invention disclosures, documents and correspondence, where the contractor has elected rights or has permission to assert rights and has not relinquished such rights or turned such rights over to the Government.

(c) Contract completion or termination. In the event of completion or termination of this contract, copies of any of the contractor-owned records identified in paragraph (b) of this clause, upon the request of the Government, shall be delivered to DOE or its

designees, including successor contractors. Upon delivery, title to such records shall vest in DOE or its designees, and such records shall be protected in accordance with applicable federal laws (including the Privacy Act), as appropriate.

(d) Inspection, copying, and audit of records. All records acquired or generated by the contractor under this contract in the possession of the contractor, including those described at paragraph (b) of this clause, shall be subject to inspection, copying, and audit by the Government or its designees at all reasonable times, and the contractor shall afford the Government or its designees reasonable facilities for such inspection, copying, and audit; provided, however, that upon request by the contracting officer, the contractor shall deliver such records to a location specified by the contracting officer for inspection, copying, and audit. The Government or its designees shall use such records in accordance with applicable federal laws (including the Privacy Act), as appropriate.

(e) Applicability. Paragraphs (b), (c), and (d) of this clause apply to all records without regard to the date or origination of such records.

(f) Records retention standards. Special records retention standards, described at DOE Order 200.1, Information Management Program (version in effect on effective date of contract), are applicable for the classes of records described therein, whether or not the records are owned by the Government or the contractor. In addition, the contractor shall retain individual radiation exposure records generated in the performance of work under this contract until DOE authorizes disposal. The Government may waive application of these record retention schedules, if, upon termination or completion of the contract, the Government exercises its right under paragraph (c) of this clause to obtain copies and delivery of records described in paragraphs (a) and (b) of this clause.

(g) Subcontracts. The contractor shall include the requirements of this clause in all subcontracts that are of a cost-reimbursement type if any of the following factors is present:

(1) The value of the subcontract is greater than $2 million (unless specifically waived by the contracting officer);

(2) The contracting officer determines that the subcontract is, or involves, a critical task related to the contract; or

(3) The subcontract includes 48 CFR 970.5223–1, Integration of Environment, Safety, and Health into Work Planning and Execution, or similar clause.

(End of Clause)

970.5208–1 Printing.

As prescribed in 48 CFR 970.0808–3, insert the following clause:

Printing (Month and Year TBE)

(a) To the extent that duplicating or printing services may be required in the performance of this contract, the Contractor shall provide or secure such services in accordance with the Government Printing and Binding Regulations, Title 44 of the U.S. Code, and DOE Directives relative thereto.

(b) The term ''Printing'' includes the following processes: composition, platemaking, presswork, binding, microform publishing, or the end items produced by such processes. Provided, however, that performance of a requirement under this contract involving the duplication of less than 5,000 copies of a single page, or no more than 25,000 units in the aggregate of multiple pages, will not be deemed to be printing.

(c) Printing services not obtained in compliance with this guidance shall result in the cost of such printing being disallowed.

(d) The Contractor shall include the substance of this clause in all subcontracts hereunder which require printing (as that term is defined in Title I of the U.S. Government Printing and Binding Regulations).

(End of Clause)

970.5209–1 Requirement for guarantee of performance.

As prescribed in 48 CFR 970.0970–2, the contracting officer shall insert the following provision in solicitations for management and operating contracts:

Requirement for Guarantee of Performance (Month and Year TBE)

The successful offeror is required by other provisions of this solicitation to organize a dedicated corporate entity to carry out the work under the contract to be awarded as a result of this solicitation. The successful offeror will be required, as part of the determination of responsibility of the newly organized, dedicated corporate entity and as a condition of the award of the contract to that entity, to furnish a guarantee of that entity's performance. That guarantee of performance must be satisfactory in all respects to the Department of Energy.

(End of Clause)

970.5215–1 Total available fee: Base fee amount and performance fee amount.

As prescribed in 48 CFR 970.1504–5(a), insert the following clause. The clause should be tailored to reflect the contract's actual inclusion of base fee amount and performance fee amount.

Total Available Fee: Base Fee Amount and Performance Fee Amount (Month and Year TBE)

(a) Total available fee. Total available fee, consisting of a base fee amount (which may be zero) and a performance fee amount (consisting of an incentive fee component for objective performance requirements, an award fee component for subjective performance requirements, or both) determined in accordance with the provisions of this clause, is available for payment in accordance with the clause of this contract entitled, ''Payments and advances.''

(b) Fee Negotiations. Prior to the beginning of each fiscal year under this contract, or other appropriate period as mutually agreed upon and, if exceeding one year, approved by the Senior Procurement Executive, or designee, the contracting officer and Contractor shall enter into negotiation of the requirements for the year or appropriate period, including the evaluation areas and individual requirements subject to incentives, the total available fee, and the allocation of fee. The contracting officer shall modify this contract at the conclusion of each negotiation to reflect the negotiated requirements, evaluation areas and individual requirements subject to incentives, the total available fee, and the allocation of fee. In the event the parties fail to agree on the requirements, the evaluation areas and individual requirements subject to incentives, the total available fee, or the allocation of fee, a unilateral determination will be made by the contracting officer. The total available fee amount shall be allocated to a twelve month cycle composed of one or more evaluation periods, or such longer period as may be mutually agreed to between the parties and approved by the Senior Procurement Executive, or designee.

(c) Determination of Total Available Fee Amount Earned. (1) The Government shall, at the conclusion of each specified evaluation period, evaluate the contractor's performance of all requirements, including performance based incentives completed during the period, and determine the total available fee amount earned. At the contracting officer's discretion, evaluation of incentivized performance may occur at the scheduled completion of specific incentivized requirements.

(2) The DOE Operations/Field Office Manager, or designee, will be (insert title of DOE Operations/Field Office Manager, or designee). The contractor agrees that the determination as to the total available fee earned is a unilateral determination made by the DOE Operations/Field Office Manager, or designee.

(3) The evaluation of contractor performance shall be in accordance with the Performance Evaluation and Measurement Plan(s) described in subparagraph (d) of this clause unless otherwise set forth in the contract. The Contractor shall be promptly advised in writing of the fee determination, and the basis of the fee determination. In the event that the contractor's performance is considered to be less than the level of performance set forth in the Statement of Work, as amended to include the current Work Authorization Directive or similar document, for any contract requirement, it will be considered by the DOE Operations/Field Office Manager, or designee, who may at his/her discretion adjust the fee determination to reflect such performance. Any such adjustment shall be in accordance with the clause entitled, ''Conditional Payment of Fee, Profit, or Incentives'' if contained in the contract.

(d) Performance Evaluation and Measurement Plan(s). To the extent not set forth elsewhere in the contract:

(1) The Government shall establish a Performance Evaluation and Measurement Plan(s) upon which the determination of the total available fee amount earned shall be based. The Performance Evaluation and Measurement Plan(s) will address all of the requirements of contract performance specified in the contract directly or by reference. A copy of the Performance Evaluation and Measurement Plan(s) shall be provided to the Contractor:

(i) prior to the start of an evaluation period if the requirements, evaluation areas, specific

incentives, amount of fee, and allocation of fee to such evaluation areas and specific incentives have been mutually agreed to by the parties; or

(ii) not later than thirty days prior to the scheduled start date of the evaluation period, if the requirements, evaluation areas, specific incentives, amount of fee, and allocation of fee to such evaluation areas and specific incentives have been unilaterally established by the contracting officer.

(2) The Performance Evaluation and Measurement Plan(s) will set forth the criteria upon which the Contractor will be evaluated relating to any technical, schedule, management, and/or cost objectives selected for evaluation. Such criteria should be objective, but may also include subjective criteria. The Plan(s) shall also set forth the method by which the total available fee amount will be allocated and the amount earned determined.

(3) The Performance Evaluation and Measurement Plan(s) may, consistent with the contract statement of work, be revised during the period of performance. The contracting officer shall notify the contractor:

(i) of such unilateral changes at least ninety calendar days prior to the end of the affected evaluation period and at least thirty calendar days prior to the effective date of the change;

(ii) of such bilateral changes at least sixty calendar days prior to the end of the affected evaluation period; or

(iii) if such change, whether unilateral or bilateral, is urgent and high priority, at least thirty calendar days prior to the end of the evaluation period.

(e) Schedule for total available fee amount earned determinations. The DOE Operations/Field Office Manager, or designee, shall issue the final total available fee amount earned determination in accordance with the schedule set forth in the Performance Evaluation and Measurement Plan(s). However, a determination must be made within sixty calendar days after the receipt by the contracting officer of the Contractor's self-assessment, if one is required or permitted by paragraph (f) of this clause, or seventy calendar days after the end of the evaluation period, whichever is later. If the contracting officer evaluates the Contractor's performance of specific requirements on their completion, the payment of any earned fee amount must be made within seventy calendar days (or such other time period as mutually agreed to between the contracting officer and the Contractor) after such completion. If the determination is delayed beyond that date, the Contractor shall be entitled to interest on the determined total available fee amount earned at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the payment date. This rate is referred to as the ''Renegotiation Board Interest Rate,'' and is published in the **Federal Register** semiannually on or about January 1 and July 1. The interest on any late total available fee amount earned determination will accrue daily and be compounded in 30-day increments inclusive from the first day after the schedule determination date through the actual date the determination is issued. That is, interest accrued at the end of any 30-day period will be added to the determined amount of fee earned and be subject to interest if not paid in the succeeding 30-day period.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.1504–5(a)(1), when the award fee cycle consists of two or more evaluation periods, add the following to paragraph (c):

(4) At the sole discretion of the Government, unearned total available fee amounts may be carried over from one evaluation period to the next, so long as the periods are within the same award fee cycle.

Alternate II (Month and Year TBE). As prescribed in 48 CFR 970.1504–5(a)(2), when the award fee cycle consists of one evaluation period, add the following to paragraph (c):

(4) Award fee not earned during the evaluation period shall not be allocated to future evaluation periods.

Alternate III (Month and Year TBE). As prescribed in 48 CFR 970.1504–5(a)(3), when the DOE Operations/Field Office Manager, or designee, requires the contractor to submit a self-assessment, add the following as paragraph (f):

(f) Contractor self-assessment. Following each evaluation period, the Contractor shall submit a self-assessment within (*Insert Number*) calendar days after the end of the period. This self-assessment shall address both the strengths and weaknesses of the Contractor's performance during the evaluation period. Where deficiencies in performance are noted, the Contractor shall describe the actions planned or taken to correct such deficiencies and avoid their recurrence. The DOE Operations/Field Office Manager, or designee, will review the Contractor's self-assessment, if submitted, as part of its independent evaluation of the contractor's management during the period. A self-assessment, in and of itself may not be the only basis for the award fee determination.

Alternate IV (Month and Year TBE). As prescribed in 48 CFR 970.1504–5(a)(4), when the DOE Operations/Field Office Manager, or designee, permits the contractor to submit a self-assessment at the contractor's option, add the following text as paragraph (f):

(f) Contractor self-assessment. Following each evaluation period, the Contractor may submit a self-assessment, provided such assessment is submitted within (*Insert Number*) calendar days after the end of the period. This self-assessment shall address both the strengths and weaknesses of the Contractor's performance during the evaluation period. Where deficiencies in performance are noted, the Contractor shall describe the actions planned or taken to correct such deficiencies and avoid their recurrence. The DOE Operations/Field Office Manager, or designee, will review the Contractor's self-assessment, if submitted, as part of its independent evaluation of the Contractor's management during the period. A self-assessment, in and of itself may not be the only basis for the award fee determination.

970.5215–2 Make-or-buy plan.

As prescribed in 48 CFR 970.1504–5(b), insert the following clause:

Make-or-Buy Plan (Month and Year TBE)

(a) *Definitions. Buy item* means a work activity, supply, or service to be produced or performed by an outside source, including a subcontractor or an affiliate, subsidiary, or division of the contractor.

Make item means a work activity, supply, or service to be produced or performed by the contractor using its personnel and other resources at the Department of Energy facility or site.

Make-or-buy plan means a contractor's written program for the contract that identifies work efforts or requirements that either are ''make items'' or ''buy items''.

(b) *Make-or-buy plan.* The contractor shall develop and implement a make-or-buy plan that establishes a preference for providing supplies and services on a least-cost basis, subject to any specific make or buy criteria identified in the contract or otherwise provided by the contracting officer. In developing and implementing its make-or-buy plan, the contractor agrees to assess subcontracting opportunities and implement subcontracting decisions in accordance with the following:

(1) The contractor shall conduct internal productivity improvement and cost-reduction programs so that in-house performance options can be made more efficient and cost-effective.

(2) The contractor shall consider subcontracting opportunities with the maximum practicable regard for open communications with potentially affected employees and their representatives. Similarly, a contractor shall communicate its plans, activities, cost-benefit analyses, and decisions to those stakeholders, including representatives of the community and local businesses, likely to be affected by such actions.

(c) *Submission and approval.* For new contract awards, the contractor shall submit an initial make-or-buy plan, for approval, within 180 days after contract award. If the existing contract is to be extended, the contractor shall submit a make-or-buy plan for review and approval at least 90 days prior to the commencement of the negotiations for the extension. The following documentation shall be prepared and submitted:

(1) A description of each work item, and if appropriate, the identification of the associated Work Authorization or Work Breakdown Structure element;

(2) The categorization of each work item as ''must make,'' ''must buy,'' or ''can make or buy,'' with the reasons for such categorization in consideration of the program specific make or buy criteria (including least cost considerations). For non-core capabilities categorized as ''must make,'' a cost/benefit analysis must be performed for each item if:

(i) The contractor is not the least-cost performer, and

(ii) A program specific make-or-buy criterion does not otherwise justify a ''must make'' categorization;

(3) A decision to either ''make'' or ''buy'' in consideration of the program specific

make or buy criteria (including least cost considerations) for work effort categorized as ''can make or buy'';

(4) Identification of potential suppliers and subcontractors, if known, and their location and size status;

(5) A recommendation to defer a make or buy decision where categorization of an identifiable work effort is impracticable at the time of initial development of the plan and a schedule for future re-evaluation;

(6) A description of the impact of a change in current practice of making or buying on the existing work force; and

(7) Any additional information appropriate to support and explain the plan.

(d) *Conduct of operations.* Once a make-or-buy plan is approved, the contractor shall perform in accordance with the plan.

(e) *Changes to the make-or-buy plan.* The make-or-buy plan established in accordance with paragraph (b) of this clause shall remain in effect for the term of the contract, unless:

(1) A lesser period is provided either for the total plan or for individual items or work effort;

(2) The circumstances supporting the make-or-buy decisions change, or

(3) New work is identified.

At least annually, the contractor shall review its approved make-or-buy plan to ensure that it reflects current conditions. Changes to the approved make-or-buy plan shall be submitted in advance of the effective date of the proposed change in sufficient time to permit evaluation and review. Changes shall be submitted in accordance with the instructions provided by the contracting officer. Modification of the make-or-buy plan to incorporate proposed changes or additions shall be effective upon the contractor's receipt of the contracting officer's written approval.

(End of Clause)

970.5215–3 Conditional payment of fee, profit, or incentives.

As prescribed in 48 CFR 970.1504–5(c), insert the following clause:

Conditional Payment of Fee, Profit, or Incentives (Month and Year TBE)

In order for the Contractor to receive all otherwise earned fee, fixed fee, profit, or share of cost savings under the contract in an evaluation period, the Contractor must meet the minimum requirements in paragraphs (a) and (b) of this clause, and if Alternate I is applicable, (a) through (d) of this clause. If the Contractor does not meet the minimum requirements, the DOE Operations/Field Office Manager or designee may make a unilateral determination to reduce the evaluation period's otherwise earned fee, fixed fee, profit or share of cost savings as described in the following paragraphs of this clause.

(a) *Minimum requirements for Environment, Safety & Health (ES&H) Program.* The Contractor shall develop, obtain DOE approval of, and implement a Safety Management System in accordance with the provisions of the clause entitled, ''Integration of Environment, Safety and Health into Work Planning and Execution,'' if included in the contract, or as otherwise agreed to with the contracting officer. The minimal performance requirements of the system will be set forth in the approved Safety Management System, or similar document. If the Contractor fails to obtain approval of the Safety Management System or fails to achieve the minimum performance requirements of the system during the evaluation period, the DOE Operations/Field Office Manager or designee, at his/her sole discretion, may reduce any otherwise earned fees, fixed fee, profit or share of cost savings for the evaluation period by an amount up to the amount earned.

(b) *Minimum requirements for catastrophic event.* If, in the performance of this contract, there is a catastrophic event (such as a fatality, or a serious workplace-related injury or illness to one or more Federal, contractor, or subcontractor employees or the general public, loss of control over classified or special nuclear material, or significant damage to the environment), the DOE Operations/Field Office Manager or designee may reduce any otherwise earned fee for the evaluation period by an amount up to the amount earned. In determining any diminution of fee, fixed fee, profit, or share of cost savings resulting from a catastrophic event, the DOE Operations/Field Office Manager or designee will consider whether willful misconduct and/or negligence contributed to the occurrence and will take into consideration any mitigating circumstances presented by the contractor or other sources.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.1504–5(c), for contracts awarded on a cost-plus-award-fee, incentive fee or multiple fee basis, add the following paragraphs (c) and (d):

(c) *Minimum requirements for specified level of performance.* (1) At a minimum the Contractor must perform the following:

(i) the requirements with specific incentives at the level of performance set forth in the Statement of Work, Work Authorization Directive, or similar document unless an otherwise minimal level of performance has been established in the specific incentive;

(ii) all of the performance requirements directly related to requirements specifically incentivized at a level of performance such that the overall performance of these related requirements is at an acceptable level; and

(iii) all other requirements at a level of performance such that the total performance of the contract is not jeopardized.

(2) The evaluation of the Contractor's achievement of the level of performance shall be unilaterally determined by the contracting officer. To the extent that the Contractor fails to achieve the minimum performance levels specified in the Statement of Work, Work Authorization Directive, or similar document, during the evaluation period, the DOE Operations/Field Office Manager, or designee, may reduce any otherwise earned fee, fixed fee, profit, or shared net savings for the evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit, or shared net savings being less than 25% of the total available fee amount. Such 25% shall include base fee, if any.

(d) *Minimum requirements for cost performance.* (1) Requirements incentivized by other than cost incentives must be performed within their specified cost constraint and must not adversely impact the costs of performing unrelated activities.

(2) The performance of requirements with a specific cost incentive must not adversely impact the costs of performing unrelated requirements.

(3) The Contractor's performance within the stipulated cost performance levels for the evaluation period shall be determined by the contracting officer. To the extent the Contractor fails to achieve the stipulated cost performance levels, the DOE Operations/Field Office Manager, or designee, at his/her sole discretion, may reduce in whole or in part any otherwise earned fee, fixed fee, profit, or shared net savings for the evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit or shared net savings being less than 25% of the total available fee amount. Such 25% shall include base fee, if any.

970.5215–4 Cost reduction.

As prescribed in 48 CFR 970.1504–5(d), insert the following clause:

Cost Reduction (Month and Year TBE)

(a) *General.* It is the Department of Energy's (DOE's) intent to have its facilities and laboratories operated in an efficient and effective manner. To this end, the Contractor shall assess its operations and identify areas where cost reductions would bring cost efficiency to operations without adversely affecting the level of performance required by the contract. The Contractor, to the maximum extent practical, shall identify areas where cost reductions may be effected, and develop and submit Cost Reduction Proposals (CRPs) to the contracting officer. If accepted, the Contractor may share in any shared net savings from accepted CRPs in accordance with paragraph (g) of this clause.

(b) *Definitions. Administrative cost* is the contractor cost of developing and administering the CRP.

Design, process, or method change is a change to a design, process, or method which has established cost, technical and schedule baseline, is defined, and is subject to a formal control procedure. Such a change must be innovative, initiated by the contractor, and applied to a specific project or program.

Development cost is the Contractor cost of up-front planning, engineering, prototyping, and testing of a design, process, or method.

DOE cost is the Government cost incurred implementing and validating the CRP.

Implementation cost is the Contractor cost of tooling, facilities, documentation, etc., required to effect a design, process, or method change once it has been tested and approved.

Net Savings means a reduction in the total amount (to include all related costs and fee) of performing the effort where the savings revert to DOE control and may be available for deobligation. Such savings may result from a specific cost reduction effort which is

negotiated on a cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price basis, or may result directly from a design, process, or method change. They may also be savings resulting from formal or informal direction given by DOE or from changes in the mission, work scope, or routine reorganization of the Contractor due to changes in the budget.

Shared Net Savings are those net savings which result from:

(1) A specific cost reduction effort which is negotiated on a cost-plus-incentive-fee or fixed-price incentive basis, and is the difference between the negotiated target cost of performing an effort as negotiated and the actual allowable cost of performing that effort; or

(2) A design, process, or method change, which occurs in the fiscal year in which the change is accepted and the subsequent fiscal year, and is the difference between the estimated cost of performing an effort as originally planned and the actual allowable cost of performing that same effort utilizing a revised plan intended to reduce costs along with any Contractor development costs, implementation costs, administrative costs, and DOE costs associated with the revised plan. Administrative costs and DOE costs are only included at the discretion of the contracting officer. Savings resulting from formal or informal direction given by the DOE or changes in the mission, work scope, or routine reorganization of the Contractor due to changes in the budget are not to be considered as shared net savings for purposes of this clause and do not qualify for incentive sharing.

(c) *Procedure for submission of CRPs.* (1) CRPs for the establishment of cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price efforts or for design, process, or methods changes submitted by the Contractor shall contain, at a minimum, the following:

(i) Current Method (Baseline)—A verifiable description of the current scope of work, cost, and schedule to be impacted by the initiative, and supporting documentation.

(ii) New Method (New Proposed Baseline)—A verifiable description of the new scope of work, cost, and schedule, how the initiative will be accomplished, and supporting documentation.

(iii) Feasibility Assessment—A description and evaluation of the proposed initiative and benefits, risks, and impacts of implementation. This evaluation shall include an assessment of the difference between the current method (baseline) and proposed new method including all related costs.

(2) In addition, CRPs for the establishment of cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price efforts shall contain, at a minimum, the following:

(i) The proposed contractual arrangement and the justification for its use; and

(ii) A detailed cost/price estimate and supporting rationale. If the approach is proposed on an incentive basis, minimum and maximum cost estimates should be included along with any proposed sharing arrangements.

(d) *Evaluation and Decision.* All CRPs must be submitted to and approved by the contracting officer. Included in the information provided by the CRP must be a discussion of the extent the proposed cost reduction effort may:

(1) Pose a risk to the health and safety of workers, the community, or to the environment;

(2) Result in a waiver or deviation from DOE requirements, such as DOE Orders and joint oversight agreements;

(3) Require a change in other contractual agreements;

(4) Result in significant organizational and personnel impacts;

(5) Create a negative impact on the cost, schedule, or scope of work in another area;

(6) Pose a potential negative impact on the credibility of the Contractor or the DOE; and

(7) Impact successful and timely completion of any of the work in the cost, technical, and schedule baseline.

(e) *Acceptance or Rejection of CRPs.* Acceptance or rejection of a CRP is a unilateral determination made by the contracting officer. The contracting officer will notify the Contractor that a CRP has been accepted, rejected, or deferred within (*Insert Number*) days of receipt. The only CRPs that will be considered for acceptance are those which the Contractor can demonstrate, at a minimum, will:

(1) Result in net savings (in the sharing period if a design, process, or method change);

(2) Not reappear as costs in subsequent periods; and

(3) Not result in any impairment of essential functions.

(f) The failure of the contracting officer to notify the Contractor of the acceptance, rejection, or deferral of a CRP within the specified time shall not be construed as approval.

(g) *Adjustment to Original Estimated Cost and Fee.* If a CRP is established on a cost-plus-incentive-fee, fixed-price incentive or firm-fixed-price basis, the originally estimated cost and fee for the total effort shall be adjusted to remove the estimated cost and fee amount associated with the CRP effort.

(h) *Sharing Arrangement.* If a CRP is accepted, the Contractor may share in the shared net savings. For a CRP negotiated on a cost-plus-incentive-fee or fixed-price incentive basis, with the specific incentive arrangement (negotiated target costs, target fees, share lines, ceilings, profit, etc.) set forth in the contractual document authorizing the effort, the Contractor's share shall be the actual fee or profit resulting from such an arrangement. For a CRP negotiated as a cost savings incentive resulting from a design, process, or method change, the Contractor's share shall be a percentage, not to exceed 25% of the shared net savings. The specific percentage and sharing period shall be set forth in the contractual document.

(i) *Validation of Shared Net Savings.* The contracting officer shall validate actual shared net savings. If actual shared net savings cannot be validated, the contractor will not be entitled to a share of the net shared savings.

(j) *Relationship to Other Incentives.* Only those benefits of an accepted CRP not rewardable under other clauses of this contract shall be rewarded under this clause.

(k) *Subcontracts.* The Contractor may include a clause similar to this clause in any subcontract. In calculating any estimated shared net savings in a CRP under this contract, the Contractor's administration, development, and implementation costs shall include any subcontractor's allowable costs, and any CRP incentive payments to a subcontractor resulting from the acceptance of such CRP. The Contractor may choose any arrangement for subcontractor CRP incentive payments, provided that the payments not reduce the DOE's share of shared net savings.

(End of Clause)

970.5215–5 Limitation on fee.

As prescribed in 48 CFR 970.1504–5(e), the contracting officer shall insert the following provision:

Limitation on Fee (Month and Year TBE)

(a) For the purpose of this solicitation, fee amounts shall not exceed the total available fee allowed by the fee policy at 48 CFR 970.1504–1–1,or as specifically stated elsewhere in the solicitation.

(b) The Government reserves the unilateral right, in the event an offeror's proposal is selected for award, to limit: fixed fee to not exceed an amount established pursuant to 48 CFR 970.1504–1-5; and total available fee to not exceed an amount established pursuant to 48 CFR 970.1504–1–9; or fixed fee or total available fee to an amount as specifically stated elsewhere in the solicitation.

(End of Clause)

970.5222–1 Collective bargaining agreements—management and operating contracts.

As prescribed in 48 CFR 970.2201–1–3, insert the following clause:

Collective Bargaining Agreements—Management and Operating Contracts (Month and Year TBE)

When negotiating collective bargaining agreements applicable to the work force under this contract, the Contractor shall use its best efforts to ensure such agreements contain provisions designed to assure continuity of services. All such agreements entered into during the contract period of performance should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout, or other interruption of normal operations. For this purpose, each collective bargaining agreement should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operations. As part of such agreements, management and labor should agree to cooperate fully with the Federal Mediation and Conciliation Service. The contractor shall include the substance of this clause in any subcontracts for protective services or other services performed on the DOE-owned site which will affect the continuity of operation of the facility.

(End of Clause)

970.5222–2 Overtime management.

As prescribed in 48 CFR 970.2201–2–2, insert the following clause:

Overtime Management (Month and Year TBE)

(a) The contractor shall maintain adequate internal controls to ensure that employee overtime is authorized only if cost effective and necessary to ensure performance of work under this contract.

(b) The contractor shall notify the contracting officer when in any given year it is likely that overtime usage as a percentage of payroll may exceed 4%.

(c) The contracting officer may require the submission, for approval, of a formal annual overtime control plan whenever contractor overtime usage as a percentage of payroll has exceeded, or is likely to exceed, 4%, or if the contracting officer otherwise deems overtime expenditures excessive. The plan shall include, at a minimum:

(1) An overtime premium fund (maximum dollar amount);

(2) Specific controls for casual overtime for non-exempt employees;

(3) Specific parameters for allowability of exempt overtime;

(4) An evaluation of alternatives to the use of overtime; and

(5) Submission of a semi-annual report that includes for exempt and non-exempt employees:

(i) Total cost of overtime;

(ii) Total cost of straight time;

(iii) Overtime cost as a percentage of straight-time cost;

(iv) Total overtime hours;

(v) Total straight-time hours; and

(vi) Overtime hours as a percentage of straight-time hours.

(End of Clause)

970.5223–1 Integration of environment, safety, and health into work planning and execution.

As prescribed in 48 CFR 970.2303–2(a), insert the following clause:

Integration of Environment, Safety, and Health Into Work Planning and Execution (Month and Year TBE)

(a) For the purposes of this clause,

(1) Safety encompasses environment, safety and health, including pollution prevention and waste minimization; and

(2) Employees include subcontractor employees.

(b) In performing work under this contract, the contractor shall perform work safely, in a manner that ensures adequate protection for employees, the public, and the environment, and shall be accountable for the safe performance of work. The contractor shall exercise a degree of care commensurate with the work and the associated hazards. The contractor shall ensure that management of environment, safety and health (ES&H) functions and activities becomes an integral but visible part of the contractor's work planning and execution processes. The contractor shall, in the performance of work, ensure that:

(1) Line management is responsible for the protection of employees, the public, and the environment. Line management includes those contractor and subcontractor employees managing or supervising employees performing work.

(2) Clear and unambiguous lines of authority and responsibility for ensuring (ES&H) are established and maintained at all organizational levels.

(3) Personnel possess the experience, knowledge, skills, and abilities that are necessary to discharge their responsibilities.

(4) Resources are effectively allocated to address ES&H, programmatic, and operational considerations. Protecting employees, the public, and the environment is a priority whenever activities are planned and performed.

(5) Before work is performed, the associated hazards are evaluated and an agreed-upon set of ES&H standards and requirements are established which, if properly implemented, provide adequate assurance that employees, the public, and the environment are protected from adverse consequences.

(6) Administrative and engineering controls to prevent and mitigate hazards are tailored to the work being performed and associated hazards. Emphasis should be on designing the work and/or controls to reduce or eliminate the hazards and to prevent accidents and unplanned releases and exposures.

(7) The conditions and requirements to be satisfied for operations to be initiated and conducted are established and agreed-upon by DOE and the contractor. These agreed-upon conditions and requirements are requirements of the contract and binding upon the contractor. The extent of documentation and level of authority for agreement shall be tailored to the complexity and hazards associated with the work and shall be established in a Safety Management System.

(c) The contractor shall manage and perform work in accordance with a documented Safety Management System (System) that fulfills all conditions in paragraph (b) of this clause at a minimum. Documentation of the System shall describe how the contractor will:

(1) Define the scope of work;

(2) Identify and analyze hazards associated with the work;

(3) Develop and implement hazard controls;

(4) Perform work within controls; and

(5) Provide feedback on adequacy of controls and continue to improve safety management.

(d) The System shall describe how the contractor will establish, document, and implement safety performance objectives, performance measures, and commitments in response to DOE program and budget execution guidance while maintaining the integrity of the System. The System shall also describe how the contractor will measure system effectiveness.

(e) The contractor shall submit to the contracting officer documentation of its System for review and approval. Dates for submittal, discussions, and revisions to the System will be established by the contracting officer. Guidance on the preparation, content, review, and approval of the System will be provided by the contracting officer. On an annual basis, the contractor shall review and update, for DOE approval, its safety performance objectives, performance measures, and commitments consistent with and in response to DOE's program and budget execution guidance and direction. Resources shall be identified and allocated to meet the safety objectives and performance commitments as well as maintain the integrity of the entire System. Accordingly, the System shall be integrated with the contractor's business processes for work planning, budgeting, authorization, execution, and change control.

(f) The contractor shall comply with, and assist the Department of Energy in complying with, ES&H requirements of all applicable laws and regulations, and applicable directives identified in the clause of this contract entitled ''Laws, Regulations, and DOE Directives.'' The contractor shall cooperate with Federal and non-Federal agencies having jurisdiction over ES&H matters under this contract.

(g) The contractor shall promptly evaluate and resolve any noncompliance with applicable ES&H requirements and the System. If the contractor fails to provide resolution or if, at any time, the contractor's acts or failure to act causes substantial harm or an imminent danger to the environment or health and safety of employees or the public, the contracting officer may issue an order stopping work in whole or in part. Any stop work order issued by a contracting officer under this clause (or issued by the contractor to a subcontractor in accordance with paragraph (i) of this clause) shall be without prejudice to any other legal or contractual rights of the Government. In the event that the contracting officer issues a stop work order, an order authorizing the resumption of the work may be issued at the discretion of the contracting officer. The contractor shall not be entitled to an extension of time or additional fee or damages by reason of, or in connection with, any work stoppage ordered in accordance with this clause.

(h) Regardless of the performer of the work, the contractor is responsible for compliance with the ES&H requirements applicable to this contract. The contractor is responsible for flowing down the ES&H requirements applicable to this contract to subcontracts at any tier to the extent necessary to ensure the contractor's compliance with the requirements.

(i) The contractor shall include a clause substantially the same as this clause in subcontracts involving complex or hazardous work on site at a DOE-owned or -leased facility. Such subcontracts shall provide for the right to stop work under the conditions described in paragraph (g) of this clause. Depending on the complexity and hazards associated with the work, the contractor may require that the subcontractor submit a Safety Management System for the contractor's review and approval.

(End of Clause)

970.5223–2 Acquisition and use of environmentally preferable products and services.

As prescribed in 48 CFR 970.2304–2, insert the following clause:

Acquisition and Use of Environmentally Preferable Products and Services (Month and Year TBE)

(a) In the performance of this contract, the Contractor shall comply with the requirements of the following issuances:

(1) Executive Order 13101 of September 14, 1998, entitled ''Greening the Government Through Waste Prevention, Recycling and Federal Acquisition.''

(2) Section 6002 of the Resource Conservation and Recovery Act (RCRA) of 1976, as amended (42 U.S.C. 6962, Pub. L. 94–580, 90 Stat. 2822).

(3) Title 40 of the Code of Federal Regulations, Subchapter I, Part 247 (Comprehensive Guidelines for the Procurement of Products Containing Recovered Materials) and such other Subchapter I Parts or Comprehensive Procurement Guidelines as the Environmental Protection Agency may issue from time to time as guidelines for the procurement of products that contain recovered/recycled materials.

(4) ''U.S. Department of Energy Affirmative Procurement Program for Products Containing Recovered Materials'' and related guidance document(s), as they are identified in writing by the Department.

(b) The Contractor shall prepare and submit reports on matters related to the use of environmentally preferable products and services from time to time in accordance with written direction (*e.g.,* in a specified format) from the contracting officer.

(c) In complying with the requirements of paragraph (a) of this clause, the Contractor shall coordinate its concerns and seek implementing guidance on Federal and Departmental policy, plans, and program guidance with the DOE recycling point of contact, who shall be identified by the contracting officer. Reports required pursuant to paragraph (b) of this clause, shall be submitted through the DOE recycling point of contact.

(End of Clause)

970.5223–3 Agreement regarding workplace substance abuse programs at DOE facilities.

As prescribed in 970.2305–4(a), the contracting officer shall insert the following provision:

Agreement Regarding Workplace Substance Abuse Programs at DOE Sites (Month and Year TBE)

(a) Any contract awarded as a result of this solicitation will be subject to the policies, criteria, and procedures of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

(b) By submission of its offer, the officer agrees to provide to the contracting officer, within 30 days after notification of selection for award, or award of a contract, whichever occurs first, pursuant to this solicitation, its written workplace substance abuse program consistent with the requirements of 10 CFR part 707.

(c) Failure of the offeror to agree to the condition of responsibility set forth in paragraph (b) of this provision, renders the offeror unqualified and ineligible for award.

(End of Provision)

970.5223–4 Workplace substance abuse programs at DOE sites.

As prescribed in 48 CFR 970.2305–4(b), insert the following clause:

Workplace Substance Abuse Programs at DOE Sites (Month and Year TBE)

(a) Program Implementation. The contractor shall, consistent with 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, incorporated herein by reference with full force and effect, develop, implement, and maintain a workplace substance abuse program.

(b) Remedies. In addition to any other remedies available to the Government, the contractor's failure to comply with the requirements of 10 CFR part 707 or to perform in a manner consistent with its approved program may render the contractor subject to: the suspension of contract payments, or, where applicable, a reduction in award fee; termination for default; and suspension or debarment.

(c) Subcontracts. (1) The contractor agrees to notify the contracting officer reasonably in advance of, but not later than 30 days prior to, the award of any subcontract the contractor believes may be subject to the requirements of 10 CFR part 707.

(2) The DOE prime contractor shall require all subcontracts subject to the provisions of 10 CFR part 707 to agree to develop and implement a workplace substance abuse program that complies with the requirements of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, as a condition for award of the subcontract. The DOE prime contractor shall review and approve each subcontractor's program, and shall periodically monitor each subcontractor's implementation of the program for effectiveness and compliance with 10 CFR part 707.

(3) The contractor agrees to include, and require the inclusion of, the requirements of this clause in all subcontracts, at any tier, that are subject to the provisions of 10 CFR part 707.

(End of clause)

970.5226–1 Diversity Plan.

As prescribed in 48 CFR 970.2671–2, insert the following clause:

Diversity Plan (Month and Year TBE)

The Contractor shall submit a Diversity Plan to the contracting officer for approval within 90 days after the effective date of this contract. The contractor shall submit an update to its Plan with its annual fee proposal. Guidance for preparation of a Diversity Plan is provided in Appendix ____. The Plan shall include innovative strategies for increasing opportunities to fully use the talents and capabilities of a diverse work force. The Plan shall address, at a minimum, the Contractor's approach for promoting diversity through (1) the Contractor's work force, (2) educational outreach, (3) community involvement and outreach, (4) subcontracting, and (5) economic development (including technology transfer).

(End of Clause)

970.5226–2 Workforce restructuring under section 3161 of the National Defense Authorization Act for Fiscal Year 1993.

As prescribed in 48 CFR 970.2672–3, insert the following clause:

Workforce Restructuring under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993 (Month and Year TBE)

(a) Consistent with the objectives of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, 42 U.S.C. 7274h, in instances where the Department of Energy has determined that a change in workforce at a Department of Energy Defense Nuclear Facility is necessary, the contractor agrees to (1) comply with the Department of Energy Workforce Restructuring Plan for the facility, if applicable, and (2) use its best efforts to accomplish workforce restructuring or displacement so as to mitigate social and economic impacts.

(b) The requirements of this clause shall be included in subcontracts at any tier (except subcontracts for commercial items pursuant to 41 U.S.C. 403) expected to exceed $500,000.

(End of Clause)

970.5226–3 Community Commitment.

As prescribed in 48 CFR 970.2673–2, insert the following clause:

Community Commitment (Month and Year TBE)

It is the policy of the DOE to be a constructive partner in the geographic region in which DOE conducts its business. The basic elements of this policy include: (1) recognizing the diverse interests of the region and its stakeholders, (2) engaging regional stakeholders in issues and concerns of mutual interest, and (3) recognizing that giving back to the community is a worthwhile business practice. Accordingly, the Contractor agrees that its business operations and performance under the Contract will be consistent with the intent of the policy and elements set forth above.

(End of Clause)

970.5227–1 Rights in Data—Facilities.

As prescribed in 48 CFR 970.2704–3(a), insert the following clause:

Rights in Data—Facilities (Month and Year TBE)

(a) *Definitions.* (1) *Computer data bases,* as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

(2) *Computer software,* as used in this clause, means (i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or

cause a computer to perform a specific operation or series of operations and (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

(3) *Data,* as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term ''data'' does not include data incidental to the administration of this contract, such as financial, administrative, cost and pricing, or management information.

(4) *Limited rights data,* as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of subparagraph (e) of this clause.

(5) *Restricted computer software,* as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of paragraph (f) of this clause.

(6) *Technical data,* as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

(7) *Unlimited rights,* as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights.* (1) The Government shall have:

(i) Ownership of all technical data and computer software first produced in the performance of this Contract;

(ii) Unlimited rights in technical data and computer software specifically used in the performance of this Contract, except as provided herein regarding copyright, limited rights data, or restricted computer software, or except for other data specifically protected by statute for a period of time or, where, approved by DOE, appropriate instances of the DOE Work for Others Program;

(iii) The right to inspect technical data and computer software first produced or specifically used in the performance of this Contract at all reasonable times. The Contractor shall make available all necessary facilities to allow DOE personnel to perform such inspection;

(iv) The right to have all technical data and computer software first produced or specifically used in the performance of this Contract delivered to the Government or otherwise disposed of by the Contractor, either as the contracting officer may from time to time direct during the progress of the work or in any event as the contracting officer shall direct upon completion or termination of this Contract. The Contractor agrees to leave a copy of such data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the contracting officer. If such data are limited rights data or restricted computer software, the rights of the Government in such data shall be governed solely by the provisions of paragraph (e) of this clause (''Rights in Limited Rights Data'') or paragraph (f) of this clause (''Rights in Restricted Computer Software''); and

(v) The right to remove, cancel, correct, or ignore any markings not authorized by the terms of this Contract on any data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the Contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the Contractor of the action taken.

(2) The Contractor shall have:

(i) The right to withhold limited rights data and restricted computer software unless otherwise provided in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this Contract, data it first produces in the performance of this Contract, except for data in DOE's Uranium Enrichment Technology, including diffusion, centrifuge, and atomic vapor laser isotope separation, provided the data requirements of this Contract have been met as of the date of the private use of such data.

(3) The Contractor agrees that for limited rights data or restricted computer software or other technical, business or financial data in the form of recorded information which it receives from, or is given access to by, DOE or a third party, including a DOE Contractor or subcontractor, and for technical data or computer software it first produces under this Contract which is authorized to be marked by DOE, the Contractor shall treat such data in accordance with any restrictive legend contained thereon.

(c) Copyrighted Material. (1) The Contractor shall not, without prior written authorization of the Patent Counsel, assert copyright in any technical data or computer software first produced in the performance of this contract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf, a nonexclusive, paid-up, irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, and perform any such data copyrighted by the Contractor.

(2) The Contractor agrees not to include in the technical data or computer software delivered under the contract any material copyrighted by the Contractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (c)(1) of this clause. If the Contractor believes that such copyrighted material for which the license cannot be obtained must be included in the technical data or computer software to be delivered, rather than merely incorporated therein by reference, the Contractor shall obtain the written authorization of the contracting officer to include such material in the technical data or computer software prior to its delivery.

(d) Subcontracting. (1) Unless otherwise directed by the contracting officer, the Contractor agrees to use in subcontracts in which technical data or computer software is expected to be produced or in subcontracts for supplies that contain a requirement for production or delivery of data in accordance with the policy and procedures of 48 CFR Subpart 27.4 as supplemented by 48 CFR 927.401 through 927.409, the clause entitled, ''Rights in Data-General'' at 48 CFR 52.227–14 modified in accordance with 927.409(a) and including Alternate V. Alternates II through IV of that clause may be included as appropriate with the prior approval of DOE Patent Counsel, and the Contractor shall not acquire rights in a subcontractor's limited rights data or restricted computer software, except through the use of Alternates II or III, respectively, without the prior approval of DOE Patent Counsel. The clause at 48 CFR 52.227–16, Additional Data Requirements, shall be included in subcontracts in accordance with DEAR 927.409(h). The contractor shall use instead the Rights in Data-Facilities clause at 48 CFR 970.5227–1 in subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated under its contract with DOE.

(2) It is the responsibility of the Contractor to obtain from its subcontractors technical data and computer software and rights therein, on behalf of the Government, necessary to fulfill the Contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the Contractor shall:

(i) Promptly submit written notice to the contracting officer setting forth reasons or the subcontractor's refusal and other pertinent information which may expedite disposition of the matter, and (ii) Not proceed with the subcontract without the written authorization of the contracting officer.

(3) Neither the Contractor nor higher-tier subcontractors shall use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data or restricted computer software for their private use.

(e) *Rights in Limited Rights Data.* Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license by or for the Government, in any limited rights data of the Contractor specifically used in the performance of this Contract, provided,

however, that to the extent that any limited rights data when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Limited Rights Notice'' set forth. All such limited rights data shall be marked with the following ''Limited Rights Notice'':

Limited Rights Notice

These data contain ''limited rights data,'' furnished under Contract No. ____ with the United States Department of Energy which may be duplicated and used by the Government with the express limitations that the ''limited rights data'' may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Contractor, except that further disclosure or use may be made solely for the following purposes:

(a) Use (except for manufacture) by support services contractors within the scope of their contracts;

(b) This ''limited rights data'' may be disclosed for evaluation purposes under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(c) This ''limited rights data'' may be disclosed to other contractors participating in the Government's program of which this Contract is a part for information or use (except for manufacture) in connection with the work performed under their contracts and under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(d) This ''limited rights data'' may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed; and

(e) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government. This Notice shall be marked on any reproduction of this data in whole or in part.

(End of Notice)

(f) Rights in Restricted Computer Software. (1) Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up, license by or for the Government, in any restricted computer software of the Contractor specifically used in the performance of this Contract, provided, however, that to the extent that any restricted computer software when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Restricted Rights Notice'' set forth below. All such restricted computer software shall be marked with the following ''Restricted Rights Notice'':

Restricted Rights Notice—Long Form

(a) This computer software is submitted with restricted rights under Department of Energy Contract No. ____. It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice.

(b) This computer software may be:

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used, copied for use, in a backup or replacement computer if any computer for which it was acquired is inoperative or is replaced;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that only the portions of the derivative software consisting of the restricted computer software are to be made subject to the same restricted rights; and

(5) Disclosed to and reproduced for use by contractors under a service contract (of the type defined in 48 CFR 37.101) in accordance with subparagraphs (b)(1) through (4) of this Notice, provided the Government makes such disclosure or reproduction subject to these restricted rights.

(c) Notwithstanding the foregoing, if this computer software has been published under copyright, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in the restricted rights notice above.

(d) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of Notice)

(2) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used:

Restricted Rights Notice—Short Form

Use, reproduction, or disclosure is subject to restrictions set forth in the Long Form Notice of DOE Contract No. ____ with (name of Contractor).

(End of Notice)

(3) If the software is embedded, or if it is commercially impractical to mark it with human readable text, then the symbol R and the clause date (mo/yr), in brackets or a box, a [R-mo/yr], may be used. This will be read to mean restricted computer software, subject to the rights of the Government as described in the Long Form Notice, in effect as of the date indicated next to the symbol. The symbol shall not be used to mark human readable material. In the event this Contract contains any variation to the rights in the Long Form Notice, then the contract number must also be cited.

(4) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, the software will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions and with unlimited rights, unless the Contractor includes the following statement with such copyright notice ''Unpublished-rights reserved under the Copyright Laws of the United States.''

(g) *Relationship to patents.* Nothing contained in this clause creates or is intended to imply a license to the Government in any patent or is intended to be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.2704–3(a), where access to Category C–24 restricted data is contemplated in the performance of a contract the contracting officer shall insert the phrase ''and except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology'' after ''laser isotope separation'' and before the comma in paragraph (b)(2)(ii) of the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, as appropriate.

(End of Clause)

970.5227–2 Rights in Data—Technology Transfer.

As prescribed in 48 CFR 970.2704–3(b), insert the following clause:

Rights in Data Technology Transfer (Month and Year TBE)

(a) *Definitions.* (1) *Computer data bases,* as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

(2) *Computer software,* as used in this clause, means (i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

(3) *Data,* as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term ''data'' does not include data incidental to the administration of this contract, such as financial, administrative, cost and pricing, or management information.

(4) *Limited rights data,* as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of paragraph (g) of this clause.

(5) *Restricted computer software,* as used in this clause, means computer software developed at private expense and that is a

trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of subparagraph (h) of this clause.

(6) *Technical data,* as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

(7) *Unlimited rights,* as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights.* (1) The Government shall have:

(i) Ownership of all technical data and computer software first produced in the performance of this Contract;

(ii) Unlimited rights in technical data and computer software specifically used in the performance of this Contract, except as provided herein regarding copyright, limited rights data, or restricted computer software, and except for data subject to the withholding provisions for protected Cooperative Research and Development Agreement (CRADA) information in accordance with Technology Transfer actions under this Contract, or other data specifically protected by statute for a period of time or, where, approved by DOE, appropriate instances of the DOE Work for Others Program;

(iii) The right to inspect technical data and computer software first produced or specifically used in the performance of this Contract at all reasonable times. The Contractor shall make available all necessary facilities to allow DOE personnel to perform such inspection;

(iv) The right to have all technical data and computer software first produced or specifically used in the performance of this Contract delivered to the Government or otherwise disposed of by the Contractor, either as the contracting officer may from time to time direct during the progress of the work or in any event as the contracting officer shall direct upon completion or termination of this Contract. The Contractor agrees to leave a copy of such data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the contracting officer. If such data are limited rights data or restricted computer software. the rights of the Government in such data shall be governed solely by the provisions of paragraph (g) of this clause (''Rights in Limited Rights Data'') or paragraph (h) of this clause (''Rights in Restricted Computer Software''); and (v) The right to remove, cancel, correct, or ignore any markings not authorized by the terms of this Contract on any data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the Contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the Contractor of the action taken.

(2) The Contractor shall have:

(i) The right to withhold limited rights data and restricted computer software unless otherwise provided in provisions of this clause;

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this Contract, data it first produces in the performance of this Contract, except for data in DOE's Uranium Enrichment Technology, including diffusion, centrifuge, and atomic vapor laser isotope separation, provided the data requirements of this Contract have been met as of the date of the private use of such data; and

(iii) The right to assert copyright subsisting in scientific and technical articles as provided in paragraph (d) of this clause and the right to request permission to assert copyright subsisting in works other than scientific and technical articles as provided in paragraph (e) of this clause.

(3) The Contractor agrees that for limited rights data or restricted computer software or other technical business or financial data in the form of recorded information which it receives from, or is given access to by DOE or a third party, including a DOE contractor or subcontractor, and for technical data or computer software it first produces under this Contract which is authorized to be marked by DOE, the Contractor shall treat such data in accordance with any restrictive legend contained thereon.

(c) *Copyright (General).* (1) The Contractor agrees not to mark, register, or otherwise assert copyright in any data in a published or unpublished work, other than as set forth in paragraphs (d) and (e) of this clause.

(2) Except for material to which the Contractor has obtained the right to assert copyright in accordance with either paragraph (d) or (e) of this clause, the Contractor agrees not to include in the data delivered under this Contract any material copyrighted by the Contractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (d) of this clause. If the Contractor believes that such copyrighted material for which the license cannot be obtained must be included in the data to be delivered, rather than merely incorporated therein by reference, the Contractor shall obtain the written authorization of the contracting officer to include such material in the data prior to its delivery.

(d) *Copyrighted works (scientific and technical articles).* (1) The Contractor shall have the right to assert, without prior approval of the contracting officer, copyright subsisting in scientific and technical articles composed under this contract or based on or containing data first produced in the performance of this Contract, and published in academic, technical or professional journals, symposia, proceedings, or similar works. When assertion of copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) on the data when such data are delivered to the Government as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a nonexclusive, paid-up, irrevocable, world-wide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(2) The contractor shall mark each scientific or technical article first produced or composed under this Contract and submitted for journal publication or similar means of dissemination with a notice, similar in all material respects to the following, on the front reflecting the Government's non-exclusive, paid-up, irrevocable, world-wide license in the copyright.

Notice: This manuscript has been authored by [insert the name of the Contractor] under Contract No. [insert the contract number] with the U.S. Department of Energy. The United States Government retains and the publisher, by accepting the article for publication, acknowledges that the United States Government retains a non-exclusive, paid-up, irrevocable, world-wide license to publish or reproduce the published form of this manuscript, or allow others to do so, for United States Government purposes.

(End of Notice)

(3) The title to the copyright of the original of unclassified graduate theses and the original of related unclassified scientific papers shall vest in the author thereof, subject to the right of DOE to retain duplicates of such documents and to use such documents for any purpose whatsoever without any claim on the part of the author or the contractor for additional compensation.

(e) *Copyrighted works (other than scientific and technical articles and data produced under a CRADA).* The Contractor may obtain permission to assert copyright subsisting in technical data and computer software first produced by the Contractor in performance of this Contract, where the Contractor can show that commercialization would be enhanced by such copyright protection, subject to the following:

(1) Contractor Request to Assert Copyright.

(i) For data other than scientific and technical articles and data produced under a CRADA, the Contractor shall submit in writing to Patent Counsel its request to assert copyright in data first produced in the performance of this Contract pursuant to this clause. The right of the Contractor to copyright data first produced under a CRADA is as described in the individual CRADA. Each request by the Contractor must include:

(A) The identity of the data (including any computer program) for which the Contractor requests permission to assert copyright, as

well as an abstract which is descriptive of the data and is suitable for dissemination purposes, (B) The program under which it was funded, (C) Whether, to the best knowledge of the Contractor, the data is subject to an international treaty or agreement, (D) Whether the data is subject to export control, (E) A statement that the Contractor plans to commercialize the data in compliance with the clause of this contract entitled, ''Technology Transfer Mission,'' within five (5) years after obtaining permission to assert copyright or, on a case-by-case basis, a specified longer period where the Contractor can demonstrate that the ability to commercialize effectively is dependent upon such longer period, and (F) For data other than computer software, a statement explaining why the assertion of copyright is necessary to enhance commercialization and is consistent with DOE's dissemination responsibilities.

(ii) For data that is developed using other funding sources in addition to DOE funding, the permission to assert copyright in accordance with this clause must also be obtained by the Contractor from all other funding sources prior to the Contractor's request to Patent Counsel. The request shall include the Contractor's certification or other documentation acceptable to Patent Counsel demonstrating such permission has been obtained.

(iii) Permission for the Contractor to assert copyright in excepted categories of data as determined by DOE will be expressly withheld. Such excepted categories include data whose release (A) would be detrimental to national security, *i.e.,* involve classified information or data or sensitive information under Section 148 of the Atomic Energy Act of 1954, as amended, or are subject to export control for nonproliferation and other nuclear-related national security purposes, (B) would not enhance the appropriate transfer or dissemination and commercialization of such data, (C) would have a negative impact on U.S. industrial competitiveness, (D) would prevent DOE from meeting its obligations under treaties and international agreements, or (E) would be detrimental to one or more of DOE's programs. Additional excepted categories may be added by the Assistant General Counsel for Technology Transfer and Intellectual Property. Where data are determined to be under export control restriction, the Contractor may obtain permission to assert copyright subject to the provisions of this clause for purposes of limited commercialization in a manner that complies with export control statutes and applicable regulations. In addition, notwithstanding any other provision of this Contract, all data developed with Naval Reactors' funding and those data that are classified fall within excepted categories. The rights of the Contractor in data are subject to the disposition of data rights in the treaties and international agreements identified under this Contract as well as those additional treaties and international agreements which DOE may from time to time identify by unilateral amendment to the Contract; such amendment listing added treaties and international agreements is effective only for data which is developed after the date such treaty or international agreement is added to this Contract. Also, the Contractor will not be permitted to assert copyright in data in the form of various technical reports generated by the Contractor under the Contract without first obtaining the advanced written permission of the contracting officer.

(2) DOE Review and Response to Contractor's Request. The Patent Counsel shall use its best efforts to respond in writing within 90 days of receipt of a complete request by the Contractor to assert copyright in technical data and computer software pursuant to this clause. Such response shall either give or withhold DOE's permission for the Contractor to assert copyright or advise the Contractor that DOE needs additional time to respond, and the reasons therefor.

(3) Permission for Contractor to Assert Copyright.

(i) For computer software, the Contractor shall furnish to the DOE designated, centralized software distribution and control point, the Energy Science and Technology Software Center, at the time permission to assert copyright is given under paragraph (e)(2) of this clause: (A) an abstract describing the software suitable for publication, (B) the source code for each software program, and (C) the object code and at least the minimum support documentation needed by a technically competent user to understand and use the software. The Patent Counsel, for good cause shown by the Contractor, may allow the minimum support documentation to be delivered within 60 days after permission to assert copyright is given or at such time the minimum support documentation becomes available. The Contractor acknowledges that the DOE designated software distribution and control point may provide a technical description of the software in an announcement identifying its availability from the copyright holder.

(ii) Unless otherwise directed by the contracting officer, for data other than computer software to which the Contractor has received permission to assert copyright under paragraph (e)(2) of this clause above, the Contractor shall within sixty (60) days of obtaining such permission furnish to DOE's Office of Scientific and Technical Information (OSTI) a copy of such data as well as an abstract of the data suitable for dissemination purposes. The Contractor acknowledges that OSTI may provide an abstract of the data in an announcement to DOE, its contractors and to the public identifying its availability from the copyright holder.

(iii) For a five year period or such other specified period as specifically approved by Patent Counsel beginning on the date the Contractor is given permission to assert copyright in data, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works and perform publicly and display publicly, by or on behalf of the Government. Upon request, the initial period may be extended after DOE approval. The DOE approval will be based on the standard that the work is still commercially available and the market demand is being met.

(iv) After the period approved by Patent Counsel for application of the limited Government license described in paragraph (e)(3)(iii) of this clause, or if, prior to the end of such period(s), the Contractor abandons commercialization activities pertaining to the data to which the Contractor has been given permission to assert copyright, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, distribute copies to the public, prepare derivative works, perform publicly and display publicly, and to permit others to do so.

(v) Whenever the Contractor asserts copyright in data pursuant to this paragraph (e), the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 on the copyrighted data and also an acknowledgment of the Government sponsorship and license rights of paragraphs (e)(3) (iii) and (iv) of this clause. Such action shall be taken when the data are delivered to the Government, published, licensed or deposited for registration as a published work in the U.S. Copyright Office. The acknowledgment of Government sponsorship and license rights shall be as follows: Notice: These data were produced by (insert name of Contractor) under Contract No. ____ with the Department of Energy. For (period approved by DOE Patent Counsel) from (date permission to assert copyright was obtained), the Government is granted for itself and others acting on its behalf a nonexclusive, paid-up, irrevocable worldwide license in this data to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government. There is provision for the possible extension of the term of this license. Subsequent to that period or any extension granted, the Government is granted for itself and others acting on its behalf a nonexclusive, paid-up, irrevocable worldwide license in this data to reproduce, prepare derivative works, distribute copies to the public, perform publicly and display publicly, and to permit others to do so. The specific term of the license can be identified by inquiry made to Contractor or DOE. Neither the United States nor the United States Department of Energy, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any data , apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights.

(End of Notice)

(vi) With respect to any data to which the Contractor has received permission to assert copyright, the DOE has the right, during the five (5) year or specified longer period approved by Patent Counsel as provided for in paragraph (e) of this clause, to request the Contractor to grant a nonexclusive, partially exclusive or exclusive license in any field of use to a responsible applicant(s) upon terms that are reasonable under the circumstances, and if the Contractor refuses such request, to grant such license itself, if the DOE determines that the Contractor has not made

a satisfactory demonstration that either it or its licensee(s) is actively pursuing commercialization of the data as set forth in subparagraph (e)(1)(A) of this clause. Before licensing under this subparagraph (vi), DOE shall furnish the Contractor a written request for the Contractor to grant the stated license, and the Contractor shall be allowed thirty (30) days (or such longer period as may be authorized by the contracting officer for good cause shown in writing by the Contractor) after such notice to show cause why the license should not be granted. The Contractor shall have the right to appeal the decision of the DOE to grant the stated license to the Invention Licensing Appeal Board as set forth in 10 CFR 781.65—''Appeals.''

(vii) No costs shall be allowable for maintenance of copyrighted data, primarily for the benefit of the Contractor and/or a licensee which exceeds DOE Program needs, except as expressly provided in writing by the contracting officer. The Contractor may use its net royalty income to effect such maintenance costs.

(viii) At any time the Contractor abandons commercialization activities for data for which the Contractor has received permission to assert copyright in accordance with this clause, it shall advise OSTI and Patent Counsel and upon request assign the copyright to the Government so that the Government can distribute the data to the public.

(4) The following notice may be placed on computer software prior to any publication and prior to the Contractor's obtaining permission from the Department of Energy to assert copyright in the computer software pursuant to paragraph (c)(3) of this section.

Notice: This computer software was prepared by [insert the Contractor's name and the individual author], hereinafter the Contractor, under Contract [insert the Contract Number] with the Department of Energy (DOE). All rights in the computer software are reserved by DOE on behalf of the United States Government and the Contractor as provided in the Contract. You are authorized to use this computer software for Governmental purposes but it is not to be released or distributed to the public. NEITHER THE GOVERNMENT NOR THE CONTRACTOR MAKES ANY WARRANTY, EXPRESS OR IMPLIED, OR ASSUMES ANY LIABILITY FOR THE USE OF THIS SOFTWARE. This notice including this sentence must appear on any copies of this computer software.

(End of Notice)

(5) a similar notice can be used for data, other than computer software, upon approval of DOE Patent Counsel.

(f) Subcontracting. (1) Unless otherwise directed by the contracting officer, the Contractor agrees to use in subcontracts in which technical data or computer software is expected to be produced or in subcontracts for supplies that contain a requirement for production or delivery of data in accordance with the policy and procedures of 48 CFR Subpart 27.4 as supplemented by 48 CFR 927.401 through 927.409, the clause entitled, ''Rights in Data-General'' at 48 CFR 52.227–14 modified in accordance with 927.409(a) and including Alternate V. Alternates II through IV of that clause may be included as appropriate with the prior approval of DOE Patent Counsel, and the Contractor shall not acquire rights in a subcontractor's limited rights data or restricted computer software, except through the use of Alternates II or III, respectively, without the prior approval of DOE Patent Counsel. The clause at 48 CFR 52.227–16, Additional Data Requirements, shall be included in subcontracts in accordance with 48 CFR 927.409(h). The Contractor shall use instead the Rights in Data-Facilities clause at 48 CFR 970.5227–1 in subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated under its contract with DOE.

(2) It is the responsibility of the Contractor to obtain from its subcontractors technical data and computer software and rights therein, on behalf of the Government, necessary to fulfill the Contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the Contractor shall:

(i) Promptly submit written notice to the contracting officer setting forth reasons or the subcontractor's refusal and other pertinent information which may expedite disposition of the matter, and

(ii) Not proceed with the subcontract without the written authorization of the contracting officer.

(3) Neither the Contractor nor higher-tier subcontractors shall use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data and restricted computer software for their private use.

(g) Rights in Limited Rights Data. Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable nonexclusive, paid-up license by or for the Government, in any limited rights data of the Contractor specifically used in the performance of this Contract, provided, however, that to the extent that any limited rights data when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Limited Rights Notice'' set forth below. All such limited rights data shall be marked with the following ''Limited Rights Notice:''

Limited Rights Notice

These data contain ''limited rights data,'' furnished under Contract No. ____ with the United States Department of Energy which may be duplicated and used by the Government with the express limitations that the ''limited rights data'' may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Contractor, except that further disclosure or use may be made solely for the following purposes:

(a) Use (except for manufacture) by support services contractors within the scope of their contracts;

(b) This ''limited rights data'' may be disclosed for evaluation purposes under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(c) This ''limited rights data'' may be disclosed to other contractors participating in the Government's program of which this Contract is a part for information or use (except for manufacture) in connection with the work performed under their contracts and under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(d) This ''limited rights data'' may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed; and

(e) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government.

This Notice shall be marked on any reproduction of this data in whole or in part.

(End of Notice)

(h) Rights in Restricted Computer Software. (1) Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up, license by or for the Government, in any restricted computer software of the Contractor specifically used in the performance of this Contract; provided, however, that to the extent that any restricted computer software when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Restricted Rights Notice'' set forth below. All such restricted computer software shall be marked with the following ''Restricted Rights Notice:''

Restricted Rights Notice—Long Form

(a) This computer software is submitted with restricted rights under Department of Energy Contract No. ____. It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice.

(b) This computer software may be:

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used, copied for use, in a backup or replacement computer if any computer for which it was acquired is inoperative or is replaced;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that only the portions of the derivative software consisting of the restricted computer software are to be made subject to the same restricted rights; and

(5) Disclosed to and reproduced for use by contractors under a service contract (of the

type defined in 48 CFR 37.101) in accordance with subparagraphs (b)(1) through (4) of this Notice, provided the Government makes such disclosure or reproduction subject to these restricted rights.

(c) Notwithstanding the foregoing, if this computer software has been published under copyright, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in the restricted rights notice above.

(d) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of Notice)

(2) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

Restricted Rights Notice—Short Form

Use, reproduction, or disclosure is subject to restrictions set forth in the Long Form Notice of DOE Contract No. ____ with (name of Contractor).

(End of Notice)

(3) If the software is embedded, or if it is commercially impractical to mark it with human readable text, then the symbol R and the clause date (mo/yr) in brackets or a box, a [R-mo/yr], may be used. This will be read to mean restricted computer software, subject to the rights of the Government as described in the Long Form Notice, in effect as of the date indicated next to the symbol. The symbol shall not be used to mark human readable material. In the event this Contract contains any variation to the rights in the Long Form Notice, then the contract number must also be cited.

(4) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, the software will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions and with unlimited rights, unless the Contractor includes the following statement with such copyright notice ''Unpublished-rights reserved under the Copyright Laws of the United States.''

(i) Relationship to patents. Nothing contained in this clause creates or is intended to imply a license to the Government in any patent or is intended to be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.2704–3(b), where access to Category C–24 restricted data is contemplated in the performance of a contract the contracting officer shall insert the phrase ''and except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology'' after ''laser isotope separation'' and before the comma in paragraph (b)(2)(ii) of the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer, as appropriate.

(End of Clause)

970.5227–3 Technology Transfer Mission.

As prescribed in 48 CFR 970.2770–4(a), insert the following clause:

Technology Transfer Mission (Month and Year TBE)

This clause has as its purpose implementation of the National Competitiveness Technology Transfer Act of 1989 (Sections 3131, 3132, 3133, and 3157 of Pub. L. 101–189 and as amended by Pub. L. 103–160, Sections 3134 and 3160). The Contractor shall conduct technology transfer activities with a purpose of providing benefit from Federal research to U.S. industrial competitiveness.

(a) Authority. (1) In order to ensure the full use of the results of research and development efforts of, and the capabilities of, the Laboratory, technology transfer, including Cooperative Research and Development Agreements (CRADAs), is established as a mission of the Laboratory consistent with the policy, principles and purposes of Sections 11(a)(1) and 12(g) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a); Section 3132(b) of Pub. L. 101–189, Sections 3134 and 3160 of Pub. Law 103–160, and of Chapter 38 of the Patent Laws (35 U.S.C. 200 *et seq.*); Section 152 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2182); Section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5908); and Executive Order 12591 of April 10, 1987.

(2) In pursuing the technology transfer mission, the Contractor is authorized to conduct activities including but not limited to: identifying and protecting Intellectual Property made, created or acquired at or by the Laboratory; negotiating licensing agreements and assignments for Intellectual Property made, created or acquired at or by the Laboratory that the Contractor controls or owns; bailments; negotiating all aspects of and entering into CRADAs; providing technical consulting and personnel exchanges; conducting science education activities and reimbursable Work for Others (WFO); providing information exchanges; and making available laboratory or weapon production user facilities. It is fully expected that the Contractor shall use all of the mechanisms available to it to accomplish this technology transfer mission, including, but not limited to, CRADAs, user facilities, WFO, science education activities, consulting, personnel, assignments, and licensing in accordance with this clause.

(b) *Definitions* (1) *Contractor's Laboratory Director* means the individual who has supervision over all or substantially all of the Contractor's operations at the Laboratory.

(2) *Intellectual Property* means patents, trademarks, copyrights, mask works, protected CRADA information, and other forms of comparable property rights protected by Federal Law and other foreign counterparts.

(3) *Cooperative Research and Development Agreement (CRADA)* means any agreement entered into between the Contractor as operator of the Laboratory, and one or more parties including at least one non-Federal party under which the Government, through its laboratory, provides personnel, services, facilities, equipment, intellectual property, or other resources with or without reimbursement (but not funds to non-Federal parties) and the non-Federal parties provide funds, personnel, services, facilities, equipment, intellectual property, or other resources toward the conduct of specified research or development efforts which are consistent with the missions of the Laboratory; except that such term does not include a procurement contract, grant, or cooperative agreement as those terms are used in sections 6303, 6304, and 6305 of Title 31 of the United States Code.

(4) *Joint Work Statement* (*JWS*) means a proposal for a CRADA prepared by the Contractor, signed by the Contractor's Laboratory Director or designee which describes the following:

(i) Purpose;

(ii) Scope of Work which delineates the rights and responsibilities of the Government, the Contractor and Third Parties, one of which must be a non-Federal party;

(iii) Schedule for the work; and

(iv) Cost and resource contributions of the parties associated with the work and the schedule.

(5) *Assignment* means any agreement by which the Contractor transfers ownership of Laboratory Intellectual Property, subject to the Government's retained rights.

(6) *Laboratory Biological Materials* means biological materials capable of replication or reproduction, such as plasmids, deoxyribonucleic acid molecules, ribonucleic acid molecules, living organisms of any sort and their progeny, including viruses, prokaryote and eukaryote cell lines, transgenic plants and animals, and any derivatives or modifications thereof or products produced through their use or associated biological products, made under this contract by Laboratory employees or through the use of Laboratory research facilities.

(7) *Laboratory Tangible Research Product* means tangible material results of research which

(i) Are provided to permit replication, reproduction, evaluation or confirmation of the research effort, or to evaluate its potential commercial utility;

(ii) Are not materials generally commercially available; and

(iii) Were made under this contract by Laboratory employees or through the use of Laboratory research facilities.

(8) *Bailment* means any agreement in which the Contractor permits the commercial or non-commercial transfer of custody, access or use of Laboratory Biological Materials or Laboratory Tangible Research Product for a specified purpose of technology transfer or research and development, including without limitation evaluation, and without transferring ownership to the bailee.

(c) *Allowable Costs.* (1) The Contractor shall establish and carry out its technology transfer efforts through appropriate organizational elements consistent with the requirements for an Office of Research and Technology Applications (ORTA) pursuant to paragraphs (b) and (c) of Section 11 of the

Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710). The costs associated with the conduct of technology transfer through the ORTA including activities associated with obtaining, maintaining, licensing, and assigning Intellectual Property rights, increasing the potential for the transfer of technology, and the widespread notice of technology transfer opportunities, shall be deemed allowable provided that such costs meet the other requirements of the allowable costs provisions of this Contract. In addition to any separately designated funds, these costs in any fiscal year shall not exceed an amount equal to 0.5 percent of the operating funds included in the Federal research and development budget (including Work For Others) of the Laboratory for that fiscal year without written approval of the contracting officer.

(2) The Contractor's participation in litigation to enforce or defend Intellectual Property claims incurred in its technology transfer efforts shall be as provided in the clause entitled ''Insurance—Litigation and Claims'' of this contract.

(d) Conflicts of Interest—Technology Transfer. The Contractor shall have implementing procedures that seek to avoid employee and organizational conflicts of interest, or the appearance of conflicts of interest, in the conduct of its technology transfer activities. These procedures shall apply to other persons participating in Laboratory research or related technology transfer activities. Such implementing procedures shall be provided to the contracting officer for review and approval within sixty (60) days after execution of this contract. The contracting officer shall have thirty (30) days thereafter to approve or require specific changes to such procedures. Such implementing procedures shall include procedures to:

(1) Inform employees of and require conformance with standards of conduct and integrity in connection with the CRADA activity in accordance with the provisions of paragraph (n)(5) of this clause;

(2) Review and approve employee activities so as to avoid conflicts of interest arising from commercial utilization activities relating to Contractor-developed Intellectual Property;

(3) Conduct work performed using royalties so as to avoid interference with or adverse effects on ongoing DOE projects and programs;

(4) Conduct activities relating to commercial utilization of Contractor-developed Intellectual Property so as to avoid interference with or adverse effects on user facility or WFO activities of the Contractor;

(5) Conduct DOE-funded projects and programs so as to avoid the appearance of conflicts of interest or actual conflicts of interest with non-Government funded work;

(6) Notify the contracting officer with respect to any new work to be performed or proposed to be performed under the Contract for DOE or other Federal agencies where the new work or proposal involves Intellectual Property in which the Contractor has obtained or intends to request or elect title;

(7) Except as provided elsewhere in this Contract, obtain the approval of the contracting officer for any licensing of or assignment of title to Intellectual Property rights by the Contractor to any business or corporate affiliate of the Contractor;

(8) Obtain the approval of the contracting officer prior to any assignment, exclusive licensing, or option for exclusive licensing, of Intellectual Property to any individual who has been a Laboratory employee within the previous two years or to the company in which the individual is a principal; and

(9) Notify non-Federal sponsors of WFO activities, or non-Federal users of user facilities, of any relevant Intellectual Property interest of the Contractor prior to execution of WFOs or user agreements.

(10) Notify DOE prior to evaluating a proposal by a third party or DOE, when the subject matter of the proposal involves an elected or waived subject invention under this contract or one in which the Contractor intends to elect to retain title under this contract.

(e) Fairness of Opportunity. In conducting its technology transfer activities, the Contractor shall prepare procedures and take all reasonable measures to ensure widespread notice of availability of technologies suited for transfer and opportunities for exclusive licensing and joint research arrangements. The requirement to widely disseminate the availability of technology transfer opportunities does not apply to a specific application originated outside of the Laboratory and by entities other than the Contractor.

(f) U.S. Industrial Competitiveness. (1) In the interest of enhancing U.S. Industrial Competitiveness, the Contractor shall, in its licensing and assignments of Intellectual Property, give preference in such a manner as to enhance the accrual of economic and technological benefits to the U.S. domestic economy. The Contractor shall consider the following factors in all of its licensing and assignment decisions involving Laboratory intellectual property where the Laboratory obtains rights during the course of the Contractor's operation of the Laboratory under this contract:

(i) whether any resulting design and development will be performed in the United States and whether resulting products, embodying parts, including components thereof, will be substantially manufactured in the United States; or

(ii) (A) whether the proposed licensee or assignee has a business unit located in the United States and whether significant economic and technical benefits will flow to the United States as a result of the license or assignment agreement; and

(B) in licensing any entity subject to the control of a foreign company or government, whether such foreign government permits United States agencies, organizations or other persons to enter into cooperative research and development agreements and licensing agreements, and has policies to protect United States Intellectual Property rights.

(2) If the Contractor determines that neither of the conditions in paragraphs (f)(1)(i) or (ii) of this clause are likely to be fulfilled, the Contractor, prior to entering into such an agreement, must obtain the approval of the contracting officer. The contracting officer shall act on any such requests for approval within thirty (30) days.

(3) The Contractor agrees to be bound by the provisions of 35 U.S.C. 204 (Preference for United States industry).

(g) Indemnity—Product Liability. In entering into written technology transfer agreements, including but not limited to, research and development agreements, licenses, assignments and CRADAs, the Contractor agrees to include in such agreements a requirement that the U.S. Government and the Contractor, except for any negligent acts or omissions of the Contractor, be indemnified for all damages, costs, and expenses, including attorneys' fees, arising from personal injury or property damage occurring as a result of the making, using or selling of a product, process or service by or on behalf of the Participant, its assignees or licensees which was derived from the work performed under the agreement. The Contractor shall identify and obtain the approval of the contracting officer for any proposed exceptions to this requirement such as where State or local law expressly prohibit the Participant from providing indemnification or where the research results will be placed in the public domain.

(h) Disposition of Income. (1) Royalties or other income earned or retained by the Contractor as a result of performance of authorized technology transfer activities herein shall be used by the Contractor for scientific research, development, technology transfer, and education at the Laboratory, consistent with the research and development mission and objectives of the Laboratory and subject to Section 12(b)(5) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(b)(5)) and Chapter 38 of the Patent Laws (35 U.S.C. 200 *et seq.*) as amended through the effective date of this contract award or modification. If the net amounts of such royalties and income received from patent licensing after payment of patenting costs, licensing costs, payments to inventors and other expenses incidental to the administration of Subject Inventions during any fiscal year exceed 5 percent of the Laboratory's budget for that fiscal year, 75 percent of such excess amounts shall be paid to the Treasury of the United States, and the remaining amount of such excess shall be used by the Contractor for the purposes as described above in this paragraph. Any inventions arising out of such scientific research and development activities shall be deemed to be Subject Inventions under the Contract.

(2) The Contractor shall include as a part of its annual Laboratory Institutional Plan or other such annual document a plan setting out those uses to which royalties and other income received as a result of performance of authorized technology transfer activities herein will be applied at the Laboratory, and at the end of the year, provide a separate accounting for how the funds were actually used. Under no circumstances shall these royalties and income be used for an illegal augmentation of funds furnished by the U.S. Government.

(3) The Contractor shall establish subject to the approval of the contracting officer a

policy for making awards or sharing of royalties with Contractor employees, other coinventors and coauthors, including Federal employee coinventors when deemed appropriate by the contracting officer.

(i) Transfer to Successor Contractor. In the event of termination or upon the expiration of this Contract, any unexpended balance of income received for use at the Laboratory shall be transferred, at the contracting officer's request, to a successor contractor, or in the absence of a successor contractor, to such other entity as designated by the contracting officer. The Contractor shall transfer title, as one package, to the extent the Contractor retains title, in all patents and patent applications, licenses, accounts containing royalty revenues from such license agreements, including equity positions in third party entities, and other Intellectual Property rights which arose at the Laboratory, to the successor contractor or to the Government as directed by the contracting officer.

(j) Technology Transfer Affecting the National Security.

(1) The Contractor shall notify and obtain the approval of the contracting officer, prior to entering into any technology transfer arrangement, when such technology or any part of such technology is classified or sensitive under Section 148 of the Atomic Energy Act (42 U.S.C. 2168). Such notification shall include sufficient information to enable DOE to determine the extent that commercialization of such technology would enhance or diminish security interests of the United States, or diminish communications within DOE's nuclear weapon production complex. DOE shall use its best efforts to complete its determination within sixty (60) days of the Contractor's notification, and provision of any supporting information, and DOE shall promptly notify the Contractor as to whether the technology is transferable.

(2) The Contractor shall include in all of its technology transfer agreements with third parties, including, but not limited to, CRADAs, licensing agreements and assignments, notice to such third parties that the export of goods and/or Technical Data from the United States may require some form of export control license or other authority from the U.S. Government and that failure to obtain such export control license may result in criminal liability under U.S. laws.

(3) For other than fundamental research as defined in National Security Decision Directive 189, the Contractor is responsible to conduct internal export control reviews and assure that technology is transferred in accordance with applicable law.

(k) Records. The Contractor shall maintain records of its technology transfer activities in a manner and to the extent satisfactory to the DOE and specifically including, but not limited to, the licensing agreements, assignments and the records required to implement the requirements of paragraphs (e), (f), and (h) of this clause and shall provide reports to the contracting officer to enable DOE to maintain the reporting requirements of Section 12(c)(6) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(c)(6)). Such reports shall be made annually in a format to be agreed upon between the Contractor and DOE and in such a format which will serve to adequately inform DOE of the Contractor's technology transfer activities while protecting any data not subject to disclosure under the Rights in Technical Data clause and paragraph (n) of this clause. Such records shall be made available in accordance with the clauses of this Contract pertaining to inspection, audit and examination of records.

(l) Reports to Congress. To facilitate DOE's reporting to Congress, the Contractor is required to submit annually to DOE a technology transfer plan for conducting its technology transfer function for the upcoming year, including plans for securing Intellectual Property rights in Laboratory innovations with commercial promise and plans for managing such innovations so as to benefit the competitiveness of United States industry. This plan shall be provided to the contracting officer on or before October 1st of each year.

(m) Oversight and Appraisal. The Contractor is responsible for developing and implementing effective internal controls for all technology transfer activities consistent with the audit and record requirements of this Contract. Laboratory Contractor performance in implementing the technology transfer mission and the effectiveness of the Contractor's procedures will be evaluated by the contracting officer as part of the annual appraisal process, with input from the cognizant Secretarial Officer or program office.

(n) Technology Transfer Through Cooperative Research and Development Agreements. Upon approval of the contracting officer and as provided in a DOE approved Joint Work Statement (JWS), the Laboratory Director, or designee, may enter into CRADAs on behalf of the DOE subject to the requirements set forth in this paragraph.

(1) Review and Approval of CRADAs. (i) Except as otherwise directed in writing by the contracting officer, each JWS shall be submitted to the contracting officer for approval. The Contractor's Laboratory Director or designee shall provide a program mission impact statement and shall include an impact statement regarding related Intellectual Property rights known by the Contractor to be owned by the Government to assist the contracting officer in the approval determination.

(ii) The Contractor shall also include (specific to the proposed CRADA), a statement of compliance with the Fairness of Opportunity requirements of paragraph (e) of this clause.

(iii) Within ninety (90) days after submission of a JWS, the contracting officer shall approve, disapprove or request modification to the JWS. If a modification is required, the contracting officer shall approve or disapprove any resubmission of the JWS within thirty (30) days of its resubmission, or ninety (90) days from the date of the original submission, whichever is later. The contracting officer shall provide a written explanation to the Contractor's Laboratory Director or designee of any disapproval or requirement for modification of a JWS.

(iv) Upon approval of a JWS, the Contractor's Laboratory Director or designee may submit a CRADA, based upon the approved JWS, to the contracting officer. The contracting officer, within thirty (30) days of receipt of the CRADA, shall approve or request modification of the CRADA. If the contracting officer requests a modification of the CRADA, an explanation of such request shall be provided to the Laboratory Director or designee.

(v) Except as otherwise directed in writing by the contracting officer, the Contractor shall not enter into, or begin work under, a CRADA until approval of the CRADA has been granted by the contracting officer. The Contractor may submit its proposed CRADA to the contracting officer at the time of submitting its proposed JWS or any time thereafter. However, the contracting officer is not obligated to respond under paragraph (n)(1)(iv) of this clause until within thirty (30) days after approval of the JWS or thirty (30) days after submittal of the CRADA, whichever is later.

(2) Selection of Participants. The Contractor's Laboratory Director or designee in deciding what CRADA to enter into shall:

(i) Give special consideration to small business firms, and consortia involving small business firms;

(ii) Give preference to business units located in the United States which agree that products or processes embodying Intellectual Property will be substantially manufactured or practiced in the United States and, in the case of any industrial organization or other person subject to the control of a foreign company or government, take into consideration whether or not such foreign government permits United States agencies, organizations, or other persons to enter into cooperative research and development agreements and licensing agreements;

(iii) Provide Fairness of Opportunity in accordance with the requirements of paragraph (e) of this clause; and

(iv) Give consideration to the Conflicts of Interest requirements of paragraph (d) of this clause.

(3) Withholding of Data. (i) Data that is first produced as a result of research and development activities conducted under a CRADA and that would be a trade secret or commercial or financial data that would be privileged or confidential, if such data had been obtained from a non-Federal third party, may be protected from disclosure under the Freedom of Information Act as provided in the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(c)(7)) for a period as agreed in the CRADA of up to five (5)years from the time the data is first produced. The DOE shall cooperate with the Contractor in protecting such data.

(ii) Unless otherwise expressly approved by the contracting officer in advance for a specific CRADA, the Contractor agrees, at the request of the contracting officer, to transmit such data to other DOE facilities for use by DOE or its Contractors by or on behalf of the Government. When data protected pursuant

to paragraph (n)(3)(i) of this clause is so transferred, the Contractor shall clearly mark the data with a legend setting out the restrictions against private use and further dissemination, along with the expiration date of such restrictions.

(iii) In addition to its authority to license Intellectual Property, the Contractor may enter into licensing agreements with third parties for data developed by the Contractor under a CRADA subject to other provisions of this Contract. However, the Contractor shall neither use the protection against dissemination nor the licensing of data as an alternative to the submittal of invention disclosures which include data protected pursuant to paragraph (n)(3)(i) of this clause.

(4) Work For Others and User Facility Programs. (i) WFO and User Facility Agreements (UFAs) are not CRADAs and will be available for use by the Contractor in addition to CRADAs for achieving utilization of employee expertise and unique facilities for maximizing technology transfer. The Contractor agrees form prospective CRADA participants, which are intending to substantially pay full cost recovery for the effort under a proposed CRADA, of the availability of alternative forms of agreements, i.e., WFO and UFA, and of the Class Patent Waiver provisions associated therewith.

(ii) Where the Contractor believes that the transfer of technology to the U.S. domestic economy will benefit from, or other equity considerations dictate, an arrangement other than the Class Waiver of patent rights to the sponsor in WFO and UFAs, a request may be made to the contracting officer for an exception to the Class Waivers.

(iii) Rights to inventions made under agreements other than funding agreements with third parties shall be governed by the appropriate provisions incorporated, with DOE approval, in such agreements, and the provisions in such agreements take precedence over any disposition of rights contained in this Contract. Disposition of rights under any such agreement shall be in accordance with any DOE class waiver (including Work for Others and User Class Waivers) or individually negotiated waiver which applies to the agreement.

(5) Conflicts of Interest. (i) Except as provided in paragraph (n)(5)(iii) of this clause, the Contractor shall assure that no employee of the Contractor shall have a substantial role (including an advisory role) in the preparation, negotiation, or approval of a CRADA, if, to such employee's knowledge:

(A) Such employee, or the spouse, child, parent, sibling, or partner of such employee, or an organization (other than the Contractor) in which such employee serves as an officer, director, trustee, partner, or employee—

(*1*) holds financial interest in any entity, other than the Contractor, that has a substantial interest in the preparation, negotiation, or approval of the CRADA;

(*2*) receives a gift or gratuity from any entity, other than the Contractor, that has a substantial interest in the preparation, negotiation, or approval of the CRADA; or

(B) A financial interest in any entity, other than the Contractor, that has a substantial interest in the preparation, negotiation, or approval of the CRADA, is held by any person or organization with whom such employee is negotiating or has any arrangement concerning prospective employment.

(ii) The Contractor shall require that each employee of the Contractor who has a substantial role (including an advisory role) in the preparation, negotiation, or approval of a CRADA certify through the Contractor to the contracting officer that the circumstances described in paragraph (n)(5)(i) of this clause do not apply to that employee.

(iii) The requirements of paragraphs (n)(5)(i) and (n)(5)(ii) of this clause shall not apply in a case where the contracting officer is advised by the Contractor in advance of the participation of an employee described in those paragraphs in the preparation, negotiation or approval of a CRADA of the nature of and extent of any financial interest described in paragraph (n)(5)(i) of this clause, and the contracting officer determines that such financial interest is not so substantial as to be considered likely to affect the integrity of the Contractor employee's participation in the process of preparing, negotiating, or approving the CRADA.

(o) Technology Transfer in Other Cost-Sharing Agreements. In conducting research and development activities in cost-shared agreements not covered by paragraph (n) of this clause, the Contractor, with prior written permission of the contracting officer, may provide for the withholding of data produced thereunder in accordance with the applicable provisions of paragraph (n)(3) of this clause.

(End of clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.2770–4(b), add the following definition under paragraph (b) and the following new paragraph (p):

(b)(8) Privately funded technology transfer means the prosecuting, maintaining, licensing, and marketing of inventions which are not owned by the Government (and not related to CRADAs) when such activities are conducted entirely without the use of Government funds.

(p) Nothing in paragraphs (c) Allowable Costs, (e) Fairness of Opportunity, (f) U.S. Industrial Competitiveness, (g) Indemnity—Product Liability, (h) Disposition of Income, and (i) Transfer to Successor Contractor of this clause are intended to apply to the contractor's privately funded technology transfer activities if such privately funded activities are addressed elsewhere in the contract.

Alternate II (Month and Year TBE). As prescribed in 48 CFR 970.2770–4(c), the contracting officer shall substitute the phrase ''weapon production facility'' wherever the word ''laboratory'' appears in the clause.

970.5228–1 Insurance—Litigation and Claims.

As prescribed in 48 CFR 970.2803–2, insert the following clause:

Insurance—Litigation and Claims (Month and Year TBE)

(a) The contractor may, with the prior written authorization of the contracting officer, and shall, upon the request of the Government, initiate litigation against third parties, including proceedings before administrative agencies, in connection with this contract. The contractor shall proceed with such litigation in good faith and as directed from time to time by the contracting officer.

(b) The contractor shall give the contracting officer immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency, filed against the contractor arising out of the performance of this contract. Except as otherwise directed by the contracting officer, in writing, the contractor shall furnish immediately to the contracting officer copies of all pertinent papers received by the contractor with respect to such action. The contractor, with the prior written authorization of the contracting officer, shall proceed with such litigation in good faith and as directed from time to time by the contracting officer.

(c)(1) Except as provided in paragraph (c)(2) of this clause, the contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the contracting officer.

(2) The contractor may, with the approval of the contracting officer, maintain a self-insurance program; provided that, with respect to workers' compensation, the contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the contracting officer may require or approve and with sureties and insurers approved by the contracting officer.

(d) The contractor agrees to submit for the contracting officer's approval, to the extent and in the manner required by the contracting officer, any other bonds and insurance that are maintained by the contractor in connection with the performance of this contract and for which the contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the contracting officer.

(e) Except as provided in subparagraphs (g) and (h) of this clause, or specifically disallowed elsewhere in this contract, the contractor shall be reimbursed—

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance or otherwise without regard to and as an exception to the clause of this contract entitled, ''Obligation of Funds.''

(f) The Government's liability under paragraph (e) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(g) Notwithstanding any other provision of this contract, the contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities, including litigation costs, counsel fees, judgment and settlements)—

(1) Which are otherwise unallowable by law or the provisions of this contract; or

(2) For which the contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the contracting officer.

(h) In addition to the cost reimbursement limitations contained in DEAR 970.3102–1–2, and notwithstanding any other provision of this contract, the contractor's liabilities to third persons (and any expenses incidental to such liabilities, including litigation costs, counsel fees, judgments and settlements) shall not be reimbursed if such liabilities were caused by contractor managerial personnel's—

(1) Willful misconduct,

(2) Lack of good faith, or

(3) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.

(i) The burden of proof shall be upon the contractor to establish that costs covered by paragraph (h) of this clause are allowable and reasonable if, after an initial review of the facts, the contracting officer challenges a specific cost or informs the contractor that there is reason to believe that the cost results from willful misconduct, lack of good faith, or failure to exercise prudent business judgment by contractor managerial personnel.

(j)(1) All litigation costs, including counsel fees, judgments and settlements shall be differentiated and accounted for by the contractor so as to be separately identifiable. If the contracting officer provisionally disallows such costs, then the contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the contracting officer.

(3) The portion of the cost of insurance obtained by the contractor that is allocable to coverage of liabilities referred to in paragraph (g)(1) of this clause is not allowable.

(4) The term ''contractor's managerial personnel'' is defined in clause paragraph (j) of 48 CFR 970.5245–1.

(k) The contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the contractor for any unallowable or unreimbursable costs incurred in connection with contract performance.

(l) If any suit or action is filed or any claim is made against the contractor, the cost and expense of which may be reimbursable to the contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the contractor shall—

(1) Immediately notify the contracting officer and promptly furnish copies of all pertinent papers received;

(2) Authorize Department representatives to collaborate with: In-house or DOE-approved outside counsel in settling or defending the claim; or counsel for the insurance carrier in settling or defending the claim if the amount of the liability claimed exceeds the amount of coverage, unless precluded by the terms of the insurance contract; and

(3) Authorize Department representatives to settle the claim or to defend or represent the contractor in and/or to take charge of any litigation, if required by the Department, if the liability is not insured or covered by bond. In any action against more than one Department contractor, the Department may require the contractor to be represented by common counsel. Counsel for the contractor may, at the contractor's own expense, be associated with the Department representatives in any such claim or litigation.

(End of Clause)

970.5229–1 State and Local Taxes.

As prescribed in 48 CFR 970.2904–1(b), insert the following clause in management and operating contracts. The requirement for the notice prescribed in paragraph (a) of the clause may be broadened to include all State and local taxes which may be claimed as allowable costs when considered to be appropriate.

State and Local Taxes (Month and Year TBE)

(a) The contractor agrees to notify the contracting officer of any State or local tax, fee, or charge levied or purported to be levied on or collected from the contractor with respect to the contract work, any transaction thereunder, or property in the custody or control of the contractor and constituting an allowable item of cost if due and payable, but which the contractor has reason to believe, or the contracting officer has advised the contractor, is or may be inapplicable or invalid; and the contractor further agrees to refrain from paying any such tax, fee, or charge unless authorized in writing by the contracting officer. Any State or local tax, fee, or charge paid with the approval of the contracting officer or on the basis of advice from the contracting officer that such tax, fee, or charge is applicable and valid, and which would otherwise be an allowable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax, fee, or charge was in fact inapplicable or invalid.

(b) The contractor agrees to take such action as may be required or approved by the contracting officer to cause any State or local tax, fee, or charge which would be an allowable cost to be paid under protest; and to take such action as may be required or approved by the contracting officer to seek recovery of any payments made, including assignment to the Government or its designee of all rights to an abatement or refund thereof, and granting permission for the Government to join with the contractor in any proceedings for the recovery thereof or to sue for recovery in the name of the contractor. If the contracting officer directs the contractor to institute litigation to enjoin the collection of or to recover payment of any such tax, fee, or charge referred to above, or if a claim or suit is filed against the contractor for a tax, fee, or charge it has refrained from paying in accordance with this article, the procedures and requirements of the clause entitled ''Insurance-Litigation and Claims'' shall apply and the costs and expenses incurred by the contractor shall be allowable items of costs, as provided in this contract, together with the amount of any judgment rendered against the contractor.

(c) The Government shall hold the contractor harmless from penalties and interest incurred through compliance with this clause. All recoveries or credits in respect of the foregoing taxes, fees, and charges (including interest) shall inure to and be for the sole benefit of the Government.

(End of Clause)

970.5231–1 Allowable Costs and Fee (Management and Operating Contracts).

As prescribed in 48 CFR 970.3170(a), insert the following clause:

Allowable Costs and Fee (Management And Operating Contracts) (Month and Year TBE)

(a) Compensation for contractor's services. Payment for the allowable costs as hereinafter defined, and of the fixed-fee, if any, as hereinafter provided, shall constitute full and complete compensation for the performance of the work under this contract.

(b) Fixed-fee. The fixed-fee payable to the contractor for the performance of the work under this contract is $____ There shall be no adjustment in the amount of the contractor's fixed-fee by reason of differences between any estimate of cost for performance of the work under this contract and the actual costs for performance of that work.

(c) Allowable costs. The allowable cost of performing the work under this contract shall be the costs and expenses that are actually incurred by the contractor in the performance of the contract work in accordance with its terms, that are necessary or incident thereto, and that are determined to be allowable as set forth in this paragraph. The determination of allowability of cost shall be based on:

(1) Allowability and reasonableness in accordance with 48 CFR 31.201–2(d) and 31.201–3;

(2) Standards promulgated by the Cost Accounting Standards Board, if applicable; otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances; and

(3) Recognition of all exclusions and limitations set forth in this clause or elsewhere in this contract as to types or amounts of items of cost. Allowable costs shall not include the cost of any item described as unallowable in paragraph (e) of this clause except as indicated therein. Failure to mention an item of cost specifically in paragraphs (d) or (e) of this clause shall not imply either that it is allowable or that it is unallowable.

(d) Items of allowable cost. Subject to the other provisions of this clause, the following items of cost of work done under this contract shall be allowable to the extent indicated:

(1) Bonds and insurance, including self-insurance, as provided in the clause entitled, ''Insurance-Litigation and Claims.''

(2) Communication costs, including telephone services, local and long-distance calls, telegrams, cablegrams, postage, and similar items.

(3) Consulting services (including legal and accounting), and related expenses, as approved by the contracting officer, except as made unallowable by paragraphs (e)(16) and (e)(26).

(4) Reasonable litigation and other legal expenses, including counsel fees, if incurred in accordance with the clause of the contract entitled, ''Insurance-Litigation and Claims'', and the DOE approved contractor litigation management procedures (including cost guidelines) as such procedures may be revised from time to time, and if not otherwise made unallowable in this contract.

(5) Losses and expenses (including settlements made with the consent of the contracting officer) sustained by the contractor in the performance of this contract and certified in writing by the contracting officer to be reasonable, except the losses and expenses expressly made unallowable under other provisions of this contract.

(6) Materials, supplies, and equipment, including freight transportation, material handling, inspection, storage, salvage, and other usual expenses incident to the procurement, use and disposition thereof, subject to approvals required under other provisions of this contract.

(7) Patents, purchased design, and royalty payments to the extent expressly provided for under other provisions in this contract or as approved by the contracting officer, and preparation of invention disclosures, reports and related documents, and searching the art to the extent necessary to make such invention disclosures in accordance with any ''Patent Rights'' clause of this contract.

(8) Personnel costs and related expenses incurred in accordance with the personnel appendix which is hereby incorporated by reference and made a part of this contract. It is specifically understood and agreed that said personnel appendix sets forth in detail personnel costs and related expenses to be allowable under this contract and is intended to document those personnel policies, practices and plans which have been found acceptable by the contracting officer. It is further understood and agreed that the contractor will advise DOE of any proposed changes in any matters covered by said policies, practices or plans which relate to this item of cost, and that the personnel appendix may be modified from time to time in writing by mutual agreement of the contractor and DOE without execution of an amendment to this contract for the purpose of effectuating any such changes in, or additions to, said personnel appendix as may be agreed upon by the parties. Such modifications shall be evidenced by execution of written numbered approval letters from the contracting officer or the contracting officer's representative. Types of personnel costs and related expenses to be incorporated into the personnel appendix, or amendments thereto, are as follows:

(i) Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; nonwork time, including vacations, holidays, sick, funeral, military, jury, witness, and voting leave; salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees, provided, however, that the contracting officer's approval is required in each instance of total compensation to an individual employee at an annual rate of $—— (see 48 CFR 970.3102–3–2) or more, when it is proposed that a total of 50 percent or more of such compensation be reimbursed under DOE cost-type contracts. Total compensation, as used here, includes only the employee's base salary, bonus, and incentive compensation payments;

(ii) Legally required contributions to old-age and survivors' insurance, unemployment compensation plans, and workers compensation plans, (whether or not covered by insurance); voluntary or agree-upon plans providing benefits for retirement, separation, life insurance, hospitalization, medical-surgical and unemployment (whether or not such plans are covered by insurance);

(iii) Travel (except foreign travel, which requires specific approval by the contracting officer on a case-by-case basis); incidental subsistence and other allowances of contractor employees, in connection with performance of work under this contract (including new employees reporting for work and transfer of employees, the transfer of their household goods and effects and the travel and subsistence of their dependents);

(iv) Employee relations, welfare, morale, etc.; programs including incentive or suggestion awards; employee counseling services, health or first-aid clinics; house or employee publications; and wellness/fitness centers;

(v) Personnel training (except special education and training courses and research assignments calling for attendance at educational institutions which require specific approval by the contracting officer on a case-by-case basis); including apprenticeship training programs designed to improve efficiency and productivity of contract operations, to develop needed skills, and to develop scientific and technical personnel in specialized fields required in the contract work;

(vi) Recruitment of personnel (including help-wanted advertisement), including service of employment agencies at rates not in excess of standard commercial rates, employment office, travel of prospective employees at the request of the contractor for employment interviews; and

(vii) Net cost of operating plant-site cafeteria, dining rooms, and canteens attributable to the performance of the contract.

(viii) Compensation of a senior executive, provided that such compensation does not exceed the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy. Costs of executive compensation shall be determined pursuant to 48 CFR 31.205–6(p).

(9) Repairs, maintenance, inspection, replacement, and disposal of Government-owned property and the restoration or clean-up of site and facilities to the extent approved by the contracting officer and as allowable under paragraph (f) of the clause of this contract entitled, ''Property.''

(10) Subcontracts and purchase orders, including procurements from contractor-controlled sources, subject to approvals required by other provisions of this contract.

(11) Subscriptions to trade, business, technical, and professional periodicals, as approved by the contracting officer.

(12) Taxes, fees, and charges levied by public agencies which the contractor is required by law to pay, except those which are expressly made unallowable under other provisions of this contract.

(13) Utility services, including electricity, gas, water, and sewerage.

(14) Indemnification of the Pension Benefit Guaranty Corporation, pursuant to the Employee Retirement Income Security Act of 1974, in accordance with 48 CFR 31.205–6(j)(3)(iv).

(15) Establishment and maintenance of bank accounts in connection with the work hereunder, including, but not limited to, service charges, the cost of disbursing cash, necessary guards, cashiers, and paymasters. If payments are made by check, facilities and arrangements for cashing checks may be provided without expense to the employees, subject to the approval of the contracting officer.

(e) Items of unallowable costs. The following items of costs are unallowable under this contract to the extent indicated:

(1) Advertising and public relations costs designed to promote the contractor or its products, including the costs of promotional items and memorabilia such as models, gifts and souvenirs, and the cost of memberships in civic and community organizations; except those advertising and public relations costs

(i) Specifically required by the contract,

(ii) Approved in advance by the contracting officer as clearly in furtherance of work performed under the contract,

(iii) That arise from requirements of the contract and that are exclusively for recruiting personnel, acquiring scarce items for contract performance, disposing of scrap or surplus materials, the transfer of federally owned or originated technology to State and local governments and to the private sector, or acquisition of contract-required supplies and services, or

(iv)Where the primary purpose of the activity is to facilitate contract performance in support of the DOE mission.

(2) Bad debts (including expenses of collection) and provisions for bad debts arising out of other business of the contractor.

(3) Proposal expenses and costs of proposals.

(4) Bonuses and similar compensation under any other name, which (i) are not pursuant to an agreement between the

contractor and employee prior to the rendering of the services or an established plan consistently followed by the contractor or (ii) are in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder, or (iii) provide total compensation to an employee in excess of reasonable compensation for the services rendered.

(5) Central and branch office expenses of the contractor, except as specifically set forth in the contract.

(6) Commissions, bonuses, and fees (under whatever name) in connection with obtaining or negotiating for a Government contract or a modification thereto, except when paid to bona fide employees or bona fide established selling organizations maintained by the contractor for the purpose of obtaining Government business.

(7) Contingency reserves, provisions for.

(8) Contributions and donations, including cash, contractor-owned property and services, regardless of the recipient.

(9) Depreciation in excess of that calculated by application of methods approved for use by the Internal Revenue Code of 1954, as amended, including the straight-line declining balance (using a rate not exceeding twice the rate which would have been used had the depreciation been computed under the straight line method), or sum-of-the-years digits method, on the basis of expected useful life, to the cost of acquisition of the related fixed assets less estimated salvage or residual value at the end of the expected useful life.

(10) Dividend provisions or payments and, in the case of sole proprietors and partners, distributions of profit.

(11) Entertainment, including costs of amusement, diversion, social activities; and directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities; costs of membership in any social, dining or country club or organization.

(12) Fines and penalties, except, with respect to civil fines and penalties only, if the contractor demonstrates to the contracting officer that—

(i) Such a civil fine or penalty was incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer; or

(ii) Such a civil fine or penalty was imposed without regard to fault and could not have been avoided by the exercise of due care.

(13) Government-furnished property, except to the extent that cash payment therefor is required pursuant to procedures of DOE applicable to transfers of such property to the contractor from others.

(14) Insurance (including any provisions of a self-insurance reserve) on any person where the contractor under the insurance policy is the beneficiary, directly or indirectly, and insurance against loss of or damage to Government property as defined in Clause

* * *

(15) Interest, however represented (except (i) Interest incurred in compliance with the contract clause entitled ''State and local Taxes'' or, (ii) imputed interest costs relating to leases classified and accounted for as capital leases under generally accepted accounting principles (GAAP), provided that the decision to enter into a capital leasing arrangement has been specifically authorized and approved by the DOE in accordance with applicable procedures and such interest costs are recorded in an appropriately specified DOE account established for such purpose), bond discounts and expenses, and costs of financing and refinancing operations.

(16) Legal, accounting, and consulting services and related costs incurred in connection with the preparation and issuance of stock, rights, organization or reorganization, prosecution or defense of antitrust suits, prosecution of claims against the United States, contesting actions of proposed actions of the United States, and prosecution or defense of patent infringement litigation (except where incurred pursuant to the contractor's performance of the Government-funded technology transfer mission and in accordance with the ''Insurance—Litigation and Claims'' clause).

(17) Losses or expenses: (i) On, or arising from the sale, exchange, or abandonment of capital assets, including investments;

(ii) On other contracts, including the contractor's contributed portion under cost-sharing contracts;

(iii) In connection with price reductions to and discount purchases by employees and others from any source;

(iv) That are compensated for by insurance or otherwise or which would have been compensated for by insurance required by law or by written direction of the contracting officer but which the contractor failed to procure or maintain through its own fault or negligence;

(v) That result from willful misconduct or lack of good faith on the part of any of the contractor's managerial personnel (as that term is defined in the clause of this contract entitled, ''Property'');

(vi) That represent liabilities to third persons that are not allowable under the clause of this contract entitled, ''Insurance—Litigation and Claims''; or

(vii) That represent liabilities to third persons for which the contractor has expressly accepted responsibility under other terms of this contract.

(18) Maintenance, depreciation, and other costs incidental to the contractor's idle or excess facilities (including machinery and equipment), other than reasonable standby facilities.

(19) Membership in trade, business, and professional organizations, except as approved by the contracting officer.

(20) Precontract costs, except as expressly made allowable under other provisions in this contract.

(21) Research and development costs, unless specifically provided for elsewhere in this contract.

(22) Selling cost, except to the extent they are determined to be reasonable and to be allocable to the contract. Allocability of selling costs to the contract will be determined in the light of reasonable benefit to the agency program arising from such activities as technical, consulting, demonstration, and other services performed for such purposes as applying or adapting the contractor's product for agency use.

(23) Storage of records pertaining to this contract after completion of operations under this contract, irrespective of contractual or statutory requirement for the preservation of records.

(24) Taxes, fees, and charges in connection with financing, refinancing, or refunding operations, including listing of securities on exchanges, taxes which are paid contrary to the clause entitled ''State and Local Taxes,'' federal taxes on net income and excess profits, special assessments on land which represent capital improvement and taxes on accumulated funding deficiencies of, or prohibited transactions involving, employee deferred compensation plans pursuant to section 4971 or section 4975 of the Internal Revenue Code of 1954, as amended, respectively.

(25) Travel expenses of the officers, proprietors, executives, administrative heads and other employees of the contractor's central office or branch office organizations concerned with the general management, supervision, and conduct of the contractor's business as a whole, except to the extent that particular travel is in connection with the contract and approved by the contracting officer.

(26) Salary or other compensation (and expenses related thereto) of any individual employed under this contract as a consultant or in another comparable employment capacity who is an employee of another organizational and concurrently performing work on a full-time annual basis for that organization under a cost-type contract with DOE, except to the extent that cash payment therefor is required pursuant to the provisions of this contract or procedure of DOE applicable to the borrowing of such an individual from another cost-type contractor.

(27) Travel by commercial aircraft or travel by other than common carrier that is not necessary for the performance of this contract or the cost of which exceeds the lesser of the lowest available commercial discount airfare, Government contract airfare, or customary standard (coach or equivalent) commercial airfare. Airfare costs in excess of the lowest such airfare are unallowable, except when such accommodations: Require circuitous routing; require travel during unreasonable hours; excessively prolong travel; result in increased cost that would offset transportation savings; would offer accommodations not reasonably adequate for the physical or medical needs of the traveler; or are not reasonably available to meet necessary mission requirements. Individual contractor determinations of nonavailability of commercial discount airfare or Government contract airfare will not be contested by DOE when the contractor can reasonably demonstrate such nonavailability or, on an overall basis, that established policies and procedures result in the routine use of the lowest available airfare. However, in order for air travel costs in excess of customary standard airfare to be allowable, the contractor must justify and document the applicable condition(s) set forth above.

(28) Special construction industry ''funds'' financed by employer contributions for such purposes as methods and materials research, public and industry relations, market

development, and disaster relief, except as specifically provided elsewhere in this contract.

(29) Late premium payment charges related to employee deferred compensation plan insurance.

(30) Facilities capital cost of money. (CAS 414 and CAS 417).

(31) Contractor costs incurred to influence either directly or indirectly—

(i) Legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State; or

(ii) Federal, State, or executive body of a political subdivision of a State action on regulatory and contract matters as described in the ''Political Activity Cost Prohibition'' clause of this contract.

(32) Commercial automobile rental expenses unless approved by the contracting officer.

(33) Costs incurred in connection with any criminal, civil or administrative proceeding commenced by the Federal Government or a State, local or foreign government, as provided in the clause titled ''Cost prohibitions related to legal and other proceedings'' incorporated elsewhere in this contract.

(34) Costs of alcoholic beverages.

(35) Contractor employee travel costs incurred for lodging, meals and incidental expenses which exceed on a daily basis the applicable maximum per diem rates in effect for Federal civilian employees at the time of travel. When the applicable maximum per diem rate is inadequate due to special or unusual situations, the contractor may pay employees for actual expenses in excess of such per diem rate limitation. To be allowable, however, such payments must be properly authorized by an officer or appropriate official of the contractor and shall not exceed the higher amounts that may be authorized for Federal civilian employees in a similar situation.

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.3170(a)(1), paragraph (b) of the basic clause may be appropriately modified to address situations where the fee is for a period of time or different fees are allowed for various phases of the work.

Alternate II (Month and Year TBE). As prescribed in 48 CFR 970.3170(a)(2), the lead sentence in subparagraph (d)(8) of the basic clause may be modified, in appropriate circumstances, to read as follows:

''Personnel costs and related expenses incurred in accordance with established policies, programs, and schedules, and any changes thereto during the contract term, applicable to the contractor's private operations and consistently followed throughout its organization, as approved by the contracting officer, such as''.

Alternate III (Month and Year TBE). As prescribed in 48 CFR 970.3170(a)(3), if the contractor will perform construction, add the following to paragraph (d) of the basic clause:

(16) Camp operations, to the extent approved by the contracting officer.

(17) Maintenance, inspection, repair, replacement, and transportation of construction plant and equipment to the extent not covered by rentals or insurance and as provided in rental agreements approved by the contracting officer.

(18) Rental for (i) construction plant and equipment rented by the contractor from others at rates and under written agreements approved by the contracting officer, and (ii) construction plant and equipment owned and furnished by the contractor under this contract.

Alternate IV (Month and Year TBE). As prescribed in 48 CFR 970.3170(a)(4), if no contractor-owned equipment is being utilized in the performance of the contract, paragraph (e)(18) of the basic clause may be omitted and the remaining subparagraphs renumbered accordingly.

Alternate V (Month and Year TBE). As prescribed in 48 CFR 970.3170(a)(5), in contracts with for-profit contractors, add the following to paragraph (e):

(36) Notwithstanding any other provision of this contract, the costs of bonds and insurance are unallowable to the extent they are incurred to protect and indemnify the contractor and/or subcontractor against otherwise unallowable costs, unless such insurance or bond is required by law, the express terms of this contract, or is authorized in writing by the contracting officer. The cost of commercial insurance to protect the contractor against the costs of correcting its own defects in materials or workmanship is an unallowable cost.

(37) Costs of gifts; however, gifts do not include awards for performance or awards made in recognition of employee achievements pursuant to an established contractor plan or policy.

(38) The costs of recreation, registration fees of employees participating in competitive fitness promotions, team activities, and sporting events except for the costs of employees' participation in company sponsored intramural sports teams or employee organizations designed to improve company loyalty, team work, or physical fitness.

(End of Clause)

970.5231–2 Political activity cost prohibition.

As prescribed in 48 CFR 970.3170(b), insert the following clause:

Political Activity Cost Prohibition (Month and Year TBE)

(a) Pursuant to the allowable cost provisions established elsewhere under the contract, costs associated with the following activities are not reimbursable under the contract:

(1) Attempts to influence the outcome of any Federal, State, or local election, referendum, initiative, or similar procedure, through in-kind or cash contributions, endorsements, publicity, or similar activities;

(2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections;

(3) Any attempt to influence (i) the introduction of Federal or State legislation, or (ii) the enactment or modification of any pending Federal or State legislation through communication with any member or employee of the Congress or State legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation;

(4) Any attempt to influence (i) the introduction of Federal or State legislation, or (ii) the enactment or modification of any pending Federal or State legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign; or

(5) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable activities.

(6) Contractor costs incurred to influence (directly or indirectly) Federal, State, or local executive branch action on regulatory and contract matters.

(b) Costs of the following activities are excepted from the coverage of paragraph (a) of this clause; provided that the resultant contract costs are reasonable and otherwise comply with the allowable cost provisions of the contract:

(1) Providing Members of Congress, their staff members or staff of cognizant legislative committees, in response to a request (written or oral, prior or contemporaneous) from Members of Congress, their staff members or staff of cognizant legislative committees, or as otherwise directed by the contracting officer, information or expert advice of a factual technical, or scientific nature, with respect to topics directly related to the performance of the contract proposed legislation. In providing this information or expert advice, the contractor shall indicate to the recipient that it is not presenting the views of DOE. Reasonable costs for transportation, lodging or meals incurred by contractor employees for the purpose of providing such information or expert advice shall also be reimbursable, provided the request for such information or expert advice is a prior written request signed by a Member of Congress, and provided such costs also comply with the allowable cost provisions of the contract.

(2) Providing State legislatures or subdivisions thereof, their staff members, or staff of cognizant legislative committees, in response to a prior written request from a State legislator, or as otherwise directed by the contracting officer, information or expert advice of factual, technical, or scientific nature, with respect to topics directly related to the performance of the contract or proposed legislation. In providing this information or expert advice, the contractor shall indicate to the recipient that it is not presenting the views of DOE. Reasonable costs for transportation, lodging, or meals incurred by contractor employees shall be

reimbursable, provided such costs also comply with the allowable costs provision of the contract.

(3) Any lobbying made unallowable under subparagraph (a)(3) above to influence State legislation in order to directly reduce contract cost, or to avoid material impairment of the contractor's authority to perform the contract if authorized by the contracting officer.

(4) Any activity specifically authorized by statute to be undertaken with funds from the contract.

(c) Unallowable lobbying costs incurred, if any, shall not be charged to DOE, paid for with DOE funds or recorded as allowable cost in DOE's system of accounts.

(d) The contractor's annual certification, submitted as part of its annual claim (*i.e.,* Voucher Accounting for Net Expenditures Accrued required under the clause titled ''Payments and Advances'') or cost incurred statement, that the costs claimed are allowable under the contract, shall also serve as the contractor's certification that the requirements and standards of this clause have been complied with.

(e) The contractor shall maintain adequate records to demonstrate that the annual certifications of claimed costs as being allowable comply with the requirements of this clause.

(f) Time logs, calendars, or similar records shall not be created for purposes of complying with this clause during any particular calendar month when: (1) An employee engages in legislative liaison activities (as delineated in paragraphs (a) and (b) of this clause) 25 percent or less of the employees's compensated hours of employment during that calendar month, and (2) within the preceding five-year period, the contractor has not materially misstated allowable or unallowable costs of any nature, including legislative liaison costs. When conditions (f)(1) and (2) of this clause are met, the contractor is not required to establish records to support the allowability of claimed costs in addition to records already required or maintained. Also, when conditions (f) (1) and (2) of this clause are met, the absence of time logs, calendars, or similar records will not serve as a basis for disallowing costs by contesting estimates of legislative liaison activity time spent by employees during any calendar month.

(g) During contract performance, the contractor should resolve, in advance, any significant questions or disagreements between the contractor and DOE concerning compliance with this clause.

(h) In providing information or expert advice under paragraph (b)(1) and (b)(2) of this clause, the contractor shall advise the contracting officer in advance or as soon as practicable.

(End of Clause)

970.5231–3 Cost Prohibitions Related to Legal and Other Proceedings.

As prescribed in 48 CFR 970.3170(c), insert the following clause:

Cost Prohibitions Related to Legal and Other Proceedings (Month and Year TBE)

(a) *Definitions. Conviction,* as used in this section, means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a conviction due to a plea of *nolo contendere.*

Costs include, but are not limited to, administrative and clerical expenses; the cost of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the contractor to assist it; all elements of compensation, related costs, and expenses of employees, officers and directors; and any similar costs incurred before, during, and after commencement of a proceeding which bears a direct relationship to the proceeding.

Fraud, as used herein, means: (i) Acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents,

(ii) Acts which constitute a cause for debarment or suspension under 48 CFR 9.406–(2)(a) and 48 CFR 9.407–(2)(a), and

(iii) Acts which violate the False Claims Act, 31 U.S.C. 3729–3731, or the Anti-kickback Act, 41 U.S.C. 51 and 54.

Penalty does not include restitution, reimbursement, or compensatory damages.

Proceeding includes an investigation.

(b) Except as otherwise described in this section, costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, or costs incurred in connection with any criminal, civil or administrative proceeding by the Federal Government, or a State, local or foreign government, are not allowable if the proceeding relates to a violation of, or failure to comply with a Federal, State, local or foreign statute or regulation by the contractor, and results in any of the following dispositions:

(1) In a criminal proceeding, conviction.

(2) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability.

(3) In the case of any civil or administrative proceeding, the imposition of a monetary penalty.

(4) A final decision by an appropriate Federal official to debar or suspend the contractor, to rescind or void a contract, or to terminate a contract for default by reason of a violation of or failure to comply with a law or regulation.

(5) A disposition by consent or compromise, if the action could have resulted in any of the dispositions described in paragraphs (b) (1), (2), (3) or (4) of this section.

(6) Not covered by paragraphs (b)(1) through (5) of this section, but where the underlying alleged contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of paragraphs (b)(1) through (5) of this section.

(c)(1) If a proceeding referred to in paragraph (b) of this clause is commenced by the Federal Government and is resolved by consent or compromise pursuant to an agreement entered into by the contractor and the Federal Government, then the costs incurred by the contractor in connection with such proceeding that are otherwise unallowable under paragraph (b) of this clause may be allowed to the extent specifically provided in such agreement.

(2) In the event of a settlement of any proceeding brought by a third party under the False Claims Act in which the United States did not intervene, reasonable costs incurred by the contractor in connection with such a proceeding that are not otherwise unallowable by regulation or by separate agreement with the United States, may be allowed if the contracting officer, in consultation with legal counsel, determines that there was very little likelihood that the third party would have been successful on the merits.

(d) If a proceeding referred to in paragraph (b) of this clause is commenced by a State, local or foreign government, the contracting officer may allow the costs incurred in such proceeding, provided the Senior Procurement Executive determines that the costs were incurred as a result of compliance with a specific term or condition of the contract, or specific written direction of the contracting officer.

(e) Costs incurred in connection with a proceeding described in paragraph (b) of this section, but which are not made unallowable by that paragraph, may be allowed by the contracting officer only to the extent that:

(1) The total costs incurred are reasonable in relation to the activities required to deal with the proceeding and the underlying cause of action;

(2) Payment of the costs incurred, as allowable and allocable contract costs, is not prohibited by any other provision(s) of this contract;

(3) The costs are not otherwise recovered from the Federal Government or a third party, either directly as a result of the proceeding or otherwise; and

(4) The amount of costs allowed does not exceed 80 percent of the total costs incurred and otherwise allowable under the contract. Such amount that may be allowed (up to the 80 percent limit) shall not exceed the percentage determined by the contracting officer to be appropriate, considering the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate. The amount of reimbursement allowed for legal costs in connection with any proceeding described in subparagraph (c)(2) shall be the amount determined to be reasonable by the contracting officer but shall not exceed 80 percent of otherwise allowable costs incurred. Agreements reached under paragraph (c) of this subsection shall be subject to this limitation. If, however, an agreement explicitly states the amount of otherwise allowable incurred legal fees and limits the allowable recovery to 80 percent or less of the stated legal fees, no additional limitation need be applied.

(f) Contractor costs incurred in connection with the defense of suits brought by employees or ex-employees of the contractor under section 2 of the Major Fraud Act of 1988, including the cost of all relief necessary to make such employee whole, where the contractor was found liable or settled, are unallowable.

(g) Costs which may be unallowable under this clause, including directly associated costs, shall be differentiated and accounted for by the contractor so as to be separately identifiable. During the pendency of any proceeding covered by paragraphs (b) and (f) of this section, the contracting officer shall generally withhold payment and not authorize the use of funds advanced under the contract for the payment of such costs. However, the contracting officer may, in appropriate circumstances, provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreements by the contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

970.5231–4 Preexisting Conditions.

As prescribed in 48 CFR 970.3170(d), insert the following clause:

Preexisting Conditions (Month and Year TBE)

(a) The Department of Energy agrees to reimburse the contractor, and the contractor shall not be held responsible, for any liability (including without limitation, a claim involving strict or absolute liability and any civil fine or penalty), expense, or remediation cost, but limited to those of a civil nature, which may be incurred by, imposed on, or asserted against the contractor arising out of any condition, act, or failure to act which occurred before the contractor assumed responsibility on [Insert date contract began]. To the extent the acts or omissions of the contractor cause or add to any liability, expense or remediation cost resulting from conditions in existence prior to [Insert date contract began], the contractor shall be responsible in accordance with the terms and conditions of this contract.

(b) The obligations of the Department of Energy under this clause are subject to the availability of appropriated funds.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.3170(d)(1), in contracts with incumbent management and operating contractors, substitute the following for paragraph (a) of the basic clause:

(a) Any liability, obligation, loss, damage, claim (including without limitation, a claim involving strict or absolute liability), action, suit, civil fine or penalty, cost, expense or disbursement, which may be incurred or imposed, or asserted by any party and arising out of any condition, act or failure to act which occurred before [Insert date this clause was included in contract], in conjunction with the management and operation of [Insert name of facility], shall be deemed incurred under Contract No. [Insert number of prior contract].

Alternate II (Month and Year TBE). As prescribed in 48 CFR 970.3170(d)(2), add the following paragraph (c) to the basic clause in contracts with management and operating contractors not previously working at that particular site or facility:

(c) The contractor has the duty to inspect the facilities and sites and timely identify to the contracting officer those conditions which it believes could give rise to a liability, obligation, loss, damage, penalty, fine, claim, action, suit, cost, expense, or disbursement or areas of actual or potential noncompliance with the terms and conditions of this contract or applicable law or regulation. The contractor has the responsibility to take corrective action, as directed by the contracting officer and as required elsewhere in this contract.

(End of Clause)

970.5232–1 Reduction or suspension of advance, partial, or progress payments upon finding of substantial evidence of fraud.

As prescribed in 48 CFR 970.3200–1–1, insert the following clause:

Reduction or Suspension of Advance, Partial, or Progress Payments (Month and Year TBE)

(a) The contracting officer may reduce or suspend further advance, partial, or progress payments to the contractor upon a written determination by the Senior Procurement Executive that substantial evidence exists that the contractor's request for advance, partial, or progress payment is based on fraud.

(b) The contractor shall be afforded a reasonable opportunity to respond in writing.

(End of Clause)

970.5232–2 Payments and Advances.

As prescribed in 48 CFR 970.3204–3, insert the following clause:

Payments And Advances (Month and Year TBE)

(a) Installments of fixed-fee. Ninety percent (90%) of the fixed-fee shall become due and payable in periodic installments in amounts based on the proportion of the work then completed, as determined by the contracting officer, and the balance upon completion and acceptance of all work under this contract. Fixed-fee payments shall be made by direct payment or withdrawn from funds advanced or available under this contract, as determined by the contracting officer. The contracting officer may offset against any such fee payment, the amounts owed to the Government by the contractor, including any amounts owed for disallowed costs under this contract. No fixed-fee payment may be withdrawn against the letter-of-credit without prior written approval of the contracting officer.

(b) Payments on Account of Allowable Costs. The contracting officer and the contractor shall agree as to the extent to which payment for allowable costs or payments for other items specifically approved in writing by the contracting officer (for example, negotiated fixed amounts) shall be made from advances of Government funds. When pension contributions are paid by the contractor to the retirement fund less frequently than quarterly, accrued costs therefor shall be excluded from costs for payment purposes until such costs are paid. If pension contribution are paid on a quarterly or more frequent basis, accrual therefor may be included in costs for payment purposes, provided that they are paid to the fund within 30 days after the close of the period covered. If payments are not made to the fund within such 30-day period, pension contribution costs shall be excluded from cost for payment purposes until payment has been made.

(c) Special bank account— use. All advances of Government funds shall be withdrawn pursuant to a letter of credit in favor of the bank or, in the option of the Government, shall be made by check payable to the contractor, and shall be deposited only in the Special Bank Account referred to in the Agreement for Special Bank Account, which is attached hereto and incorporated into this contract as an appendix. The contractor shall likewise deposit in the Special Bank Account any other revenues received by the contractor in connection with the work under this contract. No part of the funds in the Special Bank Account shall be (1) mingled with any funds of the contractor or (2) used for a purpose other than that of making payments for costs allowable under this contract or payments for other items specifically approved in writing by the contracting officer. If the contracting officer shall at any time determine that the balance on such bank account exceeds the contractor's current needs, the contractor shall promptly make such disposition of the excess as the contracting officer may direct.

(d) Title to funds advanced. Title to the unexpended balance of any funds advanced and of any bank account established pursuant to this clause shall remain in the Government and be superior to any claim or lien of the bank of deposit or others. It is understood that an advance to the contractor hereunder is not a loan to the contractor, and will not require the payment of interest by the contractor, and that the contractor acquires no right, title or interest in or to such advance other than the right to make expenditures therefrom, as provided in this clause.

(e) Financial settlement. The Government shall promptly pay to the contractor the unpaid balance of allowable costs (or other items specifically approved in writing by the contracting officer) and fixed fee upon termination of the work, expiration of the term of the contract, or completion of the work and its acceptance by the Government after (1) compliance by the contractor with DOE's patent clearance requirements, and (2) the furnishing by the contractor of:

(i) An assignment of the contractor's rights to any refunds, rebates, allowances, accounts receivable, or other credits applicable to allowable costs under the contract;

(ii) A closing financial statement;

(iii) The accounting for Government-owned property required by the clause entitled ''Property;'' and

(iv) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract subject only to the following exceptions:

(A) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible to exact statement by the contractor;

(B) Claims, together with reasonable expenses incidental thereto, based upon

liabilities of the contractor to third parties arising out of the performance of this contract; provided that such claims are not known to the contractor on the date of the execution of the release; and provided further that the contractor gives notice of such claims in writing to the contracting officer promptly, but not more than one (1) year after the contractor's right of action first accrues. In addition, the contractor should provide prompt notice to the contracting officer of all potential claims under this clause, whether in litigation or not (see also 48 CFR 970.5228–1, Insurance—Litigation and Claims); and

(C) Claims for reimbursement of costs (other than expenses of the contractor by reason of any indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the contractor under the provisions of this contract relating to patents.

In arriving at the amount due the contractor under this clause, there shall be deducted, any claim which the Government may have against the contractor in connection with this contract, and deductions due under the terms of this contract, and not otherwise recovered by or credited to the Government. The unliquidated balance of the Special Bank Account may be applied to the amount due and any balance shall be returned to the Government forthwith.

(f) Claims. Claims for credit against funds advanced for payment shall be accompanied by such supporting documents and justification as the contracting officer shall prescribe.

(g) Discounts. The contractor shall take and afford the Government the advantage of all known and available cash and trade discounts, rebates, allowances, credits, salvage, and commissions unless the contracting officer finds that action is not in the best interest of the Government.

(h) Revenues. All revenues other than the contractor's fixed fee or fees, if any, accruing to the contractor in connection with the work under this contract shall be Government property and shall be deposited in the Special Bank Account to be available for payment of allowable cost under this contract.

(i) Direct payment of charges. The Government reserves the right, upon ten days written notice from the contracting officer to the contractor, to pay directly to the persons concerned, all amounts due which otherwise would be allowable under this contract. Any payment so made shall discharge the Government of all liability to the contractor therefor.

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.3204–3(a), if a separate fixed-fee is provided for a separate item of work, paragraph (a) of the basic clause should be modified to permit payment of the entire fixed-fee upon completion of that item.

Alternate II (Month and Year TBE). As prescribed in 48 CFR 970.3204–3(b), when total available fee provisions are used, replace paragraph (a) of the basic clause with the following paragraph (a):

(a) Payment of Base Fee and Award Fee. The base fee amount, if any, is payable in equal monthly installments. Total available fee amount earned is payable following the FDO's issuing a Determination of Total Available Fee Amount Earned in accordance with the clause of this contract entitled ''Total Available Fee: Base Fee Amount and Performance Fee Amount.'' Base fee amount and total available fee amount earned payments shall be made by direct payment or withdrawn from funds advanced or available under this contract, as determined by the contracting officer. The contracting officer may offset against any such fee payment the amounts owed to the Government by the contractor, including any amounts owed for disallowed costs under this contract. No base fee amount or total available fee amount earned payment may be withdrawn against the payments cleared financing arrangement with the prior written approval of the contracting officer.

Alternate III (Month and Year TBE). As prescribed in 48 CFR 970.3204–3(c), the following paragraph (j) shall be included in management and operating contracts with integrated contractors:

(j) Review and approval of costs incurred. The contractor shall prepare and submit annually as of September 30, a voucher for the total of net expenditures accrued (i.e., net costs incurred) for the period covered by the voucher, and DOE, after audit and appropriate adjustment, will approve such voucher. This approval by DOE will constitute an acknowledgment by DOE that the net costs incurred are allowable under the contract and that they have been recorded in the accounts maintained by the contractor in accordance with DOE accounting policies, but will not relieve the contractor of responsibility for DOE's assets in its care, for appropriate subsequent adjustments, or for errors later becoming known to DOE.

970.5232–3 Accounts, Records, and Inspection.

As prescribed in 48 CFR 970.3270(a), insert the following clause:

Accounts, Records, and Inspection (Month and Year TBE)

(a) Accounts. The contractor shall maintain a separate and distinct set of accounts, records, documents, and other evidence showing and supporting all allowable costs incurred, revenues or other applicable credits, negotiated fixed amounts, fixed-fee accruals, and the receipt, use, and disposition of all Government property coming into the possession of the contractor under this contract. The system of accounts employed by the contractor shall be satisfactory to DOE and in accordance with generally accepted accounting principles consistently applied.

(b) Inspection and audit of accounts and records. All books of account and records relating to this contract shall be subject to inspection and audit by DOE at all reasonable times, before and during the period of retention provided for in (d) below, and the contractor shall afford DOE proper facilities for such inspection and audit.

(c) Audit of subcontractors' records. The contractor also agrees, with respect to any subcontracts (including fixed-price or unit-price subcontracts or purchase orders) where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor of any tier, to either conduct an audit of the subcontractor's costs or arrange for such an audit to be performed by the cognizant government audit agency through the contracting officer.

(d) Disposition of records. Except as agreed upon by the Government and the contractor, all financial and cost reports, books of account and supporting documents, and other data evidencing costs allowable, revenues, and other applicable credits under this contract, shall be the property of the Government, and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of this contract and final audit of accounts hereunder. Except as provided in this contract, all other records in the possession of the contractor relating to this contract shall be preserved by the contractor for a period of three years after final payment under this contract or otherwise disposed of in such manner as may be agreed upon by the Government and the contractor.

(e) Reports. The contractor shall furnish such progress reports and schedules, financial and cost reports, and other reports concerning the work under this contract as the contracting officer may from time to time require.

(f) Inspections. The DOE shall have the right to inspect the work and activities of the contractor under this contract at such time in such manner as it shall deem appropriate.

(g) Subcontracts. The contractor further agrees to require the inclusion of provisions similar to those in paragraphs (a) through (g) and paragraph (i) of this clause in all subcontracts (including fixed-price or unit-price subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor.

(h) Comptroller General. (1) The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the contractor's directly pertinent records involving transactions related to this contract or a subcontract hereunder.

(2) This paragraph may not be construed to require the contractor or subcontractor to create or maintain any record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(3) Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.3270(a)(1), if the contract includes the clause at 48 CFR 52.215–22, Price Reduction for Defective Cost or Pricing Data, the basic clause shall be modified as follows:

(a) Paragraph (a) of the basic clause shall be modified by adding the words ''or anticipated to be incurred'' after the words ''allowable costs incurred.''

(b) Paragraph (g) of the basic clause shall be modified by adding the following:

The contractor further agrees to include an ''Audit'' clause, the substance of which is the ''Audit'' clause set forth at 48 CFR 52.215–2, in each subcontract which does not include provisions similar to those in paragraph (a) through paragraph (g) and paragraph (h) of this clause, but which contains a ''defective cost or pricing data'' clause.

Alternate II (Month and Year TBE). As prescribed in 48 CFR 970.3270(a)(2), in cost-reimbursement contracts involving an estimated cost exceeding $5 million and expected to run for more than 2 years, and any other cost-reimbursement contract determined by the Head of the Contracting Activity in which the contractor has an established internal audit organization, add the following paragraph (i) to the basic clause:

(i) Internal audit. The contractor agrees to conduct an internal audit and examination satisfactory to DOE of the records, operations, expenses, and the transactions with respect to costs claimed to be allowable under this contract annually and at such other times as may be mutually agreed upon. The results of such audit, including the working papers, shall be submitted or made available to the contracting officer. The contractor shall include this paragraph (i) in all cost-reimbursement subcontracts with an estimated cost exceeding $5 million and expected to run for more than 2 years, and any other cost-reimbursement subcontract determined by the Head of the Contracting Activity.

970.5232–4 Obligation of funds.

As prescribed in 48 CFR 970.3270(b), insert the following clause:

Obligation of Funds (Month and Year TBE)

(a) Obligation of funds. The amount presently obligated by the Government with respect to this contract is ____ dollars ($)____. Such amount may be increased unilaterally by DOE by written notice to the contractor and may be increased or decreased by written agreement of the parties (whether or not by formal modification of this contract). Estimated collections from others for work and services to be performed under this contract are not included in the amount presently obligated. Such collections, to the extent actually received by the contractor, shall be processed and accounted for in accordance with applicable requirements imposed by the contracting officer pursuant to the Laws, regulations, and DOE directives clause of this contract. Nothing in this paragraph (a) is to be construed as authorizing the contractor to exceed limitations stated in financial plans established by DOE and furnished to the contractor from time to time under this contract.

(b) Limitation on payment by the Government. Except as otherwise provided in this contract and except for costs which may be incurred by the contractor pursuant to the termination clause of the contract, or costs of claims allowable under the contract occurring after completion or termination and not released by the contractor at the time of financial settlement of the contract in accordance with the clause entitled ''Payments and Advances,'' payment by the Government under this contract on account of allowable costs shall not, in the aggregate, exceed the amount obligated with respect to this contract, less the contractor's fee. Unless expressly negated in this contract, payment on account of those costs excepted in the preceding sentence which are in excess of the amount obligated with respect to this contract shall be subject to the availability of:

(1) Collections accruing to the contractor in connection with the work under this contract and processed and accounted for in accordance with applicable requirements imposed by the contracting officer pursuant to the Laws, regulations, and DOE directives clause of this contract, and

(2) Other funds which DOE may legally use for such purpose, provided DOE will use its best efforts to obtain the appropriation of funds for this purpose if not otherwise available.

(c) Notices—Contractor excused from further performance. The contractor shall notify DOE in writing whenever the unexpended balance of available funds (including collections available under paragraph (a) of this clause, plus the contractor's best estimate of collections to be received and available during the ____ day period hereinafter specified, is in the contractor's best judgment sufficient to continue contract operations at the programmed rate for only ____ days and to cover the contractor's unpaid fee, and outstanding encumbrances and liabilities on account of costs allowable under the contract at the end of such period. Whenever the unexpended balance of available funds (including collections available under paragraph (a) of this clause, less the amount of the contractor's fee then earned but not paid, is in the contractor's best judgment sufficient only to liquidate outstanding encumbrances and liabilities on account of costs allowable under this contract, the contractor shall immediately notify DOE and shall make no further encumbrances or expenditures (except to liquidate existing encumbrances and liabilities), and, unless the parties otherwise agree, the contractor shall be excused from further performance (except such performance as may become necessary in connection with termination by the Government) and the performance of all work hereunder will be deemed to have been terminated for the convenience of the Government in accordance with the provisions of the termination clause of the contract.

(d) Financial plans; cost and encumbrance limitations. In addition to the limitations provided for elsewhere in this contract, DOE may, through financial plans, such as Approved Funding Programs, or other directives issued to the contractor, establish controls on the costs to be incurred and encumbrances to be made in the performance of the contract work. Such plans and directives may be amended or supplemented from time to time by DOE. The contractor hereby agrees.

(1) To comply with the specific limitations (ceilings) on costs and encumbrances set forth in such plans and directives,

(2) To comply with other requirements of such plans and directives, and

(3) To notify DOE promptly, in writing, whenever it has reason to believe that any limitation on costs and encumbrances will be exceeded or substantially underrun.

(e) Government's right to terminate not affected. The giving of any notice under this clause shall not be construed to waive or impair any right of the Government to terminate the contract under the provisions of the termination clause of the contract.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.3270(b), paragraph (d) of the clause may be omitted in contracts which, expressly or otherwise, provide a contractual basis for equivalent controls in a separate clause.

970.5235–1 Federally Funded Research and Development Center Sponsoring Agreement.

As prescribed in 48 CFR 970.3501–4, the contracting officer shall insert the following clause:

Federally Funded Research and Development Center Sponsoring Agreement (Month and Year TBE)

(a) Pursuant to 48 CFR 35.017–1, this contract constitutes the sponsoring agreement between the Department of Energy and the contractor, which establishes the relationship for the operation of a Department of Energy sponsored Federally Funded Research and Development Center (FFRDC).

(b) In the operation of this FFRDC, the contractor may be provided access beyond that which is common to the normal contractual relationship, to Government and supplier data, including sensitive and proprietary data, and to Government employees and facilities needed to discharge its responsibilities efficiently and effectively. Because of this special relationship, it is essential that the FFRDC be operated in the public interest with objectivity and independence, be free from organizational conflicts of interest, and have full disclosure of its affairs to the Department of Energy.

(c) Unless otherwise provided by the contract, the contractor may accept work from a nonsponsor (as defined in 48 CFR 35.017) in accordance with the requirements and limitations of DOE Order 481.1, Work for Others (Non-Department of Energy Funded Work) (see current version).

(d) As an FFRDC, the contractor shall not use its privileged information or access to government facilities to compete with the private sector. Specific guidance on restricted activities is contained in DOE Order 481.1.

(End of Clause)

970.5236–1 Government Facility Subcontract Approval.

As prescribed in 48 CFR 970.3605–2, insert the following clause:

Government Facility Subcontract Approval (Month and Year TBE)

Upon request of the contracting officer and acceptance thereof by the contractor, the contractor shall procure, by subcontract, the construction of new facilities or the alteration or repair of Government-owned facilities at the plant. Any subcontract entered into under this paragraph shall be subject to the written approval of the contracting officer and shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

(End of Clause)

970.5237–1 Waiver of Limitations on Severance Payments to Foreign Nationals.

As prescribed in 48 CFR 970.3701–1–2, the contracting officer shall insert the following solicitation provision:

Waiver of Limitations on Severance Payments to Foreign Nationals (Month and Year TBE)

Pursuant to 48 CFR 970.3701–1, Severance Payments to Foreign Nationals, the cost allowability limitations in 48 CFR 970.3102–3–2(i)(iv) and (v) are waived for this contract.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.3701–1–2(b), substitute the following paragraph for the foregoing solicitation provision when the waiver of limitations to severance payments for foreign nationals has not been predetermined by the Department.

Pursuant to 48 CFR 970.3701–1, Severance Payments to Foreign Nationals, the Department will consider waiving the cost allowability limitations in 48 CFR 970.3102–3–2(i)(iv) and (v) for this contract.

970.5237–2 Facilities management.

As prescribed in 48 CFR 970.3770–2, insert the following clause:

Facilities Management (Month and Year TBE)

Copies of DOE Directives referenced herein are available from the contracting officer.

(a) Site development planning. The Government shall provide to the contractor site development guidance for the facilities and lands for which the contractor is responsible under the terms and conditions of this contract. Based upon this guidance, the contractor shall prepare, and maintain through annual updates, a Long-Range Site Development Plan (Plan) to reflect those actions necessary to keep the development of these facilities current with the needs of the Government and allow the contractor to successfully accomplish the work required under this contract. In developing this Plan, the contractor shall follow the procedural guidance set forth in the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract. The contractor shall use the Plan to manage and control the development of facilities and lands. All plans and revisions shall be approved by the Government.

(b) General design criteria. The general design criteria which shall be utilized by the contractor in managing the site for which it is responsible under this contract are those specified in the applicable DOE Directives in the 6430, Design Criteria, series listed elsewhere in this contract. The contractor shall comply with these mandatory, minimally acceptable requirements for all facility designs with regard to any building acquisition, new facility, facility addition or alteration or facility lease undertaken as part of the site development activities of paragraph (a) above. This includes on-site constructed buildings, pre-engineered buildings, plan-fabricated modular buildings, and temporary facilities. For existing facilities, original design criteria apply to the structure in general; however, additions or modifications shall comply with this directive and the associated latest editions of the references therein. An exception may be granted for off-site office space being leased by the contractor on a temporary basis.

(c) Energy management. The contractor shall manage the facilities for which it is responsible under the terms and conditions of this contract in an energy efficient manner in accordance with the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract. The contractor shall develop a 10-year energy management plan for each site with annual reviews and revisions. The contractor shall submit an annual report on progress toward achieving the goals of the 10-year plan for each individual site, and an energy conservation analysis report for each new building or building addition project. Any acquisition of utility services by the contractor shall be conducted in accordance with 48 CFR 970.41.

(d) Subcontract Requirements. To the extent the contractor subcontracts performance of any of the responsibilities discussed in this clause, the subcontract shall contain the requirements of this clause relative to the subcontracted responsibilities.

(End of Clause)

970.5243–1 Changes.

As prescribed in 48 CFR 970.4302–1, the contracting officer shall insert the following clause in all management and operating contracts:

Changes (Month and Year TBE)

(a) Changes and adjustment of fee. The contracting officer may at any time and without notice to the sureties, if any, issue written directions within the general scope of this contract requiring additional work or directing the omission of, or variation in, work covered by this contract. If any such direction results in a material change in the amount or character of the work described in the ''Statement of Work,'' an equitable adjustment of the fee, if any, shall be made in accordance with the agreement of the parties and the contract shall be modified in writing accordingly. Any claim by the contractor for an adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the contractor of the notification of change; provided, however, that the contracting officer, if it is determined that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. A failure to agree on an equitable adjustment under this clause shall be deemed to be a dispute within the meaning of the clause entitled ''Disputes.''

(b) Work to continue. Nothing contained in this clause shall excuse the contractor from proceeding with the prosecution of the work in accordance with the requirements of any direction hereunder.

(End of Clause)

970.5244–1 Contractor Purchasing System.

As prescribed in 48 CFR 970.4402–5, insert the following clause:

Contractor Purchasing System (Month and Year TBE)

(a) General. The contractor shall develop, implement, and maintain formal policies, practices, and procedures to be used in the award of subcontracts consistent with this clause and 48 CFR 970.44. The contractor's purchasing system and methods shall be fully documented, consistently applied, and acceptable to DOE in accordance with 48 CFR 970.4401–1. The contractor shall maintain file documentation which is appropriate to the value of the purchase and is adequate to establish the propriety of the transaction and the price paid. The contractor's purchasing performance will be evaluated against such performance criteria and measures as may be set forth elsewhere in this contract. DOE reserves the right at any time to require that the contractor submit for approval any or all purchases under this contract. The contractor shall not purchase any item or service the purchase of which is expressly prohibited by the written direction of DOE and shall use such special and directed sources as may be expressly required by the DOE contracting officer. DOE will conduct periodic appraisals of the contractor's management of all facets of the purchasing function, including the contractor's compliance with its approved system and methods. Such appraisals will be performed through the conduct of Contractor Purchasing System Reviews in accordance with 48 CFR subpart 44.3, or, when approved by the contracting officer, through the contractor's participation in the conduct of the Balanced Scorecard performance measurement and performance management system. The contractor's approved purchasing system and methods shall include the requirements set forth in paragraphs (b) through (x) of this clause.

(b) Acquisition of utility services. Utility services shall be acquired in accordance with the requirements of 48 CFR 970.41.

(c) Acquisition of Real Property. Real property shall be acquired in accordance with 48 CFR Subpart 917.74.

(d) Advance Notice of Proposed Subcontract Awards. Advance notice shall be provided in accordance with 48 CFR 970.4401–3.

(e) Audit of Subcontractors. (1) The contractor shall provide for:

(i) periodic post-award audit of cost-reimbursement subcontractors at all tiers, and

(ii) audits, where necessary, to provide a valid basis for pre-award or cost or price analysis.

(2) Responsibility for determining the costs allowable under each cost-reimbursement subcontract remains with the contractor or next higher-tier subcontractor. The contractor shall provide, in appropriate cases, for the timely involvement of the contractor and the DOE contracting officer in resolution of subcontract cost allowability.

(3) Where audits of subcontractors at any tier are required, arrangements may be made to have the cognizant Federal agency perform the audit of the subcontract. These arrangements shall be made administratively between DOE and the other agency involved and shall provide for the cognizant agency to audit in an appropriate manner in light of the magnitude and nature of the subcontract. In no case, however, shall these arrangements preclude determination by the DOE contracting officer of the allowability or unallowability of subcontractor costs claimed for reimbursement by the contractor.

(4) Allowable costs for cost reimbursable subcontracts are to be determined in accordance with the cost principles of 48 CFR Part 31, appropriate for the type of organization to which the subcontract is to be awarded, as supplemented by 48 CFR Part 931. Allowable costs in the purchase or transfer from contractor-affiliated sources shall be determined in accordance with 48 CFR 970.4402–3 and 48 CFR 970.3102–3–21(b).

(f) Bonds and Insurance. (1) The contractor shall require performance bonds in penal amounts as set forth in 48 CFR 28.102–2(a) for all fixed priced and unit-priced construction subcontracts in excess of $100,000. The contractor shall consider the use of performance bonds in fixed price nonconstruction subcontracts, where appropriate.

(2) For fixed-price, unit-priced and cost reimbursement construction subcontracts in excess of $100,000 a payment bond shall be obtained on Standard Form 25A modified to name the contractor as well as the United States of America as obligees. The penal amounts shall be determined in accordance with 48 CFR 28.102–2(b).

(3) For fixed-price, unit-priced and cost-reimbursement construction subcontracts, greater than $25,000, but not greater than $100,000, the contractor shall select two or more of the payment protections at 48 CFR 28.102–1(b), giving particular consideration to the inclusion of an irrevocable letter of credit as one of the selected alternatives.

(4) A subcontractor may have more than one acceptable surety in both construction and other subcontracts, provided that in no case will the liability of any one surety exceed the maximum penal sum for which it is qualified for any one obligation. For subcontracts other than construction, a co-surety (two or more sureties together) may reinsure amounts in excess of their individual capacity, with each surety having the required underwriting capacity that appears on the list of acceptable corporate sureties.

(g) Buy American. The contractor shall comply with the provisions of the Buy American Act as reflected in 48 CFR 52.225–3 and 48 CFR 52.225–5. The contractor shall forward determinations of nonavailability of individual items to the DOE contracting officer for approval. Items in excess of $100,000 require the prior concurrence of the Head of Contracting Activity. If, however, the contractor has an approved purchasing system, the Head of the Contracting Activity may authorize the contractor to make determinations of nonavailability for individual items valued at $100,000 or less.

(h) Construction and Architect-Engineer Subcontracts. (1) Independent Estimates. A detailed, independent estimate of costs shall be prepared for all construction work to be subcontracted.

(2) Specifications. Specifications for construction shall be prepared in accordance with the DOE publication entitled ''General Design Criteria Manual.''

(3) Prevention of Conflict of Interest. (i) The contractor shall not award a subcontract for construction to the architect-engineer firm or an affiliate that prepared the design. This prohibition does not preclude the award of a ''turnkey'' subcontract so long as the subcontractor assumes all liability for defects in design and construction and consequential damages.

(ii) The contractor shall not award both a cost-reimbursement subcontract and a fixed-price subcontract for construction or architect-engineer services or any combination thereof to the same firm where those subcontracts will be performed at the same site.

(iii) The contractor shall not employ the construction subcontractor or an affiliate to inspect the firm's work. The contractor shall assure that the working relationships of the construction subcontractor and the subcontractor inspecting its work and the authority of the inspector are clearly defined.

(i) Contractor-Affiliated Sources. Equipment, materials, supplies, or services from a contractor-affiliated source shall be purchased or transferred in accordance with 48 CFR 970.4402–3.

(j) Contractor-Subcontractor Relationship. The obligations of the contractor under paragraph (a) of this clause, including the development of the purchasing system and methods, and purchases made pursuant thereto, shall not relieve the contractor of any obligation under this contract (including, among other things, the obligation to properly supervise, administer, and coordinate the work of subcontractors). Subcontracts shall be in the name of the contractor, and shall not bind or purport to bind the Government.

(k) Government Property. Identification, inspection, maintenance, protection, and disposition of Government property shall conform with the policies and principles of 48 CFR part 45, 48 CFR part 945, the Federal Property Management Regulations 41 CFR chapter 101, the DOE Property Management Regulations 41 CFR chapter 109, and their contracts.

(l) Indemnification. Except for Price-Anderson Nuclear Hazards Indemnity, no subcontractor may be indemnified except with the prior approval of the Senior Procurement Executive.

(m) Leasing of Motor Vehicles. Contractors shall comply with 48 CFR 8.11 and 48 CFR 908.11.

(n) Make-or-Buy Plans. Acquisition of property and services shall be obtained on a least-cost basis, consistent with the requirements of the ''Make-or-Buy Plan'' clause of this contract and the contractor's approved make-or-buy plan.

(o) Management, Acquisition and Use of Information Resources. Requirements for automatic data processing resources and telecommunications facilities, services, and equipment, shall be reviewed and approved in accordance with applicable DOE Orders and regulations regarding information resources.

(p) Priorities, Allocations and Allotments. Priorities, allocations and allotments shall be extended to appropriate subcontracts in accordance with the clause or clauses of this contract dealing with priorities and allocations.

(q) Purchase of Special Items. Purchase of the following items shall be in accordance with the following provisions of 48 CFR 908.71 and the Federal Property Management Regulations, 41 CFR chapter 101:

(1) Motor vehicles—48 CFR 908.7101
(2) Aircraft—48 CFR 908.7102
(3) Security Cabinets—48 CFR 908.7106
(4) Alcohol—48 CFR 908.7107
(5) Helium—48 CFR 908.7108
(6) Fuels and packaged petroleum products—48 CFR 908.7109
(7) Coal—48 CFR 908.7110
(8) Arms and Ammunition—48 CFR 908.7111
(9) Heavy Water—48 CFR 908.7121(a)
(10) Precious Metals—48 CFR 908.7121(b)
(11) Lithium—48 CFR 908.7121(c)
(12) Products and services of the blind and severely handicapped—41 CFR 101–26.701
(13) Products made in Federal penal and correctional institutions—41 CFR 101–26.702

(r) Purchase vs. Lease Determinations. Contractors shall determine whether required equipment and property should be purchased or leased, and establish appropriate thresholds for application of lease vs. purchase determinations. Such determinations shall be made:

(1) At time of original acquisition;

(2) When lease renewals are being considered; and

(3) At other times as circumstances warrant.

(s) Quality Assurance. Contractors shall provide no less protection for the Government in its subcontracts than is provided in the prime contract.

(t) Setoff of Assigned Subcontractor Proceeds. Where a subcontractor has been permitted to assign payments to a financial institution, the assignment shall treat any right of setoff in accordance with 48 CFR 932.803.

(u) Strategic and Critical Materials. The contractor may use strategic and critical materials in the National Defense Stockpile.

(v) Termination. When subcontracts are terminated as a result of the termination of all or a portion of this contract, the contractor

shall settle with subcontractors in conformity with the policies and principles relating to settlement of prime contracts in 48 CFR Subparts 49.1, 49.2 and 49.3. When subcontracts are terminated for reasons other than termination of this contract, the contractor shall settle such subcontracts in general conformity with the policies and principles in 48 CFR Subparts 49.1, 49.2, 49.3 and 49.4. Each such termination shall be documented and consistent with the terms of this contract. Terminations which require approval by the Government shall be supported by accounting data and other information as may be directed by the contracting officer.

(w) Unclassified Controlled Nuclear Information. Subcontracts involving unclassified uncontrolled nuclear information shall be treated in accordance with 10 CFR part 1017.

(x) Subcontract Flowdown Requirements. In addition to terms and conditions that are included in the prime contract which direct application of such terms and conditions in appropriate subcontracts, the contractor shall include the following clauses in subcontracts, as applicable:

(1) Davis-Bacon clauses prescribed in 48 CFR 22.407.
(2) Foreign Travel clause prescribed in 48 CFR 952.247–70.
(3) Counterintelligence clause prescribed in 48 CFR 970.0404–4(a).
(4) Service Contract Act clauses prescribed in 48 CFR 22.1006.
(5) State and local taxes clause prescribed in 48 CFR 970.2904–1.
(6) Cost or pricing data clauses prescribed in 48 CFR 970.1504–3–1(b).

(End of Clause)

970.5245–1 Property.

As prescribed in 48 CFR 970.4501–1(a), insert the following clause:

Property (Month and Year TBE)

(a) Furnishing of Government property. The Government reserves the right to furnish any property or services required for the performance of the work under this contract.

(b) Title to property. Except as otherwise provided by the contracting officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any item of such property. The contractor shall make such disposition of rejected items as the contracting officer shall direct. Title to other property, the cost of which is reimbursable to the contractor under this contract, shall pass to and vest in the Government upon (1) issuance for use of such property in the performance of this contract, or (2) commencement of processing or use of such property in the performance of this contract, or (3) reimbursement of the cost thereof by the Government, whichever first occurs. Property furnished by the Government and property purchased or furnished by the contractor, title to which vests in the Government, under this paragraph are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.

(c) Identification. To the extent directed by the contracting officer, the contractor shall identify Government property coming into the contractor's possession or custody, by marking and segregating in such a way, satisfactory to the contracting officer, as shall indicate its ownership by the Government.

(d) Disposition. The contractor shall make such disposition of Government property which has come into the possession or custody of the contractor under this contract as the contracting officer may direct during the progress of the work or upon completion or termination of this contract. The contractor may, upon such terms and conditions as the contracting officer may approve, sell, or exchange such property, or acquire such property at a price agreed upon by the contracting officer and the contractor as the fair value thereof. The amount received by the contractor as the result of any disposition, or the agreed fair value of any such property acquired by the contractor, shall be applied in reduction of costs allowable under this contract or shall be otherwise credited to account to the Government, as the contracting officer may direct. Upon completion of the work or the termination of this contract, the contractor shall render an accounting, as prescribed by the contracting officer, of all government property which had come into the possession or custody of the contractor under this contract.

(e) Protection of government property—management of high-risk property and classified materials.

(1) The contractor shall take all reasonable precautions, and such other actions as may be directed by the contracting officer, or in the absence of such direction, in accordance with sound business practice, to safeguard and protect government property in the contractor's possession or custody.

(2) In addition, the contractor shall ensure that adequate safeguards are in place, and adhered to, for the handling, control and disposition of high-risk property and classified materials throughout the life cycle of the property and materials consistent with the policies, practices and procedures for property management contained in the Federal Property Management regulations (41 CFR chapter 101), the Department of Energy Property Management regulations (41 CFR chapter 109), and other applicable regulations.

(3) High-risk property is property, the loss, destruction, damage to, or the unintended or premature transfer of which could pose risks to the public, the environment, or the national security interests of the United States. High-risk property includes proliferation sensitive, nuclear related dual use, export controlled, chemically or radioactively contaminated, hazardous, and specially designed and prepared property, including property on the militarily critical technologies list.

(f) Risk of loss of Government property. (1)(i) The contractor shall not be liable for the loss or destruction of, or damage to, Government property unless such loss, destruction, or damage was caused by any of the following:

(A) Willful misconduct or lack of good faith on the part of the contractor's managerial personnel;

(B) Failure of the contractor's managerial personnel to take all reasonable steps to comply with any appropriate written direction of the contracting officer to safeguard such property under paragraph (e) of this clause; or

(C) Failure of contractor managerial personnel to establish, administer, or properly maintain an approved property management system in accordance with paragraph (i)(1) of this clause.

(ii) If, after an initial review of the facts, the contracting officer informs the contractor that there is reason to believe that the loss, destruction of, or damage to the government property results from conduct falling within one of the categories set forth above, the burden of proof shall be upon the contractor to show that the contractor should not be required to compensate the government for the loss, destruction, or damage.

(2) In the event that the contractor is determined liable for the loss, destruction or damage to Government property in accordance with (f)(1) of this clause, the contractor's compensation to the Government shall be determined as follows:

(i) For damaged property, the compensation shall be the cost of repairing such damaged property, plus any costs incurred for temporary replacement of the damaged property. However, the value of repair costs shall not exceed the fair market value of the damaged property. If a fair market value of the property does not exist, the contracting officer shall determine the value of such property, consistent with all relevant facts and circumstances.

(ii) For destroyed or lost property, the compensation shall be the fair market value of such property at the time of such loss or destruction, plus any costs incurred for temporary replacement and costs associated with the disposition of destroyed property. If a fair market value of the property does not exist, the contracting officer shall determine the value of such property, consistent with all relevant facts and circumstances.

(3) The portion of the cost of insurance obtained by the contractor that is allocable to coverage of risks of loss referred to in paragraph (f)(1) of this clause is not allowable.

(g) Steps to be taken in event of loss. In the event of any damage, destruction, or loss to Government property in the possession or custody of the contractor with a value above the threshold set out in the contractor's approved property management system, the contractor:

(1) Shall immediately inform the contracting officer of the occasion and extent thereof,

(2) Shall take all reasonable steps to protect the property remaining, and

(3) Shall repair or replace the damaged, destroyed, or lost property in accordance with the written direction of the contracting officer. The contractor shall take no action prejudicial to the right of the Government to recover therefore, and shall furnish to the Government, on request, all reasonable assistance in obtaining recovery.

(h) Government property for Government use only. Government property shall be used only for the performance of this contract.

(i) Property Management. (1) Property Management System. (i) The contractor shall establish, administer, and properly maintain an approved property management system of accounting for and control, utilization, maintenance, repair, protection, preservation, and disposition of Government property in its possession under the contract. The contractor's property management system shall be submitted to the contracting officer for approval and shall be maintained and administered in accordance with sound business practice, applicable Federal Property Management regulations and Department of Energy Property Management regulations, and such directives or instructions which the contracting officer may from time to time prescribe.

(ii) In order for a property management system to be approved, it must provide for:

(A) Comprehensive coverage of property from the requirement identification, through its life cycle, to final disposition;

(B) Employee personal responsibility and accountability for Government-owned property;

(C) Full integration with the contractor's other administrative and financial systems; and

(D) A method for continuously improving property management practices through the identification of best practices established by ''best in class'' performers.

(iii) Approval of the contractor's property management system shall be contingent upon the completion of the baseline inventory as provided in subparagraph (i)(2) of this clause.

(2) Property Inventory. (i) Unless otherwise directed by the contracting officer, the contractor shall within six months after execution of the contract provide a baseline inventory covering all items of Government property.

(ii) If the contractor is succeeding another contractor in the performance of this contract, the contractor shall conduct a joint reconciliation of the property inventory with the predecessor contractor. The contractor agrees to participate in a joint reconciliation of the property inventory at the completion of this contract. This information will be used to provide a baseline for the succeeding contract as well as information for closeout of the predecessor contract.

(j) The term ''contractor's managerial personnel'' as used in this clause means the contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of:

(1) All or substantially all of the contractor's business; or

(2) All or substantially all of the contractor's operations at any one facility or separate location to which this contract is being performed; or

(3) A separate and complete major industrial operation in connection with the performance of this contract; or

(4) A separate and complete major construction, alteration, or repair operation in connection with performance of this contract; or

(5) A separate and discrete major task or operation in connection with the performance of this contract.

(k) The contractor shall include this clause in all cost reimbursable subcontracts.

(End of Clause)

Alternate I (Month and Year TBE). As prescribed in 48 CFR 970.4501–1(b), when the award is to a nonprofit contractor, replace paragraph (j) of the basic clause with the following paragraph (j):

(j) The term ''contractor's managerial personnel'' as used in this clause means the contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of all or substantially all of:

(1) The contractor's business; or

(2) The contractor's operations at any one facility or separate location at which this contract is being performed; or

(3) The contractor's Government property system and/or a Major System Acquisition or Major Project as defined in DOE Order 4700.1 (Version in effect on effective date of contract).

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Monday,
March 13, 2000

Part III

Department of Agriculture

Agricultural Marketing Service
7 CFR Part 205
National Organic Program; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Docket Number: TMD–00–02–PR2]

RIN 0581–AA40

National Organic Program

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would establish a National Organic Program (NOP or program) under the direction of the Agricultural Marketing Service (AMS), an arm of the United States Department of Agriculture (USDA). This national program is intended to facilitate interstate commerce and marketing of fresh and processed food that is organically produced and to assure consumers that such products meet consistent, uniform standards. This program will establish national standards for the production and handling of organically produced products, including a National List of substances approved and prohibited for use in organic production and handling. This proposal will establish a national-level accreditation program to be administered by AMS for State officials and private persons who want to be accredited as certifying agents. Under the program, certifying agents will certify production and handling operations in compliance with the requirements of this regulation and initiate compliance actions to enforce program requirements. The proposal includes requirements for labeling products as organic and containing organic ingredients. The rule also provides for importation of organic agricultural products from foreign programs determined to have equivalent organic program requirements. The program is proposed under the Organic Foods Production Act of 1990, as amended.

DATES: Comments must be submitted on or before June 12, 2000.

ADDRESSES: Interested persons are invited to submit written comments on this proposal to: Keith Jones, Program Manager, National Organic Program, USDA–AMS–TMP–NOP, Room 2945–So., Ag Stop 0275, PO Box 96456, Washington, DC 20090–6456. Comments also may be sent by fax to (703) 365–0760 or filed via the Internet through the National Organic Program's homepage at: http://www.ams.usda.gov/nop. Written comments to this proposed rule submitted by regular mail and faxed comments should be identified with docket number TMD–00–02-PR. To facilitate the timely scanning and posting of comments to the NOP homepage, multiple page comments submitted by regular mail should not be stapled or clipped. Commenters should identify the topic and section number of this proposal to which the comment refers.

It is our intention to have all comments to this proposal, whether mailed, faxed, or submitted via the Internet, available for viewing on the NOP homepage at http://www.ams.usda.gov/nop in a timely manner. Comments submitted in response to this proposal will be available for viewing at USDA–AMS, Transportation and Marketing, Room 2945–South Building, 14th and Independence Ave., SW, Washington, DC, from 9:00 a.m. to 12:00 p.m. and from 1:00 p.m. to 4:00 p.m., Monday through Friday (except official Federal holidays). Persons wanting to visit the USDA South Building to view comments received in response to this proposal are requested to make an appointment in advance by calling (202) 720–3252.

FOR FURTHER INFORMATION CONTACT: Richard Mathews, Senior Agricultural Marketing Specialist, USDA–AMS–TM–NOP, Room 2510–So., PO Box 96456, Washington, DC 20090–6456; Telephone: (202) 205–7806; Fax: (202) 205–7808.

SUPPLEMENTARY INFORMATION:

Background of the National Organic Program

To address problems created by inconsistent organic standards, the organic industry attempted to establish a national voluntary organic certification program in the late 1980's. However, that effort failed to develop a consensus on needed organic standards. Congress was then petitioned by an organic industry trade association to establish a mandatory national organic program, resulting in the Organic Foods Production Act of 1990 (the Act). Congress passed the Act to: (1) Establish national standards governing the marketing of certain agricultural products as organically produced products; (2) assure consumers that organically produced products meet a consistent standard; and (3) facilitate commerce in fresh and processed food that is organically produced. This proposal is designed to implement the Act.

To help readers better understand this proposal, we have provided answers to some frequently asked questions about the proposed rule, including some of the issues most commonly raised in public comments.

Is this the final word on National organic standards?

No. This is only a proposed rule. It is important that you take the time to read it carefully and write to USDA to give us your recommendations, being as specific as you can. Your comments are due by June 12, 2000.

Your comments do matter. On December 16, 1997, the first proposed rule was published in the **Federal Register**, and 275,603 people wrote to us to explain why and how the rule should be rewritten, the largest public response to a proposed rule in USDA history. Then, in the October 24, 1998 **Federal Register**, we asked for public comment on issues concerning livestock confinement, medications, and the authority of certifying agents, and 10,817 people wrote to us. As you read through this document, you will get a sense of what these comments said because in each section we briefly summarize the relevant comments and provide our response to them.

We expect to publish a final rule later this year, once we know what you think about this proposal. The final rule will have, as proposed here, an implementation phase-in period so farmers and processors won't have to change overnight.

Has there been citizen input on this proposal beyond public comments?

Yes. The National Organic Standards Board (NOSB) is a 15-member citizen board that advises the Secretary on all aspects of the National Organic Program and has special responsibility for development of the National List. Established by law in 1990, the NOSB includes 3 environmental representatives, 3 consumer representatives, 4 organic farmers/ranchers, 2 organic processors, 1 retailer, 1 scientist, and 1 certifying agent. Currently, the NOSB comprises 14 members. The 15th member, an accredited certifying agent, would be appointed after certifying agents are accredited by the Secretary. Since the first NOSB was appointed in 1993, the Board has held 19 public meetings, including one public teleconference, crisscrossing the country to hear from the public before making recommendations to the Secretary on national standards. The vast majority of commenters on the first proposed rule urged the Secretary to rewrite the proposal in line with NOSB recommendations—and this is what we have done. More information on NOSB

members, meeting minutes, and a side-by-side comparison of this proposal with NOSB recommendations can be found at www.ams.nop/gov.

In addition, to be consistent with OMB Circular No, A–119, which directs agencies to use voluntary consensus standards, USDA considered adoption of the *American Organic Standards, Guidelines for the Organic Industry* as a voluntary consensus standard for use in the National Organic Program. In October 1999, the Organic Trade Association published the American Organic Standards (AOS). The AOS standards were developed over several months with two opportunities for comment from interested parties. The introduction states that the standards are written as an up-to-date compilation and codification of organic standards and certification procedures, as they are understood and applies in the United States. Organic Trade Association members are expected to follow the guidelines.

USDA has determined that it would be impractical to use the American Organic Standards in lieu of USDA developed standards for the following reasons: (1) Not all participants in the organic industry elected to participate in developing the AOS; (2) the AOS are new to the industry so there has not been sufficient time for the industry to assess their effectiveness, and (3) some certifying agents disagree with portions of the AOS.

Why do we need national standards for organic food?

National standards for organic food production are designed to bring about greater uniformity in the production, manufacture, and marketing of organic products. In the absence of a national standard, 49 State and private organizations have established individual programs and standards for certifying organic agricultural products. The lack of consistency between these standards has created problems for farmers and handlers of organic products, particularly if they want to sell their products in multiple States with different standards. Lack of a nationwide standard has also created confusion for consumers, who may be uncertain what it really means when a food product is called ''organic.''

With a national standard, consumers across the country can go into any store and have full confidence that any food product labeled ''organic'' meets a strict, consistent standard no matter where it was made. Use of the word, ''organic,'' on the label of any product that does not meet the standard is strictly prohibited.

Consumers will have that confidence, because this proposal requires for the first time that all organic operations be certified by USDA-approved certifying agents. Up to now, certification has been optional; some farmers choose not to be certified at all, and others are certified by State or private certifiers using different standards. It can be hard for consumers to know if a product has been certified, or, if it has, to what standard. Under this proposal, all organic operations, except for the very smallest, would be certified to the same standard. And all products labeled as ''organic'' would have to comply with the production and handling standards in this rule.

Consumers can also look for the USDA organic seal, which can only be used on products that have been certified by USDA-approved certifying agents. This seal assures consumers that the maker of the product is part of a rigorous certification program and has been thoroughly reviewed by professional inspectors trained in organic agriculture.

National standards will also bring greater predictability for producers of organic foods. There will be no confusion about whether a product satisfies the particular standard of any State, for example, because all organic foods will meet the same standards.

Finally, a national standard for organic food will help our farmers and manufacturers sell organic products in other countries. The lack of a consistent national organic program has limited access to important markets in other countries because of the confusion created by multiple, independent standards. A strong national standard will help to ensure buyers in other countries that all U.S. organic products meet the same standards.

How can I tell how much organic food is in a product?

This proposal sets strict labeling standards based on the percentage of organic content. If a product is 100 percent organic, it can, of course, be labeled as such. A product that is at least 95 percent organic can be described as, for example, ''organic cereal.'' If a cereal, for example, contains between 50 and 95 percent organic content, it can be described as ''cereal made with organic ingredients,'' and up to three organic ingredients can be listed. Finally, if the food contains less than 50 percent organic content, the term, ''organic,'' may only appear on the ingredient information panel. These four new labeling categories will provide consumers with much greater information than they have today. [Labeling is covered in subpart D.]

What is the National List?

The National List of Allowed and Prohibited Substances (known as the National List) identifies specific substances that may or may not be used in organic production and handling operations. The National List is developed by the NOSB, through consultation with outside experts, and forwarded to the Secretary for approval. The list identifies those synthetic substances, which would otherwise be prohibited, that may be used in organic production based on the recommendations of the NOSB. Only those synthetic substances found on the National List may be used. The National List also identifies those natural substances that may not be used in organic production, as determined by the Secretary based on the NOSB recommendations.

The first proposal included some substances on the National List that were not recommended by the NOSB. This proposal contains no substances on the approved list that were not found in the NOSB recommendations.

This proposal also includes restrictions or other conditions on the use of allowed substances, also known as ''annotations,'' as recommended by the NOSB. Such annotations have been used by existing State and private certification programs to further ensure that allowed substances are used in a manner that is consistent with organic production. (The National List is covered in subpart G, §§ 205.600 through 205.607.)

Does this proposal prohibit use of genetic engineering in organic production?

Yes. This proposal prohibits the use of genetic engineering (included in the broad definition of ''excluded methods'' in this proposal, based on the definition recommended by the National Organic Standards Board) in the production of all foods and ingredients that carry the organic label.

275,603 commenters on the first proposal nearly universally opposed the use of this technology in organic production systems. Based on this overwhelming public opposition, this proposal prohibits its use in the production of all organic foods even though there is no current scientific evidence that use of excluded methods presents unacceptable risks to the environment or human health. While these methods have been approved for use in general agricultural production and may offer certain benefits for the

environment and human health, consumers have made clear their strong opposition to their use in organically grown food. Since the use of excluded methods in the production of organic foods runs counter to consumer expectations, foods produced with these methods will not be permitted to carry the organic label. (Excluded methods are defined in subpart A and discussed further under Production and Handling (subpart C), Labeling (subpart D), and the National List (subpart G).)

Will genetic engineering be allowed in the production of foods that contain both organic and nonorganic ingredients?

No. For products with mostly organic content—those products where more than half of the ingredients are organic and that have the word, ''organic,'' on the main product label— excluded methods must not be used in the production of any ingredients. Only those products, in which fewer than half of the ingredients are organic and in which the organic ingredients are only identified on the ingredient panel, could contain nonorganic ingredients produced through excluded methods.

We believe consumers have expressed a clear expectation that these methods should not be used in the production of any ingredients contained in mostly organic products. Because prominent use of the word, ''organic,'' on the label of such products reinforces that expectation, we have chosen to prohibit use of excluded methods in production of both the organic and nonorganic ingredients.

We recognize that this policy will place additional burdens on organic food processors and certifying agents because the ability to meet these requirements will depend largely on practices used in conventional agricultural markets. For organic food processors, it may be harder to find sources of nonorganic ingredients that are produced without use of excluded methods. Similarly, certifying agents may face greater difficulty because they will be required to ensure that handlers have complied with this requirement. However, we believe that the need to meet strong consumer expectations outweighs these concerns. Furthermore, we anticipate that as marketplace practices or standards evolve, these practices will be the basis for implementing this provision, providing handlers and certifying agents recognize criteria with which to evaluate sources of nonorganic ingredients in products containing both organic and nonorganic ingredients.

Does this proposal prohibit use of irradiation in organic production?

Yes. This proposal prohibits the use of irradiation in the production of all foods and ingredients that carry the organic label. 275,603 commenters on the first proposal almost universally opposed the use of this technology in organic production systems. Based on this overwhelming public opposition, this proposal prohibits its use in the production of all organic foods even though there is no current scientific evidence that use of irradiation presents unacceptable risks to the environment or human health and may, in fact, offer certain benefits. Because this rule is a marketing standard and consumers have expressed a clear expectation that irradiation should not be used in the production of organic foods, foods produced with this technology will not be permitted to carry the organic label.

The prohibition on irradiation extends to nonorganic ingredients used in mostly organic ingredients—those products where more than half of the ingredients are organic and that have the word, ''organic,'' on the main product label. Only those products, in which fewer than half of the ingredients are organic and in which the organic ingredients are only identified on the ingredient panel, could contain irradiated nonorganic ingredients. We do not believe that this prohibition on irradiation in nonorganic ingredients will place undue burden on either handlers or certifiers because of current labeling requirements for irradiated products.

Does this proposal prohibit use of sewage sludge in organic production?

Yes. This proposal prohibits the use of sewage sludge in the production of all foods and ingredients that carry the organic label. This prohibition extends to nonorganic ingredients used in the production of mostly organic foods—those products in which more than half of the ingredients are organic and that have the word, ''organic,'' on the main product label. Only those products, in which fewer than half of the ingredients are organic and which the organic ingredients are only identified on the ingredient panel, could contain nonorganic ingredients produced using sewage sludge.

275,603 commenters on the first proposal almost universally opposed the use of this technology in organic production systems. Based on this overwhelming public opposition, this proposal prohibits its use in the production of all organic foods, even though there is no current scientific evidence that use of sewage sludge in the production of foods presents unacceptable risks to the environment or human health. We believe consumers have expressed a clear expectation that sewage sludge should not be used in the production of any ingredients contained in mostly organic products. Because prominent use of the word, ''organic,'' on the label of such products reinforces that expectation, we have chosen to prohibit use of sewage sludge in production of both the organic and nonorganic ingredients. We recognize that this policy may place additional burdens on organic food processors and certifying agents. However, we believe that the need to meet strong consumer expectations outweighs these concerns.

Does this proposal set standards for livestock production?

Yes. The proposal sets the first comprehensive standards for production of organic animals and meat products. Under this proposal, use of antibiotics would be prohibited in organic livestock production. The standards also prohibit the routine confinement of animals and require that ruminant animals have access to outdoor land and pasture, although temporary confinement would be allowed under certain, limited circumstances. Animals under organic management must also receive 100-percent organically grown feed. (Organic livestock management issues are discussed in greater detail under subpart C, 205.236 through 205.239.)

Does this proposal prohibit ''ecolabeling''?

No. This proposal only regulates use of the term, ''organic,'' on product labels. Other labels would be allowed as long as they are truthful and not misleading and meet general food labeling requirements. The labeling requirements of this proposal are intended to assure that the term, ''organic,'' and other similar terms or phrases are not used in a way that misleads consumers. Should we find that terms or phrases are being used to represent ''organic'' when the products are not produced to the requirements of this regulation, we would proceed to restrict their use. (Labeling is covered in subpart D.)

Are organic foods pesticide-free?

No. Organic farmers can use natural pesticides to control weeds and insects and maintain the high quality of organic products that consumers have come to expect. Use of synthetic chemical pesticides, however, is prohibited unless specifically allowed on the National List as recommended by the

National Organic Standards Board and approved by the Secretary. (The National List is covered in subpart G, sections 205.600 through 205.607.)

Who needs to be certified?

As a general rule, all organic production and handling operations must be certified. The Act and this proposal, however, do provide for some exceptions. For example, organic operations with less than $5,000 in annual sales of organic products do not require certification. Similarly, organic operations that handle only those products with less than 50 percent organic content or that restrict labeling of organic ingredients to the ingredient information panel do not require certification. Finally, we are not requiring certification of most grocery stores and restaurants (referred to in this proposal as ''retail food establishments'') at this time.

Even where operations do not require certification, however, all organic food products must meet the national standards as described in this proposal. In that way, consumers can be confident that all products labeled as ''organic'' meet the national standards, even if they did not require certification under the NOP. (Certification is covered in subpart E; the exceptions from certification are found in subpart B.)

Will organic farmers have to pay fees?

Organic farmers and other organic operations will have to pay fees for organic certification but will not be charged any fees by USDA. Fees for certification services will be set by the private or State certifying agents. The proposal also requires that certifying agents make their schedule of fees publicly available so that organic operations can plan appropriately and so that they can make informed choices where multiple certifying agents are available. USDA will also review fees charged by certifying agents to ensure that they are reasonable and that they are being applied fairly to all organic operations. Under this proposal, USDA would only charge fees for reviewing (''accrediting'') certifying agents. These fees will primarily be based on the actual costs of the accreditation work done by USDA staff so that certifying agents with smaller and less complex programs will pay lower fees. The proposal also provides for a reduction in the accreditation fees during the first 18 months of the program to provide an incentive for certifying agents to become accredited under the new national program as soon as possible. (Fees are covered in subpart G, §§ 205.640 through 205.642.)

How do I become an accredited certifying agent?

All certifying agents must be accredited by USDA. Certifying agents may apply for accreditation effective with publication of the final rule and are encouraged to apply as soon after publication of the final rule as possible. USDA will provide additional information on applying for accreditation on or about the date of publication of the final rule. This information will be available on the NOP website and by mail upon request.

Applications for accreditation will be handled on a first-come-first-served basis. Those that apply within the first 6 months following publication of the final rule and are determined by the Administrator to meet the requirements for accreditation will be notified of their status in writing on or about 12 months after publication of the final rule. This approach is being taken because of the market advantage that could be realized by accredited certifying agents if USDA did not announce the accreditations simultaneously. (Accreditation is covered in subpart F.)

What are the roles and responsibilities of certifying agents in the National Organic Program?

Certifying agents are the ''front line'' representatives of USDA and play a critical role in the oversight and enforcement of the national organic standards program. Once accredited by USDA, certifying agents are empowered to make key decisions regarding the status of organic operations. Certifying agents review the organic plans of organic operations and are authorized to grant certification to those operations that meet the strict national organic standards. Certifying agents are also responsible for the continuing oversight of organic operations— reviewing annual updates of organic plans, conducting residue analyses, and conducting other monitoring activities.

In cases in which a certifying agent finds that an organic operation does not meet the national standards, the agent is empowered to issue notices of noncompliance and to initiate suspension or revocation of certification. Organic operations can appeal such decisions to USDA but unless the organic operation appeals the certifying agent's decision or can correct the problems identified by the certifying agent, the agent's decision will stand. (Accreditation is covered in subpart F; Compliance is covered in subpart G, §§ 205.660 through 205.668; and Appeals are covered in subpart G, §§ 205.680 through 205.681.]

How will USDA ensure that the National standards are applied fairly and consistently by all certifying agents?

Because this proposal gives certifying agents such an important role in enforcing the national standards, USDA oversight of those certifying agents is particularly important. Under this proposal, all certifying agents, both private and in State organic programs, would have to be accredited by USDA before they could begin to certify organic operations. It is this accreditation process, in which USDA reviews all certifying agents to make sure they understand and can accurately apply the national organic standards, that is USDA's main tool to ensure that the standards are applied fairly and consistently by all certifying agents.

The accreditation process is really one of ongoing oversight by USDA. Accreditation must be renewed every 5 years so that we can be sure certifying agents continue to meet the program standards. USDA will conduct one or more site visits of certifying agents during the period of accreditation as another mechanism of monitoring their compliance. Finally, certified operations may file complaints with USDA if they believe they have been treated unfairly or if a certifying agent is otherwise not following the program requirements. We will investigate these complaints for possible enforcement action.

Can States have organic standards that are more strict than the National standard?

Yes. Some States may have unique environmental or other concerns that they believe require extra conditions above the national standard. In those cases, States would apply to USDA to have their special State program approved by the Secretary.

However, no State would be allowed to set up a program that does not at least meet the national standard. And States would not be allowed to use their programs to keep out or otherwise discriminate against organic products made in another State. (State Programs are covered in subpart G, §§ 205.620 through 205.622.)

What is the timeframe for implementation?

The final rule in this rulemaking process will establish a procedure and a timeframe for implementing the NOP. We expect that the interim period between publication of the final rule in this rulemaking process and the effective date of the program (actual implementation of regulations) will be 18 months. The following is a

preliminary list of several administrative and program issues that must be implemented during that period. Certifying agent applications will be evaluated and accreditation granted. Certifying agents will, in turn, certify production and handling operations to the requirements of these regulations. Equivalency discussions will be held with foreign governments and foreign certifying agents. Guidelines and practice standards on production and handling practices must be finalized and distributed by the NOP. A petition process for recommending amendments to the National List must be developed and distributed. The NOSB will continue to review materials for the National List. State programs may have to make adjustments in their organic certification programs for consistency with the standards of this program. Producers should use the interim period to prepare their production operations to comply with the relevant requirements of this program. Handlers should use the interim period to prepare for necessary changes in the labeling of their products.

Prior Documents in This Proceeding

This proposed rule is issued pursuant to the Organic Food Production Act of 1990 (Act or OFPA), as amended (7 U.S.C. 6501 *et seq.*). This proposal replaces the proposed rule published in the **Federal Register** December 16, 1997. Comments to the first proposal were considered in the preparation of this proposed rule.

The following notices related to the NOSB and the development of this proposed regulation have been published in the **Federal Register**. Five notices of nominations for membership on the NOSB were published between April 1991 and June 1999 (56 FR 15323, 59 FR 43807, 60 FR 40153, 61 FR 33897, 64 FR 33240). Two notices of extension of time for submitting nominations were published on September 22, 1995, and September 23, 1996 (60 FR 49246, 61 FR 49725). Seventeen notices of meetings of the NOSB were published between March 1992 and October 1999 (57 FR 7094, 57 FR 27017, 57 FR 36974, 58 FR 85, 58 FR 105, 58 FR 171, 59 FR 58, 59 FR 26186, 59 FR 49385, 60 FR 51980, 60 FR 15532, 61 FR 43520, 63 FR 7389, 63 FR 64451, 64 FR 3675, 64 FR 28154, 64 FR 54858). One notice of public hearings on organic livestock and livestock products was published on December 30, 1993 (58 FR 69315). One notice specifying a procedure for submitting names of substances for inclusion on the National List was published on March 27, 1995 (60 FR 15744). A rule proposing the NOP was published on December 16, 1997 (62 FR 65850). An extension of the time period for submitting comments to the proposed rule was published on February 9, 1998 (63 FR 6498). One request for comments on Issue Papers was published on October 28, 1998 (63 FR 57624). A notice of a program to assess organic certifying agencies was published on June 9, 1999 (64 FR 30861).

This preamble includes a discussion of the proposed rule and supplementary information, including the Regulatory Impact Assessment, Regulatory Flexibility Act Analysis, Federalism Impact Statement, and Paperwork Reduction Act Analysis. The Civil Rights Impact Analysis is not included as an attachment but may be obtained by writing at the address provided above or via the Internet through the National Organic Program's homepage at: http://www.ams.usda.gov/nop.

National Organic Program Overview

Subpart A—Definitions

Proposal Description

This subpart defines various terms used in this part. These definitions are intended to enhance conformance with the regulatory requirements through a clear understanding of the meaning of key terms.

We have amended terms and definitions carried over from the first proposal where necessary to make their wording consistent with the language used in this proposal. We have removed the definition for the following terms because the terms are not used in this proposal or have been determined to be unnecessary: Active ingredient in any input other than pesticide formulations, active ingredient in pesticide formulations, agroecosystem, botanical pesticides, breeding, chapter, cation balancing agent, certification activities, certification applicant, certified facility, chapter, confirmation of accreditation, contaminant, critical control point, cytotoxic mode of action, degradation, detectable residue level, extract, farm, foliar nutrient, formulated product, fungicide, generic name, incidental additive, inert ingredient in any input other than pesticide formulations, intentionally applied, made with certain organic ingredients, mating disrupter, micronutrient, nonactive residues, nonorganic agricultural ingredient or product, petition, preliminary evaluation, processing methods, production aid, production input, proper manuring, putrefaction, site evaluation, soil amendment, split operation, subtherapeutic, suspension of accreditation, synergist, synthetic volatile solvent, treated, untreated seeds, USDA seal, and weed. We received comments on some of the definitions that have been deleted. We have not addressed these comments here because the relevant definitions have been deleted.

Definitions—Changes Based On Comments

This subpart differs from our first proposal in several respects as follows:

(1) We have amended the term, ''audit trail,'' by replacing the category, ''organic'' or ''made with certain organic ingredients,'' with ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients),'' or agricultural product containing less than 50 percent organic ingredients identified as organic in an ingredients statement. We have taken this action to clarify the definition as requested by several commenters.

(2) We have amended the term, ''buffer area,'' to ''buffer zone'' and amended the term by replacing ''a certified farm or portion of a farm'' with ''a certified production operation or portion of a production operation.'' A few commenters suggested including a minimum size for the buffer zone and specifying that buffer zones must be uncropped vegetated areas. The appropriate size and type of a buffer zone is highly site-specific and cannot be rigidly specified for all locations without placing unreasonable burdens on some producers. Several commenters supported determination of the appropriate buffer zone size and type by the producer in consultation with the certifying agent. Additional information on this issue can be found at subpart C, Crop Production, Changes Requested But Not Made, item 1.

(3) We have amended the definition of the term, ''certification or certified,'' to make the language in the definition consistent with the language of this proposal. We have also removed the language concerning the information to be found on a certificate. Commenters suggested amending the definition by adding the words, ''annual'' and ''based on an on-site inspection and comprehensive review of the operation.'' Other commenters recommended deleting the reference to products on a certificate because it is the operation, not the product, that is certified. We have not made the suggested additions because the issues are adequately addressed in the regulations. We have removed the language concerning information found on a certificate because this information

is adequately addressed in the regulations.

(4) We have amended the definition of ''certifying agent'' to clarify that the term only applies to State-entity and private-entity certifying agents. We have taken this action because there was some confusion among commenters over whether the original definition included a State program's governing State official.

(5) We have amended the definition of ''commercially available'' by removing the phrase, ''to be feasibly and economically used.'' We have taken this action because we agree with commenters that use of the phrase provides an opportunity for producers and handlers to avoid use of preferred inputs. We have also clarified that ''commercially available'' applies to processors by including the words, ''or processing ingredient.'' Additional information on this issue can be found at subpart C, Production and Handling (General), Changes Requested But Not Made, item 2.

(6) We have amended the definition of ''compost'' by referring to compost as ''the product of a carefully managed process through which microorganisms break down plant and animal materials into more available forms suitable for application to the soil.'' We also state that ''composting'' must use methods to raise the temperature of raw materials to the levels needed to stabilize nutrients and kill pathogens. Specific instructions on the production of compost for use in organic production has been referenced to the National Resources Conservation Service's (NRCS) practice standard for a composting facility (Code 317). The NRCS practice Standard provides a field tested and verifiable procedure for producing compost. We have made these changes because commenters suggested that we clarify the meaning of compost. Several commenters stated that the definition should include rules about what kinds of materials are acceptable for use in compost. Additional information on this issue can be found at subpart C, Production and Handling (General), Changes Based On Comments, item 4.

(7) We have amended the definition of ''crop rotation'' by adding a statement about the relationship of crop rotation to perennial crops as suggested by an industry association.

Several commenters suggested inserting references to the use of legumes and sod as essential to crop rotation. The benefits achieved through the use of legumes and sod could be fulfilled through many types of rotation plans, which could only be developed according to the site-specific climate, soil type, and type of crops or livestock produced on a given operation. In the interest of flexibility this proposal does not specify what specific crops have to be included in a crop rotation. The issue addressed in this suggestion is addressed in the crop rotation practice standard at § 205.205. Additional information on crop rotation can be found at subpart C, Production, Changes Based On Comments, item 5.

(8) We have amended the definition of ''disease vectors'' by adding that disease vectors include plants and animals that transmit disease organisms or pathogens which may attack crops or livestock. A few commenters pointed out that the definition as originally proposed was technically inaccurate because it did not address the transmission of disease organisms to crops or livestock.

(9) We have rewritten the definition of ''employee'' to provide that an employee is any person providing paid or volunteer services for a certifying agent. A few States requested that the definition clearly reference volunteers. A trade association recommended expanding the definition to include any person who works for a certifying agent. We have included volunteers in this proposal because of their substantial use by some certifying agents. Other States suggest changing ''certification decisions'' to ''certification activities'' to include any person who is involved in the certification process. We have addressed the commenters' concern by referring to services provided by the employee for the certifying agent. A few States stated that the definition needs to clarify who is the employer of an independent inspector. An independent inspector would not be included in the definition of employee. Such persons are considered to be contractors. Some States expressed concern regarding the use of volunteers from certified production and handling operations. Section 205.501(a)(11) requires that a certifying agent prevent conflicts of interest by not permitting any employee, inspector, contractor, or other personnel to accept payment, gifts, or favors of any kind, other than prescribed fees, from any business inspected, except that a certifying agent that is a not-for-profit organization with an Internal Revenue Code tax exemption may accept voluntary labor from certified operations. Under this exception all volunteers would be excluded from work, discussions, and decisions in all stages of the certification process and the monitoring of certified production or handling operations for all entities in which such person has or has held a commercial interest, including an immediate family interest or the provision of consulting services, within the prior 12-month period. Additional information on conflicts of interest can be found at subpart F, Changes Based On Comments, items 4 and 5, and subpart F, Changes Requested But Not Made, items 5, 6, 7, and 8; subpart F, Additional Provisions, item 2.

(10) We have rewritten the definition of ''fertilizer'' to provide for the inclusion of minor nutrients and trace elements with the three primary nutrients (nitrogen, phosphorus, potassium) contained in a substance or a blended substance utilized in a soil fertility program. This is a generic definition of fertilizer. Issues concerning what substances may be present in a fertilizer for organic production are addressed in subpart C of this proposal.

(11) We have amended the definition of ''handle'' by providing that the term shall not include the sale, transportation, or delivery of crops or livestock by the producer thereof to a handler. This change was made because we found merit in a certifying agent's concern that farmers were turned into handlers by definition. This was not our intent.

(12) We have amended the definition of ''inspector'' to make terms used in the definition consistent with terms used in this proposal and to remove the phrase, ''who is qualified.'' A State certifying agent suggested deleting the phrase, ''who is qualified,'' because the issue of inspector qualification is more appropriately addressed in the regulations. We concur that the definition of ''inspector'' does not need to address the issue of qualifications, especially in light of the fact that certifying agents are required by these regulations to use qualified inspectors.

(13) We have amended the definition of ''livestock'' by adding reference to the production of fiber, feed, and other agricultural-based consumer products and by providing that ''livestock'' shall not include fish or bees for the production of food, fiber, feed, or other agricultural-based consumer products. A trade association and several States recommended adding fibers to the definition. We have added fiber, feed, and other agricultural-based consumer products to the definition to capture all types of consumer products that would be produced from livestock. We have excluded aquatic animals from the definition of livestock pending future development of detailed practice standards for specific aquatic animals. We have also excluded bees from the definition of livestock pending future National Organic Standards Board (NOSB or Board) review and recommendations on apiculture.

Additional information on this issue can be found at subpart C, Livestock Production, Changes Based On Comments, items 3 and 4.

(14) We have amended the definition of ''market information.'' A commenter suggested that the definitions of the terms, ''labeling'' and ''market information,'' were difficult to distinguish from one another and needed clarification. We have added language to make a distinction between the two terms. ''Market information'' now includes the phrase, ''distributed, broadcasted, or made available outside of retail outlets.'' This phrase indicates that any information distributed, broadcasted, or made available outside of retail outlets to assist in the sale or promotion of a product falls under the ''market information'' category. ''Labeling'' includes any information displayed or made available in retail outlets on or about the product.

(15) We have amended the definition of ''organic'' to clarify that the term, ''organic,'' is used as a labeling term. Commenters, including several States, stated that the definition repeated the proposed requirements for allowing the use of ''organic'' on a product label. They suggested amending the definition to clarify that the term, ''organic,'' is used as a labeling term. We made the suggested change because we agree that the definition unnecessarily repeated regulatory information and that use of the term, ''organic,'' is intended as a labeling term.

(16) We have amended the definition of ''producer'' to clarify that the term includes the production of fiber and other agricultural-based consumer products. Several States suggested that the definition of ''producer'' be amended to clarify that a producer could also be growing or producing a fiber product. We agree that this clarification is needed and have also added reference to ''other agricultural-based consumer products'' to further clarify that the term includes all agricultural-based consumer products produced by a producer.

(17) We have changed the definition of ''routine use of parasiticide'' to the definition recommended by the NOSB. Commenters suggested removing ''without cause'' from the definition in the first proposal and adding such phrases as ''without an indication of illness from parasites,'' ''administration with need based on the presence of a diagnosed problem with parasites,'' and ''with or without cause.'' The NOSB's definition solves the problems caused by the use of the phrase, ''without cause.'' Additional information on this issue can be found at subpart C, Livestock Production, Changes Based On Comments, item 9.

(18) We have amended the definition of ''slaughter stock'' by changing ''human consumption'' to ''consumption by humans and other animals.'' A few commenters recommended deleting the word, ''human,'' to indicate that organic livestock may also be used to produce pet food. We agree that slaughter stock may be used in the production of products for consumption by humans and other animals.

(19) We have amended the term, ''soil quality,'' and its definition by referencing ''water'' in the term and the definition. This change was made because of the reference to ''soil and water quality'' in § 205.200 of this proposal. Several State commenters stated that the definition of ''soil quality'' was too vague and would pose problems in enforcing a requirement that addressed the effect of various practices on soil quality. Other commenters requested expansion of the definition to include a discussion of why soil quality is important and what functions healthy soil serves in an organic production system. Another State suggested expanding the definition to include water quality, since there were several references in the regulations to effects on soil or water quality. The importance of soil quality has been addressed under subpart C of this proposal. We acknowledge that the phrase, ''soil and water quality,'' is used in subpart C and have, therefore, expanded the term, ''soil quality,'' to ''soil and water quality'' and amended the definition accordingly. We have also added a new phrase to the previous definition to acknowledge that one important criterion of soil and water quality is the control of environmental contaminants. The determination of which observable indicators to monitor and how to interpret the observations will be subject to documentation in the organic system plan and consultation between the producer and the certifying agent. Guidance will be provided to certifying agents through program manuals. Additional information on this issue can be found at subpart C, Production and Handling (General), Changes Based On Comments, item 2.

(20) We have amended the term, ''governing State official,'' to ''State program's governing State official'' and retained the definition to clarify the difference between a State certifying agent and a governing State official. We have used the term, ''State program's governing State official,'' throughout this proposal. A trade association and a State recommended removing the word, ''certification,'' from the definition. We have not made this change because the term is meant to identify the person responsible for administering the State's organic certification program. By ''State organic certification program,'' we mean the law, regulations, and any policies and procedures established by the State to govern the organic certification of producers or handlers by State or private certifying agents.

(21) We have amended the definition of ''unavoidable residual environmental contamination.'' Commenters stated that USDA should set levels rather than make case-by-case decisions regarding residual environmental contamination. They suggested that background levels could be used to determine whether land exceeds the level. Another commenter requested a clear statement of ''unavoidable'' and ''contamination'' to facilitate enforcement. Some States stated that there should be a level that is unacceptable for organic agriculture. A commenter suggested that the definition read, ''The presence of a material prohibited in organic production, processing, or handling in soil, crop, or food that occurs as a result of factors beyond the control of the producer, processor, or handler.'' Another commenter suggested that the definition read, ''Background levels of prohibited substances at a site which are clearly beyond the control of a certified organic farm operator through notices to neighbors, careful avoidance of abnormally precontaminated sites, and establishment of buffer zones.'' In this proposal, we have defined ''unavoidable residual environmental contamination'' as ''background levels of naturally occurring or synthetic chemicals that are persistent in the soil or present in organically produced agricultural products that are below established tolerances.''

Definitions—Changes Requested But Not Made

This subpart retains from our first proposal terms and their definitions on which we received comments as follows:

(1) A few commenters requested that the definition of ''Administrator'' be revised to provide that authority to administer the National Organic Program may be delegated to a State official. We have not made the recommended change because the definition of ''Administrator'' merely addresses the top official of the Agricultural Marketing Service (AMS) and any AMS official to whom the Administrator may delegate authority. The definition is not meant to address working relationships established

between AMS and a State or State entity.

(2) An environmental group requested that we delete the phrase, ''other than during the manufacture of a multiingredient product containing both types of ingredients,'' from the definition of ''commingling.'' This proposal requires that a handler prevent the commingling of organic and nonorganic products but permits use of the word, ''organic,'' in labeling a product made with organic and nonorganic ingredients in accordance with these regulations. Therefore, it is necessary to indicate that the term, ''commingling,'' does not apply to the manufacture of multiingredient products produced in accordance with these regulations.

(3) A farmers' association recommended that the Secretary delegate authority for determining crop year to certifying agents because crop year will vary from region to region. We have found no compelling reason to make certifying agents responsible for determining crop year and have not made the recommended change.

(4) A few commenters requested that the definition of ''handling operation'' be amended to exclude retailers of prepackaged agricultural products. This change is unnecessary because such retailers are excluded by the definition of ''handling operation'' through the phrase, ''except final retailers of agricultural products that do not process agricultural products.''

(5) Several commenters, including a State department of agriculture, recommended elimination of the exception for weight labels in the definition of ''label.'' We have not made the recommended change to the definition of ''label'' because, as used in this proposal, ''label'' is intended to represent the organic nature of the product. A weight label that does not refer to the organic nature of the product would not constitute a label for the purposes of this proposal.

(6) A commenter requested that the definitions for ''labeling'' and ''market information'' be amended to refer only to products produced by the seller. We have not made this requested change because changing the definitions to only include products produced by the seller would severely restrict the application of the terms, ''labeling'' and ''market information.'' As defined, ''labeling'' and ''market information'' correctly include any information that may be presented to consumers concerning all products sold whether produced by the seller, most likely a retail outlet, or produced by a production or handling operation from which the seller acquired the products.

(7) A commenter requested that we include definitions for ''manure'' and ''aged or rotted manure.'' Under this proposal it is not necessary to define either term.

(8) An environmental organization requested that a phrase be added to the definition of ''mulch'' to indicate that acceptable mulch materials leave no chemical or toxic residues. This proposal allows the use of composted plant and animal wastes obtained from nonorganic sources, such as commercial compost products. Uncomposted plant or animal waste material which has been treated with a substance can be as utilized as a mulch provided the substance appears on the National List or complies with the OFPA. Off-farm plant and animal wastes from food processing, municipal yard waste facilities, and other sources are used extensively in existing organic operations and generally permitted by organic certification programs. Using such organic wastes is consistent with a system of organic production and handling, which calls for recycling organic wastes to return nutrients to the land. We believe that concerns about potential contaminants in plant and animal waste materials can be addressed by the requirement in this proposal that these materials be managed in a manner that prevents such contamination. Accordingly, this change has not been made. Additional information on this issue can be found at subpart C, Crop Production, Changes Requested But Not Made, items 2 and 3.

(9) Several commenters suggested adding information to the definition of ''National Organic Standards Board'' to address the role of the NOSB with regard to the National List. This change is unnecessary because the role of the NOSB is adequately covered in section 6517, National List, of the Act.

(10) Numerous comments were received from consumers, environmental groups, and organic producers concerning the definition of the term, ''nonagricultural ingredient.'' Commenters expressed the view that this term represented an attempt by USDA to circumvent the intent of the Act that synthetic ingredients not be permitted in organic processed products. We disagree with the position that the Act prohibits the use of synthetic ingredients in organic processed products. The use of synthetic ingredients in organic processed products is discussed in the preamble to the National List found in subpart G. We have changed the term, ''nonagricultural ingredient,'' to ''nonagricultural substance'' to be consistent with the language used in this proposal. The definition remains the same.

(11) Commenters stated their objection to the use of the term, ''nonsynthetic (natural),'' and its definition. A commenter mistakenly stated that the term, ''natural,'' was defined in the Act. Other commenters felt that use of any term that was not included in the Act was a violation of the Act. Because the term, ''natural,'' is so ambiguous and subject to differing interpretations, the term, ''nonsynthetic,'' as used throughout this regulation, represents an important clarification of the intent of the Act, and we have, therefore, retained it in this proposal.

(12) A few commenters requested that the definition of ''petition'' be amended by adding the phrase, ''to the National Organic Standards Board,'' immediately following the word, ''submitted.'' We have not made the requested change for two reasons. First, the change is unnecessary. Second, petitions, whether addressed to the NOSB or National Organic Program (NOP) Staff, will be received by the NOP because the administrative functions of the NOSB are performed at the NOP office. Petitions received will be distributed by the NOP to the NOSB and appropriate technical reviewers.

(13) A producers association stated that the definition for ''processing'' was confusing with regard to the difference between a handler and a processor. A handling operation that performs any of the activities listed in the definition of processing becomes a processor. We have found no compelling reason to revise this comprehensive definition for processing, which comes directly from the Act. A commenter suggested that this definition be changed to include repackaging for weight. In addition to the definition being stipulated by the Act, affixing a weight label to a product is a normal retail activity that does not warrant the expense and effort necessary to certify all retailers who routinely affix weight labels to organic product.

(14) A few commenters requested that the definition of ''State organic certification program'' be amended by adding a statement indicating that a State program could have additional requirements. This issue is addressed in subpart G, State Organic Certification Programs, Proposal Description.

(15) A technical institute recommended including genetically engineered organisms and their products in the definition of ''synthetic,'' and an environmental

group wanted the definition to include the combustion of minerals. We have not amended the definition as given in the Act because it already includes the combustion of minerals, which are chemically changed by the process of combustion. We also do not consider it necessary to classify genetically engineered organisms as either synthetic or nonsynthetic for the purposes of this regulation, since these organisms and their products are prohibited for use in organic production or handling regardless of whether or not they are synthetic.

(16) A commenter recommended adding the word, ''synthetic,'' immediately preceding the word, ''substances,'' in the second sentence of the definition of ''system of organic farming and handling.'' We disagree with this suggestion because ''substances'' as used in this definition could be synthetic or nonsynthetic. A few commenters requested deletion of the word, ''extraneous,'' as a modifier of ''synthetic additives'' in the definition of ''system of organic farming and handling.'' The commenters stated that use of the word, ''extraneous,'' implied that synthetic additives can be used in organic processed products. Synthetics may be used in processed products if the substance is included on the National List. Additionally, the word, ''extraneous,'' modifies the word, ''processing,'' in the definition, and we consider use of extraneous processing to be inconsistent with organic handling. For these reasons, we have not removed the word, ''extraneous,'' from the definition. We have, however, amended the term, ''system of organic farming and handling,'' by deleting ''farming'' and inserting ''production.'' The definition for the term, ''system of organic production and handling,'' is unchanged. We have taken this action to make the term consistent with the language of this proposal. Additional information on this issue can be found at subpart C, Production and Handling (General), Changes Requested But Not Made, item 1.

(17) Several commenters, including a State Department of Agriculture and a fishery association, requested that wild game and aquatic animals be included in the definition of ''wild crop.'' Regarding aquatic animals, we intend to develop detailed practice standards for specific aquatic species, which will be published for comment and finalized prior to the implementation of the NOP. Given the virtual absence of recognized certification programs for aquatic operations, including aquaculture, there are no U.S. models on which to base national standards. Additional information on this issue can be found at subpart B, Changes Requested But Not Made, item 11 and subpart C, Crop Production, Changes Requested But Not Made, item 7. Accordingly, we have not made the requested changes to the definition of ''wild crop.''

Definitions—Additional Provisions

Upon further review of the definitions in the first proposal, we have decided to propose the following additions and changes.

Amended Definitions

(1) We have amended the definition of ''accreditation'' to include foreign entities as now provided for in subpart F, Accreditation. Additional information on including foreign entities in accreditation can be found at subpart B, Additional Provisions, item 1, and subpart F, Changes Based On Comments, item 1.

(2) We have amended the definition of ''allowed synthetic'' by replacing ''for use in organic farming'' with ''for use in organic production, or handling.'' This correction was necessary because the National List includes synthetic substances used in organic production and handling.

(3) We have amended the terms, ''certified organic farm,'' ''certified organic handling operation,'' and ''certified organic wild-crop harvesting operation,'' with the term, ''certified operation.'' The term, ''certified operation,'' is used throughout this proposal to refer to a crop or livestock production, wild-crop harvesting, or handling operation or portion of an operation that is certified by an accredited certifying agent as utilizing a system of organic production or handling as described by the Act and regulations in this part. We have taken this action to simplify the regulatory language.

(4) We have amended the term, ''cultural,'' to ''cultural methods'' and amended the definition by removing all references to livestock. We have taken this action because this proposal does not refer to cultural methods with reference to livestock health care.

(5) We have amended the definition of ''field'' by replacing ''farm'' with ''production operation.'' This action was taken because ''farm'' has been replaced by ''production operation'' throughout this proposal.

(6) We have amended the definition of ''handler'' by adding the phrase, ''including producers who handle crops or livestock of their own production.'' We have made this change to clarify that producers who handle their own production become handlers under the regulations. Such producer/handlers must be certified as a handler.

(7) We have amended the term, ''inert ingredient in pesticide formulations,'' to ''inert ingredient.'' We have also amended the definition by specifying that the pesticide product is used in organic crop or livestock production and handling. These changes have been made to make the term and its definition consistent with the language used in the National List. This proposal takes a different position on inert ingredients, as explained in subpart G, National List, Changes Based on Comments, item 6, than was taken in the first proposal. Because of the increased importance of inert ingredients in this proposal, we have rejected the position of the few commenters who recommended removal of this definition.

(8) We have amended the term, ''organic plan,'' to ''organic system plan'' and made editorial changes to the definition to make the term and language of the definition consistent with the language in this proposal.

(9) We have amended the definition of ''peer review panel'' by removing ''to assist in evaluating the performance of a certifying agent'' and inserting ''to assist in evaluating applicants for accreditation as certifying agents.'' This change clarifies that the role of the peer review panel is to evaluate applicants for accreditation. Additional information on ''peer review panel'' can be found at subpart C, Proposal Description, Production and Handling (General).

(10) We have amended the definition of ''person'' by adding ''contractor'' to clarify that, when the regulations use ''person,'' the meaning includes ''contractors.''

(11) We have amended the definition of ''records'' by removing the record examples. A trade association and several States recommend adding ''process flow charts'' to the examples of records. Another commenter, who does not want to give USDA unlimited access to personnel files, suggested the creation of a specific list of records to be maintained. We have rewritten the recordkeeping provisions, removing all references to specific records or types of records which must be maintained. We have taken this action because we believe that it is impracticable to specify in detail every class of records which may be found essential in demonstrating compliance with the Act and regulations. Different types of certified production and handling operations will, by the very nature of their business, be required to maintain different records to establish their

compliance with the Act and regulations. Additional information on the issue of listing every class of records which may be found essential in demonstrating compliance with the Act and regulations can be found at subpart B, Changes Based On Comments, item 6.

(12) We have amended the definition of ''State.'' Addition of the term, ''State entity,'' necessitated our amendment of the definition of ''State'' to clarify that State means the States of the United States of America.

(13) We have amended the term, ''system of organic farming and handling,'' to ''system of organic production and handling'' and retained the original definition in this proposal. The original definition was crafted to be consistent with the requirements of the Act. We have changed ''farming'' to ''production'' to provide a more encompassing term, which may come to include such diverse activities as hydroponics, green house production, and harvesting of aquatic animals. The purpose of the original definition was to describe practices and substances consistent with systems of organic farming and organic handling as required by the Act and to provide an explicit reference point for determining which practices and substances are most consistent with these systems. Several commenters suggested that the definition include the concepts, ''agroecosystem health,'' ''ecological harmony,'' and ''biological diversity.'' Commenters also suggested including definitions for ''organic agriculture,'' ''organic farming,'' and ''transition to organic.'' This definition is intended to clarify regulatory provisions in this proposal and is not intended as a broad philosophical statement. The terms, ''organic agriculture,'' ''organic farming,'' and ''transition to organic,'' are not used in this proposal and, therefore, are not defined.

(14) We amended the definition of transplant to prevent confusion with a related term, ''seedling.'' While the terms, ''transplant'' and ''seedling'' are often used interchangeably, the Act treats them as distinct and establishes separate regulatory requirements. We have determined that the physical process of moving and replanting a seedling results in that seedling becoming a transplant. We have created this distinction to be able to enforce the full requirements of the Act. Additional information on ''transplant'' can be found at subpart C, Crop Production, Changes Based On Comments, item 4.

New Definitions

(1) We have defined ''accredited laboratory.'' Information concerning ''accredited laboratory'' can be found at subpart G, Inspection and Testing, Reporting, and Exclusion from Sale, Proposal Description.

(2) We have defined ''action level.'' Information concerning ''action level'' can be found at subpart G, Inspection and Testing, Reporting, and Exclusion from Sale, Changes Based On Comments, item 2.

(3) We have defined ''agricultural inputs.'' Information concerning ''agricultural inputs'' can be found at subpart G, Inspection and Testing, Reporting, and Exclusion from Sale, Changes Based On Comments, item 1.

(4) We have defined ''Agricultural Marketing Service (AMS) '' because the term is used throughout this proposal.

(5) We have defined ''breeder stock.'' We have added this definition because this proposal establishes conditions for the administration of an allowed synthetic parasiticide to livestock producing offspring for incorporation into an organic operation. We have also proposed conditions under which dairy stock, whose milk or milk products are to be sold, labeled, or represented as organically produced, may be treated with allowed synthetic parasiticides. Additional information on this issue can be found at subpart C, Livestock Production, Changes Based On Comments, item 9.

(6) We have defined ''bulk.'' Information concerning ''bulk'' can be found at subpart D, Additional Provisions, item 7.

(7) We have defined ''claims.'' Information concerning ''claims'' can be found at subpart D, Changes Based On Comments, item 1.

(8) We have defined ''detectable residue.'' Information concerning ''detectable residue'' can be found at subpart G, Inspection and Testing, Reporting, and Exclusion from Sale, Proposal Description and at Changes Based On Comments, item 2.

(9) We have defined ''drift.'' Information concerning ''drift'' can be found in subpart G, Residue Testing, changes based on comments, item 2.

(10) We have defined ''estimated national mean.'' Information concerning ''estimated national mean'' can be found at subpart G, Inspection and Testing, Reporting, and Exclusion from Sale, Proposal Description and at Changes Based On Comments, item 2.

(11) We have defined ''excluded methods.'' As a result of extensive public comment, we have revised the definition of certain methods to be excluded from organic production systems. Many commenters suggested that we use the definition for certain methods to be excluded from organic production systems proposed by the NOSB. This proposal essentially adopts that definition. ''Excluded methods'' refers to a variety of methods used to genetically modify organisms or influence their growth and development by means that are not possible under natural conditions or processes and are not considered compatible with organic production. Such methods would include recombinant DNA, cell fusion, and micro-and macroencapsulation. Such methods would not include the use of traditional breeding, conjugation, fermentation, hybridization, in vitro fertilization, or tissue culture.

We recognize that the phrases, ''natural conditions or processes'' and ''not considered compatible with organic production,'' may be subject to interpretation. We have proposed to use these phrases for two reasons. First, ''natural conditions or processes'' is used in the NOSB and American Organic Standards definitions, both of which were the result of consultation with organic industry and consumer stakeholders and, thus, accurately reflect current industry practices as well as consumer preferences. Second, we recognize that industry and consumer expectations regarding the products of these techniques in organic production systems may evolve. We believe that, taken together, these phrases allow for a degree of flexibility to ensure that our regulations continue to accurately reflect industry practices and consumer preferences. In cases where questions may arise regarding a specific technique, we anticipate that such questions would be resolved by the Administrator based on recommendations from the NOSB.

(12) We have defined ''feed additive.'' Information concerning ''feed additive'' can be found at subpart C, Livestock Production, Changes Based On Comments, item 7.

(13) We have defined ''feed supplement'' Information concerning feed supplement'' can be found at subpart C, Livestock Production, Changes Based On Comments, item 7.

(14) We have defined ''forage.'' Information concerning ''forage'' can be found at subpart C, Livestock Production, Changes Based On Comments, item 4.

(15) We have defined ''immediate family.'' Information concerning ''immediate family'' can be found at subpart F, Changes Based On Comments, items 14 and 15; Changes Requested But Not Made, item 18; and Additional Provisions, item 2.

(16) We have defined ''ingredient'' because the term is used throughout subpart D.

(17) We have defined ''inspection'' because the term is used throughout subparts E and F.

(18) We have defined ''lot.'' Information concerning ''lot'' can be found at subpart D, Proposal Description and at Additional Provisions, item 6.

(19) We have defined ''natural resources of the operation.'' This definition has been added to provide greater context for evaluating the ''maintain or improve'' requirement for a system of organic production and handling. Information concerning ''natural resources of the operation'' can be found at subpart C, Production and Handling (General), Changes Based On Comments, item 2.

(20) We have defined ''nonretail container.'' Information concerning ''nonretail container'' can be found at subpart D, Proposal Description and at Additional Provisions, item 6.

(21) We have defined ''practice standard.'' Practice standards have been added to this proposal in response to commenter requests for more specific guidelines for measuring the performance of an organic system of production and handling. A practice standard is a series of specific guidelines, requirements, and operating procedures through which a production or handling operation implements a required component of its organic system plan. For example, this proposal contains a practice standard for soil fertility and crop nutrient management which describes the tillage practices, sources and handling restrictions for nutrients, and prohibited activities that a production operation must comply with. There are specific practice standards applicable to crop, livestock, and wild-crop production, and handling operations. We are also proposing to incorporate the terms of the NRCS practice standard for a composting facility into the requirements of this proposal. Additional information on ''practice standards'' can be found at subpart C, Production and Handling (General), Changes Based On Comments, item 4.

(22) We have defined ''private entity'' because the term is used throughout subpart F to differentiate between governmental (State entity) and nongovernmental (private entity) organizations providing certification services.

(23) We have defined ''production lot number.'' Information concerning ''production lot number'' can be found at subpart D, Proposal Description and at Additional Provisions, item 6.

(24) We have defined ''residue testing'' because the term is used throughout the inspection and Testing, Reporting, and Exclusion from Sale portion of subpart G.

(25) We have defined ''retail food establishment.'' Information on ''retail food establishment'' can be found in subpart B, Applicability, Proposal Description and Additional Provisions, item 2.

(26) We have defined ''sewage sludge.'' This term has been added and defined as synonymous with ''biosolids'' to incorporate the Environmental Protection Agency's regulatory language for this category of materials. Information concerning ''sewage sludge'' can be found at subpart C, Crop Production, Changes Based On Comments, item 1.

(27) We have defined ''State entity.'' This proposal provides for the accreditation of domestic, tribal government, and foreign governmental subdivisions that provide certification services. We refer to such an entity in this proposal as a ''State entity.'' Additional information on ''State entity'' can be found at subpart F, Changes Based On Comments, item 1.

(28) We have defined ''tolerance.'' Information concerning ''tolerance'' can be found at subpart G, Inspection and Testing, Reporting, and Exclusion from Sale, Proposal Description and at Changes Based On Comments, item 2.

Subpart B—Applicability

This subpart provides an overview of what has to be certified under the National Organic Program (NOP), describes exemptions and exclusions from certification, addresses use of the term, ''organic,'' and addresses recordkeeping by certified production and handling operations.

Proposal Description

Except for exempt and excluded operations, each production or handling operation or specified portion of a production or handling operation that produces or handles crops, livestock, livestock products, or other agricultural products that are intended to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' must be certified. Certified operations must meet all applicable requirements of these regulations.

Certifying agents will begin the process of certifying organic production and handling operations to the national standards upon receipt of their accreditation from the Administrator. All production and handling operations certified by an accredited certifying agent will be considered certified to the national standards until the certified operation's anniversary date of certification. We are providing this phase-in procedure for production and handling operations certified by newly accredited certifying agents because we believe that such certifying agents will, upon publication of the final rule, demonstrate their eligibility for accreditation by applying the national standards to the certification and renewal of certification of their clients. We are also providing this phase-in procedure to provide relief to certified operations which would otherwise have to be certified twice within a 12-month period (prior to their certifying agent's accreditation and again following their certifying agent's accreditation). This relief will only be available to those certified operations certified by a certifying agent that receives its accreditation within 18 months from the date of publication of the final rule. We anticipate that certifying agents and production and handling operations will move as quickly as possible to begin operating under the national organic standards. We are providing this substantial phase-in period because accredited certifying agents will have to schedule on-site inspections around varying growing seasons and because certifying agents and production and handling operations will need time to adapt to the new national organic standards.

Exempt and Excluded Operations. This regulation establishes several categories of exempt or excluded operations. Exempt operations derive their exemption from the Act while excluded operations are excluded as a result of a Departmental policy decision. An exempt or excluded operation does not need to be certified. However, operations that qualify as exempt or excluded operations may elect to apply for certification. A production or handling operation that is exempt or excluded from obtaining certification still must meet other regulatory requirements contained in this rule as explained below.

Exempt Operations. (1) A production or handling operation that has $5,000 or less in gross agricultural income from organic sales annually is exempt from certification and does not need to submit an the organic system plan to anyone for acceptance or approval. However, an exempt producer or handler must comply with the labeling requirements of § 205.309 and the organic production and handling requirements applicable to its type of operation. For example a producer of organic vegetables, that performs no handling functions, would have to comply with the labeling requirements

of § 205.309 and the applicable production requirements in §§ 205.202 through 205.207. The labeling and production and handling requirements protect the integrity of organically produced products.

(2) A retail food establishment or portion of a retail food establishment that handles organically produced agricultural products but does not process them is exempt from all of the requirements in these regulations.

(3) A handling operation or portion of a handling operation that handles agricultural products containing less than 50 percent organic ingredients by total weight of the finished product (excluding water and salt) is exempt from the requirements in these regulations, except the recordkeeping provisions of § 205.101(c); the provisions for prevention of contact of organic products with prohibited substances in § 205.272; and the labeling regulations in § 205.309. The recordkeeping provisions maintain an audit trail for organic products. The prevention of contact with prohibited substances and the labeling requirements protect the integrity of organically produced products.

(4) If a handling operation or portion of a handling operation that handles agricultural products containing at least 50 percent organic ingredients by weight (excluding water and salt) does not use the word, ''organic,'' on any package panel other than the information panel, it is exempt from the requirements in these regulations, except the recordkeeping provisions of § 205.101(c); the provisions for prevention of contact of organic products with prohibited substances as provided in § 205.272; and the labeling regulations in § 205.309. The recordkeeping provisions maintain an audit trail for organic products. The prevention of contact with prohibited substances and labeling requirements protect the integrity of organically produced products.

As noted above, exempt handling operations producing multiingredient products must maintain records as required by § 205.101(c). This would include records sufficient to: (1) prove that ingredients identified as organic were organically produced and handled, and (2) verify quantities produced from such ingredients. Such records must be maintained for no less than 3 years and the operation must allow representatives of the Secretary and the applicable State program's governing State official access to the records during normal business hours for inspection and copying to determine compliance with the applicable regulations.

Excluded Operations. (1) A handling operation or portion of a handling operation that sells organic agricultural products labeled as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' that are packaged or otherwise enclosed in a container prior to being received or acquired by the operation, remain in the same package or container, and are not otherwise processed while in the control of the handling operation is excluded from the requirements in these regulations, except for the provisions for prevention of commingling and contact of organic products with prohibited substances in § 205.272. The requirements for the prevention of commingling and contact with prohibited substances protect the integrity of organically produced products.

This exclusion will avoid creating an unnecessary barrier for handlers who distribute nonorganic products and who want to offer a selection of organic products.

(2) A retail food establishment or portion of a retail food establishment that processes or prepares, on the premises of the retail food establishment, raw and ready-to-eat food from certified agricultural products labeled as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' is excluded from the requirements in these regulations, except for the provisions for prevention of contact of organic products with prohibited substances as provided in § 205.272; and the labeling regulations in § 205.309. The prevention of commingling and contact with prohibited substances and labeling requirements protect the integrity of organically produced products.

Excluded retail food establishments include restaurants; delicatessens; bakeries; grocery stores; or any retail outlet with an in-store restaurant, delicatessen, bakery, salad bar, or other eat-in or carry-out service of processed or prepared raw and ready-to-eat food.

We have excluded such retail food establishments because comments to the first proposal concerning the issue of certification of retail food establishments were completely divergent. Comments ranged from the certification of all retail food establishments to exclusion of all retail food establishments. There is clearly a great deal of public concern regarding the handling of organic products by retail food establishments. Someday retail food establishments may be subject to regulation under this NOP. Any such regulation would be preceded by rulemaking with an opportunity for public comment. Our exclusion of retail food establishments from this proposal does not prevent a State from developing an organic retail food establishment certification program or otherwise regulating retail food establishments that prepare, package, or process organic agricultural products.

No retailer, regardless of this exclusion and the exceptions found in the definitions for ''handler'' or ''handling operation,'' may sell, label, or provide market information on a product unless such product has been produced and handled in accordance with the Act and these regulations. Any retailer who knowingly sells or labels a product as organic, except in accordance with the Act and these regulations, will be subject to a civil penalty of not more than $10,000 under this program. Such retailer may also be subject to enforcement actions and penalties under Federal statutes and their implementing regulations administered by other agencies of the Federal government.

Recordkeeping Requirements for Certified Operations. A certified operation must maintain records concerning the production and handling of agricultural products that are sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' sufficient to demonstrate compliance with the Act and regulations. Such records must be adapted to the particular business that the certified operation is conducting, fully disclose all activities and transactions of the certified operation in sufficient detail to be readily understood and audited, be maintained for not less than 5 years beyond their creation, and be sufficient to demonstrate compliance with the Act and regulations. Certified operations must make the records required by this regulation available for inspection and copying by authorized representatives of the Secretary, the applicable State program's governing State official, and the certifying agent. Access to such records must be provided during normal business hours.

Examples of Records. Each exempt, excluded, and certified operation should maintain the records which demonstrate compliance with the Act and the regulations applicable to it and which it believes establish an audit trail sufficient to prove to the Secretary, the applicable State program's governing State official, and the certifying agent that the exempt, excluded, or certified operation is and has been in compliance with the Act and regulations.

Examples of records include: Application and supporting documents for certification; organic system plan and supporting documents; purchased inputs, including seeds, transplants, livestock, and substances (fertilizers, pesticides, and veterinary biologics consistent with the livestock provisions of subpart C), cash purchase receipts, receiving manifests (bills of lading), receiving tickets, and purchase invoices; field records (planting, inputs, cultivation, and harvest); storage records (bin register, cooler log); livestock records, including feed (cash purchase receipts, receiving manifests (bills of lading), receiving tickets, purchase invoices, copies of grower certificates), breeding records (calendar, chart, notebook, veterinary documents), purchased animals documentation (cash purchase receipts, receiving manifests (bills of lading), receiving tickets, purchase invoices, copies of grower certificates), herd health records (calendar, notebook, card file, veterinary records), and input records (cash purchase receipts, written records, labels); producer invoice; producer contract; receiving manifests (bills of lading); transaction certificate; producer certificate; handler certificate; weigh tickets, receipts, and tags; receiving tickets; cash purchase receipts; raw product inventory reports and records; finished product inventory reports and records; daily inventories by lot; records as to reconditioning, shrinkage, and dumping; production reports and records; shipping reports; shipping manifests (bills of lading); paid freight and other bills; car manifests; broker's contracts; broker's statements; warehouse receipts; inspection certificates; residue testing reports; soil and water testing reports; cash receipt journals; general ledgers and supporting documents; sales journals; accounts payable journals; accounts receivable journals; cash disbursement journals; purchase invoices; purchase journals; receiving tickets; producer and handler contracts; cash sales receipts; cash purchase journals; sales invoices, statements, journals, tickets, and receipts; account sales invoices; ledgers; financial statements; bank statements; records of deposit; canceled checks; check stubs; cash receipts; tax returns; accountant's or other work papers; agreements; contracts; purchase orders; confirmations and memorandums of sales; computer data; computer printouts; and compilations of data from the foregoing.

Request for Comment. This proposal provides that all ingredients in a multiingredient product identified as organic must have been produced by a production or handling operation certified by an accredited certifying agent. We are seeking comment on the following question. Should handlers be allowed to identify organically produced products produced by exempt production operations as organic ingredients? Such identification would be restricted to the ingredients list on the information panel. This may provide a wholesale outlet for organically produced agricultural products produced by producers exempted from certification because their gross agricultural income from organic sales totals $5,000 or less annually.

Compliance with Federal Statutes and Regulations. Any agricultural product that is sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' must be produced and handled in accordance with the requirements in these regulations. Organic agricultural products must be produced and handled in compliance with the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Products Inspection Act, concerning meat, poultry, and egg products; the Federal Food, Drug, and Cosmetic Act; the Federal Insecticide, Fungicide, and Rodenticide Act; and any other applicable Federal statute and its implementing regulations.

Foreign Applicants. The regulations in this part, as applicable, apply equally to domestic and foreign applicants for accreditation, accredited certifying agents, domestic and foreign applicants for certification as organic production or handling operations, and certified production and handling operations unless otherwise specified.

Applicability—Changes Based on Comments

This subpart differs from our first proposal in several respects as follows:

(1) *Exception for Handlers Serving Three or Fewer Certified Operations.* We have removed the provision that would have allowed handlers providing services to fewer than three certified organic producers to operate without separate certification under the NOP (§ 205.201). Such handlers will now have to be certified unless otherwise exempted or excluded from certification under § 205.101 of these regulations. We have taken this action because we believe that the first proposal invites problems, such as making certain that the contracted handler maintains compliance with the Act and regulations, taking enforcement actions against persons violating the Act and regulations, and being equitable to all handlers since large-volume handling operations may qualify for inclusion under the provision on the basis of few clients while small-volume handlers would be disqualified because they have three or more clients.

More than 100 comments were received, most from consumers, in opposition to the provision. Many of the commenters erroneously interpreted the provision as an exemption for handlers of product for less than three certified operations. Most of these commenters expressed the belief that it is a violation of the Act to allow handlers to operate through inclusion under another certified operation's certification rather than through separate certification under the Act and regulations. Several commenters stated that it is unacceptable to exempt handling operations providing services to fewer than three certified entities from separate certification. Several commenters stated that operations that process products from a certified producer should always be certified. Several State departments of agriculture and others stated that the exemption for handlers servicing fewer than three certified operations does not make sense. They emphasized that certified operations could produce very large quantities of organic product and a large-scale handler may contract with only a few certified producer operations. Therefore, they called for elimination of the exemption. A few commenters questioned the certified operation's ability to ensure that the contracted handler maintains compliance with the Act and regulations. They expressed their belief that the certified operation would have no authority to maintain compliance with the Act within a facility it neither owns nor manages.

We never intended to exempt handlers of fewer than three certified operations from certification. Rather, we proposed a means by which handlers of fewer than three certified operations could be covered under the certification of a certified operation for which it provides handling services.

Several of the commenters favored the provision that any handling operation that provides handling services to fewer than three certified entities that produce or handle agricultural products that are or that are intended to be sold, labeled, or represented as organic or made with certain organic ingredients would not be required to be separately certified apart from the operations for which it provides such services. However, supporters of the concept differed in their position on the proposal. Most stated that the provision would work

only if it is made clear that a handler can provide services to only one or two separate entities and qualify for the exemption and only if included in the certifications of and inspected along with the entities for which the handler will provide the services. They further emphasized that all applicable standards must be met. A few supporters recommended that there be a contract between the handler and the certified operation and that the certified operation be responsible for any failure of the handler to adhere to these regulations. Another commenter stated that, if handlers are to be exempt from certification, the qualifying parameter for exemption should be based upon economic value similar to that for production operations.

Two commenters supported the proposal but wanted the fewer-than-three-certified-operations limitation removed. One of the commenters, a nonprofit agricultural organization, expressed the belief that the limitation needlessly restricts commercial activity, invites an excessive amount of paperwork related to certification applications, and provides no greater assurances for quality control. This commenter, referring to the definition of handling operation at section 6502(10) of the Act, interpreted ''to receive or otherwise acquire'' as synonymous with taking legal title to the product. This commenter stated that this interpretation creates a distinct, verifiable threshold which clearly identifies those operations needing to be certified and those that do not need to be certified. Under the commenter's suggested system, handlers who take legal title to organic products assume responsibility for their subsequent handling and are required to have their operations certified. Any handler who works on organic products without taking legal title would have his or her activities approved and monitored by the certifying agent responsible for the product when it arrived at the handler's door. The commenter believes that noncertified handlers who wanted to serve organic customers would quickly learn to provide the quality control and accountability requirements which certifying agents expect to see.

We disagree with the commenters who recommended removal of the fewer-than-three-certified-operations restriction on the grounds that the proposal to limit exemptions to handlers contracting with fewer than three certified operations needlessly restricts commercial activity, invites an excessive amount of paperwork related to certification applications, and provides no greater assurances for quality control. The primary justification given for removal of the fewer-than-three-certified-operations restriction is the belief that any handler who works on organic products without taking legal title would have his or her activities approved and monitored by the certifying agent responsible for the product when it arrived at the handler's door. First, it is unreasonable to expect the certifying agent to be responsible for monitoring noncertified handlers even if they are providing services to an operation certified by the certifying agent. Second, we disagree with the commenter's interpretation that ''to receive or otherwise acquire'' is synonymous with taking legal title to the product. ''To receive or otherwise acquire'' involves the possession, control, or custody of a product. Such possession, control, or custody of a product may or may not involve the transfer of title to the product. In other words, a handler may have possession, control, or custody of the product under a right derived from a certified operation but not under a claim of the handler's title to the product.

(2) *Certification for a Portion of a Production or Handling Operation.* We have clarified that a portion of a production or handling operation can be certified. We have taken this action because we agree with the association commenter who suggested that the Department clarify for potential applicants for certification that a portion of their production or handling operation can be certified. The Act at section 6506(b) authorizes the certification of specific fields of a production operation or parts of a handling operation when: (1) In the case of a production operation or field, the area to be certified has distinct, defined boundaries and buffer zones separating the land being operated through the use of organic methods from land that is not being operated through the use of such methods; (2) the operators of such production or handling operation maintain records of all organic operations separate from records relating to other operations and make such records available at all times for inspection by the Secretary, the certifying agent, and the State program's governing State official; and (3) appropriate physical facilities, machinery, and management practices are established to prevent the possibility of a mixing of organic and nonorganic products or a penetration of prohibited chemicals or other substances on the certified area. This clarification is found at § 205.100 of this proposal.

(3) *Exemption for Operations with $5000 or Less in Income.* We have clarified at § 205.101(a)(1) that the producer and handler exemption from certification applies to production and handling operations that sell agricultural products as organic but whose gross agricultural income from organic sales totals $5,000 or less annually. We have taken this action because of commenter confusion over whether the $5,000 level applied to all sales of agricultural products or just sales of organic agricultural products. This action is consistent with the position of a State department of agriculture, which stated that the $5,000 exemption should apply to organic sales, not sales of all agricultural products. The commenter believes that, as originally proposed, the regulation would limit opportunities for organic industry development, especially for small producers and other small agribusinesses.

(4) *Applicability of Regulation to Exempt Operations.* We have revised the producer and handler exemption, provided to producers and handlers with gross agricultural income from organic sales totaling $5,000 or less annually, to provide that such operations are exempt from certification and do not need to submit an organic system plan to anyone for acceptance or approval but must comply with the requirements for organic production and handling and the labeling requirements for agricultural products produced on an exempt or excluded operation. We have taken this action because the first proposal too narrowly addressed the regulatory requirements that exempt producers must meet. Our purpose is to exempt such production and handling operations from the regulatory and financial burdens of certification but not to exempt them from the standards for organic production and handling. A fundamental concept of this regulation is to establish a label for organic. To the extent that these entities will be using the term, ''organic,'' to describe their product, they must be truthful. If they don't comply with the other requirements of this part, they cannot truthfully describe their product as organic.

Several State commenters expressed the belief that the producer exemption would be too difficult to enforce. Some expressed the belief that exempt production operations would still require monitoring to verify compliance with organic standards. A State department of agriculture commented that some monitoring of uncertified operations would still be needed to verify compliance with standards; otherwise there would be no guarantee that standards would be met for

products being sold as organic. Another State, which expressed strong disagreement with the producer exemption, asked how complaints against such producers would be reconciled if they are exempt from the NOP and do not have to maintain records over a multiple-year period. This commenter stated its intent, under its State program, to require certification of organic production operations producing less than $5,000 in agricultural product yearly. This same commenter acknowledged the Federal program's obligation to provide the exemption as required by section 6505(d) of the Act.

A producer raised the issue of having exempt operations provide affidavits of compliance with the Act and regulations except for certification. A certifying agent made the observation that the rule as first proposed would not permit exempt producers, whether operating under an affidavit or not, to sell any of their products to a certified operation for further processing unless they were fully certified. This certifying agent stated that it did not believe excluding exempt producers from selling any of their products to a certified operation for further processing unless they were fully certified was consistent with the intent of the Act.

We disagree with both commenters. First, we believe that an affidavit program for exempt producers, opting to exercise their right to the exemption, would impose unnecessary regulation upon entities that the Act clearly intended not to impose such regulation upon. Second, an affidavit program would create a regulatory burden on the Department and certifying agents that would not be justified by the size of such operations. We recognize, as pointed out by commenters, that some State programs currently require organic production operations that would be exempt under this national program to register with the State and to comply with requirements such as filing financial records and maintaining records of production methods and substances used.

While we believe that an affidavit program is not appropriate at the national level, we do believe that States would be authorized to regulate organic operations exempted under the NOP's $5,000-or-less organic sales exemption under an approved State program. Under this proposal, producers and handlers exempted under the NOP's $5,000-or-less organic sales exemption will be exempt from the certification regulations and will not have to submit an organic system plan to anyone for acceptance or approval but will be required to comply with the requirements for organic production and handling and for labeling. States may implement a program for monitoring the activities of exempt production and handling operations and enforcing compliance with the NOP. States will be permitted to require certification of federally exempted producers and handlers under an approved State organic certification program. The Department will consider any complaint of noncompliance with these regulations by an exempt production or handling operation and take appropriate action.

(5) *Applicability of Federal Statutes.* We have added at § 205.102(c) reference to a production or handling operation's responsibility for complying with all applicable Federal statutes and their implementing regulations as those statutes may apply to the production and handling of agricultural products. We have made this addition as a means of advising producers, handlers, and the public that these regulations do not supersede or alter a producer's or handler's responsibilities under other Federal statutes and their implementing regulations.

A processors association urged the Department to advise the public in this rule that food products produced and processed under the organic standard must comply with applicable provisions of the Federal Food, Drug, and Cosmetic Act; the Federal Meat Inspection Act; the Poultry Products Inspection Act; and all other relevant statutes and their implementing regulations, in all respects, especially related to adulteration and misbranding.

(6) *Recordkeeping Provisions.* We have rewritten the recordkeeping provisions removing all references to specific records or types of records which must be maintained. In their place, we are requiring that certified operations maintain records adapted to the particular business that the certified operation is conducting. Such records must disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited and must be sufficient to demonstrate compliance with the Act and regulations. We have taken this action because we believe that it is impracticable to specify in detail every class of records which may be found essential in demonstrating compliance with the Act and regulations. Different types of certified production and handling operations will, by the very nature of their business, be required to maintain different records to establish their compliance with the Act and regulations.

A certifying agent and a beekeepers association expressed support for the recordkeeping requirements in the first proposal. The beekeeping association emphasized the value of such recordkeeping in monitoring the use of substances. A marketing association and a State commented that the recordkeeping period for a list of substances applied to a certified operation should be changed from 3 to 5 years to be consistent with the requirements of section 6511(d) of the Act. A research foundation suggested removal of the requirement for identifying the name and address of the person who applies and who has applied any substance to any part of the farm and any livestock or other agricultural product. A trade association recommended the addition of a new paragraph addressing the records required to be maintained by crop production operations to establish an audit trail. Specifically, the commenter recommended that the new paragraph require that an audit trail be maintained by all organic crop production operations, which records: (1) All sources and amounts of all off-farm inputs; (2) the dates, rate, method of application, location, reason for use, and name and address of applicator for all off-farm inputs; (3) the dates, projected and actual yield, and harvest location of all crops produced by the operation, both organic and nonorganic; (4) the dates, quantities, and locations of all crops stored; (5) the transport system(s) used to distribute organic crops; and (6) the product name, date, quantity, and buyer of all products sold, both organic and nonorganic. A State commenter stated that the maintenance of records on a certified operation is important, but there must be restraint in requiring redundant or irrelevant information. Approximately 50 retail commenters, speaking on behalf of a producer handler, stated that the recordkeeping requirements were burdensome and overly complicated.

Comments indicated that there was some concern regarding what records had to be maintained by certified operations. Commenters were concerned about requiring the maintenance of the correct records for establishing an audit trail, avoiding the retention of redundant or irrelevant records, and minimizing the burden and complexity of the recordkeeping.

We agree with the commenters who stated that the recordkeeping period for a list of substances applied should be consistent with the 5-year recordkeeping requirements of the Act.

Accordingly, this proposal at § 205.103(b)(3) requires that certified operations maintain all records applicable to their organic operations for not less than 5 years beyond their creation. We disagree with those commenters who called for more specifics relative to what records need to be maintained and agree with those commenters who expressed concern regarding the magnitude of records required to be maintained. This proposal provides each production and handling operation with the opportunity to decide for itself what records are necessary to demonstrate its compliance with the Act and regulations.

(7) *Exemption from Prevention of Commingling.* We have removed the requirement that a handling operation or portion of a handling operation that handles only agricultural products that contain less than 50 percent organic ingredients by total weight of the finished product (excluding water and salt) that is exempt from the requirements in this part comply with the provision for the prevention of commingling. As noted in item 8 below, exempt handlers of agricultural products that contain at least 50 percent organic ingredients by weight will also be exempt from complying with the provision for the prevention of commingling. We have taken this action because the commingling of agricultural products is often a part of the processing activity. Such operations must, however, comply with all of the applicable labeling provisions of subpart D including the prohibition on the combining of organic and nonorganic forms of the same agricultural product. In other words, the handler must not, for example, combine organic and nonorganic corn if corn is to be shown on the information panel as ''organic corn.''

A commenter called for the removal of the requirement that an exempt handler comply with the provisions for the prevention of commingling and contact of organic products with prohibited substances. The commenter claimed that requiring exempt handlers to prevent commingling of organic and nonorganic products and contact of organic products with prohibited substances is inconsistent with the Act. We do not agree. As noted above, we have removed the prevention of commingling requirement because the commingling of agricultural products is often a part of the processing activity. We have not, however, removed the requirement for the prevention of contact of organic products with prohibited substances because the requirement is necessary to safeguard the integrity of organic ingredients used in the products being handled.

(8) *Exemption for Handlers that Handle Product Containing at Least 50 Percent Organic Ingredients.* We have provided at § 205.101(a)(4) that any handling operation or portion of a handling operation that handles agricultural products that contain at least 50 percent organic ingredients by weight (excluding water and salt) that chooses to not use the word, ''organic,'' on any panel other than the information panel is exempt from the requirements in these regulations, except the provisions for prevention of contact of organic products with prohibited substances as set forth in § 205.272, the labeling provisions of § 205.309, and the recordkeeping provisions of § 205.101(c).

A commenter stated that the Department is required under the Act to exempt any handling operation or portion of a handling operation that processes agricultural products that contain at least 50 percent organically produced ingredients by weight (excluding water and salt). We disagree with the commenter. Section 6505(c)(1) of the Act ties the exemption from certification to use of the word, ''organic,'' on the principal display panel. The Secretary, in consultation with the National Organic Standards Board (NOSB) and the Secretary of Health and Human Services, may require certification of any operation that chooses to use the word, ''organic,'' on the principal display panel. This proposal provides that handlers, processing agricultural products that contain at least 50 percent organically produced ingredients by weight (excluding water and salt), who choose to only use the word, ''organic,'' on the information panel are exempt from certification. Handlers processing agricultural products that contain at least 50 percent organically produced ingredients by weight (excluding water and salt) who choose to use the word, ''organic,'' on any other panel, including the principal display panel, must be certified. Use of the word, ''organic,'' on the principal display panel carries with it connotations in the minds of consumers regarding the organic nature of the product which necessitate certification of handlers of such products. Further, requiring certification of handlers of such products is consistent with current industry practice.

Applicability—Changes Requested But Not Made

This subpart retains from our first proposal regulations on which we received comments as follows:

(1) *Exemptions for Handlers.* Commenters stated that under no circumstances should organic handling operations be exempt from certification. A few environmental organizations, a certifying agent, and an industry association commented that the first proposal exceeded statutory authority by broadening the producer exemption in section 6505(d) of the Act to apply to handlers. An agriculture research and education organization stated that, while the Act does not specifically identify handling operations under the producer exemption, including them is a reasonable and workable interpretation of the Act. The commenter stated that the Act provides an exemption to persons who sell no more than $5,000 annually in value of agricultural products and it sees no reason why the exemption should not include handlers. This commenter also recommended that the NOP develop a new category of exemption of up to $10,000 for on-farm processing. The commenter's recommended exemption would apply to value-added, made-on-site products, such as maple syrup, jams, and relishes, and would allow individuals to combine their production and handling exemptions.

We do not agree with those commenters who stated that the first proposal exceeded statutory authority. The title of the exemption in the Act (section 6505(d)) specifically refers to small farmers. However, the text to the exemption provides, in full, that ''subpart (a)(1) shall not apply to persons who sell no more than $5,000 annually in value of agricultural products.'' ''Person'' is defined in the Act as ''an individual, group of individuals, corporation, association, organization, cooperative, or other entity.'' The Act defines ''agricultural product'' as ''any agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock, that is marketed in the United States for human or livestock consumption. Handlers are covered by the definition of ''person'' and ''agricultural product'' and are thereby eligible for exemption.

The financial burden of certification is no less for handlers with sales of no more than $5,000 annually than it is for producers with sales of no more than $5,000 annually. Therefore, since the cost of certification is the primary reason for exempting production

operations with sales of no more than $5,000 annually, it is reasonable to also exempt handling operations with sales of no more than $5,000 annually.

This proposal exempts production and handling operations that sell agricultural products as ''organic'' but whose gross agricultural income from organic sales totals $5,000 or less annually. Production and handling operations exempted on the basis of organic sales of $5,000 or less annually are exempt from certification under Subpart E and do not need to submit an organic system plan under § 205.201 but must comply with the applicable organic production and handling requirements of subpart C and the labeling requirements of § 205.309.

Exemptions for production operations and handling operations are separate exemptions. Therefore, a production operation that is also a handling operation, due to its production and sale of processed products, must qualify for each exemption separately. The balance of this paragraph lists exemption eligibility examples. A production operation with gross agricultural income from organic sales totaling $5,000 or less annually will be exempt from certification as an organic production operation. A handling operation with gross agricultural income from organic sales totaling $5,000 or less annually will be exempt from certification as an organic handling operation. A production and handling operation with gross agricultural income from organic production sales totaling $5,000 or less annually and organic handling sales totaling $5,000 or less annually will be exempt from certification as an organic production operation and from certification as an organic handling operation. A production and handling operation with gross agricultural income from organic production sales totaling $5,000 or less annually and organic handling sales totaling more than $5,000 annually will be exempt from certification as an organic production operation only. A production and handling operation with gross agricultural income from organic production sales totaling more than $5,000 annually and organic handling sales totaling $5,000 or less annually will be exempt from certification as an organic handling operation only.

Products marketed by exempt production operations and handling operations cannot be represented as certified organic or display the U.S. Department of Agriculture (USDA) organic seal. Products from exempt operations may not be included as organic ingredients in a multiingredient product produced or processed in a certified operation. We anticipate that this exemption will be used primarily by small market gardeners, hobbyists, and other small producers who sell produce and other agricultural products at farmers markets and roadside stands to consumers within their communities.

(2) *Exceeding $5000 Limit for Exemption.* A few commenters, including a State, raised the concern that an organic operation might not anticipate sales over $5,000 but could exceed its exemption due to a bumper crop or market price increases, putting the operation in violation. The Department believes that once an exempted operation reaches the $5,000 maximum exemption level, it is compelled to seek certification, which it would have to obtain and maintain if it is to continue to sell organic products. A certified organic operation, including one which previously lost its exempt status, could switch from certified to exempt if its size or operations were changed such that it no longer sold more than $5,000 annually in value of agricultural products.

(3) *Certification of Exempt Operations.* A producer interpreted ''exempt'' as meaning that operations exempted from certification could not be certified as an organic operation. This interpretation is not correct. Any production or handling operation, including an exempt operation, which makes application for certification as an organic operation and meets the requirements for organic certification may be certified.

(4) *Increasing the Statutory Limitation of $5000 for Exemption.* In the first proposal, we asked for comments as to whether the $5,000 level for exemption from certification should be raised to $10,000 or to another amount and why an increased amount would be appropriate. Suggested levels ranged from $2,000 to $50,000. The suggested levels and justifications for such levels are not sufficiently consistent for us to recommend that Congress change the $5,000 level.

In addition, we requested data as to the number of operations that may be exempt under the current $5,000 limitation for exemption and the number of operations that may be exempt under any new monetary amount suggested. Comments from the few States responding to the request for data as to the number of operations that may be exempt under the current $5,000 limitation revealed that from one-third to one-half of organic producers in the commenting States would be exempt under the statutorily authorized $5,000 exemption limitation.

(5) *Certification of Retail Operations.* A commenter said the first proposal ignored retail operations which contract with an organic farm to produce organic products with the store's brand on the label. The commenter said the retail operation should be certified because it is responsible if violation occurs in the organic production or handling of the branded product. The commenter is incorrect in suggesting that the retailer would be held responsible for a violation if the violation occurred at the production or handling facility. When a retail operation contracts for the production, packaging, or labeling of organic product, it is the certified production or handling operation that is responsible for meeting the applicable organic production or handling requirements under the Act and these regulations. If a violation occurs in the organic production or handling of the product, the certified production or handling operation retains responsibility for the violation even if the retailer's name is on the label.

(6) *Exemption for Products Containing Less than 50 Percent Organic Ingredients.* Several commenters representing States and organic organizations opposed the exemption of a handling operation or portion of a handling operation that handles only agricultural product containing less than 50 percent organic ingredients. They stated that handling operations creating products with organic ingredients should be certified regardless of the percentage of organic ingredients found in the products they produce. These commenters stated that exemptions from certification undermine audit trails and consumer confidence. Each of these commenters called for removal of the proposed exemption. Another commenter stated that, if a product is less than 50 percent organic, then it is not organic and should not be labeled or sold as such.

We disagree with the comments. Because such products consist of less than 50 percent organic ingredients, handlers may only use the word, ''organic,'' on the information panel of such products to truthfully represent the organic nature of the ingredients. Such handlers must also comply with the recordkeeping provisions of § 205.101(c), the prevention of contact of organic products with prohibited substances provisions of § 205.272, and the labeling provisions of § 205.309.

(7) *Ensuring Organic Ingredients are Not Contaminated.* A commenter asked how the Department would ensure that organic ingredients are not contaminated without certification of the handling operation creating the final

product. Handling operations that handle agricultural products containing less than 50 percent organic ingredients and at least 50 percent organic ingredients that are exempt from certification must maintain records sufficient to: (1) Prove that ingredients identified as organic were organically produced and handled, and (2) verify quantities produced for such ingredients. Such operations are required at § 205.101(c) of this proposal to allow representatives of the Secretary and the applicable State program's governing State official access to these records for inspection and copying during normal business hours to determine compliance with the applicable regulations.

(8) *Exclusion for Handlers that Receive and Distribute Prepackaged Product.* Commenters raised several issues regarding the exclusion of handlers who receive and distribute prepackaged organic products. At least three certifying agents commented that all retailers should be certified unless they handle only organic product in a ''final, sealed retail container,'' or ''final impermeable containers.'' The commenters are apparently seeking further assurance that nothing is added to the organic product while under control of a distributor or retail operation. Because of the wide variety of organic products and the special needs of some of those products, establishing restrictions on the kind of containers used for transportation could unfairly treat some products and commodity industries. For example, some organic products may require containers which ''breathe'' or allow the exchange of air and outside temperatures. Nonpermeable containers could hasten spoilage of some fresh and processed organic products.

A few certifying agents proposed that distributors and trucking companies which transport agricultural products also should be certified under this part. However, such transportation operations do not carry out the functions specified in the definitions for handler and handling operations. Distributors and trucking companies have traditionally been excluded from requirements of agricultural production regulations. The Act cannot be used to regulate activities or entities beyond its regulatory authorities. In this case, it is the responsibility of producers, handlers, interim handlers, and retailers to meet the requirements of this regulation by ensuring that their contracted shippers and distributors understand, respect, and protect the integrity of the organic products they are transporting.

An organic association requested that proper notification of ''good organic handling practices'' be made to the transportation, trucking, and public warehousing sectors to inform them of their responsibilities. The commenter stated that the notification should include requirements for audit trail records, measures needed to prevent commingling and contamination by prohibited substances. This commenter expressed the belief that excluded handlers should preregister and provide a signed statement of acknowledgment of the requirements. Regarding enforcement of the suggested requirements, this commenter stated that enforcement of the requirements should be funded and administered by existing State and Federal inspection services.

We acknowledge the need for education regarding the requirements of this rule as well as such issues as the handling of organic products. The NOP, in cooperation with the NOSB, will provide educational material to the public regarding the requirements of this rule. Such educational material will include good organic handling practices made available to the transportation, trucking, and public warehousing sectors. However, we disagree with the suggestions calling for preregistration of exempt and excluded handlers and enforcement of the requirements by existing State and Federal inspection services. We believe the suggestions create a burden, on exempt and excluded handlers, the Department, and certifying agents, not justified by the nature of the handling performed.

(9) *Seafood Products.* A marketing institute recommended that the first proposal be revised to address seafood products in a separate seafood section and to include provisions that apply to seafood harvested in the wild. This commenter stated that wild-caught seafood should be allowed to be labeled as organic. A processors association also called for the labeling of wild-caught seafood as organic.

While the first proposal contained no standards solely for aquatic animals in an organic operation, it did contain provisions applicable to their production. The first proposal allowed fish and crustaceans, among other livestock types, to be sold, labeled, or represented as organic if such livestock had been brought into an organic operation no later than the earliest commercially available stage of life. Several commenters suggested that the management of aquatic animals differs sufficiently from mammals and poultry to require separate regulatory provisions. We concur and intend to develop detailed practice standards for specific aquatic animals as discussed further under the production and handling subpart.

Applicability—Additional Provisions

Upon further review of the applicability provisions in the first proposal, we have decided to propose the following additions and changes.

(1) *Foreign Applicants.* We have added a new provision at § 205.104 addressing applicability of these regulations to foreign applicants. We have made this addition to clarify our intent that the regulations in this part apply equally to domestic and foreign applicants for accreditation, accredited certifying agents, domestic and foreign applicants for certification as organic production or handling operations, and certified organic production and handling operations unless otherwise specified in these regulations.

(2) *New Exclusions.* We have excluded retail food establishments that process or prepare raw and ready-to-eat food from most of the requirements in these regulations. An excluded retail food establishments must comply with the requirements for the prevention of contact with prohibited substances provisions of § 205.272 and the labeling provisions of § 205.309. We have excluded such retail food establishments because comments to the first proposal concerning the issue of certification of retail food establishments (restaurant, delicatessen, bakery, grocery store, or other retail outlet) preparing, packaging, or processing raw and ready-to-eat organic agricultural products that are previously labeled as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' were completely divergent. The first proposal also contained an inconsistency which would have required a supermarket delicatessen to be certified but would have excluded from certification a restaurant with carry-out delicatessen products.

As the comments discussed below show, there is clearly a great deal of public concern regarding the handling of organic products by retail food establishments. Should we decide to regulate retail food establishments under the NOP, we will proceed with rulemaking and provide an opportunity for public comment.

Our exclusion of retail food establishments from this proposal does not prevent a State from developing an organic retail food establishment certification program or otherwise regulating retail food establishments that prepare, package, or process organic

agricultural products. Texas and Maryland currently have retailer certification programs.

No retailer, regardless of this exclusion and the exceptions found in the definitions for ''handler'' or ''handling operation,'' may sell or label a product as organically produced and handled or fix a label to or provide other market information concerning an agricultural product if such label or information implies that such product is produced and handled using organic methods unless such product has been produced and handled in accordance with the Act and these regulations. Any retailer who knowingly sells or labels a product as organic, except in accordance with the Act and these regulations, will be subject to a civil penalty of not more than $10,000 under this program. Such retailer may also be subject to enforcement actions and penalties under Federal statutes and their implementing regulations administered by other agencies of the Federal Government.

More than 90 commenters, including an organic association, stated that the retailer exclusion in the first proposal violates the requirement to certify all handling operations. The organic association believes that processing, as defined in the Act, includes all the normal culinary arts, food manufacturing, and packaging. All of these commenters, including some States, recommended removal of the exclusion. Several commenters, including a few States, expressed concern that exclusions from certification eliminate effective audit trails and undermine consumer confidence in organic products. One State commented that it believed retail food establishments should be certified because they are the last handler link from producer to consumer.

Several commenters stated that retailers who receive organic product have a high potential for loss of integrity of the organic product due to accidental misuse of pesticides and sanitizers during shipping or storage and to inadvertent commingling with nonorganic product. The commenters believe that, even though a retailer may only display and sell organic product, such retailer should be certified and monitored for compliance to ensure proper treatment of the product in shipment and storage. A State agency, however, cautioned against establishing another burden on the organic industry. The commenter said that if sorting from bulk and repackaging into smaller packages requires certification, then many small ''natural food'' retail outlets would find certification more costly than the economic benefits of marketing organic products. The commenter said many small, natural food retail food establishments would likely stop carrying organic items.

A few commenters stated there is a high potential for fraud among retailers who have the opportunity to repackage, mislabel, and sell nonorganic product as organic. Therefore, they believe that all retailers must be subject to certification or some form of oversight to assure that they are not mislabeling product.

A commenter representing a large retail grocery store operation said that good identification procedures enable retail stores to keep organic product separated from nonorganic product during transportation, storage, and in-store displays. The commenter continued that unduly rigid requirements would be burdensome on retailers. The commenter indicated that the costs of certification and compliance may outweigh the benefits of carrying organic product.

Another commenter from a major retail food establishment suggested that retailers that wash and sort fresh organic produce for display should be required to follow ''good organic handling practices'' that would establish recordkeeping responsibilities and prevent commingling with nonorganic products and contamination by prohibited materials. The commenter suggested that conformance could be maintained by existing State or local health inspectors or Federal inspectors with special training in organic handling systems. However, there is no authority in the Act to require the services of State or local inspectors.

Another retailer stated that retailers will comply with regulations because consumers will hold retailers responsible for deficiencies or illegal actions through the entire production and processing chain for agricultural products.

A commenter stated that, if a restaurant serves organic foods, it should be allowed to so state. The commenter went on to say that restaurants and grocery stores have a right to state that they used organic ingredients in preparing a given dish. This commenter believes that restaurants and grocery stores selling organic products, even if they prepare them, should not have to be certified. A few commenters claimed that processing, as defined in the Act, includes all culinary arts and food manufacturing. They stated that restaurants must be certified or, at the very least, be required to keep records of organic foods prepared. A State commenter who stated that exemptions undermine audit trails and consumer confidence suggested that restaurants serving organic foods be required to maintain records showing the origin and certification status of raw agricultural ingredients used in the restaurant's food products.

The Department routinely monitors compliance of various food producers, handlers, distributors, and retailers which are regulated under a variety of Departmental programs. The Department responds to consumer complaints and often conducts unannounced compliance investigations and audits of agricultural industry businesses. The Department understands the need for and commits Departmental resources to this organic program. In addition, oversight of these operations can be conducted by State agencies.

Subpart C—Organic Crop, Wild Crop, Livestock, and Handling Requirements

Proposal Description

This subpart sets forth the requirements with which production and handling operations must comply in order to sell, label, or represent agricultural products as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients).'' The producer or handler of an organic production or handling operation must comply with all applicable provisions of subpart C. Any practice implemented in accordance with this subpart must maintain or improve the natural resources, including soil and water quality, of the operation. Production and handling operations which sell, label, or represent agricultural products as organic in any manner and which are exempt or excluded from certification must comply with the requirements of this subpart, except for the development of an organic system plan.

Production and Handling (General). The Organic Food Production Act of 1990 (OFPA or Act) requires that all crop, wild crop, livestock, and handling operations requiring certification submit an organic system plan to their certifying agent and, where applicable, the State organic program. The organic system plan is a detailed description of how an operation will achieve, document, and sustain compliance with all applicable provisions in the OFPA and these regulations. The certifying agent must concur that the proposed organic system plan fulfills the requirements of Subpart C, and any subsequent modification of the organic plan by the producer or handler must receive the approval of the certifying agent.

The organic system plan is the forum through which the producer or handler and certifying agent collaborate to define, on a site-specific basis, how to achieve and document compliance with the requirements of certification. The organic system plan commits the producer or handler to a sequence of practices and procedures resulting in an operation that complies with every applicable provision in the regulations. Accreditation qualifies the certifying agent to attest to whether an organic system plan comports with the organic standard. The organic system plan must be negotiated, enacted, and amended through an informed dialogue between certifying agent and producer or handler, and it must be responsive to the unique characteristics of each operation.

An organic system plan contains six components. First, the organic system plan must describe the practices and procedures used, including the frequency with which they will be used, in the certified operation. Second, it must list and characterize each substance used as a production or handling input. Third, it must identify the monitoring techniques which will be used to verify that the organic plan is being implemented in a manner which complies with all applicable requirements. Fourth, it must explain the recordkeeping system used to preserve the identity of organic products from the point of certification through delivery to the customer who assumes legal title to the goods. Fifth, the organic system plan must describe the measures to be taken to avoid contact between certified production and handling operations and prohibited substances and document how the operation will prevent commingling of organic and nonorganic products. Finally, the organic system plan must contain the additional information deemed necessary by the certifying agent to evaluate site-specific conditions relevant to compliance with these or applicable State program regulations. Producers or handlers may submit a plan developed to comply with other Federal, State, or local regulatory programs if it fulfills the requirements of an organic system plan.

The first element of the organic system plan requires a narrative or other descriptive format that identifies the practices and procedures to be performed and maintained, including the frequency with which they will be performed. Practices are tangible production and handling techniques such as the method for applying manure, the mechanical and biological methods used to prepare and combine ingredients and package finished products, and the measures taken to exclude pests from a facility. Procedures are the protocols established for selecting appropriate practices and materials for use in the organic system plan, such as a procedure for locating commercially available organically produced seed. Procedures reflect the decision-making process used to implement the organic system plan.

By requiring information on the frequency with which production and handling practices and procedures will be performed, this proposal calls for the organic system plan to include an implementation schedule, including information on the timing and sequence of all relevant production and handling activities. The plan will include, for example, information about planned crop rotation sequences, the timing of any applications of organic materials, and the timing and location of soil tests. Livestock management practices might describe development of a rotational grazing plan or addition of mineral supplements to the feed supply. A handling operation might identify steps involved in locating and contracting with farmers who could produce organic ingredients that were in short supply.

The second element that must be included in an organic system plan is information on the application of substances to land, facilities, or agricultural products. This requirement encompasses both natural and synthetic materials allowed for use in production and handling operations. For natural materials which may be used in organic operations under specific restrictions, the organic plan must detail how the application of the materials will comply with those restrictions. For example, farmers who apply manure to their fields must document in their organic system plans how they will prevent that application from contributing to water contamination.

The third element of the organic system plan is a description of the methods used to evaluate its effectiveness. Producers and handlers are responsible for identifying measurable indicators that can be used to evaluate how well they are achieving the objectives of the operation. For example, production objectives could be measured through regular tallies of bushels or pounds of product sold from the farm or in numbers of cases sold from a handling operation. Indicators that can identify changes in quality or effectiveness of management practices could be relatively simple, such as the information contained in a standard soil test. The specific indicators used to evaluate a given organic system plan will be determined by the producer or handler in consultation with the certifying agent. Thus, if the organic system plan calls for improvements in soil organic matter content in a particular field, it would include provisions for analyzing soil organic matter levels at periodic intervals. If herd health improvement is an objective, factors such as somatic cell count or observations about changes in reproductive patterns might be used as indicators.

The fourth element of the organic system plan is a description of the recordkeeping system used to verify and document an audit trail, as appropriate to the operation. For each crop or wild-crop harvested, the audit trail must trace the product from the field, farm parcel, or area where it is harvested through the transfer of legal title. A livestock operation must trace each animal from its entrance into through removal from the organic operation. A handling operation must trace each product that is handled and sold, labeled, or represented as organic from the receipt of its constituent ingredients to the sale of the processed product. In response to several comments received, this proposal provides information, found in subpart B, § 205.103, on the records needed to establish a verifiable audit trail.

The fifth element which must be included in an organic system plan pertains to split production or handling operations. This provision requires an operation that produces both organic and nonorganic products to describe the measures used to prevent commingling of organic and nonorganic products. This requirement addresses contact of organic products, including livestock, organic field units, storage areas, and packaging to be used for organic products, with prohibited substances. Requirements in the first proposal for information about the nonorganic portion of the operation have been removed.

We do not propose to list the specific requirements to be included in an organic system plan. We expect to publish a program manual to provide guidance on appropriate documentation for the certification process. In the meantime, the accreditation process provides an assurance that certifying agents are competent to determine the specific documentation they require to review and evaluate an operation's organic system plan. Section 205.200(a)(6) allows a certifying agent to request additional information needed to determine that an organic system plan meets the requirements of this

subpart. The site-specific nature of organic production and handling necessitates that certifying agents have the authority to determine whether specific information is needed to carry out their function.

Crop Production. Any field or farm parcel used to produce an organic crop must have been managed in accordance with the requirements in §§ 205.203 through 205.206 and have had no prohibited substances applied to it for at least 3 years prior to harvest of the crop. Such fields and farm parcels must also have distinct, defined boundaries and buffer zones to prevent contact with the land or crop by prohibited substances applied to adjoining land.

A producer of an organic crop must manage soil fertility, including tillage and cultivation practices, in a manner that maintains or improves the physical, chemical, and biological condition of the soil and minimizes soil erosion. Crop nutrients must be budgeted and supplied through proper use of manure or other animal and plant materials, mined mineral substances, and other substances approved for use under these regulations. The producer must manage animal and plant waste materials to maintain or improve soil organic matter content in a manner that does not contribute to contamination of crops, soil, or water by plant nutrients, pathogenic organisms, heavy metals, or residues of prohibited substances. Raw animal manure must either be composted, applied to land used for a crop not intended for human consumption, or incorporated into the soil at least 90 days before harvesting an edible product that does not come into contact with the soil or soil particles and at least 120 days before harvesting an edible product that does come into contact with the soil or soil particles. Composted plant or animal waste materials used for soil fertility must be produced in compliance with the Natural Resources Conservation Service's (NRCS) Conservation Practice Standard for a Composting Facility (Code 317). Uncomposted plant and animal waste materials may be used to amend soil fertility. A plant or animal waste material that has been chemically altered by a manufacturing process may be used only if it is included on the National List of synthetic substances allowed for use in organic production. Mined substances of low solubility may be used as sources of crop nutrients, as may mined substances of high solubility, when justified by soil or crop tissue analysis. Ashes of untreated plant or animal materials which have not been combined with a prohibited substance and which are not included on the National List of nonsynthetic substances prohibited for use in organic crop production may be used to produce an organic crop. Synthetic crop nutrient supplements that appear on the National List of allowed synthetic substances may be used as a source of crop nutrients when justified by soil or crop tissue analysis. The producer may not use any fertilizer that contains a synthetic substance not allowed for crop production on the National List or use sewage sludge. Burning crop residues as a means of disposal, except for trimmings of perennial crops burned to suppress the spread of disease, is prohibited.

The producer must use organically grown seeds, annual seedlings, and planting stock, except that untreated nonorganic seeds and planting stock may be used when equivalent organic varieties are not commercially available. Seed and planting stock treated with substances that appear on the National List of synthetic substances allowed for use in organic production may be used when an organically produced or untreated variety is not commercially available. Nonorganically produced annual seedlings may be used when a temporary variance has been established due to damage caused by unavoidable business interruption, such as fire, flood, or frost. Planting stock used to produce a perennial crop may be sold as organically produced planting stock after it has been maintained under a system of organic management for at least 1 year. Seeds, annual seedlings, and planting stock treated with prohibited substances may be used to produce an organic crop when the application of the substance is a requirement of Federal or State phytosanitary regulations. Seeds, annual seedlings, or planting stock produced through an excluded method may not be used for organic production.

The producer is required to implement a crop rotation, including but not limited to sod, cover crops, green manure crops, and catch crops. The crop rotation must maintain or improve soil organic matter content, provide for effective pest management in perennial crops, manage deficient or excess plant nutrients, and control erosion to the extent that these functions are applicable to the operation.

The producer must use preventive practices to manage crop pests, weeds, and diseases, including but not limited to crop rotation, soil and crop nutrient management, sanitation measures, and cultural practices that enhance crop health. Such cultural practices include the selection of plant species and varieties with regard to suitability to site-specific conditions and resistance to prevalent pests, weeds, and diseases. Mechanical and biological methods that do not entail application of synthetic substances may be used as needed to control pest, weed, and disease problems that may occur. Pest control practices include augmentation or introduction of pest predators or parasites; development of habitat for natural enemies; and nonsynthetic, nontoxic controls such as lures, traps, and repellents. Weed management practices include mulching with fully biodegradable materials; mowing; livestock grazing; hand weeding and mechanical cultivation; flame, heat, or electrical techniques; and plastic or other synthetic mulches, provided that they are removed from the field at the end of the growing or harvest season. Disease problems may be controlled through management practices which suppress the spread of disease organisms and the application of nonsynthetic biological, botanical, or mineral inputs. When these practices are insufficient to prevent or control crop pests, weeds, and diseases, a biological or botanical substance, or a synthetic substance that is allowed on the National List may be used provided that the producer evaluates and mitigates the effects of repetitive use of the same or similar materials on resistance and shifts in pest, weed, or disease types. The producer must use a pest, weed, or disease control substance in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act. Pest control substances produced through excluded methods are prohibited.

Any wild crop that is to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' must be harvested from land to which no prohibited substances have been applied for at least 3 years prior to harvest. The wild crop must also be harvested in a manner that ensures such harvesting or gathering will not be destructive to the environment and will sustain the growth and production of the wild crop.

Livestock Production. We propose that any livestock or edible livestock product to be sold, labeled, or represented as organic must be maintained under continuous organic management from birth or hatching, with four exceptions. Poultry or edible poultry products must be from animals that have been under continuous organic management beginning no later than the second day of life. Milk or milk products must be from animals that

have been under continuous organic management beginning no later than 1 year prior to the production of such products. A nonedible livestock product must be derived from an animal that has been under continuous organic management beginning no later than 1 year prior to the harvest of the nonedible product. Livestock used as breeder stock may be brought from a nonorganic operation into an organic operation at any time, provided that, if such livestock are gestating and the offspring are to be organically raised from birth, the breeder stock must be brought into the organic operation prior to the last third of pregnancy.

We also propose that, should an animal be brought into an organic operation pursuant to this section and subsequently moved to a nonorganic operation, neither the animal nor any products derived from it may be sold, labeled, or represented as organic. Breeder or dairy stock that has not been under continuous organic management from birth may not be sold, labeled, or represented as organic slaughter stock. No organism produced with excluded methods may be used for breeding purposes or for the production of livestock products intended to be sold, labeled, or represented as organic. The producer of an organic livestock operation must maintain records sufficient to preserve the identity of all organically managed livestock and all edible and nonedible organic livestock products produced on his or her operation.

We are proposing that, except for feed additives and supplements included on the National List of synthetic substances allowed for use in organic livestock production, the total feed ration for livestock managed in an organic operation must be composed of agricultural products, including pasture and forage, that are organically produced. Any portion of the feed ration that is handled must comply with organic handling requirements. The producer must not use animal drugs, including hormones, to promote growth in an animal or provide feed supplements or additives in amounts above those needed for adequate growth and health maintenance for the species at its specific stage of life. The producer must not feed animals under organic management plastic pellets for roughage or formulas containing urea or manure. The feeding of mammalian and poultry slaughter by-products to mammals or poultry is prohibited. The producer must not supply animal feed, feed additives, or feed supplements in violation of the Federal Food, Drug, and Cosmetic Act.

The producer of an organic livestock operation must establish and maintain preventive animal health care practices. The producer must select species and types of livestock with regard to suitability for site-specific conditions and resistance to prevalent diseases and parasites. The producer must provide organic feedstuffs, as well as vitamins, minerals, and other supplements, sufficient to meet the animals' nutritional requirements. The producer must establish appropriate housing, pasture conditions, and sanitation practices to minimize the occurrence and spread of diseases and parasites. Animals in an organic livestock operation must be maintained under conditions which provide for exercise, freedom of movement, and reduction of stress appropriate to the species. Additionally, all physical alterations performed on animals in an organic livestock operation must be conducted to promote the animals' welfare and in a manner that minimizes stress and pain.

The producer of an organic livestock operation must administer vaccines and other veterinary biologics as needed to protect the well-being of animals in his or her care. When preventive practices and veterinary biologics are inadequate to prevent sickness, the producer may administer medications included on the National List of synthetic substances allowed for use in livestock operations. The producer may not administer synthetic parasiticides to breeder stock during the last third of gestation if the progeny is to be sold, labeled, or represented as organically produced. After administering synthetic parasiticides to dairy stock, the producer must observe a 90-day withdrawal period before selling the milk or milk products produced from the treated animal as organically produced. Every use of a synthetic medication or parasiticide must be incorporated into the livestock operation's organic system plan subject to approval by the certifying agent.

We propose that the producer of an organic livestock operation must not treat an animal in that operation with antibiotics, any synthetic substance not included on the National List of synthetic substances allowed for use in livestock production, or any substance that contains a nonsynthetic substance included on the National List of nonsynthetic substances prohibited for use in organic livestock production. The producer must not administer any animal drug, other than vaccinations, in the absence of illness. The use of hormones is prohibited in organic livestock production, as is the use of synthetic parasiticides on a routine basis. The producer must not administer synthetic parasiticides to slaughter stock or administer any animal drug in violation of the Federal Food, Drug, and Cosmetic Act. The producer must not withhold medical treatment from a sick animal to maintain its organic status. All appropriate medications and treatments must be used to restore an animal to health when methods acceptable to organic production standards fail. Livestock that are treated with prohibited materials must be clearly identified and shall not be sold, labeled, or represented as organic.

Under this proposal, a livestock producer must document in his or her organic system plan the preventative measures he or she has in place to deter illness, the allowed practices he or she will employ if illness occurs, and his or her protocol for determining when a sick animal must receive a prohibited animal drug. The standards we are proposing will not allow an organic system plan that envisions an acceptable level of chronic illness or proposes to deal with disease by sending infected animals to slaughter. Neither situation can be considered consistent with the principles of organic management. The organic system plan must reflect a proactive approach to health management, drawing upon allowable practices and materials. Animals with conditions that do not respond to this approach must be treated appropriately and diverted to nonorganic markets.

The producer of an organic livestock operation must establish and maintain livestock living conditions for the animals under his or her care which accommodate the health and natural behavior of the livestock. The producer must provide access to shade, shelter, exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the climate, and the environment. This requirement includes access to pasture for ruminant animals. The producer must also provide appropriate clean, dry bedding, and, if the bedding is typically consumed by the species, it must comply with applicable organic feed requirements. The producer must provide shelter designed to allow for the natural maintenance, comfort level, and opportunity to exercise appropriate to the species. The shelter must also provide the temperature level, ventilation, and air circulation suitable to the species and reduce the potential for livestock injury. The producer may provide temporary confinement of an animal because of inclement weather; the animal's stage of production;

conditions under which the health, safety, or well-being of the animal could be jeopardized; or risk to soil or water quality. The producer of an organic livestock operation is required to manage manure in a manner that does not contribute to contamination of crops, soil, or water by plant nutrients, heavy metals, or pathogenic organisms and optimizes nutrient recycling.

Handling. This proposal permits mechanical or biological methods to be used to process an agricultural product intended to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' for the purpose of retarding spoilage or otherwise preparing the agricultural product for market. It permits the use of nonagricultural substances and nonorganically produced agricultural products that are included on the National List in or on a processed agricultural product intended to be sold, labeled, or represented as ''organic'' or ''made with organic (specified ingredients).'' This proposal prohibits a handler from using ionizing radiation for any purpose, an ingredient produced with excluded methods, or a volatile synthetic solvent in or on a processed agricultural product intended to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients).''

The practice standard for facility pest management requires the producer or handler operating a facility to use management practices to prevent pests, including removing pest habitat, food sources, and breeding areas; preventing access to handling facilities; and controlling environmental factors, such as temperature, light, humidity, atmosphere, and air circulation to prevent pest reproduction. Permitted pest control methods include augmentation or introduction of predators or parasites for the pest species; mechanical or physical controls, including traps, light, or sound; and nontoxic, nonsynthetic controls, such as lures and repellents.

This proposal permits the use of a nonsynthetic biological or botanical substance or any synthetic substance to control facility pests if the permitted prevention and control practices are not effective. Any substance applied must be used in accordance with the label provisions as approved by the appropriate authority, such as the Environmental Protection Agency (EPA) or the Food and Drug Administration (FDA). We propose that the handler of an organic handling operation who uses any biological, botanical, or synthetic substance to control facility pests must specify in the organic system plan all measures taken or intended to be taken to prevent contact between the substance and any ingredient or finished product intended to be sold, labeled, or represented as organic or made with organic ingredients. In addition to these restrictions, the handler must include in the organic handling plan an evaluation of the effects of repetitive use of the same or similar materials on pest resistance and shifts in pest types.

This proposal delineates practice standards that must be followed by an organic handling operation to prevent the commingling of organic and nonorganic products and protect organic products from contact with prohibited substances. An organic handling operation must not use packaging materials and storage containers or bins that contain a synthetic fungicide, preservative, or fumigant in handling an organic product. The operation also must not use or reuse any storage bin or container that was previously in contact with any prohibited substance unless the reusable bin or container has been thoroughly cleaned and poses no risk of prohibited materials contacting the organic product.

Temporary Variances. This subpart establishes conditions under which operations may receive temporary variances from the provisions contained in §§ 205.203 through 205.207, 205.336 through 205.239, and 205.270 through 205.272. The Administrator may establish temporary variances due to natural disasters declared by the Secretary; unavoidable business interruption caused by catastrophe such as wind, fire, hail, flooding, excessive moisture, earthquake, or drought; or to conduct research on organic production and handling techniques or inputs. A certifying agent may recommend that the Administrator establish a temporary variance for unavoidable business interruption. The Administrator will determine how long a temporary variance will be in effect at the time it is established, subject to extension as the Administrator deems necessary. Upon notification by the Administrator that a temporary variance has been established due to a natural disaster, a certifying agent must inform each production and handling operation it certifies within the affected geographical region or each individual production and handling operation affected by the temporary variance. Temporary variances may not be issued for any practice, material, or procedure which is otherwise prohibited by these regulations.

A request for issuance of a temporary variance, the justification for it, and measures to evaluate the impact of the practice on the operation's natural resources must be documented in the organic plan and approved by the certifying agent. For example, if a drought resulted in a severe shortage of organically produced hay, a dairy operation might be permitted to substitute some nonorganic hay for a portion of the herd's diet to prevent liquidation of the herd. The producer must keep records showing the source and amount of the hay and update the organic plan to describe the justification for the practice and a timeframe for restoring the total feed ration to organic sources. The certifying agent might also request that the plan include contingency measures to avoid the need to resort to nonorganic feed in case of a future shortage. A variance for experimental purposes might be issued to permit a crop producer to undertake on-farm trials of small quantities of a new (but not produced with excluded methods) crop variety that was not available as organic seed.

Production and Handling (General)—Changes Based on Comments

The subpart differs from our first proposal in several respects as follows:

(1) *Genetically Engineered Organisms.* In the first proposal, we invited public comment on the use of genetically engineered organisms (GEO's) or their products in a system of organic production and handling. Specifically, we asked whether the use of GEO's or their products should be permitted, prohibited, or allowed on a case-by-case basis in organic production or handling operations. Hundreds of thousands of public comments opposed the use of GEO's or their products in organic production or processing. In response to these comments, this proposal prohibits use of genetic engineering (included in the broad definition of ''excluded methods'' in this proposal, based on the definition recommended by the National Organic Standards Board (NOSB)) in all stages of organic production and handling. This proposal contains a specific prohibition on the use of seeds, annual seedlings and planting stock (§ 205.204(b)), pest control substances (§ 205.206(f)), organisms (§ 205.236 (b)(3)), and ingredients (§ 205.270(c)(2)) produced with excluded methods.

Products created with modern biotechnology techniques have been tested, approved by the appropriate regulatory agencies, and can be used safely in general agricultural production. At the same time,

consumers have made clear their opposition to use of these techniques in organic food production. This rule is a marketing standard, not a safety standard. Since use of genetic engineering in the production of organic foods runs counter to consumer expectations, foods produced through excluded methods will not be permitted to carry the organic label.

We acknowledge that the broad prohibition on use of excluded methods in organic production and handling systems may create compliance obstacles for organic operations and certifying agents. For example, many current certification programs allow vaccination of animals with synthetic compounds when such treatment is mandatory. However, while many FDA-approved vaccines are now produced using excluded methods, we are unaware of any certification program which has an enforcement mechanism to ensure that such substances are not used in organic production. We do not know to what extent, if any, organic livestock producers are currently using vaccines produced with excluded methods or how a prohibition on the use of such substances would affect development of the industry.

Similarly, the prohibition on the use of excluded methods in the production of organic foods may also present challenges to organic handlers and certifying agents. This may pose a particular problem with respect to the nonorganic ingredients of multiingredient products with 50-95 percent organic content, to which the prohibition on use of excluded methods also applies. For example, it may be harder for organic food processors, who may struggle to find sources of nonorganic ingredients that are produced without use of excluded methods and for certifying agents, who must ensure that handlers have complied with this requirement.

As with most elements of this program, compliance monitoring and enforcement will rely on the ongoing oversight of organic operations by USDA-accredited certifying agents, rather than on product testing. Certifying agents must approve organic plans that detail procedures and practices to be followed by organic operations and will review extensive records maintained by organic operations to ensure that they are complying with the approved organic plans and the regulations.

This system of compliance assurance will be particularly important with respect to the prohibition on use of excluded methods. Producers and handlers must be vigilant in the acquisition of materials and products. Certifying agents should be aware of agricultural products produced through excluded methods and must carefully review material and product origin documentation. It will be the responsibility of certifying agents to review the sourcing specifications and other provisions of producer and handler organic plans to ensure the integrity of organic and multiingredient products. We anticipate that this system of carefully reviewed and documented organic plans, which establishes documented procedures demonstrating good faith efforts to diligently pursue and maintain the integrity of ingredients produced without use of excluded methods, could satisfy the requirements in this regulation.

With respect to the prohibition on the use of excluded methods in production of the nonorganic ingredients in multiingredient products, we recognize that the ability to meet these requirements depends primarily on practices used in conventional agricultural markets. We also recognize that practices for preserving product identity, including segregating genetically engineered and nongenetically engineered products, are evolving in some conventional markets. Currently there are no consensus industry standards for product segregation, rather contractual agreements are used to the extent possible. As the marketplace evolves toward recognized best practices or standards for product testing and segregation, we anticipate that these methods and systems will become the standards for implementing the prohibition on use of excluded methods in production of nonorganic ingredients in multiingredient products. Linking the requirements pertaining to nonorganic ingredients in this proposal to the evolving practices within the marketplace will provide certifying agents with a verifiable criterion against which to evaluate production and handling processes, as well as providing greater certainty to handlers and processors as they seek to identify acceptable sources of nonorganic ingredients.

As with other prohibited substances, a positive detection of a product of excluded methods would trigger an investigation by the certifying agent to determine if a violation of organic production or handling standards occurred and would not necessarily represent a violation on its own. The presence of a detectable residue alone does not necessarily indicate use of a product of excluded methods that would constitute a violation of the standards.

We anticipate that these issues will be of particular interest to commenters on the proposal, and that comments may help to shed light on industry capabilities and expectations. We recognize that this policy will place additional burdens on certified operations and certifying agents, but we believe that the necessity to meet strong consumer expectations outweighs these concerns.

(2) *Measurable Degradation Standard.* We are proposing that any practice implemented in accordance with the requirements for organic production and handling must maintain or improve the soil and water quality of the operation. This provision is a modification of the requirement in the first proposal that the use or application of a practice not result in measurable degradation of soil or water quality. Some commenters stated that the concept of measurable degradation was too limiting and reduced the holistic principles behind organic production to an exercise in risk assessment. In introducing the concept of measurable degradation, we stated that its purpose was to ''clarify that all methods and substances used in an organic operation shall be consistent with a system of organic farming and handling and the purposes of the OFPA.'' As such, measurable degradation and the specific indicators of soil and water quality used to monitor it were designed as tools to evaluate compliance with the OFPA and not as ends in themselves.

The new provision requiring that an organic operation maintain or improve its soil and water quality retains the linkage between production and handling practices and the natural resources of the operation, which is a fundamental tenet of both organic production and the OFPA. We have introduced the ''maintain or improve'' provision to allow for consideration of a variety of environmental indicators that contribute to the overall performance of the operation. Both the objective of certification—establishing an organic system of production and handling—and the standard by which it is achieved—the requirements in this proposal—remain constant for all operations. The environmental indicators used to establish and monitor compliance with an approved organic system plan will depend upon the site-specific conditions of the individual operation. For example, a producer and certifying agent would consider the soil types, hydrology, other environmental conditions and the specific nature of the crops and livestock being produced to

determine which indicators would best reflect the performance of the organic system plan. Site-specific conditions—high water table, soils that are prone to erosion—combined with the operation's production practices—the use of persistent inputs such as copper or sulfur compounds, the type of tillage practices used—will dictate the selection of environmental indicators. While individual indicators, especially when signaling that significant change has occurred, remain important, the ''maintain or improve'' provision allows a producer or handler and his or her certifying agent to assume a broader perspective in monitoring compliance with the OFPA.

Many commenters objected to the requirement in the first proposal that certain production practices ''not result in a measurable degradation of the soil.'' The purpose of the ''measurable degradation'' requirement was solely to provide producers and their certifying agents with quantifiable, verifiable tools with which to evaluate compliance with the applicable regulations. While the current proposal does not refer to ''measurable degradation'' in the practice standards, producers and handlers must identify and incorporate into their organic system plans specific testing and evaluation techniques to measure the environmental impact of their production practices. In many cases, this requirement could be filled with a standard soil analysis, which would indicate trends in soil organic content, nutrient composition, and physical properties. In other cases, chemical or biological analysis of stream water entering and leaving a crop or livestock operation could suffice to monitor compliance with the practice standards. There is no way to substantiate the effectiveness of the practices and materials used in an organic production system without some form of measurable verification. Analytical procedures to monitor the condition, over time, of an operation's resource base are a standard feature of efficient resource management, whether or not the operation is organically managed.

(3) *Function and Content Requirements of the Organic System Plan.* We propose significant changes in the function and content requirements of the organic system plan to solidify its role in the relationship between producer or handler and certifying agent. Public comment on the first proposal identified numerous perceived deficiencies in the provisions for an organic system plan. Some commenters, including organic certifying agents and industry associations, stated that the proposed content requirements were a ''shadow'' of the plan intended by the OFPA because the regulatory text did not include the words, ''management,'' ''rotation,'' or ''manure.'' Some commenters characterized the organic system plan in the first proposal as a simple list of materials to be used and practices to be followed and thought that it would not adequately address why the producer or handler made specific production choices. Echoing the recommendation adopted by the NOSB at its June 1994 meeting in Santa Fe, NM, other commenters suggested that each organic system plan should be required to include key elements of organic production, such as soil and crop management, resource conservation, crop protection, and maintenance of organic integrity through growing, harvesting, and postharvest operations. We fully agree with the principle that a comprehensive organic system plan is an integral component of a certified operation and that it provides the foundation for the working relationship between the certifying agent and the producer or handler. This proposal contains a standard that defines and characterizes an organic system of production and handling and establishes the organic system plan as the centerpiece of the relationship between producer or handler and certifying agent.

Some commenters expressed concern that the first proposal did not link the organic system plan to specific regulatory requirements such as proper tillage, crop rotation, and manuring. The first proposal did, however, require operations to document compliance with all applicable standards. The obligation to document compliance with all applicable standards was implicit in the requirement that an organic system plan contain a description of the practices to be performed and maintained to establish a system of organic farming and handling. A producer or handler intending to engage in a practice must comply with the corresponding standards and include his or her intentions for doing so in the organic system plan. This proposal contains a similar provision, found in § 205.200(a)(1), which requires a description of the practices and procedures used in the certified operation, again, without stating the specific standards with which the operation must comply.

We acknowledge that, by providing the regulatory guidance necessary to implement the OFPA, the Secretary is further empowering accredited certifying agents to determine whether an operation's organic system plan meets the requirements of the statute. The provisions for an organic system plan in § 205.200(a)(1)–(6) outline the prerequisites for certification. Combined with the production and handling standards in §§ 205.201 through 205.207, 205.236 through 205.239, and 205.270 through 205.272, these requirements provide the criteria necessary for certifying agents to determine whether to grant certification.

For similar reasons, we propose not to include in this proposal a list of the specific requirements to be included in a particular type of organic system plan. For example, while the first proposal required that a farm operation submit the total acreage under organic management as part of its organic system plan, there is no similar requirement in this proposal. We believe that accredited certifying agents are capable of determining the specific documentation they require to review an application for certification. Certifying agents are granted authority to request the information they deem essential to the performance of their duties. Many resources are available to certifying agents for determining the information needed to make certification decisions. The Federal-State Marketing Improvement Program of the Agricultural Marketing Service (AMS) helped fund a project (#12–25–G–0202) which created an organic inspection manual and developed a whole set of organic certification form templates. Among these templates are detailed forms for organic farm, livestock, and handling system plans. AMS worked with the Independent Organic Inspectors Association and the Organic Certifiers Council on this project and supports continued movement toward standardized certification documentation. The NOSB provided recommendations, including sample questionnaires, for the information it deems necessary for inclusion in an organic system plan. Additionally, the Organic Trade Association recently released the American Organic Standards that drew upon broad industry involvement to create a detailed description of organic system plan requirements.

The organic system plan in the first proposal included requirements for split farming operations—meaning farms that engage in both organic and nonorganic production—that some commenters stated were excessive. These commenters pointed out that the OFPA does not provide for the organic system plan to include any production or handling practice not consistent with the OFPA, and that the practices on the nonorganic portion of the split-farm

would not be consistent with the Act. Based on these comments, this proposed organic production system plan will not require information about a split-farm's nonorganic operations. However, this proposal requires that a split operation, whether a production or a handling operation, describe the measures it is taking or will take to prevent commingling of organic and nonorganic product and to prevent contact of organic products, fields, or facilities with prohibited substances.

(4) *Regulatory Enforcement.* The National Organic Program (NOP) will require consistent and effective enforcement of the regulations across diverse crop, wild crop, livestock, and handling operations which are differentiated by site-specific conditions within dissimilar geographic regions. The resources and objectives of each certified operation are unique, and the OFPA, accordingly, provides certifying agents with criteria, not formulas, to determine whether the practices, procedures, and inputs described in an organic system plan constitute compliance with the OFPA. The flexibility implicit in this approach allows producers and handlers to choose from a variety of production and handling options. In addition to being flexible, a regulatory mechanism must be clear, consistent, and enforceable. For this reason, producers and handlers must document the choices they make in an organic system plan and demonstrate a good-faith effort to implement the plan. For example, the decision to use an allowed synthetic pest control substance must be based on evidence that prevention and nonsynthetic pest control measures are not adequate.

Public comment indicated that the regulatory mechanisms that were introduced in the first proposal, including orders of preference, performance standards, and provision for allowance of certain practices ''if necessary,'' provided producers and handlers too much discretion in selecting materials and practices. These comments indicated that insufficient oversight by certifying agents could dilute the meaning of organic certification. Therefore, we are proposing significant changes in the regulatory mechanisms which govern producers, handlers, and their certifying agents in determining the materials, practices, and procedures used in an organic operation.

One regulatory mechanism used in the first proposal was an ''order of preference'' scheme for selecting organic practices or materials employed in production and handling. This scheme was proposed for a number of areas: Crop rotation; manuring practices; soil fertility and nutrient management; seeds and planting stock selection; crop pest, weed, and disease prevention and management; livestock health care; selection of handling ingredients; and prevention and facility pest management. There was also a general order of preference requirement that mandated the use of nonsynthetic substances in preference to synthetic substances.

Comments from at least one industry association supported using orders of preference to assure that choices made by producers and handlers will be as consistent as possible with organic farming and handling principles. Others, including several organic certifying agents, felt that the conditions for choosing a lower order of preference were not specified clearly enough and could result in inconsistent enforcement of the standards. Some commenters thought that certifying agents would be overly burdened by having to review and approve the justification in the organic plan for choosing less preferable practices, although some stated that if the criteria for choosing a lower order of preference were clarified and documentation of the reasoning behind the choice was explicitly required, then this scheme would be workable. Some noted that ranking practices and inputs according to their suitability is analogous to the ''approved, restricted, prohibited'' scheme which many State and private certification programs employ. A few commenters expressed the belief that establishing provisions to issue variances would address their concerns and provide for adequate oversight and enforcement concerning practices, procedures, and inputs that are considered to be acceptable but less desirable for organic production and handling.

However, several commenters, including consumers and organic certifying agents, asserted that ''preference'' could be interpreted as purely based on the personal choice or convenience of the producer or handler. Some certifying agents indicated that the soil fertility order of preference was too complex and difficult to enforce. A number of consumers disliked this concept because it permitted some deviation from the most desirable standards, such as use of organically produced seeds. Another commenter speculated that this scheme could be interpreted as establishing different levels of ''organicness.'' Although these interpretations do not reflect the intent of the first proposal, in the interest of clarity, we have removed references to orders of preference in the current regulatory text. We also removed the general requirement for orders of preference and to simplify the scheme so that it will be less burdensome for certifying agents to enforce. Several provisions in this proposal, including the seeds and planting stock practice standard (§ 205.204) and the crop pest, weed, and disease management practice standard (§ 205.206) will allow less desirable practices or substances to be used only if the preferred alternative is either ineffective or not commercially available. As was true of the first proposal, justification for choosing a less desirable alternative, such as nonorganic seeds or planting stock, must be documented in the relevant organic system plan and approved by the certifying agent.

Several commenters, including industry and environmental associations, also took issue with the use in the first proposal of performance standards, which specify the required outcome but not the practices that must be used to achieve it. The general provision that any practice or substance used in an organic operation not contribute to measurable degradation of soil or water quality is an example of such a performance standard. Objections to the use of performance standards referred to the nature of organic production standards, which focus on the production process and not quantifiable outcomes such as pesticide residue levels. Some of these commenters asserted that such a mechanism would relegate organic standards to a risk assessment model, which is not appropriate for evaluating a system of organic management.

We agree that standards for an organic management system cannot be reduced to measurable outcomes, and this was not the intent of the proposed performance standards in the first proposal. The evaluation of measurable indicators as benchmarks of the proper functioning of a management system is compatible with the overall requirement that practices be implemented that are consistent with a system of organic farming and handling. Such indicators help to determine whether a given operation is in compliance with the regulations. For example, the crop rotation provisions in this proposal list a series of functions, including weed management, that should be provided by an appropriate rotation. While the possible types of rotation that could achieve this objective are virtually limitless and could not be specifically prescribed, recording changes in weed populations could document the

effectiveness of the rotation being implemented.

Another type of regulatory provision employed in the first proposal permitted the use of certain practices or substances only ''if necessary.'' This was proposed for the introduction of nonorganic animals into an organic operation, for using up to 20 percent nonorganic livestock feed, for permitting restrictions on access by livestock to space for movement and access to outdoors, and for use of synthetic processing aids in producing an organic processed product. A producer or handler was required to establish his or her need to use a particular practice or substance based on site-specific circumstances. The basis for each such decision was to be stated in the organic system plan and evaluated by the certifying agent. Many commenters indicated that this provision was not appropriate because, for example, the allowance for the use of 20 percent nonorganic livestock feed, ''if necessary,'' left a loophole that could permit an unscrupulous producer to use nonorganic feed without a valid reason that was consistent with the regulations. We concur that this allowance for practices ''if necessary'' is overly vague and have removed the provision from this proposal. It has been replaced by more specific regulatory restrictions, referred to as practice standards, which better reflect the recommendations of the NOSB.

We have addressed comments that requested more specific guidelines for acceptable organic practices by introducing the concept of practice standards. Practice standards are a series of specific guidelines, requirements, and operating procedures for common agricultural practices such as crop rotation, pest management, and crop nutrient management. The NOSB reviewed portions of the current NRCS practice standards for crop rotation, nutrient management, pest management, composting facilities, and cover or green manure crops at its Washington, DC, meeting in June 1999. NRCS practice standards, while not public health standards, contain rigorous, field-tested provisions which provide specific benchmarks for monitoring the performance of many required organic production techniques. A practice standard can also serve as the foundation for an even more detailed program manual.

For example, we are proposing that composted animal and plant waste materials which are used for soil fertility and crop nutrient management must be produced at a facility in compliance with the NRCS practice standard for a Composting Facility (Code 317). This document establishes minimum acceptable requirements for the design, construction, and operation of a composting facility. A copy of this practice standard may be obtained from any NRCS field office. A copy of this practice standard may be viewed at USDA–AMS–TMD–NOP, Room 2510—South Building; 1400 Independence Ave., SW, Washington, DC 20250–0248. The NOP intends to publish additional practice standards for public comment in the **Federal Register**. We are also holding discussions with NRCS to determine whether farming operations which comply with the certification requirements of the NOP will have the added benefit of being able to participate simultaneously with NRCS cost-share programs.

Incorporating NRCS practice standards into the requirements for organic certification introduces a significantly greater degree of specificity than most organic standards have previously contained. For example, the Composting Facility practice standard includes specifications for facility size, moisture content of the compost pile, carbon-nitrogen ratio, and the interval which certain temperatures must be sustained to achieve a finished product. The practice standard also contains restrictions on source materials which may make it difficult to utilize certain categories of materials which have traditionally been allowed in organic compost production. Enforcing these additional requirements will require far greater oversight from the certifying agent, and expertise in this area will become another factor in accreditation. NRCS uses its practice standards for voluntary cost-share programs, and organic producers may find the requirements burdensome as an added, mandatory expense. Despite the many comments we received criticizing the provisions for performance standards in the first proposal, organic certification schemes have traditionally prescribed outcomes and allowed producers and handlers flexibility in selecting practices used to achieve them. However, we received many other comments stating that more rigorous, clearly defined regulatory mechanisms were needed to protect the integrity of organic certification. We have considered the use of NRCS practice standards to provide clear, consistent, and verifiable guidelines for conducting essential organic production practices. We are particularly interested in receiving specific comment on the feasibility of using NRCS practice standards for compost production and how such practice standards may generally be used to establish organic standards.

(5) *Temporary Variances.* Section 205.201(b) of this proposal provides procedures for establishing a temporary variance from certain requirements of subpart C. The temporary variance is a mechanism for providing regulatory flexibility that did not appear in the first proposal. This mechanism is proposed in response to comments from an industry association and several certifying agents who expressed the need, in certain circumstances, to use practices that would otherwise not comply with the applicable practice standard. Similar mechanisms are used by most existing certifying agents to make exceptions in cases of compelling need, when there is minimal concern for compromising the integrity of an organic system. Temporary variances are established from specific requirements and not, unless specified, from all production standards. They are established for a determined period of time, subject to extension as deemed necessary by the Administrator. For example, the Administrator could, under appropriate circumstances, waive the requirement that a producer must provide livestock with a ration composed of 100 percent organically produced feed.

Temporary variances are created under very specific circumstances and are subject to strong oversight by the Department to prevent potential abuse. This proposal contains three situations in which the Administrator could establish a temporary variance. These situations are: natural disasters as declared by the Secretary in a specific geographical area; business interruption caused by wind, flood, fire, or other catastrophic event; or for the purpose of conducting research or trials of techniques, varieties, or ingredients used in organic production or handling. In the case of natural disaster declared by the Secretary, the Administrator will establish a temporary variance available to all organic operations within the area designated as affected. For local catastrophic events in which the Secretary does not declare a disaster, the certifying agent is responsible for making recommendations to the Administrator for establishing temporary variances. Catastrophic events must be of a sufficient magnitude and have a direct, immediate impact such that the operation could not continue to function without the temporary variance. Certifying agents are responsible for making a recommendation for a temporary variance in situations prompted by

research needs. Producers and handlers cannot appeal directly to the Administrator for a temporary variance but must make such a request through their certifying agent.

Temporary variances, as proposed here, will not extend to any practice or substance that is expressly prohibited by any provision of the OFPA, the applicable standards, these regulations, or any other Federal, State, or local laws or regulations. For example, a variance cannot be granted for use of an organism produced through excluded methods, for use of sewage sludge as a fertilizer, or for use of irradiation to process an organic product or ingredient. We expect to provide additional guidelines in a program manual to assist certifying agents in evaluating how much of an allowance is appropriate, such as how much of the ration for which animals could come from nonorganic sources under a variance.

Production and Handling (General)—Changes Requested But Not Made

This subpart retains from our first proposal regulations on which we received comments as follows:

(1) *Definition of ''System of Organic Farming and Handling''.* The first proposal contained a definition of a ''system of organic farming and handling'' to provide an explicit reference point for determining which practices and substances were consistent with such a system. Several industry associations and certifying agents commented that the definition was helpful but lacking in key concepts, such as ''ecological balance,'' ''agroecosystem health,'' and ''biological diversity.'' Several thought the definition should receive greater emphasis in the regulations as a reference point for the underlying principles of organic production and handling and that the NOSB's definition should be used. Although we considered many of the concepts discussed by commenters, only the scope and not the meaning of the original definition has been changed. The definition in this proposal is based on the one we developed in consultation with the NOSB but is limited to concepts that are incorporated into the OFPA. Measuring compliance with the component-based mandates of the OFPA, such as fostering soil fertility and preventing water contamination by manure, does not require criteria as far-reaching as ''agroecosystem health'' or ''biological diversity.'' We also took into consideration the costs to comply with such open-ended requirements and determined that this could be excessively burdensome. Synergistic benefits may be associated with organic production and handling systems, but the OFPA requires only that individual components of the system—soil, water, wild crop environment—be protected. Adherence to the conservation practices found in the individual practice standards will result in cumulative benefits to the agroecosystem, but producers and handlers would have difficulty measuring compliance at this scale. Establishing standards that address individual components of an organic farming system, such as tillage practices and manure management, will directly and beneficially impact the entire ecosystem. For the purpose of enforcement, however, we propose retaining the component-based criteria for evaluating a system of organic farming and handling.

(2) *Commercial Availability Standard.* The first proposal allowed certain materials and practices, such as nonorganic seeds and nonorganic minor ingredients in a product labeled organic, to be chosen if preferable alternatives were not ''commercially available.'' We have retained the commercial availability principle in this proposal but have limited its use to the provisions addressing the selection of organic or untreated seeds and planting stock. A number of producers, consumers, and certifying agents expressed concern that producers or handlers not be permitted to base claims of commercial unavailability on any price difference between organic and nonorganic inputs. They argued that the term, ''feasibly and economically,'' in the proposed definition of ''commercially available'' were too vague to be enforceable. Comments from an industry association supported the use of this concept but requested a more specific definition that could be used to assess the economic dimension of commercial availability. The NOSB has also cited commercial availability as a valid criterion for allowing some flexibility in the choice of inputs and stated that the term is applicable to the quantity and quality of available product as well as its cost.

Although commercial availability is not defined in the OFPA, the concept is well established within current certification programs and the commercial world in general. To be considered commercially available, a preferred input must be known and readily available in the sense that a producer or handler can locate and acquire the quantity and quality of product needed to sustain his or her operation. The producer or handler must make a good faith effort to procure the preferred input but should not be expected to rely on an inconsistent supply of a necessary commodity. We do not provide a formula for determining when price difference alone is enough to justify purchase of the less desirable input because of the multiple factors which could affect such a decision.

By limiting the application of the commercial availability standard to the selection of organic or untreated seeds and planting stock, we are limiting its use to relatively narrow and well defined markets. A producer must justify a choice based on commercial availability when submitting an organic plan to the certifying agent, and it must be supported by evidence of a good-faith effort to obtain the preferred input. The attempt to source an input from known suppliers and an investigation to discover potential new suppliers constitute the producer's good-faith effort. Certifying agent approval of the organic plan provides sufficient protection against abuse of this provision. Although comments reflected concern that too many allowances for nonorganic inputs could dilute the integrity of certification, the organic industry has built its reputation while using the commercial availability exemption for sourcing certain materials. Certifying agent oversight can ensure that it works in the NOP as well.

Production and Handling (General)—Additional Provisions

Upon further review of the provisions in the first proposal, we have decided to propose the following additions and changes.

(1) *Dual Use of an Organic System Plan.* Section 205.201(b) allows a producer or handler to submit an organic production system plan developed to meet the requirements of another Federal, State, or local regulatory program if the plan fulfills the applicable requirements of this section. Government agencies may have programs in place that require participating agricultural producers or handlers to develop and follow a management plan. For example, the NRCS Environmental Quality Incentives Program (EQIP) requires a conservation plan. An organic production system plan could be incorporated into such a conservation plan and fully comply with the requirements proposed in § 205.201 of this proposal. This new provision could reduce the paperwork burden for an operation that participates in more than one program requiring a farm conservation plan.

Crop Production—Changes Based on Comments

This subpart differs from our first proposal in several respects as follows:

(1) *Biosolids.* The first proposal requested public comment on the possible use of biosolids as a means of enhancing soil fertility on an organic agricultural operation. Our interpretation of the term, ''biosolids,'' is synonymous with the definition of sewage sludge contained in 40 CFR part 503. In response to the comments we received, this proposal adds biosolids to the list in § 205.203(e)(2) of substances that are specifically prohibited for use in organic production.

The first proposal reviewed some historical information about the Federal enforcement of biosolids use and the steps taken by EPA, FDA, and the U.S. Department of Agriculture (USDA) to ensure that biosolids are safe to use on crops for human consumption. Comments were solicited as to whether biosolids should be permitted or prohibited in organic production. The first proposal noted that the NOSB recommended that biosolids should be classified as synthetic and were not appropriate for use in organic crop production. The NOSB took this position at its 1996 meeting in Indianapolis, IN, and reaffirmed it at its 1998 meeting in Ontario, CA.

We received hundreds of thousands of comments, virtually all of which strongly opposed the use of biosolids in organic agriculture. The vast majority of the commenters stated that biosolids can contain synthetic substances prohibited in organic agriculture, such as industrial waste, street runoff containing petroleum products, and household waste contaminated with cleaning products, polychlorinated biphenyls (PCB's) and dioxins. Commenters indicated that sewage sludge should not be allowable because it may contain synthetic materials prohibited in organic production which are not restricted under EPA regulations. Many commenters stated that biosolids are not currently allowed in organic production and that permitting their use would run contrary to consumer expectations. Such an allowance would place producers at a competitive disadvantage in domestic and international markets. While sewage sludge may be safely used in conventional agriculture, allowing its use under these standards would be inconsistent with the historical understanding of organic fertility management shared by producers and consumers. Therefore, this proposal prohibits the use of sewage sludge in organic production.

(2) *Tillage and Conservation Practices.* While no comments objected to the inclusion of tillage and cultivation practices in the first proposal, a few took issue with the requirement that these practices result in ''no measurable degradation'' of soil quality. In this proposal, the concept of '' no measurable degradation'' has been replaced with the requirement to ''maintain or improve'' soil quality. We agree with commenters who suggest that prevention of soil erosion is an important consideration for the selection of tillage and cultivation methods and have included a requirement that tillage and cultivation practices maintain or improve the physical, chemical, and biological condition of soil and minimize soil erosion. We have removed other references to preventing measurable degradation when using plant or animal wastes in the first proposal and replaced them with a requirement, in § 205.203(c), that the producer manage these materials to maintain or improve soil organic matter content in a manner that does not contribute to contamination of crops, soil, or water by plant nutrients, pathogenic organisms, heavy metals, or residues of prohibited substances. In accordance with several comments received, this provision frames the requirement in terms of achieving a positive outcome rather than avoiding a negative one. This proposal specifies the types of measurable degradation that could result from improper or excessive application of plant or animal waste materials, and producers, in consultation with the certifying agent, will identify potential problems and address them in the organic system plan. The organic system plan must also identify appropriate monitoring activities to ensure that the ''maintain or improve'' requirement is being met. For example, a producer who manages an on-farm composting facility might make regular observations of the pile to check for leaking and periodically sample a nearby stream for nitrate content.

(3) *Application of Raw Manure.* The first proposal requested public comment on appropriate guidelines to ensure that use of raw animal manure would not cause contamination of food products by pathogens that cause foodborne illness. The OFPA restricts the use of raw manure by requiring that a reasonable period of time elapse between its application to a crop intended for human consumption and the harvest of that crop. This period of time must be approved by the certifying agent, but in no event may it be less than 60 days. The OFPA stipulates that the certifying agent determine the interval between the last application of raw manure and harvest of the crop to ensure the safety of the crop. Furthermore, the OFPA prohibits raw manure from being applied to any crop in a way that significantly contributes to water contamination by nitrates or bacteria. The first proposal contained an order of preference which favored the use of composted materials, including manure, as inputs for soil fertility but allowed raw manure applications subject to the 60-day minimum preharvest interval contained in the OFPA.

Many public comments addressed the issue of raw manure use, and some industry, producer, consumer, and environmental groups submitted substantial technical information. Many of these commenters addressed the human health risk associated with the use of manure in organic crop production. Most of these comments suggested that a determination of sufficient time to ensure the safety of a crop depends on soil and climate conditions, but that the 60-day period specified in the OFPA was not sufficient. Some commenters cited various amounts of time that might be considered safe. Other commenters stated that no interval between application and harvest could be considered safe and recommended prohibiting the application of raw manure to any crop. The NOSB had extensive deliberations on the use of raw manure in organic crop production at its June 1999 meeting in Washington, DC.

The OFPA's requirement that raw manure be applied in a manner that ensures the safety of the crop presents a unique regulatory challenge. We have consistently maintained that the NOP is for marketing, not food safety, purposes. Organic production and handling standards, which are not based on risk assessment of public health consequences, may differ from the requirements established by agencies that are responsible for food safety regulations. The OFPA's requirement that the application of raw manure ensures the safety of the food to which it has been applied requires the NOP to move toward establishing a public health standard. This requirement is especially challenging given that there is no Federal oversight of the application of raw manure to any kind of crop nor any public health standards to establish what constitutes safe use of raw manure. Applications of raw manure are a hazardous, threatening

pathogenic contamination of food products, notwithstanding the use of composted manure, which can carry similar hazards.

We have responded to the concerns regarding the application of raw manure to organically produced crops by proposing the standards contained in § 205.203(c)(1). We propose that raw animal manure must be composted, unless it is applied to land used for a crop not intended for human consumption, incorporated into the soil not less than 120 days prior to the harvest of a product in direct contact with the soil surface or particles, or incorporated into the soil not less than 90 days prior to the harvest of a product the edible portion of which does not have contact with the soil surface or particles. However, many site-specific variables affect the viability of pathogens in raw manure, and we cannot determine whether this standard will be sufficient under all conditions to fulfill the safe food requirement contained in the OFPA. We are requesting comment on the development of more comprehensive standards that certifying agents are capable of enforcing. We are also requesting comment on how to regulate the authority to determine the ''reasonable period of time'' between the last application of raw manure and harvest of a crop which the OFPA delegates to the certifying agent. Given the need for far greater scientific understanding of the spread of pathogens in raw manure, we do not consider that certifying agents should be expected to make the determination of safety.

Several comments were received which suggest that any use of raw animal manure could jeopardize human health and that the use of raw animal manure by organic farmers thereby increases the risk that organic foods may not be as safe as conventionally produced foods. We recognize that our knowledge of the risks from foodborne pathogens has advanced since the OFPA was passed a decade ago, and that safety precautions have been strengthened accordingly. Therefore, we are seeking further guidance for developing regulations that minimize the potential for contamination of crops grown for human consumption by pathogens from raw animal manure. This approach is consistent with the traditional organic certification procedures which have restricted the use of raw manure for environmental as well as health concerns. Other Federal and State regulatory programs may impose additional requirements on the use of raw manure in crop production which could be applicable to organic operations.

The first proposal required that management practices for the application and storage of raw manure be implemented in a manner that does not significantly contribute to contamination of water by nitrates and bacteria, including human pathogens. The use of the word, ''significantly,'' in this provision is a direct reference to the authorizing language in the OFPA (Section 2114(b)(2) (C)). However, commenters suggested that this language implies that ''insignificant'' contamination would be acceptable. This proposal requires that soil management practices aim at preventing, to the extent possible, any contamination of water by nitrates and pathogenic bacteria.

(4) *Use of Treated Seed.* The first proposal permitted the use of treated seeds if the same variety was not commercially available in untreated form or if unanticipated or emergency circumstances made it infeasible to obtain untreated seeds. In this context, ''treated seed'' refers to the application of a pesticide to a seed prior to planting and does not include the use of a disinfection treatment for a seed that is intended for sprouting and food use. A number of comments from producer and industry groups suggested that this was appropriate but that a producer should have to choose an ''equivalent'' untreated seed variety that was commercially available. The term, ''equivalent,'' indicates that two seed varieties have similar performance attributes, such as resistance to drought and insects, and production traits, including yield, size, and shape of the commodity. We agree with this provision because it favors a nonsynthetic input over a synthetic one and have, therefore, included it in this proposal. We are also requiring that, when selecting a nonorganically produced seed, a producer select an untreated equivalent variety in preference to one which has been treated with an allowed synthetic treatment.

Some comments objected to any allowance for the use of treated seeds or planting stock, citing the prohibition in 2109(c)(3) of the OFPA (7 U.S.C. 6508(c)(3)) on the use of transplants that are treated with any synthetic or prohibited material. We recognize that the use of synthetic seed treatments, some of which are acutely toxic, may seem inconsistent with a system of organic production and handling, but it is an established practice in State and private certification programs and is supported by provisions of the OFPA. We believe that retention of the commercial availability requirement, a preference for untreated, nonorganically produced seed over treated, nonorganically produced seed, and the use of temporary variances in this proposal provide an appropriate context for regulating the use of synthetic seed treatments.

The requirement from the first proposal that all seeds, annual seedlings, and planting stock be organically produced is retained in this proposal. Similarly, this proposal contains a comparable exception to the requirement so that nonorganically produced seeds and planting stock could be used to produce an organic crop when an equivalent organically produced variety is not commercially available. A producer's decision to use nonorganically produced seeds and planting stock for reasons of commercial nonavailability of equivalent organic varieties must be included in his or her organic plan and agreed to by the certifying agent. We decided to retain these provisions from the first proposal after receiving comments from producer and industry groups that acknowledged that the supplies of organic farm inputs will not be sufficient to provide for the seed and planting stock needs of all organic operations in the near future. We have added the requirement that producers select equivalent untreated seed over treated seed when commercial availability allows them to use a nonorganically produced variety. We recognize that these provisions could lead to certifying agents facing numerous decisions regarding commercial availability and equivalency in the organic system plans they review. This degree of oversight is warranted, however, to ensure that the use of synthetic materials in organic production is kept to a minimum. We are not extending the commercial availability exception to the requirement for organically produced annual seedlings because the comments indicated that the organic input suppliers are effectively meeting this demand.

In contrast to the first proposal, we propose that any synthetic seed treatment used in organic production must be included on the National List of synthetic substances allowed for use in organic production. We base this requirement on the OFPA, which identifies ''treated seed'' as a category of synthetic substances eligible for inclusion on the National List. We believe that including specific seed treatments on the National List will satisfy the requirement in the OFPA that a farmer shall not apply a material to or

engage in a practice on seeds or seedlings that is contrary to or inconsistent with the applicable certification program. The approach we are proposing is also consistent with current practice in the organic industry. The NOSB endorsed this approach at its 1994 meeting in Santa Fe, NM, by recommending that seed treated with synthetic fungicides appearing on the National List be allowed when nontreated varieties are commercially unavailable.

We propose that producers or handlers may request a temporary variance due to unavoidable natural disaster in order to use nonorganically produced annual seedlings. The temporary variance will be appropriate in instances in which an unexpected event such as a frost, flooding, fire, or other catastrophic event destroyed the producer's nontreated planting materials and no organically produced replacements are commercially available. This provision cannot be used to compensate for mismanagement by the producer. For example, a producer who planted seedlings prior to the recognized frost date and lost his or her crop to a freeze could not claim that this disaster was unavoidable. This provision requires that the producer make all reasonable efforts to protect his or her seeds, annual seedlings, and planting stock before being allowed to substitute with treated replacements.

Some commenters cited the prohibition in section 2109(c)(3) of the OFPA against using transplants that are treated with any synthetic or prohibited material as justification for prohibiting the use of synthetic seed treatments. However, the statute permits the use of seeds and seedlings treated with substances included on the National List of allowed synthetic substances. The seemingly inconsistent requirements for seedlings and transplants, functionally equivalent terms, have made this a difficult issue to resolve. The first proposal attempted to reconcile these differences by defining transplant as an annual seedling produced on an organic farm and transplanted to a field on the same farm operation to raise an organically produced crop. Many commenters felt that distinguishing between annual seedlings which originated on and off the operation was not a valid approach. We concur, and have removed this definition, and interpret the term,'' transplant,'' as applying to any seedling which is transported and replanted, regardless of whether it originated on the operation or not. We interpret the prohibition on using a transplant treated with any synthetic or prohibited material as taking effect after the seedling has been physically transplanted. Therefore, the prohibition only applies to materials applied after transplanting and not to the synthetic treatment included on the National List, which may have been applied to the seed that produced the seedling.

The application of disinfectants to seeds used for sprouting represents a unique dimension of the seed treatment issue. Raw sprouts pose a potential food safety risk because the conditions under which they are produced—growing time, temperature, water activity, pH and nutrient content—can foster the rapid growth of bacteria. In 1999, FDA issued guidance advising sprout producers and seed suppliers of measures to reduce microbial hazards common to sprout production. These measures include treating seeds with one or more approved methods such as presprout soaking with 20,000 ppm calcium hypochlorite. Based on the recommendation of the NOSB, the Secretary has included on the National List in this proposal three chlorine materials to disinfect and sanitize food contact surfaces. However, these materials carry the annotation that residual chlorine levels in water shall not exceed the maximum residual disinfectant limit under the Safe Drinking Water Act, which is well below the 20,000 ppm level that FDA currently advises sprout producers to follow.

Existing State and private certification programs have diverged in their response to the FDA guidance on chlorine treatments. While treating food products with high concentrations of chlorine has traditionally been prohibited, some certifying agents currently allow sprout treatment at the 20,000 ppm level. Producers of organic sprouts are finding it increasingly difficult to balance the FDA guidance, the expectations of consumers, and the requirements of their certifying agents. This proposal contains no specific guidance on the use of chlorine treatments on seeds used in sprout production. As synthetic compounds, chlorine materials would have to be added to the National List at specified concentrations to be used for disinfecting sprouts. Without a specific National List exemption, operations that treat sprouts at the level established in the FDA guidance could not be organically managed.

(5) *Crop Rotation*. The OFPA requires an organic crop production plan to foster soil fertility through practices that include a crop rotation. The first proposal required the establishment of a crop rotation or other ''means'' of ensuring soil fertility and effective pest management but did not provide explicit restrictions concerning situations in which those means could be substituted. Producers and producer groups sent many comments stressing the importance of a proper crop rotation for successful organic crop production and objecting to the vague allowance for other methods to be used in its place. Although we have not changed the definition of crop rotation from the first proposal, the new practice standard eliminates the possibility that an organic producer will substitute some other practice for a crop rotation. This proposal does, however, allow for variances from an approved crop rotation plan due to natural disasters, including weather.

A few commenters made the point that, although the OFPA includes a provision for a crop rotation as a means of improving soil fertility, a crop rotation serves other critical functions as well. We reviewed the NRCS practice standard for crop rotation (Code 328) which addresses many of the concerns raised in public comment. Accordingly, § 205.205 of this proposal requires the producer to implement a crop rotation, including, but not limited to, cover crops, sod, green manure crops, alley crops, and catch crops. These techniques serve the following functions as applicable to the operation: maintain or improve soil organic matter content; provide for effective pest management in annual and perennial crops; manage deficient or excess plant nutrients; provide erosion control to minimize soil loss; and manage subsurface water to prevent transport of dissolved materials.

A few comments suggested requiring that rotation plans include sod or legumes, which serve to improve soil organic matter content and increase soil nitrogen supplies to meet the demands of a following crop. However, all of these functions could be fulfilled through many different types of rotation plans, which could only be developed according to the site-specific climate, soil type, and type of crops or livestock produced on a given operation. In the interest of flexibility, therefore, this proposal does not specify what crops have to be included in a crop rotation. An organic plan that meets the criteria specified in this proposal must be developed by a producer and approved by the certifying agent.

Proposed § 205.205(b) specifically applies to perennial crops. Under this provision, an orchard plan might include establishment of hedgerow areas that provide habitat for beneficial insects to assist in effective pest management. This provision was added

in response to comments stating that an organic farm plan should address the functions provided by crop rotations even in the case of perennial crops such as orchards and sod. We expect to develop program manuals containing more detailed information on different types of rotations, including methods to fulfill the prescribed functions for perennial crops, that are suitable to a wide range of types of operations and geographic conditions.

(6) *Prohibition on Cytotoxic Pest Control Substances.* In response to several comments, we have deleted the provision in the first proposal to prohibit use of a synthetic carbon-based substance having a cytotoxic mode of action for any use as a pest control substance. Some commenters interpreted this provision to mean that this single criterion would substitute for those specified in the OFPA for evaluating substances proposed for inclusion on the National List. Other commenters, including industry groups, objected to this provision because it has not previously been part of certification standards and its meaning was too ambiguous. Some substances that have historically been accepted for organic production could have cytotoxic effects when used in inappropriate concentrations. Although this provision added to and did not replace the evaluation criteria contained in the OFPA and eliminated the need for the NOSB to review clearly inappropriate substances, it has been removed from this proposal in the interest of clarity.

Crop Production—Changes Requested But Not Made

This subpart retains from our first proposal regulations on which we received comments as follows:

(1) *Buffer Zones.* Section 205.202(a)(3) of this proposal requires that any land on which organic crops are produced have distinct, defined boundaries and buffer zones, such as runoff diversions, to prevent the unintended exposure of the crop to prohibited substances from adjoining land. Several commenters suggested that the regulations should specify a minimum size for buffer zones, as is currently required by some organic certifying agents. Although specifying a size for these zones would establish a more definable requirement, it could also impose unnecessary burdens on some organic producers without offering greater protection of organic fields and crops from unintended contact with prohibited substances. Another commenter argued that buffer zones should not be required for unmanaged lands such as wilderness areas or abandoned farms. There might be no need for a buffer zone if an organic farm were completely surrounded by wilderness or abandoned farms, which is one reason why a the size of a buffer zone should not be specified. This proposal leaves the determination of an adequate buffer zone to the organic producer and the certifying agent on a case-by-case basis. Buffer zone provisions are an important part of each organic production system plan, and we will provide guidelines for buffer zones in program manuals.

(2) *Nonorganic Plant and Animal Waste Materials.* The first proposal permitted the use of any uncomposted plant or animal wastes. It also allowed use of composted plant or animal wastes obtained from nonorganic sources, such as commercial compost products. Several consumer and environmental groups objected to permitting the use of plant or animal wastes from nonorganic sources. Such materials, they argued, could potentially contain residues of prohibited substances that could compromise the integrity of the organic farm system. However, off-farm plant and animal wastes from food processing, municipal yard waste facilities, and other sources are used extensively in existing organic operations and are generally permitted by organic certification programs. Bone meal, fish meal, and seaweed meal are also commonly used as organic farm inputs. Commercial fertilizer products that contain mixtures of such plant and animal by-products are commonly permitted for use in existing organic certification programs, subject to certifying agent review. Using such organic wastes is consistent with a system of organic production and handling, which calls for recycling organic wastes to return nutrients to the land. We believe that concerns about potential contaminants in plant and animal waste materials can be addressed by the requirement in this proposal that these materials be managed in a manner that prevents such contamination. For example, cotton gin trash that had been treated with a prohibited substance could only be used if the organic system plan specified composting the material before adding it to the soil. Composting has been shown to effectively biodegrade synthetic organic compounds, and the organic system plan could also call for the compost or soil to be monitored regularly for specific residues.

Finally, the first proposal and this proposal prohibit the use of any commercially blended fertilizer product that contains a prohibited substance, as required by the OFPA. Although a number of commenters worried that a product containing toxic synthetic substances as inert ingredients could be used for organic production, this prohibition prevents such products from being used. For this reason, the use of any composted or uncomposted plant or animal wastes to supply soil or crop nutrient is permitted without further limitation other than preventing contamination of soil or water by pathogenic organisms, heavy metals, or residues of prohibited substances. The certifying agent will be expected to have the expertise to recognize materials that might be of concern and ensure that they are properly addressed in the organic system plan. We expect to provide additional guidelines in program manuals to help evaluate whether animal manure is fully decomposed, as well as guidelines for other types of materials to address potential soil or water quality concerns. We acknowledge the need to examine carefully commercial blended fertilizers and soil amendments to ensure that such products do not contain prohibited substances.

(3) *Chemically Altered Plant or Animal Waste Materials.* The first proposal allowed the use of a composted or uncomposted plant or animal waste material that had been chemically altered by a manufacturing process—such as leather meal, newspaper, and biosolids—if the material was included on the National List of allowed synthetics. Only newspaper was proposed for inclusion on the National List. A few commenters objected to this allowance, although newspaper is commonly permitted as a mulch material or as an ingredient in compost in existing organic certification programs and was recommended for this use by the NOSB. The National List review process offers an adequate safeguard to ensure that other waste materials that may be permitted in the future will be consistent with a system of organic production and handling, and we propose to retain this provision in § 205.203(c)(5) of this proposal.

(4) *Soil and Crop Mineral Nutrients.* This proposal includes provisions for supplying soil and crop mineral nutrients that are similar to those in the first proposal. While use of a proper crop rotation and recycled plant and animal wastes can often provide all the mineral nutrients required by crops, supplemental sources of these nutrients are sometimes needed. Section 205.203(d) of this proposal permits a producer to supply soil and crop nutrients through use of mined minerals and other nonsynthetic sources. Synthetic micronutrients are also allowed if they are included on the

National List. Ash from plant or animal materials can be used, as long as the burned material was not treated or combined with a prohibited substance and was not included on the National List of prohibited nonsynthetic substances. For example, ashes from treated wood or incinerator ash are not permitted, nor is ash from manure, which is on the National List of prohibited nonsynthetics. The prohibition of burning crop residues on the farm in the first proposal has been retained, but an exception for burning trimmings of perennial crops to control diseases has been added in response to an NOSB recommendation.

Commenters raised no objection to the proposed allowance for mineral substances of low solubility, including lime, greensand (glauconite), and rock phosphate, which have traditionally been permitted in organic certification programs. However, numerous producers and certifying agents expressed concern about the allowance for use of mined mineral substances of high solubility or salinity. These include substances such as sodium (Chilean) nitrate or potassium nitrate (niter), potassium chloride (muriate of potash), langbeinite (sulfate of potash magnesia), and potassium sulfate. Because of their potential to degrade soil quality by contributing to soil salinization, these substances, along with the synthetic micronutrients that are on the National List of allowed synthetics, were allowed only when used in cases of known nutrient deficiency. Many commenters objected to the use of sodium nitrate and potassium nitrate in organic production, and some contested the determination that nonsynthetic, mined sources of potassium nitrate are available. Some also objected to allowing potassium chloride, which has traditionally been prohibited in most organic certification programs. Several commenters argued that no highly soluble source of nitrogen, synthetic or not, should be permitted for application to soil in an organic management system. They indicated that these materials are not permitted in international organic standards, and approval could potentially harm exports of organic products. The NOSB reviewed Chilean nitrate in 1995 and recommended certain restrictions on the use of this material, which is allowed with restrictions in some existing organic certification programs and prohibited in others. In accordance with the NOSB's recommendation, this proposal permits these materials to be used according to justifications in the organic system plan. More detailed guidance will be provided in program manuals on the appropriate justifications for the use of highly soluble nutrient sources, including plans for discontinuing their use. Soil or tissue testing will be an important aspect of justifying the need for any such supplementation. Producers concerned about requirements for export markets can request certification to the standards required by individual contracts.

(5) *Nonorganically Produced Planting Stock.* The first proposal allowed nonorganically produced planting stock used to produce a perennial crop to be sold, labeled, or represented as organically produced after the planting stock had been managed on an organic operation for a period of no less than 1 crop year. This provision is authorized by section 2107(a)(11) of the OFPA (7 U.S.C. 6506(a)(11)). Some commenters thought this provision provided a loophole for indiscriminate use of treated planting stock on an organic operation. They argued that a producer could purchase treated nursery stock and list it as organic planting stock in the organic plan after only 1 year. However, producer and industry groups supported this provision as an important stimulus to the organic input suppliers, since it allows a nursery operation to purchase planting stock from a nonorganic operation and later resell this stock as organically produced. The first proposal described an organic nursery operation which could purchase nonorganic dwarf apple rootstock and graft it with locally adapted varieties and then sell the resulting planting stock as organically produced after raising it organically for at least 1 year. We agree that the potential benefits of this provision outweigh its possible abuses, and § 205.204(d) of this proposal permits nonorganically produced planting stock to be used as planting stock to produce a perennial crop to be sold, labeled, or represented as organically produced after the planting stock has been under a system of organic management for no less than 1 crop year.

(6) *Pest, Weed, and Disease Control Practice Standard.* The OFPA sets forth practices such as the use of natural poisons that persist in the environment or plastic mulches that are prohibited or restricted in the control of pests, weeds, and diseases in organic crops. It also lists the following categories of active synthetic pest, weed, and disease control substances that may be considered for exemption if they are included on the National List: Copper and sulfur compounds; toxins derived from bacteria; pheromones; soaps; horticultural oils; fish emulsions; treated seed; vitamins and minerals; livestock parasiticides and medications, and production aids, including netting, tree wraps and seals, insect traps, sticky barriers, row covers, and equipment cleansers. Section 205.206 of this proposal contains the practice standard to implement the provisions of the OFPA for synthetic pest control substances.

We have made a minor modification by eliminating one element of the order of preference which commenters considered too difficult to enforce. There is no distinction made in this proposal between pest prevention and control practices in terms of preferability. However, a provision in the first proposal that permitted application of a botanical or allowed synthetic pest control substance only if previously delineated methods were ineffective has been retained. This provision is supported by public comments from producers, certifying agents, and many consumers who emphasized that such substances, while sometimes necessary, should only be permitted as a last resort. This provision requires a producer to document the need for copper and sulfur fungicides, dormant oils, or similar materials in their organic system plan.

(7) *Wild-crop Harvesting.* We received few comments on the provision in the first proposal concerning wild-crop harvesting, and, therefore, this proposal retains similar requirements. Changing the term for the location from which wild crops may be harvested from ''land'' to ''area'' is the only substantive difference between the first proposal and this one. We made this change to be consistent with the language in the OFPA. One commenter stated that maps should be required as part of the certification process. A certifying agent could reasonably require such maps to assist in evaluating the organic system plan, but we have not made their inclusion a requirement.

The provisions of this section apply only to the management of wild crops. The OFPA includes ''fish used for food, wild or domesticated game, or other nonplant life'' in the definition of livestock, and we are considering additional standards for animals and animal products harvested from the wild. We received substantial public comment on the opportunities for developing standards for marine and freshwater aquatic animals (encompassing finfish and shellfish) and apiculture operations. Additional comments addressed the feasibility of developing production standards for harvesting wild terrestrial animals.

The certification of aquatic animals has very limited precedent among existing certifying agents and will require additional dialogue before credible standards can be developed. The FY 2000 Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act provides funds for the NOP to convene national meetings to consider the development of organic standards for aquatic animals. Meetings will be held in Alaska, Alabama, and Rhode Island. Simultaneously, the NOP will be working with stakeholders from the aquaculture community to consider standards for the production of farm-raised aquatic animals.

The certification of apiculture operations has some precedent among certifying agents. However, due to many unique production considerations, organic certification for apiculture operations has been very limited. Public comment on the first proposal indicated that consensus on critical apiculture issues including forage area and pest management will require considerable additional dialogue. The NOSB has expressed interest in leading the discussion of the key issues pertinent to certification of apiculture operations. We will incorporate public participation and the NOSB's recommendations into future production standards for apiculture as well as for other wild harvested livestock operations as needed.

(8) *Practice Standards for Specialty Crop Operations.* Several organic certifying agents and producer associations commented that the proposed rule did not sufficiently detail prescribed practices for many specialized aspects of organic production and handling, such as mushrooms, greenhouses, and aquaculture. We concur that such details are lacking, and to a certain extent, this proposal addresses that gap through the introduction of more detailed practice standards. In some cases, more specific regulations appropriate for such specialized operations, including aquaculture, mushroom production, and greenhouse operations, will be filled in as recommendations are developed by the NOSB. Beyond this, the Department expects to address the need for greater specificity through program manuals, which will provide more detailed guidance about site-specific decisions. For example, program manuals could include examples of crop rotation plans suited to different geographic regions, soil conditions, and types of enterprises. Program manuals could also be used to provide guidance about how indicators of the condition of the natural resource base can be qualitatively assessed using simple field observations so that the impact of site-specific practices on soil and water quality can be documented in the organic plan.

Crop Production—Additional Provisions

Upon further review of the provisions in the first proposal, we have decided to propose the following additions and changes.

(1) *Mandatory Phytosanitary Treatment of Seeds, Seedlings, and Planting Stock.* Section 205.204(e) of this proposal contains a new provision that permits the use of treated seeds, seedlings, or planting stock in cases in which Federal or State phytosanitary regulations require treatment. For example, some States require seed potatoes or strawberry crowns to be treated to prevent the spread of plant diseases. The OFPA authorizes reasonable exemptions from specific requirements for compliance with Federal or State emergency pest or disease treatment programs. This provision is also consistent with the NOSB's recommendation on the use of treated planting stock.

(2) *Restriction on the Use of a Synthetic Pest Control Substance.* The first proposal included a provision that any use of biological or botanical pest control substances or synthetic pest control substances approved for use on the National List had to be used in a manner that did not result in measurable degradation of soil or water quality. This provision has been removed, and § 205.207(e) of this proposal includes a new provision that further restricts use of these substances by requiring the producer to implement measures to evaluate and mitigate the effects of repetitive use of the same or similar materials on pest resistance and shifts in pest types. This requirement can be met by reviewing available research on pest resistance to the substance being used and observing changes in pest populations following repeated application of the substance. Public comments pointed out evidence that nonsynthetic biological and botanical pest control substances, if overused, pose concerns for inducing accelerated resistance in pest populations.

Livestock Production—Changes Based on Comments

This subpart differs from our first proposal in several respects as follows:

(1) *Minimum Period of Organic Management—Nonedible Products.* The first proposal established a 90-day minimum period of organic management for animals from which nonedible products, such as wool, were to be harvested. Many consumers and producers said that a 90-day period was too short and that an animal should be under organic management for at least 1 year before a nonedible organic product could be obtained from it. This requirement is consistent with the provision that dairy animals receive a minimum of 1 year of continuous organic management prior to the production of the milk or milk products to be sold, labeled, or represented as organic. Therefore, this proposal has been revised to state that an animal brought into an organic operation must be under continuous organic management for 1 year prior to the harvest of nonedible products that are sold, labeled, or represented as organic.

(2) *Origin of Mammalian Slaughter Stock.* The first proposal allowed mammalian livestock from a nonorganic source for the production of organic meat if the livestock was brought into an organic operation no later than the 15th day of life, if necessary. Public comment was sought as to the specific conditions, such as commercial unavailability of organic livestock or an emergency situation, that should be a prerequisite for allowing mammalian livestock of nonorganic origin to be designated as organic slaughter stock. Thousands of commenters, along with the NOSB, strongly opposed allowing the use of cows, sheep, or other mammals as organic slaughter stock if they were not organic from birth. Most of them also rejected allowing such practices on an ''if necessary'' basis. Accordingly, § 205.236 requires that mammalian slaughter stock be organically raised from birth.

(3) *Standard for Aquatic Animal Production.* While the first proposal contained no standards solely for aquatic animals in an organic operation, it did contain provisions applicable to their production. The first proposal allowed fish and crustaceans, among other livestock types, to be sold, labeled, or represented as organic if such livestock had been brought into an organic operation no later than the earliest commercially available stage of life. Several commenters suggested that the management of aquatic species differs significantly from mammals and poultry and would require separate regulatory provisions. We concur and intend to develop detailed practice standards for specific aquatic species that will be published for comment and finalized prior to the implementation of the NOP. Given the virtual absence of recognized certification programs for

aquatic operations, including aquaculture, there are limited models on which to base national standards. Therefore, we must create opportunities for producers, consumers, certifying agents, and other interested parties to participate in the development of practice standards. We will hold public meetings in Alaska, Alabama, and Rhode Island to receive comment and anticipate that the NOSB will also provide recommendations.

(4) *Apiculture Standard.* The first proposal allowed bees to be brought into an organic operation at any stage of life and required that the predominant portion of their forage be organically produced. Several commenters, including producer and industry groups, pointed out that bees differ significantly from other livestock types and that the first proposal lacked sufficient details to guide honey producers. Many consumers stated that the provisions proposed for bee forage, which required only that a predominant portion of the bees' forage be organic, were too vague and lenient. Recognizing that the provisions in the first proposal for certifying beekeeping operations were inadequate, we removed them entirely from this proposal. We will review the detailed production and handling standards for beekeeping operations that several certifying agents have developed and assess the feasibility of developing a practice standard. The NOSB has agreed to review and recommend an apiculture practice standard for organic honey production and hive care, including the origin of organic bees.

(5) *Organic Feed Requirement.* The first proposal allowed a producer to feed livestock up to 20 percent of the total feed ration in a given year that was not organically produced. Furthermore, in an emergency situation, the first proposal allowed the Administrator to increase the amount of nonorganic feed that could be provided. Thousands of comments were received opposing any allowance for nonorganic livestock feed, and many thought that no conditions justified providing any nonorganic feed to organic animals. Most producer groups, organic certifying agents, and industry groups, however, recognized that eliminating all flexibility in this regard could seriously inhibit growth of the organic livestock industry and reduce the availability organic livestock products. Several existing certification programs allow some use of nonorganic feed in emergencies, in one case specifying that up to 10 percent of the livestock ration may be nonorganic. Commenters made it clear that the commercial availability of certified organic livestock feed has increased enough to eliminate exemptions based on availability, even in regions such as the Northeast where supplies were previously difficult to obtain. The NOSB also recommended providing an allowance for livestock to receive nonorganic feed in emergency situations, with strict requirements for documentation in the organic system plan.

Based on the public comment received and the recommendations of the NOSB, we agree that allowances for providing nonorganic feed to organically managed livestock should be limited to emergencies, such as fire, drought, flood, and other natural disasters. Accordingly, we have removed the provision from the first proposal that a producer may provide up to 20 percent nonorganically raised feed ''as necessary.'' Exemptions for emergency use of nonorganic feed must be authorized by the Administrator through the procedures for establishing a temporary variance. Producers will work with their certifying agents to determine the minimum percentage of nonorganic feed needed to supply the nutritional requirements of the livestock until the 100 percent organic ration can be restored.

(6) *New Dairy Herd exemption.* The first proposal included an exemption to allow an entire, distinct dairy herd—converted to organic management for the first time—to be fed nonorganic feed up to 90 days prior to the production of milk or milk products labeled as organic. A few producer groups supported this allowance for a one-time, whole-herd exemption to make it feasible for existing conventional dairy farmers to convert to organic management without incurring the costs of 100 percent organic feed for 12 months prior to certification. However, in light of the strong opposition to any nonorganic feed allowance by consumers and its inconsistency with NOSB recommendations, we have eliminated this provision.

(7) *Synthetic Feed Additives.* The first proposal prohibited the feeding of substances containing synthetic amino acid additives and synthetic trace elements to stimulate the growth or production of livestock. In § 205.237(c)(2), the term, ''synthetic amino acids,'' is replaced with the term, ''additives,'' which includes nutritional substances other than amino acids. Some commenters stated that the term, ''additives,'' more precisely reflects the intent of the OFPA, which prohibits the use of growth stimulants. The provision in the first proposal to permit use of synthetic amino acid additives to fulfill the normal nutritional needs of livestock is retained in § 205.237(a).

(8) *Prohibition on Antibiotics.* The OFPA prohibits producers from using subtherapeutic doses of antibiotics. While this suggests that treatment with antibiotics at therapeutic levels is allowed, the OFPA does not contain affirmative conditions for their use. In developing provisions in the first proposal for treating livestock with antibiotics, we reviewed the NOSB recommendations, public input received at NOSB meetings, testimony presented at livestock hearings, and existing State and private standards. We found that innovative production practices and consumer expectations had increasingly diminished the use of antibiotics in organic livestock since passage of the OFPA. At its 1994 meeting in Santa Fe, NM, the NOSB recommended prohibiting the use of antibiotics in the production of organic slaughter stock but allowing their use with extended withdrawal intervals for dairy and breeder stock. By its Ontario, CA, meeting in 1998, the NOSB recommended prohibiting all antibiotic use after animals were brought into an organic operation. Other comments we reviewed favored allowing the use of antibiotics because organic livestock might benefit from receiving such treatments. Other commenters requested that organic producers be prohibited from withholding treatment from sick animals for economic reasons.

The first proposal permitted mammals raised as organic slaughter stock to receive antibiotics in the first 21 days of life and other species to be given antibiotics in the first 7 days of life. The rationale for allowing antibiotic use was based on concerns about the vulnerability of newly born or hatched livestock brought into an organic operation from a nonorganic source. The first proposal permitted organic slaughter stock to originate from nonorganic sources if it was brought under organic management at an early stage of life. Allowing the use of animal drugs could be an appropriate safety net for young organic livestock during their first week of organic management. We requested public comment on the use of animal drugs in the production of organic livestock, including organic slaughter stock. We also published an issue paper in October 1998 entitled ''The Use of Antibiotics and Parasiticides in Organic Livestock Production,'' requesting additional public comment on this subject.

We received thousands of comments from consumers, producers, and industry groups objecting to any allowance for antibiotic use in

organically produced livestock. Many of these comments supported a comprehensive prohibition on the use of antibiotics, regardless of the animal's age or the type of products produced from it. Based on these public comments and the availability of alternative production practices, this proposal prohibits selling, labeling, or representing as organic any animal that has been treated with an antibiotic at any dosage.

(9) *Parasiticide Use.* The first proposal permitted livestock in an organic operation to receive parasiticides topically at any time of life, provided that the producer complied with the prohibition against routine use of a synthetic internal parasiticide. We concluded that, while some earlier public comment favored prohibiting the use of internal parasiticides and the NOSB recommended restricting their use, many producers had indicated that parasiticides were essential to their operations. These producers stated that parasites can threaten animal health at any stage of life and that the use of parasiticides is unavoidable in certain regions of the country. Even under highly controlled situations, some parasites endemic to certain regions can be carried by wild birds, water, or feed. Concerns for the overall health of an animal warranted that parasiticides be used as soon as possible after determining the presence of parasites at a level affecting the health of the infected livestock.

In responding to the first proposal, a large number of commenters stated that synthetic parasiticides should be prohibited in organic production, especially for slaughter stock. The NOSB also recommended prohibiting the use of parasiticides in slaughter animals. For other livestock, the Board recommended that, in certain climates, in certain stages of production, and for certain animals, the use of synthetic parasiticides might be necessary. The Board stated that breeding stock, for example, could receive parasiticides up to certain stages of gestation specific to the type of livestock. Such use of synthetic parasiticides would be highly restricted and include a lengthy period of elapsed time before the animal's offspring would be eligible for use in a certified operation. The Board proposed developing practice standards to address specific instances in which parasiticides could be allowed.

This proposal allows the use of synthetic parasiticides included on the National List for use in organic production on breeder and dairy stock provided that preventative practices and veterinary biologics are inadequate to prevent infestation. This proposal prohibits administering synthetic parasiticides to livestock sold for slaughter. These provisions reflect an attempt to balance the conflicting positions taken by consumers and producers in response to the first proposal and the subsequent issue paper on livestock medications. We recognize that the goal of organic production is to use management practices and natural substances to eliminate, when possible, reliance on synthetic materials. However, we do not believe that a comprehensive prohibition on synthetic parasiticides is feasible for all species and for all regions of the country at this time. Additionally, the new requirements for access to the outdoors for organically managed livestock contained in this proposal may exacerbate exposure to parasites for animals in systems which previously used greater degrees of confinement. These provisions are also consistent with the position of the NOSB, which recommended at its October 1999 meeting to allow a synthetic parasiticide for use on organically raised breeder and dairy stock with the same restrictions incorporated in this proposal.

The OFPA prohibits the use of synthetic internal parasiticides on a routine basis. In the first proposal, the word, ''routine,'' was defined as administering an animal drug ''without cause.'' Many commenters objected to that definition, pointing out that producers would not administer a parasiticide unless they perceived a justifiable cause. Commenters fear that this might lead to dependence on parasiticides rather than a management system to reduce the number of parasites. Therefore, this proposal adopts the NOSB-recommended definition for ''routine'' as use of a synthetic parasiticide on a regular, planned, or periodic basis. The prohibition on using synthetic treatments on a routine basis is retained in § 205.238(c)(4).

(10) *Temporary Confinement.* The first proposal provided that, if necessary, animals could be maintained under conditions that restrict the available space for movement or access to outdoors if other living conditions were adequate to maintain the animals' health without the use of permitted animal drugs. This provision considered the effects of climate, geographical location, and physical surroundings on the ability of animals to have access to the outdoors. We explained that a system of organic production is soil based and that animals should be allowed, as appropriate, access to the soil. This understanding was considered in balance with animal health issues, such as the need to keep animals indoors during extended periods of inclement weather. The determination of necessity was to be based on site-specific conditions described by the producer in an organic system plan or updates to an organic plan, which required approval from the certifying agent. We requested public comment as to the conditions under which animals may be maintained to restrict the available space for movement or access to the outdoors. We also released an issue paper in October 1998 entitled ''Livestock Confinement in Organic Production Systems'' to solicit further public participation in preparing this proposal.

Many commenters stated that, while confinement is appropriate under certain conditions, access to the outdoors is a fundamental tenet of organic livestock production. Commenters cited the widespread prohibition on confinement systems, such as raising poultry in battery cages, contained in domestic and international standards. Producers of organic livestock have incorporated access to the outdoors into viable production systems for all major commercial species, and consumers clearly identify these practices as a distinguishing characteristic of organic products. Some commenters stated that production standards containing broad allowances for confinement would weaken their incentive for purchasing organic products. Some producers pointed out that providing animals access to the outdoors can reduce stress and diminish the risk of transmitting disease. The vast majority of commenters strongly indicated that protection of an animal's welfare or the soil and water resources of the operation were the only appropriate conditions for restricting access to the outdoors. Furthermore, many commenters stated that the condition and properties of the outdoor area to which an animal receives access, such as the nutritional content of pasture, must be important considerations in developing livestock production standards.

Section 205.239(b) of this proposal specifies the circumstances under which animals may be temporarily confined. This new requirement proposes temporary confinement during periods of inclement weather; certain stages of production such as when dairy animals are very young; when the animal's health, safety, or well-being are jeopardized; or when there is risk to soil and water quality. The NOSB specified that the stage of an animal's production

is not intended to include the lactation cycle of dairy animals in which only dry cows would be allowed access to the outside and pasture. The NOSB recommended and we propose that when there is a risk to soil or water quality, livestock should be temporarily confined. Practice standards addressing when and how individual species may be temporarily confined will be developed and published in program manuals. We are also incorporating the NOSB recommendation that ruminants receive access to pasture during the periods they are not temporarily confined.

(11) *Physical Alterations.* This proposal contains a requirement in § 205.238(a)(5) that the producer of an organic livestock operation must perform, as needed, physical alterations on livestock to promote the animal's welfare and in a manner that minimizes pain and stress. Physical alterations include castration and other practices, such as wing clipping, intended to modify or affect the animal's behavior in confinement. We received comments on the first proposal which stated that the performance of physical alterations is integral to a system of organic livestock production which must be addressed in the standards. Subsequently, some commenters on the confinement issue paper drew a connection between certain physical alterations, such as debeaking in poultry, and the conditions for space and mobility under which livestock are raised We anticipate that this subject will be a significant consideration when the NOP engages in equivalency discussions under the Codex Alimentarius guidelines.

While many certification programs have production standards for conducting physical alterations on animals, we cannot identify general consensus on which practices should be approved or prohibited. Many production variables, including breed, the number and concentration of animals raised, and the available natural resource base, influence the selection of production practices. Operations which raise the same species of livestock could, due to differences in production practices, require different approaches to whether and how to conduct physical alterations. We do not have sufficient information at this time to propose species-specific guidelines but anticipate working with producers, consumers, and certifying agents to develop a better understanding on which to act. By including the requirement for conducting physical alterations in a manner which promotes an animal's welfare and minimizes pain and stress in this proposal, we are acknowledging two points. One, physical alterations have an appropriate and at times necessary role in livestock production, and, two, consideration for animal welfare and comfort is an integral component of organic livestock production.

In order to use an animal's welfare and comfort as a condition for establishing standards, we are requesting comment on techniques to measure animal stress. Certifying agents will need objective, verifiable methods to determine whether a producer is fulfilling the livestock management conditions established in the organic system plan. Such methods may include physiological or behavioral approaches to measuring stress and may be directed at individual animals or larger groups such as herds or flocks. The many comments addressing the well-being of animals under organic management indicate that this issue is central to the differentiation of organic production standards from nonorganic practices. We need consistent, verifiable enforcement techniques to ensure that organic producers are capable of attaining and documenting such standards.

(12) *Treatment of Sick or Injured Animals.* In this proposal, any animal that is to be sold, labeled, or represented as organic may not be treated with a prohibited animal drug, including antibiotics, synthetic substances that are not allowed, or nonsynthetic substances that are prohibited. Any substance used as an animal drug in organic livestock production must be approved by FDA or registered by EPA and must be administered in compliance with the Federal Food, Drug, and Cosmetic Act. This proposal simultaneously requires that sick or injured animals must be treated with the appropriate animal medicine regardless of whether organic status is lost as a result of doing so. This requirement has been added in response to an NOSB recommendation. Thousands of comments expressed concern that organic livestock would suffer unduly if producers were not required to provide treatment, especially to save the life of a critically ill animal, rather than risk the suffering or death of the animal simply to maintain its organic status. If the treatment required under this proposal includes the use of a prohibited substance, the animal and any product derived from it must be diverted to the nonorganic market.

(13) *Feeding of Animal By-Products.* Although we received thousands of comments supporting a ban on the feeding of any animal by-products to livestock under organic management, a broad prohibition would prevent certain essential practices, such as feeding milk to young mammals. This prohibition is also inappropriate in the case of carnivorous livestock, such as many aquatic species. We believe that the comments we received were not intended to prohibit such practices but were, rather, motivated by concerns for food safety and the humane treatment of animals. This proposal prohibits the feeding of poultry and mammalian slaughter by-products to organically raised poultry or mammals. This change is based on the thousands of comments that expressed strong consumer preference against adding animal by-products into feed for the same species. There was concern that this practice could expose ruminant animals to Bovine Spongiform Encephalopathy (BSE). FDA regulates animal feed additives and uses its authority to address the human health considerations of animal refeeding. FDA continually revises its regulations to ensure the highest level of protection against known and emerging human health risks. The prohibition on feeding poultry and mammalian slaughter by-products to organically raised poultry or mammals contained in this proposal is based solely on the consumer preference expressed in public comment and is not a food safety standard. Future changes that are made to FDA regulations will be reflected in NOP standards.

(14) *Withdrawal Intervals.* The first proposal required that a producer determine that an animal was fully recovered from the condition for which an animal drug was administered before a product obtained from that animal could be sold, labeled, or represented as organic. In compliance with FDA regulations, this could not have been less than the withdrawal time specified on the label of the animal drug administered. We received comments from producer groups that favored extending the withdrawal times specified on animal drug labels. Many private certification programs applied the principle of extended withdrawal periods to the use of antibiotics in dairy and breeder stock before innovations in production led to such substances being prohibited. The NOSB has continued to include extended withdrawal period annotations with its recommendations for the use of parasiticides.

Based on consumer preference and the recommendations of the NOSB, we are proposing an extended withdrawal interval for three animal drugs (Ivermectin, Lidocaine, and Procaine) included on the National List in this proposal. FDA exercises full responsibility for determining and

enforcing the withdrawal intervals for animal drugs. No food safety arguments are used or implied to support the use of extended withdrawal periods. Rather, we determined that extended withdrawal periods are more compatible with consumer expectations of organically raised animals. In emergency situations where the need for a synthetic parasiticide or medicine is unavoidable, an extended withdrawal period would indicate that such use was neither routine nor normal. This approach is consistent with the manner in which organic certification agencies addressed antibiotic use in livestock production. Before the current prohibition on antibiotics became the industry norm, certifying agents allowed their use under restricted conditions, including extended withdrawal intervals, to demonstrate to consumers that such use was genuinely essential.

Livestock Production—Changes Requested But Not Made

This subpart retains from our first proposal regulations on which we received comments as follows:

(1) *Feed Requirements.* The first proposal required the use of preventive health care practices, including diverse feedstuffs, appropriate housing, well maintained pasture, and good sanitation practices, and this proposal contains similar provisions. It also included provisions for administering appropriate veterinary biologics, vitamins, and minerals, and on selecting species and types of livestock with regard to suitability for site-specific conditions and resistance to prevalent diseases and parasites. Preventive health care practices were generally supported by comments as being consistent with a system of organic livestock production.

Many commenters requested an explanation of the term, ''diverse feedstuffs,'' and some expressed concern that this provision could permit use of feed supplements which might be prohibited by other Federal, State, or local laws. All provisions proposed in this subpart must be in compliance with applicable laws and regulations, including the Federal Food, Drug, and Cosmetic Act; the OFPA; and our definition of a system of organic production and handling. Vitamins, minerals, and other synthetic or nonagricultural supplements, which appear on the National List of allowed synthetic livestock products in the first proposal are similarly permitted here, and provide a means to diversify an animal's diet. Soybean meal and other organically produced feed concentrates also serve this purpose. We encourage the NOSB to develop and recommend practice standards to provide additional guidance regarding the appropriate variety of feed for specific livestock species. Both the first proposal and this one defer to publications of the National Research Council's Committee on Animal Nutrition to establish nutrient requirements for livestock. Producers and certifying agents will use these publications to ensure that animal nutrient requirements are met.

Handling—Changes Based on Comments

This subpart differs from our first proposal in several respects as follows:

(1) *Irradiation.* In the first proposal, we requested public comment on the compatibility of ionizing radiation (irradiation) with a system of organic production and handling. We also asked if there are effective alternatives to ionizing radiation, such as sanitary practices, heat pasteurization, and incidental additives, that are compatible with a system of organic production and handling, and, if so, how they are compatible. We further asked whether the use of ionizing radiation was considered an essential standard industry practice or good manufacturing practice. Although the NOSB recommended prohibiting the use of ionizing radiation for organic products, we requested this information because of increasing concern about foodborne illness and growing interest in FDA-approved ionizing radiation as a sanitation or preservation treatment for a wide range of agricultural products.

We received hundreds of thousands of comments from every segment of the organic community—producers, processors, certifying agents, consumers, environmental groups, and retailers—opposing the use of ionizing radiation. These comments indicated that ionizing radiation has been expressly prohibited in all existing organic certification standards, international as well as domestic. Allowing this practice could put domestic producers and handlers at a trade disadvantage, disrupt international markets, and undermine consumer faith in the integrity of the domestic organic label.

Comments suggested alternatives to ionizing radiation for preventing contamination by human pathogens. Alternatives include heat disinfection, refrigeration, moisture and oxygen reduction, packaging, hygienic handling, and appropriate use of disinfectant substances. Although no one suggested that any products might be unavailable if irradiation were prohibited, many commenters expressed the willingness to do without any product that required irradiation. In response to the overwhelming consensus of public comment, this proposal prohibits any use of ionizing radiation for the handling of any organic product in § 205.270(c).

(2) *Incidental Additives.* The first proposal included a provision that permitted the use of incidental additives in processing, except those extracted with a volatile synthetic solvent, if it was necessary for the production of the product. As with previous provisions for practices that could be used only ''if necessary,'' the preamble to the first proposal explained that a determination of necessity was based on site-specific conditions that were described by a producer or handler in an organic system plan or updates to an organic system plan and reviewed by the certifying agent. We requested comments as to the conditions under which an incidental additive might be considered necessary and requested comment as to whether handlers who handle only products sold, labeled, or represented as ''made with certain organic ingredients'' should be exempted from the restriction of using incidental additives only if necessary. An incidental additive was defined as an additive that is present in an agricultural product at an insignificant level, does not have any technical or functional effect in the product, and is not considered an active ingredient. This definition is consistent with 21 CFR 101.100(a)(3)(ii) and is the basis for the definition of an incidental additive in this proposal.

Although thousands of consumers objected to the use of synthetic substances in processed organic products, many others specified that an incidental additive that had been reviewed and approved by the NOSB would be acceptable. Few respondents supported exempting products labeled as ''made with organic ingredients'' from restrictions on the use of incidental additives. The NOSB recommended that documentation be required for use of synthetic incidental additives and that handlers demonstrate progress over time in finding replacements. Organic industry groups also commented that hundreds of incidental additives are currently being used to process organic products and that prohibiting the use of such substances would severely restrict the choices available to consumers and limit the growth of the organic sector. The NOSB recommended several synthetic incidental additives for the National List, recognizing that a wide range of organic products could not be feasiblely manufactured without the use

of incidental additives such as defoaming agents, adjuvants, clarifiers, filtering agents, and equipment cleansers. Therefore, this proposal requires that any incidental additive used to process agricultural products that are intended to be sold, labeled, or represented as ''organic'' or ''made with organic (specified ingredients)'' must be included on the National List of allowed nonagricultural (nonorganic) substances in § 205.605. A product labeled as ''100 percent organic'' could not be produced through the use of any synthetic processing aid.

(3) *Prevention and Control of Facility Pests.* The first proposal addressed the prevention and control of facility pests and authorized the NOP to require such terms and conditions as are determined necessary. These provisions were based on existing organic certification programs and NOSB recommendations. The first proposal included a three-step order of preference, which commenters found to be overly complex and difficult to enforce. This proposal retains similar provisions but simplifies the scheme so that there are only two levels of distinction between preferable and less preferable practices. In this proposal, pest prevention and control methods that do not entail use of biological, botanical, or synthetic substances are equally acceptable, and the producer or handler may only use biological, botanical, or synthetic substances if other approved methods are not effective. Paragraph (c) of § 205.271 parallels the provision proposed in § 205.206(d) addressing crop pest, weed, and disease management. Accordingly, it requires an operator of an organic handling operation who applies any biological, botanical, or synthetic substance for the prevention or control of pests to implement measures to evaluate the effects of repetitive use of the same or similar materials on pest resistance and shifts in pest types.

(4) *Storage Containers.* Sections 205.272 (b)(1) and (b)(2) of this proposal contain provisions similar to the first proposal which prohibit the use of storage containers or bins, including packages and packaging materials, that contain synthetic fungicides, preservatives, or fumigants. These requirements also prohibit the use or reuse of any bag or container that was previously in contact with any substance that could compromise the organic integrity of its contents. This proposal adds a provision to permit the reuse of a bag or container originally used for conventional products if the reusable bin or container has been thoroughly cleaned and poses no risk of prohibited materials contacting organic products. Producers and handlers commented that it is possible and desirable to reuse some kinds of containers if precautions are taken. This modification is consistent with the OFPA, which requires that the organic quality of a product not be compromised.

(5) *Agricultural Fibers.* Some commenters stated that the labeling provisions in the first proposal for processed commodities containing organically produced cotton fibers were excessively restrictive. The OFPA provides the Secretary with the authority to implement standards for organically produced agricultural fibers, including cotton, used for nonfood purposes. This authority includes standards for the production of the agricultural fiber as well as handling standards to regulate the practices and materials that are used in the manufacture of the nonfood commodity. State and private certification agents have made substantial progress in developing and implementing handling standards for organically produced agricultural fibers that are gaining acceptance in the marketplace. We are reviewing the existing certification guidelines and industry practices and anticipate developing standards for processing organically produced agricultural fibers.

Handling—Changes Requested But Not Made

This subpart retains from our first proposal regulations on which we received comments as follows:

(1) *Facility Pest Control Substances.* The first proposal permitted the use of any substance to control facility pests, as long as the intended use was approved by the appropriate regulatory authority and the substance was applied in a manner that prevents it from coming into contact with any organic product. Many consumers objected to this provision and suggested that prohibited substances should never be allowed to be used in any organic operation. However, comments from a number of organic handlers and one industry association stated that, because handling operations must comply with health regulations that require elimination of any pests that may invade food handling facilities, prohibited substances must sometimes be used. The NOSB also acknowledged this possibility in its recommendations, and most organic certification programs similarly allow for such an occurrence, with strict provisions for safeguarding the integrity of organic products. In agreement with these comments, we have proposed a similar allowance in § 205.271(c). The handler must fully document in his or her organic plan the evidence that such a measure was necessary and the measures taken to protect organic products or ingredients from coming into contact with any pest control substance.

(2) *Waxes.* We propose to retain the definition of packaging included in the first proposal, which encompasses waxes used in contact with an edible surface of an agricultural product. A number of commenters disagreed with the inclusion of waxes in the definition of packaging, arguing that waxes should be considered nonagricultural ingredients and, therefore, should be required to appear on the National List of nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients).'' However, the first proposal did require carnauba and other waxes to be on the National List of nonagricultural ingredients allowed for use in organic processed products, and this proposal contains a similar provision. These provisions adequately address the concerns expressed by the commenters that only waxes meeting the criteria for ingredients in organic processed products be permitted. It is appropriate to include waxes in the definition of packaging to ensure that prohibited substances are not added to approved waxes that may be applied to the edible surface of organic products, in accordance with the OFPA, which prohibits use of any packaging materials that contain synthetic fungicides, preservatives, or fumigants.

Subpart D—Labels, Labeling, and Market Information

The Act provides that a person may sell or label an agricultural product as organically produced only if the product has been produced and handled in accordance with provisions of the Act and these regulations. This subpart sets forth labeling requirements for organic agricultural products and products with organic ingredients based on their percentage of organic composition. For each labeling category, this subpart establishes what ''organic'' terms and references can and cannot be displayed on a product package's principal display panel, information panel, ingredient statement, and on other package panels. Labeling is proposed for containers used in shipping and storing organic product and for denoting organic bulk products in market information which is displayed or disseminated at the point of retail sale. Restrictions on labeling organic product produced by exempt operations are described. Finally, this

subpart proposes a new USDA organic seal or shield (hereafter referred to as the USDA Seal) and regulations for display of the USDA seal and display of the seals, logos, or other identifying marks of certifying agents.

The intent of these sections is to ensure that organically produced agricultural products are consistently labeled to aid consumers in selection of organic products and to prevent labeling abuses. These provisions cover the labeling of a product as ''organic'' and are not intended to supersede other labeling requirements specified in various Federal labeling regulations. For instance, we propose that the percent of organic ingredients and the name of the certifying agent be displayed on the information panel of packaged products and that the organic ingredients be identified as ''organic'' in the ingredient statement. The Food and Drug Administration (FDA) has authority to regulate the placement of information on package information panels and, thus, FDA labeling requirements in 21 CFR parts 100 through 169 must be complied with by handler when affixing organic labels to product packages. Display of the USDA Seal and certifying agent seals, logos, or other identifying marks also must be in accordance with those regulations. The requirements of FDA's Fair Packaging and Labeling Act (FLPA) and the Federal Food, Drug, and Cosmetic Act (FFDCA) must be followed. Likewise, the Federal Trade Commission has authority over product advertising and the extent to which a handler or retail food establishment engages in advertising as part of its market information activities. The Federal Trade Commission (FTC) regulations in 16 CFR must be followed. USDA's Food Safety and Inspection Service's (FSIS) Federal Meat Inspection Act, Poultry Products Inspection Act, and Egg Products Inspection Act also have implementing regulations in 9 CFR which must be followed. The labeling requirements specified in this subpart must not be applied in a manner so that they would conflict with the labeling requirements of these and other Federal and State programs.

While this regulation does not require labeling of an organic product as organic, we assume that producers and handlers will choose to label their organic products and display the USDA Seal to the extent allowed in these regulations. They will do this to improve the marketability of their organic product.

In this proposal, assembly, packaging, and labeling of a multiingredient organic product are considered handling activities. The certification of handling operations is covered in subpart C of this regulation. No claims, statements, or marks using the term, ''organic,'' or display of certification seals, other than as provided in this regulation, may be used. A handler which chooses not to use these required and prohibited labeling provisions may not otherwise label or represent a product as organic.

Once a handler makes a decision to market a product as organic or containing organic ingredients, the handler is required to follow the provisions in this subpart regarding use, display, and location of organic claims and certification seals. Handlers who may produce organic ingredients and/or assemble multiingredient products composed of more than 50 percent organic ingredients must be certified as an organic handling operation. Handlers of products of less-than-50-percent organic ingredients do not have to be certified unless the handler actually produces one or more of the ingredients used in the less-than-50-percent product. Repackers who purchase certified organic product from other entities for repackaging and labeling must be certified as an organic operation. Entities which simply relabel a product package would be subject to recordkeeping requirements to show proof that the product purchased prior to relabeling was, indeed, organically produced. Distributors which receive and transport labeled product to market are not subject to certification or any handling requirements of this regulation.

Proposal Description

The general labeling principle employed in this proposal, and to which we think most commenters would subscribe, is that labeling or identification of the organic nature of a product should increase as the organic content of the product increases. In other words, the higher the organic content of a product, the more prominently its organic nature can be displayed. This is consistent with provisions of the Act which establishes the three percentage categories for organic content and basic labeling requirements in two of those categories.

Section 205.300 specifies the general use of the term, ''organic,'' on product labels. Paragraph (a) establishes that the term, ''organic,'' may be used only on labels and in market information of agricultural products and ingredients that have been certified as produced and handled in accordance with these regulations. The term, ''organic,'' cannot be used on a product label for any purpose other than to modify or identify the product or ingredient in the product that is organically produced and handled. Products not organically produced and handled will not be able to use the term, ''organic,'' on any package panel or in market information in any way that implies the product is organically produced.

Categories of Organic Content. The type of labeling and market information that can be used and its placement on different panels of consumer packages will be based on the percentage of organic ingredients in the product. The percentage will reflect the actual weight or fluid volume (excluding water and salt) of the organic ingredients in the product. Four categories of organic content are proposed: 100 percent organic; 95 percent or more organic content; 50 to 95 percent organic content; and less than 50 percent organic content.

100 Percent Organic

For labeling and market information purposes, this proposal allows a ''100 percent organic'' label for an agricultural product that is composed of a single ingredient such as raw, organically produced fruits and vegetables. The product also may be composed of two or more organically produced ingredients, provided that the individual ingredients are organically produced and handled consistent with provisions in subpart C of this regulation. No processing aids may be used in the production of 100 percent organic products. This proposal provides that labeling provisions for ''100 percent organic'' products be the same as provisions for the 95 percent ''organic'' products specified below.

Organic

Products labeled or represented as ''organic'' will contain, by weight (excluding water and salt), at least 95 percent organically produced raw or processed agricultural product. The organic ingredients must be produced using production and handling practices pursuant to subpart C of this regulation. The nonorganic (5 percent or less) ingredients may be composed of nonorganic or nonagricultural substances. The difference between 100 percent organic products and 95 percent-plus products is that the latter may contain up to 5 percent nonorganic or nonagricultural products.

Multiingredient Product: 50–95 Percent Organic Ingredients

For labeling and market information purposes, the third category of agricultural products are multiingredient products containing by weight or fluid volume (excluding water

and salt) between 50 and 95 percent organic agricultural ingredients produced pursuant to these regulations. Such products may be labeled or represented as ''made with organic (specified ingredients).'' By ''specified,'' we mean the name of the agricultural product forming the organic ingredient. The organic ingredients must be produced using substances on the approved National List in subpart G and employing organic production and handling practices consistent with subpart C of this regulation. For instance, breakfast cereal made with 75 percent organically produced and processed wheat and 25 percent other, nonorganically produced grains, raisins, and nuts can be labeled as ''made with organic wheat'' on the principal display panel. To qualify for this organic labeling, the nonorganic ingredients (grains, raisins, and nuts) must be produced and handled without use of the first three prohibited practices specified in paragraph (e) (excluded methods, sewage sludge, or ionizing radiation). However, those nonorganic ingredients may be produced or handled using practices prohibited in paragraphs (e)(4) through (e)(7) (using substances not on the National List; containing added sulfites, nitrates, or nitrites; using nonorganic ingredients when organic ingredients are available; and using organic and nonorganic forms of the same ingredient).

Multiingredient Product: Less Than 50 Percent Organic Ingredients

The final labeling category covers multiingredient products with less than 50 percent organic ingredients (by weight or fluid volume, excluding water and salt). The organic ingredients must be produced using substances on the approved National List in subpart G and employing organic production and handling practices consistent with subpart C of this part. The remaining nonorganic ingredients (50 percent or more of the product) may be produced, handled, and assembled without regard to these regulations (using prohibited substances and prohibited production and handling practices). Organic labeling of these products is limited to the information panel only as provided in § 205.305.

Prohibited Practices. This proposal prohibits labeling of whole products or ingredients as ''organic'' if those products or ingredients are produced using any of the following production or handling practices: (1) Ingredients or processing aids containing or created using excluded methods (genetically modified organisms (GMO)) or the products of excluded methods; (2) ingredients that have been produced using applications of sewage sludge (biosolids) as fertilizer; (3) ingredients that have been processed with ionizing radiation; (4) processing aids not approved on the National List; (5) sulfites, nitrates, or nitrites added to or used in processing of an organic product in addition to those substances occurring naturally in a commodity; (6) use of the phrase, ''organic when available,'' or similar statement on labels or in market information when referring to products composed of nonorganic ingredients used in place of specified organic ingredients; and (7) labeling as ''organic'' any product containing both organic and nonorganic forms of an ingredient specified as ''organic'' on the label. The prohibitions on the use of excluded methods, sewage sludge, irradiated products, and prohibited processing aids are included here to be consistent with the revised National List of Approved and Prohibited Substances in subpart G.

These seven prohibitions apply to the four labeling categories of products and are not individually repeated as prohibited practices in the following sections. Table 1, Prohibited Production and Handling Practices for Organic Labeling, is a summary reference of how the seven prohibited practices must be applied in the production and handling of organic and nonorganic ingredients of products in the four labeling categories.

TABLE 1.—PROHIBITED PRODUCTION AND HANDLING PRACTICES FOR LABELING CATEGORIES

Labeling category	Use excluded methods	Use sewage sludge	Use irradiation	Use processing aids not on national list	Contain added sulfites, nitrates, nitrites	Use organic ingredients when available	Use both organic & nonorganic forms of same ingredient
''100 percent Organic''							
Single/multiingredients completely organic	NO	NO	NO	Use NO Processing Aids.	NO	NO	NO.
''Organic''							
Organic Ingredients (95% or more)	NO	NO	NO	NO	NO	NO	NO.
Nonorganic Ingredients (5% or less)	NO	NO	NO	NO	NO	NO	NO.
''Made with Organic (specified ingredients)''							
Organic Ingredients (50–95%)	NO	NO	NO	NO	NO	NO	NO.
Nonorganic Ingredients (49% or less)	NO	NO	NO	OK	OK	NA*	NA*.
Less-than 50% Organic Ingredients							
Organic Ingredients (49% or less)	NO	NO	NO	NO	NO	NO	NO.
Nonorganic Ingredients (50% or more)	OK	OK	OK	OK	OK	NA*	NA*

* Not applicable.

Calculating the Percentage of Organic Ingredients. This proposal specifies procedures for calculating the percentage, by weight or fluid volume, of organically produced ingredients in an agricultural product labeled or represented as ''organic.''

The organic percentage of liquid products and liquid ingredients will be determined based on the fluid volume of the product and ingredients (excluding water and salt). When a product is identified on the principal display panel or the information panel as being reconstituted with water from a concentrate, the organic content will be calculated on the basis of a single-strength concentration.

Some products may contain both dry and liquid ingredients that are produced organically. In such cases, this proposal provides that the percentage of total organic ingredients will be based on the

combined weight of the dry organic ingredient(s) and the weight of the liquid organic ingredient(s), excluding water and salt. For example, a product may be made using organically produced vegetable oils or grain oils or contain organic liquid flavoring extracts in addition to other organic and nonorganic ingredients. In these cases, the weight of the liquid organic oils or flavoring extracts, less any added water and salt, would be added to other solid organic ingredients in the product, and their combined weight would be the basis for calculating the percentage of organic ingredients. We believe this process provides the most appropriate and least burdensome method for calculating the organic percentage of such multiingredient products.

Only one figure providing the total percentage of all organic ingredients will be shown on the information panel. The total percentage will be displayed on the information panel of the consumer package above or below the ingredient statement with the words, ''contains X percent organic ingredients,'' or a similar phrase. If the total percentage is a fraction, it will be rounded down to the nearest whole number. The percentage of each organic ingredient will not be required to be displayed.

Labeling ''100 Percent Organic'' and ''Organic'' Products. This proposal includes optional, required, and prohibited practices for labeling packages of agricultural products that are ''100 percent organic'' or ''organic'' (at least 95 percent organic). Only products that are composed of a wholly organic single ingredient or entirely of certified organic ingredients may be identified with a percentage number (100 percent) on the principal display panel. Products between 95 and 100 percent organic composition, when identified as ''organic'' on the principal display panel, will be required to state on the information panel the percentage of organic ingredients in the finished product and identify each organic ingredient in the ingredient statement.

The handler may display the following information on the principal display panel, the information panel, and any other part of the package and in market information representing the product: (1) The term, ''100 percent organic'' or ''organic,'' as applicable, to the content of the product; (2) the USDA Seal; and (3) the seal, logo, or other identifying mark of the certifying agent (hereafter referred to as ''seal or logo'') which certified the handler of the finished product. The seals or logos of other certifying agents which certified organic raw materials or organic ingredients used in the product also may be displayed, at the discretion of the handler. If multiple organic ingredients are identified on the ingredient statement, the handler of the finished product that combined the various organic ingredients must maintain documentation, pursuant to subpart B of this regulation, certifying the organic content of the added ingredients.

While certifying agent identifications can appear on the package with the USDA Seal, they may not appear larger than the USDA Seal on the package. There is no restriction on the size of the USDA Seal as it may appear on any panel of a packaged product, provided that display of the Seal conforms with the labeling requirements of FDA and FSIS.

This proposal specifies three labeling practices that will be required if a handler labels a product ''100 percent organic'' or ''organic'' on the principal display panel. If a product is labeled as ''100 percent organic'' the ingredients may also be modified with the term, ''organic,'' but would not have to be so labeled because it is assumed from the 100 percent label that all ingredients are organic. For 95 percent-plus products that contain more than one ingredient, each organic ingredient listed in the ingredient statement must be modified with the term, ''organic.'' Water and salt in the ingredient will not be identified as ''organic.'' Secondly, the total percentage of organic ingredients in the product must be shown on the information panel. The percentage statement should be placed in a manner that it can be viewed in relation to the ingredient statement.

The handler also must display on the information panel the name of the certifying agent which certified the handler producing the finished product. The handler has the option to include the business address or telephone number of the certifying agent. This information must be placed below or otherwise near the manufacturer or distributor's name.

Labeling Products ''Made with Organic (Specified Ingredients)''. With regard to agricultural products ''made with organic (specified ingredients)''—those products containing between 50 and 95 percent organic ingredients—this proposal establishes the following optional, required, and prohibited labeling practices.

Under optional practices, the statement, ''made with organic (specified ingredients),'' may be placed on the principal display panel and other panels of the package. The same statement can also be used in market information representing the product. However, the following restrictions will be placed on the statement, ''made with organic (specified ingredients),'' when it appears on the principal display panel: (1) The statement cannot list more than three organic ingredients in the product; (2) the statement cannot appear in print that is larger than one half (50 percent) of the size of the largest print or type appearing on the principal display panel; and (3) the statement must appear in its entirety in the same type size, style, and color without highlighting. Display of the statement, ''made with organic (specified ingredients),'' on other panels must be similarly consistent with the size of print used on those panels. These restrictions are consistent with FDA regulations and similar to the recommendations of the National Organic Standards Board (NOSB). This provision will help assure that the statement, ''made with organic (specified ingredients),'' is not displayed in such a manner as to misrepresent the actual organic composition of the product.

We also propose that, at the handler's option, the certifying agent's seal or logo may be displayed on the principal display panel or other package panel.

Packages of products labeled as ''made with organic (specified ingredients)'' will be required to display on the information panel the total percentage of organic ingredients in the product and modify each organic ingredient listed in the ingredient statement with the term, ''organic.'' The percentage of organic ingredients must be displayed so that it can be viewed in relation to the ingredient statement.

The name of the certifying agent which certified the handler of the finished product must be displayed below or otherwise near the manufacturer or distributor's name. The statement may include the phrase, ''Certified organic by * * *'' or ''Ingredients certified as organically produced by * * *'' to help distinguish the certifying agent from the manufacturer or distributor. At the handler's option, this label may include the business address or telephone number of the certifying agent which certified the handler of the finished product.

Labeling Products with Less Than 50 Percent Organic Ingredients. The final labeling category covers packaged multiingredient agricultural product containing less than 50 percent organic ingredients.

Handlers of ''less than 50 percent'' multiingredient products, who choose to declare the organic nature of the

product, may do so only on the information panel by declaring the total percentage of organic ingredients in the product and, in the ingredient statement, modifying the organic ingredients with the term, ''organic.'' The percentage statement must be displayed so that it can be viewed in relation to the ingredient statement.

Products composed of less than 50 percent organic content cannot display the USDA Seal or any certifying agent's seal or logo anywhere on the product package or in market information.

Handlers of such products will be subject to this regulation in the following ways. Those handlers who only purchase organic and nonorganic ingredients and assemble a finished product of less than 50 percent organic content do not have to be certified as organic handlers. They will be responsible for appropriate handling and storage of the organic ingredients prior to product assembly and for maintaining records verifying the organic certification of the ingredients used in the product. To the extent that the packaging process includes affixing the label to finished product package, those handlers will be responsible for meeting the labeling requirements of this subpart. Handlers who produce an organic ingredient prior to assembly into a finished product, even though the finished product contains less than 50 percent organic content, and must be certified as to the source of the organic ingredient(s). The nonorganic ingredients may be produced, handled, and assembled without regard to the requirements of this part.

The handler who affixes the label to the product package will be responsible for calculating the percentage of organic ingredients in an organic product. As part of the certifying agent'' annual certification of the handler, the certifier will verify the calculation and labeling of packages.

Table 2, *Labeling Consumer Product Packages,* provides a summary of the required and prohibited labeling practices for the four labeling categories.

TABLE 2.—LABELING CONSUMER PRODUCT PACKAGES

Labeling category	Principal display panel	Information panel	Ingredient statement	Other package panels
''100 percent Organic'' (Entirely organic; whole, raw or processed product).	''100 percent organic''	''100% Organic''	If multiingredient product, identify each ingredient as ''organic''.	''100 percent Organic''.
	USDA Seal and Certifying agent sets(s).	Certifying agent name (required); business address, tele. # (optional).	.....	USDA Seal and Certifying agent seal(s).
''Organic'' (95% or more organic ingredients).	''Organic''	''*X*% Organic Ingredients''.	Identify organic ingredients as ''organic''.	''Organic''.
	USDA Seal and Certifying agent seals(s).	Certifying agent name (required); business address, tele. # (optional).	.....	USDA Seal and Certifying agent seal(s).
''Made with Organic (specified ingredients)'' (50 to 95% organic ingredients).	''Made with organic (specified ingredients)''.	*''X% Organic Ingredients''.*	Identify organic ingredients as ''organic''.	''Made with organic (specified ingredients)''.
	Certifying agent seal of final product handler.	Certifying agent name (required; business address, tele. # (optional).	Identify organic ingredients as ''organic''.	''Made with organic (specified ingredients)''.
	Prohibited: USDA Seal ..	*Prohibited: USDA Seal* ..	.....	*Prohibited: USDA Seal.*
Less-than 50% Organic Ingredients (49% or less organic ingredients).	*Prohibited: Any reference to organic content of product.*	''*X%* Organic Ingredients''.	Identify organic ingredients as ''organic''.	*Prohibited: Any reference to organic content of product.*
	Prohibited: USDA Seal & Certifying agent seal.	*Prohibited: USDA Seal & Certifying agent seal.*	.....	*Prohibited: USDA Seal & Certifying agent seal.*

Misrepresentation in Labeling of Organic Products. The labeling requirements of this proposal are intended to assure that the term, ''organic,'' and other similar terms or phrases are not used on a product package or in marketing information in a way that misleads consumers as to the contents of the package. Thus, we intend to monitor the use of the term, ''organic,'' and other similar terms and phrases. Should we find that terms or phrases are being used on product packages to represent ''organic'' when the products are not produced to the requirements of this regulation, we will proceed to restrict their use.

After consideration of alternative labeling terms that handlers might wish to use to qualify or modify the term, ''organic,'' we have determined that handlers may not qualify or modify the term, ''organic,'' using adjectives such as, ''pure'' or ''healthy,'' *e.g.,* ''pure organic beef'' or ''healthy organic celery.'' The term, ''organic,'' is used in labeling to indicate a certified system of agricultural production and handling. Terms such as ''pure,'' ''healthy,'' and other similar adjectives attribute hygienic, compositional, or nutritional characteristics to products. Use of such adjectives misrepresents products produced under the organic system of agriculture as having special qualities as a result of being produced under the organic system. Furthermore, use of such adjectives would incorrectly imply that products labeled in this manner are different from other ''organic'' products that are not so

Moreover, ''pure,'' ''healthy,'' and other similar terms are regulated by FSIS and FDA. These terms may be used only in accordance with the labeling requirements of FDA and FSIS. For example, the regulations implemented by FSIS, 9 CFR 317.363, define the terms, ''healthy,'' ''health,'' and similar derivations and the conditions of use as a nutritional claim. Also, according to FSIS regulations, 9 CFR 317.8(b)(34), the term, ''pure,'' as well as the terms, ''all,'' ''100 percent,'' and similar terms, may only be used to indicate that a single ingredient product is composed of 100 percent of the product ingredient and contains no other ingredients. The term, ''healthy,'' is regulated by FDA (21 CFR

101.14) and can be used, with documentation, only to indicate or characterize a relationship of the product to a disease or health-related condition. The prohibition on use of these terms to modify ''organic'' does not otherwise preclude their use in other labeling claims.

We also intend to monitor the use of the term, ''organic,'' in corporate or company names and seek additional guidance from the FTC. We do not believe that the term, ''organic,'' in a brand name context inherently implies an organic production or handling claim or inherently constitutes a false or misleading statement.

The determination as to whether the use of the term, ''organic,'' in a brand name conveys a message about the product's attributes must be made by the Secretary. We will monitor use of the term, ''organic,'' in product and company names at this time. However, if we find that the term is being used in a false or misleading way to misrepresent the organic nature of the product, we have the authority under section 6519(b) of the Act to take action against such use. Such determinations and actions will be taken on a case-by-case basis.

Labeling of Products Shipped in International Markets. Domestically produced organic products intended for export may be labeled to meet the requirements of the country of destination or any labeling requirements specified by a particular foreign buyer. For instance, a product label may require a statement that the product has been certified to, or meets, certain European Union organic standards. Such factual statements regarding the organic nature of the product will be permitted. However, those packages must be exported and cannot be sold in the United States with such a statement on the label because the statement indicates certification to standards other than are required under this program. As a safeguard for this requirement, we require that shipping containers and bills of lading for such exported products display the statement, ''for export only,'' in bold letters. Handlers also will be expected to maintain records, such as bills of lading and U.S. Customs Service documentation, showing export of the products. Only products which have been certified and labeled consistent with the requirements of the National Organic Program (NOP) may be shipped to international markets without marking the shipping containers ''for export only.''

Organic product produced under a foreign country's or international association's organic standards deemed equivalent to these standards and certified by a certifying agent accredited by the Secretary may be imported into the United States provided that the product labels are consistent with the requirements of this subpart. Any labeling on the product package or in market representation cannot imply that the product is also certified to other organic standards or requirements that are more restrictive than this national program. These provisions are consistent with international standards and will facilitate international trade of organically produced products and, thus, benefit the global organic industry.

Labeling Nonretail Containers. Section 205.306 provides for labeling nonretail containers used to ship or store raw or processed organic agricultural products that are labeled ''100 percent organic,'' ''organic,'' and ''made with organic (specified ingredients).'' These labeling provisions are not intended for shipping or storage containers that also will be used in displays at the point of retail sale. They would be used for easy identification of the product to help prevent commingling with nonorganic product or handling of the product which would destroy the organic nature of the product (fumigation, etc.). Retail containers will have to meet labeling provisions specified in § 205.307.

Containers used only for shipping and storage of any product labeled as containing 50 percent or more organic content may, at the handler's discretion, display the following information: (1) The name and contact information of the certifying agent which certified the handler of the finished product; (2) the term, ''organic,'' modifying the product name; (3) any special handling instructions that must be followed to maintain the organic integrity of the product; and (4) the USDA Seal and the appropriate certifying agent seal. This information is optional if handlers believe display of the information helps ensure special handling or storage practices which are consistent with organic practices.

Containers used for shipping and storage of organic product must display a production lot number if such a number is used in the processing and handling of the organic product being shipped or stored. The lot number must be included for inventory control and quality assurance purposes. To help assure export of organic product produced and labeled to foreign specifications, the shipping containers and shipping documents (bills of lading) must be marked with the phrase, ''for export only,'' in bold letters. The handler also must maintain records showing export of the product to a foreign country.

Much of the required information may overlap information that the handler normally affixes to shipping and storage containers or information that is required under other Federal labeling regulations. Provisions in this proposal do not take precedence over food safety or quality control provisions which may be required for specified products or types of products covered by such Federal regulations. There are no restrictions on size or display of the term, ''organic product,'' or the certifying agent seal unless otherwise required by other Federal or State statutes.

Labeling Products at the Point of Retail Sale Section 205.101(b)(2) of subpart B on Applicability provides regulations regarding the certification of retail food establishments under this program. Those operations are subject to labeling and market information requirements concerning products offered to consumers at the point of retail sale. Such labeling and market information must truthfully represent the organic nature and handling of the product.

Section 205.307 applies to organically produced products that are not prepackaged prior to sale and are presented in a manner which allows the consumer to select the quantity of the product purchased.

To be labeled as ''100 percent organic'' or ''organic'' at the point of retail sale, the processing and assembly of such products must be carried out by a certified manufacturing facility for distribution to a retail food establishment. For instance, a tossed salad may be labeled as ''100 percent organic tossed salad'' or ''organic tossed salad'' (consistent with the percentage of organic ingredients in the salad) provided the salad and ingredients have been produced and assembled under organic certification. If the multiingredient product is identified as ''organic'' at the point of retail sale, any ingredient statement displayed at retail sale must identify the organic ingredients as ''organic.'' The retail materials may also display the USDA Seal and the seal or logo of the certifying agent. If shown, the certifying agent seal must not be larger than the USDA Seal.

Using the same example, a product made with 95 percent or more certified organic salad components but which is assembled at an uncertified operation may be labeled ''tossed salad made with organic (specified ingredients).'' The retail food establishment may not

display the USDA Seal or the seal or seals of cerftifying agents involved in ingredient certifications because the final assembly of the product was not certified pursuant to the handling requirements of this regulation.

Our position on the applicability of these regulations to different business entities is more completely explained in subpart B, Applicability, of this regulation.

''Section 205.308 addresses processed products ''made with organic (specified ingredients)'' that are not prepackaged prior to sale and are presented in a manner which allows the consumer to select the quantity of the product purchased. These products will include, but will not be limited to, multiingredient products containing between 50 and 95 percent organic ingredients. Retail displays, display containers, and market information for such products may display the phrase, ''made with organic (specified ingredients)'' provided that the product has been assembled by a manufacturing facility certified pursuant to this regulation. Up to three organic ingredients may be identified in the statement. If such statement is declared in market information at the point of retail sale, the ingredient statement must identify the organic ingredients as ''organic.'' Retail display and market information of such bulk products cannot use the USDA Seal but may display the seal or logo of the certifying agent which certified the finished product, provided that assembly of the product was carried out at a certified manufacturing facility. The certifying agent's seal or logo may be displayed at the option of the retail food establishment. If such a product has not been assembled at a certified manufacturing facility, the retail display and market information may not identify the product as ''made with organic (specified ingredients).''

Prepared food products containing less than 50 percent organic ingredients at retail sale may not be identified as organic or containing organic ingredients. The USDA Seal and any certifying agent seal or logo may not be displayed.

Labeling Products Produced on Exempt or Excluded Operations. This proposal provides limited organic labeling provisions for organic product produced or handled on exempt and excluded operations. Such operations would include retail food establishments, certain manufacturing facilities, and production and handling operations with annual organic sales of less the $5,000. They are discussed more thoroughly in subpart B, Applicability.

Under this proposal, any such operation that is exempt or excluded from certification, or which chooses not to be certified, may not label its products in a way which indicates that the operation has been certified as organic. Primarily, this means that the exempt or excluded operation may not display the USDA Seal or any seal or logo of a certifying agent. Any packaged organic product from an exempt or excluded operation may not use the labeling terms ''100 percent organic,'' or ''organic,'' or ''made with organic (specified ingredients),'' on the principal display panel. Those labeling terms are reserved for products produced by certified operations. The organic representation of exempt or excluded operation products may only be made on the information panel where the organic percentage can be displayed and the organic ingredients identified as ''organic.''

Retail displays and market representation of such products may not indicate that the product has been certified as organic. For instance, a whole, raw, organic product marketed directly to consumers at a farmers market or roadside stand as ''organic apples'' or ''organic tomatoes.'' However, no terms may be used which indicate ''certified'' organic apples, etc. No organic seal or logo may be displayed with the product at the point of retail sale.

We propose these restrictions simply as truth in labeling provisions because use of terms or phrases reserved for certified operations and products and display a certification seal will indicate that the product has been certified. We believe this requirement will help differentiate between certified and not certified products and help maintain the integrity of certified products while providing limited organic labeling opportunities for exempt and excluded operations.

Finally, this rule proposes that exempt organic producers cannot sell their product to a handler for use as an ingredient or for processing into an ingredient that will be labeled as ''organic'' on the information panel. However, this restriction is raised for public comment in subpart B, Applicability, of this part.

Small producers or handlers who qualify for exemption but who choose to be certified pursuant to these regulations can label their product as certified organic and can sell that product to certified handlers for further processing as an organic ingredient.

USDA Seal. This proposal introduces a new, redesigned, USDA Seal, that can be placed on consumer packages, displayed at retail food establishments, and used in market information to show that products have been produced and handled in accordance with these regulations. The Seal can only be used to identify raw and processed products that are labeled as ''100 percent organic'' or ''organic.'' It cannot be used for products labeled as ''made with organic (specified ingredients)'' (50 to 95 percent organic ingredients) or on multiingredient products with less than 50 percent organic ingredients.

The USDA Seal presented in this proposal will consist of the phrase, ''USDA Certified Organic,'' on a shield or badge design. When used, the seal must be the same form and design as shown in figure 1 of § 205.310 of this proposal. The seal must be printed legibly and conspicuously. On consumer packages, retail displays, and labeling and market information, the Seal may be printed on a white, light colored, or transparent background with contrasting dark colored words and shield outline or on a dark colored background with contrasting words and shield outline in one or two light colors. The Seal also may be printed in the colors red, white, and blue as follows: a white background, with dark blue shield outline, and red words. The choice of color scheme is left to the discretion of the producer, handler, or retail food establishment based on other colors on the product package and other considerations.

Labeling—Changes Based On Comments

This subpart differs from our first proposal in several respects as follows:

(1) *Use of terms other than ''organic.''* The first proposal stated that informational statements which imply ''organic'' production and handling should be used only on products that are produced and handled in accordance with these regulations. The proposal identified several informational statements commonly referred to as ''eco-label'' or ''green'' terms and phrases such as: ''produced without synthetic fertilizers,'' ''pesticide free farm,'' ''no drugs or growth hormones used,'' ''raised without antibiotics,'' ''ecologically produced,'' ''sustainably harvested,'' etc. We asked for comments on these and other terms or phrases which directly or indirectly imply that a product was organically produced and handled.

Commenters favored use of ''eco-label'' and ''green'' terms and phrases on any product labels. The general consensus expressed in the comments is

that producers and handlers should be able to make claims about their product provided the claims are truthful.

While commenters did not oppose the use of eco-label terms or phrases on nonorganic products, they made it clear that the term, ''organic,'' should only be used on products produced and handled in accordance with these regulations. Several commented that consumers respond favorably to the term, ''organic,'' when used on a product label, and, therefore, proper use of the term must be closely protected.

We also received several comments regarding use of the terms, ''biological'' and ''ecological,'' on product labels. A few comments indicated that the terms should be allowed on nonorganic products to truthfully describe an alternative agricultural system under which the product was produced or processed. However, most commenters opposed use of the terms as substitutes for the term ''organic'' on product labels.

We agree with the majority of comments received on this subject, and we, therefore, propose to regulate the term, ''organic,'' and no other terms. We propose that the term, ''organic,'' may only be used on labeling and market information of products that are produced and handled in accordance with these regulations. We understand that the terms, ''ecological'' and ''biological,'' are a special case in that they are used synonymously with the term, ''organic,'' in other countries. However, they cannot be used interchangeably with the term, ''organic,'' in this country. These terms may be used as eco-labels at this time. However, we will proceed to restrict use of these or any other terms if we find that they are used on product packages in the United States to represent ''organic'' when the products are not produced to the requirements of this regulation.

(2) *100 percent organic category.* Our first proposal did not provide for a ''100 percent organic'' category because that level of organic composition is not specifically provided for in the Act. While the Act and the first proposal provide for a labeling category of 95 percent or higher organic content, commenters appealed for a labeling category for product that is 100 percent organic. Many suggested that being able to use the term, ''100 percent,'' will give handlers added incentive to use only certified ingredients in multiingredient products. Some commenters suggested that if a product is composed only of organic ingredients, with no additives or other substances, it should be allowed to be labeled and represented in market information as 100 percent.

We agree that a ''100 percent organic'' labeling category may increase the effectiveness of marketing efforts and may provide incentives for handlers to use more certified organic ingredients in their multiingredient products. Therefore, this proposal will allow the term, ''100 percent organic,'' to be used on labels affixed to or market information representing raw or processed organic products that are composed entirely of organically produced agricultural product.

(3) *Identification of private certifying agents.* Under the first proposal, identification of private certifying agents was not permitted on the principal display panel with the USDA Seal and the State organic seal. While a few commenters suggested that only the USDA Seal should be displayed on the principal display panel, the majority of those commenting on this topic requested that private certifying agent seals be displayed on an equal basis with a seal of the appropriate State's organic program. Although the number of State certifying agents is relatively small, private certifying agents believe that State organic programs and State certifying agents may implement measures in States that work against the interests of private certifying agents. The Department believes those concerns to be unfounded. Under the NOP, the Secretary will approve all State organic programs and accredit all State certifying agents. However, any of those programs or agents that might discriminate or work against the interests of private certifying agents in the State would not be approved by the Secretary.

Some commenters suggested that many private certifying agent seals are widely recognized and respected and their seals influence consumer choices in product purchases. It is appropriate that private certifying agents be afforded the same treatment with regard to labeling as the State certifying agent. We agree with commenters' requests for equal treatment of certifying agents and that certifier seals may have marketing potential in some areas. Therefore, we specify in this proposal that a private certifying agent's seal or logo can be displayed to the same extent as the seal of a State certifying agent. This change is reflected throughout this subpart.

(4) *Use of a certifying agent's seal or logo.* Many commenters believe that the certifying agent's seal, logo, or identifying mark shown on ''100 percent organic'' and ''organic'' products should be the seal or mark of the certifying agent that certifies the handler of finished product. Commenters also stated that labels should not be used to misrepresent one product as being more organic than another product, which might happen if multiple seals are displayed on one product package and only two are displayed on a competing product package. While we understand the commenters' points, we believe that display of certifying agent seals on products labeled ''100 percent organic,'' ''organic,'' and ''made with organic (specified ingredients)'' should remain optional for handlers. If two or more certifying agents are involved in certifying raw organic agricultural product and organic ingredients used in a finished product, the seals or marks of those certifying agents may be displayed, at the discretion of the handler. There should be only two restrictions to using multiple certifying agent seals: (1) The seal of the certifier of the handling operation producing the finished product should be displayed; and (2) only the seals of those certifying agents actually involved with certification of the product or ingredients may be displayed. For instance, a private certifying agent may certify a product assembled using organic ingredients produced in Texas and certified by the Texas State certifying agent. The product package may, at the handler's option, display the Texas State agent's seal in addition to the seal of the private certifying agent which certified the operation creating other organic ingredients and creating the finished product. Likewise, display of a seal of a foreign country's organic program or foreign certifying agent will be permitted only if the foreign agent certified the finished product or a product ingredient.

Some commenters say that display of two State agent seals may confuse consumers. However, we do not believe it is likely that handlers will choose to display multiple certifying agent seals to misrepresent a product. We also do not believe that possible consumer confusion from display of multiple seals should take precedence over the handler's right to provide product information. If multiple certifying agent seals or marks are displayed on a product package or in market information, the handler or retail food establishment must maintain appropriate records showing proof of all organic certifications.

(5) *Display of certifying agent name and business address.* Commenters also suggested that the certifying agent's name and business address be displayed adjacent to identification of the handler or distributor of products labeled ''organic'' and ''made with organic

(specified ingredients).'' The commenters stated that such information should be available for consumers who may have questions about the organic nature of a product or product ingredients. We agree that the name of the certifying agent should be included on a product package but believe that display of the business address or telephone number should be optional to the handler who assembles the finished product and affixes the label on the package. If a consumer wants to inquire about the organic nature of a purchased product, the consumer can obtain contact information through the certifying agent database listed on the NOP homepage. Finally, to clearly identify the information provided, the statement, ''Certified organic by * * *'' or ''Ingredients certified as organically produced by * * *,'' may be used to distinguish the certifying agent from the manufacturer or distributor of the product.

The statement and agent identification is intended for information purposes only and is not to promote the organic nature of the product. The certifying agent identification may be placed below the manufacturer or distributor information and must not interfere with display of that information.

(6) *Size of certifying agent seal.* There was a general consensus among commenters that the seals of State and private certification agents should not be larger than the USDA Seal. To emphasize the market value of such a national organic seal and maintain some consistency of treatment with regard to the different organic content categories, we propose that State and private certifying agent seals can be the same size as but must not exceed the size of the USDA Seal on any package label or in market information. The size of the USDA Seal on a package is left to the discretion of the handler.

(7) *Displaying the percentage of organic ingredients.* The first proposal permitted use of the word, ''organic,'' in the ingredient statements to modify those ingredients that were produced and handled pursuant to these regulations, but did not require the percentage of organic ingredients to be displayed on the label. Most all commenters responding to this labeling issue stated that identification of organic ingredients as ''organic'' will encourage handlers to increase the organic composition of multiingredient products. However, some commenters did not favor any use of the word, ''organic,'' on packages of multiingredient products containing less than 50 percent organic ingredients. Some commenters also suggested that including the total percentage of organic content adjacent to the ingredient statement (in which the organic ingredients are identified) would give relevance to the ingredient statement. We concur with commenters' recommendations about the display of the total percentage of organic content and propose that the percentage of organic ingredients be placed on the information panel. The percentage statement and the ingredient statement should be shown in a way that indicates the relationship of the information. If a product is labeled ''100 percent organic,'' all ingredients (except water and salt), by definition, would have to be certified organic ingredients, and each ingredient may be but would not have to be identified as ''organic.'' Identification of organic ingredients would be required for products labeled ''organic'' and ''made with organic (specified ingredients),'' and for products containing less than 50 percent organic ingredients. We did not change the identification of organic ingredients for products containing less than 50 percent organic ingredients because we believe the uses of the term on the information panel and ingredient statement of such product packages do not imply that the product is organic.

(8) *Labeling of products containing 50–95 percent organic ingredients.* The first proposal specified that products with 50–95 percent organic content could use ''made with certain organic ingredients'' on the label. Many commenters suggested that the word, ''certain,'' may appear confusing to consumers and that a stronger statement is needed to identify the organic nature of the product. One commenter sought clarification of whether the term, ''certain,'' is a substitute for the name of the ingredient in a single-ingredient product. Many requested that the statement be changed to allow specific identification of the organic ingredients on the principal display panel. Because that is the panel first and most often observed by consumers, the commenters indicated that the information presented on the principal display panel should be clear and accurate to assist consumers in making their purchasing decisions.

After review of the comments, we believe that, if the statement is going to be displayed on the principal display panel, it should state the specified organic ingredient in the product; *e.g.,* ''made with organic (specified ingredients).'' Replacing the word, ''certain,'' with the actual organic commodity name or organic ingredient will add the specificity sought by commenters and assist consumers in making more informed choices. Under this proposal, the statement, ''made with organic (specified ingredients),'' must be used on the principal display panel and on other package panels of a product containing between 50 and 95 percent organic ingredients.

Several commenters suggested that the size of the letters in the phrase be limited to a fraction of the size of the product name as it appears on the principal display panel. They stated that limiting the size of the letters will keep the statement from making the product appear more organic than products with 95 percent organic ingredients. For instance, if a product contains 55 percent organic ingredients and the statement, ''made with organic (specified ingredients),'' is displayed on the principal display panel in large, bold letters, the product may appear more organic than a 97-percent product simply labeled ''organic.'' Commenters recommended letter sizes from one-half to three-fourths the size of the product name as it appears on the principal display panel.

We also believe that the labeling for these products should not use typeface or letter sizes which would mislead consumers. FDA labeling requirements in 21 CFR 101.3(d) specify that required statement of identity of the product shall be in a size most reasonably related to the largest printed matter on a panel. FDA enforces ''reasonably related'' as being one half the size of the largest printed matter, which is usually the product name. Therefore, to be consistent with FDA labeling requirements, we have established the print size of the statement, ''made with organic (specified ingredients),'' to be not more than 50 percent, or one half, of the largest print size appearing on the principal display panel. This print size is consistent with the recommendation of many commenters but is smaller than the 75 percent recommended by the NOSB. We propose that the statement, ''made with organic (specified ingredients),'' appear in only one print style and color, without highlighting.

We believe that these additional restrictions on display of the statement will enable the message to be delivered and yet provide some structure and consistency to display of the statement. It is our intention that the statement not be used to disproportionately dominate the principal display panel or other panels and not be used to misrepresent the organic nature of the product.

(9) *Limiting the number of organic ingredients listed.* Some commenters suggested limiting the number of organic ingredients that could be

included in the statement ''made with organic ingredients.'' This topic was the subject of much NOSB deliberation and public discussion. Commenters reasoned that if the list of organic ingredients became too long, the product could appear to be more organic than ''95 percent'' products. For instance, a product could have 10 organic ingredients, but those 10 ingredients may comprise only 51 percent of the product. The consensus of comments suggested that the statement should be limited to three organic ingredients, which is the industry standard. We believe their recommendation has merit and, therefore, propose that up to three organic ingredients can be shown in the statement. We encourage additional comments on the maximum number of ingredients that should be allowed to appear in the statement on the principal display panel. Commenters should provide reasons for the number they recommend.

(10) *Qualifications for display of the USDA Seal.* In the first proposal, we permitted the display of the USDA seal on products with 50 percent or more organic ingredients. Commenters objected. They overwhelmingly endorsed a high organic content standard for a product to be labeled as ''organic.'' They believe products containing less than 95 percent organic ingredients do not have sufficient organic content to justify an ''organic'' label on the principal display panel, and should not be so labeled under the NOP regulations. Commenters also stated that display of the USDA Seal will be very desirable. Many stated that a prohibition on display of the USDA Seal on 50-to-95-percent products would encourage handlers who assemble multiingredient products to use more organically produced ingredients and fewer nonorganic ingredients. They suggested that the USDA Seal and the certifying agent's seal or logo not be displayed on any package panel of products ''made with organic (specified ingredients)'' or on products with less than 50 percent organic ingredients.

We agree that some distinction should be made between 95 percent-plus organic products and the 50–95 percent organic products. Handlers of 95 percent-plus organic products may display both the USDA Seal and the certifying agent seal or logo on the principal display panel of the product. The commenters propose that handlers of 50–95 percent organic products not be allowed to display either seal on the principal display panel. However, we believe that, because handlers of 50–95 percent organic product are required to be certified under this program, it is appropriate that they should be allowed to display some evidence of that certification. We propose, therefore, that handlers of 50–95 percent organic product may display the seal or logo of the certifying agent which certified the finished product. Display of the USDA Seal will still be restricted to only 100 percent organic products and to 95 percent-plus products. We believe this provision will provide more equitable treatment for handlers of 50–95 percent products who are required under this regulation to obtain and maintain organic certification in order to label their organic product. It will also maintain a distinction between the two product levels by continuing the restriction on display of the USDA Seal. We believe that, while display of the USDA Seal is less likely to be an incentive for handlers of products at the lower end of the 50 to 95 percent range of organic content, handlers of products at the higher end of the 50 to 95 percent organic content range may be encouraged to increase the organic content in order to display the USDA Seal.

An organic product produced or handled by an exempt or excluded operation, including those with less than $5,000 annual organic sales, may not display the USDA Seal or the seal of a certified agent because the operation has not been certified. Even if the organic content of the product is 95 percent or higher, the product still cannot be labeled as ''certified'' organic or marketed using an organic seal or logo.

(11) *Design of the USDA Seal.* The final change prompted by comments is redesign of the USDA Seal. The Seal in the first proposal was a triangular shape behind a circle of recycling arrows around a globe figure with the word, ''organic,'' printed diagonally across the globe. That proposed seal was opposed by hundreds of commenters. Comments included: The triangle resembles a radioactive warning symbol or fallout shelter sign; the diagonal line across the circle appears to be the universal ''no'' sign (such as ''no walking,'' ''no smoking''); the globe design doesn't show up; the globe design implies an international program; the design is too busy; simplify the design; use the words, ''certified organic''; use a text logo; the seal will be too costly to produce; and the triangle points will puncture or tear plastic when printed.

Given the overwhelming negative response to the first seal, we propose a simplified design composed of the words, ''USDA CERTIFIED ORGANIC,'' inside a shield or badge design. This design is consistent with comments requesting simplicity and use of the words, ''certified organic.'' At the request of commenters, this proposal provides for labeling on transparent material. We believe the proposed basic dark on light or light on dark requirement is broad enough to allow handlers the flexibility needed to match color schemes compatible with their product packages. The alternative red, white, and blue color scheme offers handlers what consumers may identify as a more official or patriotic display of the Seal. We believe it is important that the Seal be displayed in a consistent manner, within general light/dark guidelines so that the Seal becomes easily recognizable to consumers.

Labeling—Changes Requested But Not Made

Comments reflecting different opinions on the same topic are covered above (*e.g.,* the number of organic ingredients listed on the principal display panel, the size of ''organic'' letters on the principal display panel, a recommended redesign of the USDA Seal, etc.). Obviously, not all such conflicting recommendations can be accepted. Two comments were received which are not accepted but which we believe warrant further consideration by the public and the organic community. We request additional comments regarding the following two recommendations. Commenters should specify their recommendation regarding each topic and provide reasons for their recommendation.

(1) *Changing the ''organic'' threshold for multiingredient products.* At least one commenter suggested that the 50–95 percent labeling category sets too low a threshold for organic labeling of multiingredient products. The commenter suggested that, for increased international acceptance of USDA standards, the lowest acceptable percentage for receiving an organic label should be 70 percent organic ingredients, based on the European Union (EU) standard which now requires a minimum of 70 percent organic ingredients for the product to be labeled as ''organic'' (or, ''biological'' or ''ecological'').

The EU standard allows products with a 70 percent organic content to be labeled as ''organic,'' where our proposal will require at least 95 percent organic content before a product could be labled as ''organic.'' This 95 percent standard is in the Act. Where the two standards differ is that the EU standard doe not have a ''made with organic (specified ingredients)'' category proposed in this rule.

While the Act establishes a 50-percent minimum ingredient content, that percentage can be adjusted upward if doing so would further the purposes of the Act. To do so, however, the Secretary must have good cause and justification for establishing a higher minimum organic ingredient content. In other words, we could raise the minimum organic ingredient content threshold to 70 percent, redefining two of our four categories. The four categories would be: less than 70 percent, 70–95 percent, greater than 95 percent, and 100 percent. Under this scenario, the prohibitions on excluded methods, irradiation, and sewage sludge would not apply to the nonorganic ingredients of products with less than 70 percent organic content. At the same time, these products would only be able to list the organic ingredients on the information panel. The ''made with organic ingredients'' category, to which the prohibition would apply, would be 70–95 percent organic content. The only products that would get the ''organic'' designation would still be those with at least 95 percent organic content.

Because we find no compelling reason to raise the 50-percent minimum ingredient content threshold established in the Act, we have not accepted the commentor's recommendation in this proposal. However, if comments on this proposal suggest an appropriate justification, the minimum ingredient content threshold could be raised in the final rule.

(2) *Minimum content requirements for organic ingredients.* One commenter suggested that a minimum percentage of the entire product weight be established to qualify for a single ingredient to be included in the statement, ''made with organic (specified ingredients).'' The commenter suggested that this would help prevent misrepresentation of the organic nature of a product. The commenter suggested that the minimum content for any ingredient should be 15 percent. The commenter did not justify the 15-percent minimum (as opposed to another minimum percentage). Because such a recommendation could prevent important ingredients from being specified on a product label, we have not incorporated the comment in this proposal. However, we believe the comment may have merit. One factor in establishing a minimum percentage for any individual ingredient listed on the principal display panel would be the established minimum percentage for all organic ingredients in a product, the question raised in the paragraph above. For instance, if the minimum percentage of all ingredients is established at 70 percent to conform to EU standards, should there be a minimum percentage for any individual organic ingredient that could be listed on the principal display panel as one of three organic ingredients in the product? Would such a labeling restriction prevent identification of an important organic ingredient from being displayed on the principal display panel?

Commenters on questions (1) and (2) should state whether they think the recommendations would further the marketing of organic products and, if so, clearly state the recommended percentage for each question and the reasons for their opinions regarding each issue.

(3) *Labeling requirements for small operations.* A majority of those who commented on the exemption for small operations (less than $5,000 organic sales) in the first proposal stated that such operations are not exempt from labeling requirements under the Act. In this proposal, we provide limited labeling provisions which prohibit exempt and excluded operations, including those with less than $5,000 in annual organic sales, from labeling their products in a way that indicates the operations or the products have been certified as organic. These provisions will not allow such operations to use labeling terms and organic seals and logos specified for certified operations. We believe those terms, logos and seals should be reserved for operations and products that are certified under these regulations.

Labeling—Additional Provisions

Upon further review of the label and market information provisions in the first proposal, we propose the following additions and changes.

(1) *Display of a State organic seal.* Under the first proposal, each State organic certification program would have been allowed to display a seal or logo of its State organic program. The first preamble stated that it was appropriate for a State to have a seal representing its organic program, thus allowing product produced under that program to bear the State's seal.

Currently, 13 State departments of agriculture (or other State agency) and approximately 40 private agents certify to a variety of private and State organic requirements. After establishing a policy which more clearly defines the criteria for approval of a State organic program, we believe that, in the interest of consistent and uniform national standards, product packages should not display the seal of a State organic program if the seal is different from the seal or mark used by the State's organic certifying agent.

This determination is based on a proposed change in State programs. A State organic program will be approved by the Secretary for specific, need-based reasons particular to that State (see State Programs under subpart G). To establish and maintain uniform national standards, States will not be authorized to implement more restrictive organic standards simply to promote State products that are ''more organic'' than products produced and handled in other States or under NOP requirements. Rather, the Secretary will approve only those State programs that need more restrictive requirements to protect or preserve unique environmental conditions or to accommodate product and handling practices unique to a State or portion of a State. In the absence of such environmental conditions or production practice needs, a State's organic program must have the same requirements as this NOP. If this is the case and if a relatively few State programs are approved to have more restrictive requirements, then no real purpose is served by permitting State organic programs to display a separate and distinct seal on a product label. Such a seal would not represent a ''more organic'' product.

In the place of a State organic program seal, this proposal provides for the seal or logo of a State certifying agent to be displayed on packages, if that certifying agent certifies the organic operation producing the product. Selection of a State or private certifying agent is the choice of the organic producer or handler being certified. A State's department of agriculture (or other equivalent State agency) may establish one or more State certifying agent offices as part of its governmental operations, or the State may license a private certifying agent to certify organic operations on behalf of the State. In either case, the certifying agent would certify these national requirements and not the particular requirements of a State organic program unless those requirements were approved by the Secretary. Therefore, the only organic seal or mark representing a State will be the seal or mark of a State's certifying agent or licensed certifying agent. Any certifying agent licensed by the State must be accredited by the Secretary pursuant to subpart F of this proposal.

(2) *Labeling for international markets.* We have added two paragraphs under section 205.300 to provide for labeling of products intended for international markets. Domestically produced organic products intended for export may be labeled to meet the requirements of the country of destination or any labeling

requirements specified by a particular foreign buyer.

If labeled to meet foreign labeling requirements, such packaged products cannot be sold in the United States. Pursuant to § 205.306, shipping containers and bills of lading for these products would have to be marked ''for export only'' to assure that the product was not distributed domestically. We are providing this exception to labeling requirements for the convenience of exporters only. If the foreign country or buyer does not require different product labeling, domestic product which has been produced, certified, and labeled pursuant to these regulations may be shipped without the statement, ''for export only,'' on the containers and bills of lading.

Organic product produced in another country for export to the United States may be certified to the requirements of this regulation or to an approved foreign organic certification program that has been recognized as equivalent to the requirements of the NOP. Such products must be labeled pursuant to the requirements of this subpart.

(3) *Product composition.* Under new § 205.301, Product Composition, we have clarified the composition of organic and nonorganic ingredients in products covered in the four labeling categories. All ingredients labeled as ''organic'' in the ingredient statement of the product package must be produced and handled pursuant to these requirements. No substances prohibited on the National List in subpart G and no production or handling practices prohibited in § 205.301(e) may be used in the production or handling of any ingredient labeled as ''organic.'' Regulations covering the production and handling of nonorganic ingredients varies with the labeling category. The higher the percentage of a product's organic composition, the more restrictive the production and handling requirements of the nonorganic ingredients in the product. These requirements are found under § 205.301 and explained above under Proposal Description.

(4) *Prohibited practices.* Section 205.301(e) lists seven production and handling practices that are prohibited from being used to produce whole products or product ingredients that would be labeled as ''organic'' under the NOP. Some of these prohibited practices appear for the first time in this proposal, and others were specified in the first proposal and were supported by all those who addressed them in their comments.

The first proposal prohibited organic labeling of a product or ingredient produced using water that does not meet requirements of the Safe Drinking Water Act (42 U.S.C. 300(f) *et seq.*). We have not included that provision in this proposal because potable water is required in other FDA and FSIS processing regulations and does not need to be repeated as a requirement in this regulation.

The first three practices (use of excluded methods, sewage sludge, and irradiation) are discussed elsewhere in this proposal and are added as prohibited practices in this labeling section for consistency purposes.

Only processing aids and substances on the National List in subpart G of this regulation may be used in the production and handling of 95 percent-plus organic products and 50–95 percent organic products and in any ingredient labeled as organic on a product package.

The first proposal prohibited use of sulfites, nitrates, and nitrites in production or processing of organic products or ingredients. We have amended the wording of this provision to clarify that a handler cannot add any sulfites, nitrates, and nitrites to a product and still label the finished product or ingredient as ''organic.'' We make this clarification because these substances are found naturally in many substances and may appear naturally in potable water used in processing.

The last two processing practices that would prohibit an ''organic'' label appeared in separate sections of the first proposal and are included in this proposal in § 205.301(e)(6) and (e)(7). The first is that products and organic ingredients assembled using organic or nonorganic forms of the same ingredient or component ingredients—depending on availability of the organic ingredients—cannot be labeled as ''organic when available'' or a similar phrase. Similarly, products and organic ingredients assembled using both organic and nonorganic forms of the same ingredient or component ingredients cannot be labeled as organic if that ingredient is identified as organic on the ingredient statement and included in the percentage of organic content on the information panel.

(5) *Calculating organic content.* Because labeling requirements are based on the amount of organic ingredients in a product, we have added new section 205.302, which addresses the calculation of organic percentages. Provisions in this new section were not included in the first proposal. While this should be a simple mathematical procedure, the section proposes certain guidelines for calculating and labeling organic percentages.

Only one percentage figure for total organic ingredients will be shown on a package. The percentage of individual organic ingredients will not be displayed.

An organic product may be constituted completely of organic liquid products. Therefore, this proposal adds the phrase, ''or fluid volume,'' in several places in the proposal when referring to liquid products and ingredients. For ingredients in liquid form that are reconstituted with water from a concentrate, the calculation would be based on a single-strength solution of the liquid concentrate. For products that may contain both dry and liquid organic ingredients, the percentage calculation would be based on the combined weight of the organic ingredients, including the weight of the liquid ingredients, minus water and salt.

(6) *Labeling of nonretail containers.* We have added new § 205.306, covering labeling of nonretail containers—those used only for shipping and storage of agricultural products labeled as organic or containing organic ingredients. While the same containers are commonly used for both shipping and storage, the first proposal did not reference storage containers or specify labeling requirements for those containers. These provisions are proposed only for products labeled as ''100 percent organic,'' ''organic,'' and ''made with organic (specified ingredients).'' Some may believe that use of the USDA Seal on a shipping container of products ''made with organic (specified ingredients)'' may be inconsistent with other labeling provisions prohibiting display of the Seal on consumer packages of those products. However, in the case of shipping and storage containers, the display of seals is not intended for marketing purposes but would be used for easy identification of the product to help prevent commingling with nonorganic product or handling of the product which would destroy the organic nature of the product (fumigation, etc.). These provisions will not apply to shipping and storage containers of products containing less than 50 percent organic ingredients.

(7) *Retail Food Establishments.* The extent of the regulatory authority of this regulation has been the subject of intense discussions in comments received, NOSB deliberations, and AMS discussions. Commenters claimed that it makes no sense to regulate and certify the production and handling of organic product but not require certification and regulate retail food establishments where some fresh foods containing organic ingredients are processed and

assembled and where they can become adulterated or misrepresented to the consuming public.

Retail food establishments that market organic product, whether produced in-store, in a corporate commissary, or by others, will be subject to the labeling provisions of this subpart as that labeling applies to: (1) Point-of-purchase, in-store displays describing the organic nature of the product; and (2) other market information and media advertising regarding the product being marketed at the retail food establishment. Food retail establishments must describe the product in in-store retail displays, market information, and media advertising that is consistent with the organic content of the finished product. Any labeling of a product that is inconsistent with the percentage of organic content of the product will be considered a violation of truth in labeling and/or truth in advertising regulations of FDA and the FTC. Multiingredient products which are described as organic product in retail displays and market information must be assembled by a certified manufacturing facility, pursuant to the Applicability subpart of this regulation.

Packaged organic products, organic fresh produce, and organic bulk bin food items must be described in point-of-purchase displays, pricing information, and consumer information in terms consistent with the organic content of the product. For instance, an in-store retail display would describe an 87 percent organic product by specifying the percentage of organic content of the product and identifying the organic ingredients in the ingredient statement, as may be required by FDA. The market information for such a product must not, for instance, label the product as ''organic'' or ''100 percent organic.'' This would be a violation of truth in labeling and advertising regulations of FDA and FTC. The USDA Seal and the seal of the certifying agent may be displayed at retail sales and in market information on products certified as containing 95 percent or more organic content. Multiingredient products containing 50–95 percent organic ingredients may display the seal or logo of the certifying agent of the organic handling operation.

We believe these labeling practices will help assure appropriate representation of bulk organic products at retail sale and will encourage handlers to use more organic ingredients.

Products containing less than 50 percent organic ingredients at the point of retail sale may not be identified in any way as ''organic'' or containing organic ingredients. In addition, the USDA Seal and seal, logo, or other identifying mark of the certifying agent is prohibited from being used in retail displays and market information.

(8) *Change in calculating the $5,000 exemption.* We are proposing a change in calculating the $5,000 exemption for producers and handlers. The $5,000 annual exemption will be calculated on sales of organically produced product and not on all agricultural products marketed by the exempt producer or handler, as provided in the first proposal. This exemption means that qualifying exempt organic producers and handlers may annually sell up to $5,000 of organically produced products and not be certified as an organic operation under this regulation. The exemption could apply to a large, conventional agricultural operation that also has a small amount of acreage designated for organic production—the products of which, for example, is sold at a roadside stand. Any sale of other, nonorganic products will not count against the $5,000 sales total. The labeling and market information requirements for organic products produced by such exempt operations are specified in § 205.309 of this regulation.

Subpart E—Certification

This subpart sets forth the requirements for a national program to certify production and handling operations as certified organic production or handling operations. The certification process proposed in this subpart will be carried out by accredited certifying agents.

Proposal Description

General Requirements. Production and handling operations seeking to receive or maintain organic certification must comply with the Act and applicable organic production and handling regulations. Such operations must establish, implement, and annually update an organic production or handling system plan that is submitted to an accredited certifying agent. They must permit on-site inspections by the certifying agent with complete access to the production or handling operation, including noncertified areas and structures.

As discussed in Subpart B, certified operations must maintain records concerning the production and handling of agricultural products that are sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' sufficient to demonstrate compliance with the Act and regulations. Records applicable to the organic operation must be maintained for not less than 5 years beyond their creation. Authorized representatives of the Secretary, the applicable State program's governing State official, and the certifying agent must be allowed access to the operation's records during normal business hours. Access to the operation's records will be for the purpose of reviewing and copying the records to determine compliance with the Act and regulations.

Certified operations are required to immediately notify the certifying agent concerning any application, including drift, of a prohibited substance to any field, production unit, site, facility, livestock, or product that is part of the organic operation. They must also immediately notify the certifying agent concerning any change in a certified operation or any portion of a certified operation that may affect its compliance with the Act and regulations.

Certification Process. To obtain certification, a producer or handler must submit a request for certification to an accredited certifying agent. The request must contain descriptive information about the applicant's business, an organic production and handling system plan, information concerning any previous business applications for certification, and any other information necessary to determine compliance with the Act.

Applicants for certification and certified operations must submit the applicable fees charged by the certifying agent. An applicant may withdraw its application at anytime. An applicant who withdraws its application will be liable for the costs of services provided up to the time of withdrawal of the application.

The certifying agent will decide whether to accept the applicant's application for certification. Certifying agents may decline to accept an application for certification but may not decline to accept an application on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status.

Upon acceptance of an application for certification, a certifying agent will review the application to ensure completeness and to determine whether the applicant appears to comply or may be able to comply with the applicable production or handling regulations. As part of its review, the certifying agent will verify that an applicant has submitted documentation to support the correction of any deficiencies identified in a previously received notification of noncompliance. The certifying agent

will also review any available U.S. Department of Agriculture (USDA) data on production and handling operations for information concerning the applicant.

We anticipate using data collected from certifying agents to establish and maintain a password-protected Internet database only available to accredited certifying agents and USDA. This database would include data on production and handling operations issued a notification of noncompliance, noncompliance correction, denial of certification, certification, proposed suspension or revocation of certification, and suspension or revocation of certification. Certifying agents would use this Internet database during their review of an application for certification. This data will not be available to the general public because much of the data would involve ongoing compliance issues inappropriate for release prior to a final determination.

After a complete review of the application, the certifying agent will communicate its findings to the applicant. If the review of the application reveals that the applicant may be in compliance with the applicable production or handling regulations, the certifying agent will schedule an on-site inspection of the applicant's operation to determine whether the applicant qualifies for certification. The initial on-site inspection must be conducted within a reasonable time following a determination that the applicant appears to comply or may be able to comply with the requirements for certification.

The certifying agent will conduct an initial on-site inspection of each production unit, facility, and site included in the applicant's operation. As a benchmark, certifying agents should follow auditing guidelines prescribed by the International Organization for Standardization Guide 10011–1, ''Guidelines for auditing quality systems—Part 1: Auditing'' (ISO Guide 10011–1).[1] The certifying agent will use the on-site inspection in determining whether to approve the request for certification and to verify the operation's compliance or capability to comply with the Act and regulations. Certifying agents will conduct on-site inspections when the applicant or an authorized representative of the applicant who is knowledgeable about the operation is present. An on-site inspection must also be conducted when land, facilities, and activities that demonstrate the operation's compliance with or capability to comply with the applicable production or handling regulations can be observed.

The on-site inspection must verify that the information provided to the certifying agent accurately reflects the practices used or to be used by the applicant or certified operation and that prohibited substances have not been and are not being applied to the operation. Certifying agents may use the collection and testing of soil; water; waste; plant tissue; and plant, animal, and processed products samples as tools in accomplishing this verification.

The inspector will conduct an exit interview with an authorized representative of the inspected operation to confirm the accuracy and completeness of inspection observations and information gathered during the on-site inspection. The main purpose of this exit interview is to present the inspection observations to those in charge of the firm in such a manner so as to ensure they clearly understand the results of the inspection. The firm is not required to volunteer any information during the exit interview but would be required to respond to questions or requests for additional information. The inspector will raise and discuss during the exit interview any known issues of concern, taking into account their perceived significance. As a general rule, the inspector will not make recommendations for improvements to the operation during the exit interview. However, the certifying agent will have the discretion to decide the extent to which an inspector may discuss any compliance issue.

Notification of Approval. A certifying agent will review the on-site inspection report, the results of any analyses for substances, and any additional information provided by the applicant within a reasonable time after completion of the initial on-site inspection. The certifying agent will approve certification upon making two determinations: (1) That the applicant's operation, including its organic system plan and all procedures and activities, is in compliance with the Act and regulations; and (2) that the applicant is able to conduct operations in accordance with its organic systems plan.

Upon determining the applicant's compliance and ability to comply, the agent will approve certification and issue a ''certificate of organic operation.'' The approval may include restrictions regarding minor deficiencies that would not prevent certification as a condition of continued certification. A certificate of organic operation will specify the name and address of the certified operation; the effective date of certification; the categories of organic operation, including crops, wild crops, livestock, or processed products produced by the certified operation; and the name, address, and telephone number of the certifying agent. Once certified, a production or handling operation's organic certification continues in effect until surrendered by the organic operation or suspended or revoked by the certifying agent, the State program's governing State official, or the Administrator.

Denial of Certification. Should the certifying agent determine that the applicant is not able to comply or is not in compliance with the act, the certifying agent will issue a written notification of noncompliance to the applicant. Applicants who receive a notification of noncompliance may correct the deficiencies and submit, by the date specified, a description of correction and supporting documentation to the certifying agent. As an alternative, the applicant may submit a new application to another certifying agent, along with the notification of noncompliance and a description of correction of the deficiencies and supporting documentation. Applicants may also submit, by the date specified, written information to the certifying agent to rebut the noncompliance described in the notification of noncompliance. When a noncompliance cannot be corrected, a notification of noncompliance and a ''notification of denial of certification'' may be combined in one notification.

The certifying agent will evaluate the applicant's corrective actions taken and supporting documentation submitted or the written rebuttal. If necessary, the certifying agent will conduct a followup on-site inspection of the applicant's operation. When the corrective action or rebuttal is sufficient for the applicant to qualify for certification, the certifying agent will approve certification. When the corrective action or rebuttal is not sufficient for the applicant to qualify for certification, the certifying agent will issue the applicant a written notice of denial of certification. The certifying agent will also issue a written notice of denial of certification when an applicant fails to respond to the notification of noncompliance. The

[1] ISO Guide 10011–1 is available for viewing at USDA–AMS, Transportation and Marketing Programs, Room 2945—South Building, 14th and Independence Ave., SW, Washington, DC, from 9:00 a.m. to 4:00 p.m., Monday through Friday (except official Federal holidays). A copy may be obtained from the American National Standards Institute, 11 West 42nd Street, New York, NY 10036; Website: www.ansi.org; E-mail: ansionline@ansi.org; Telephone: 212–642–4900; Facsimile: 212–398–0023.

notice of denial of certification will state the reasons for denial and the applicant's right to reapply for certification, request mediation, or file an appeal.

An applicant who has received a notification of noncompliance or notice of denial of certification may apply for certification again at any time with any certifying agent. When the applicant submits a new application to a different certifying agent, the application must include a copy of the notification of noncompliance or notice of denial of certification. The application must also include a description of the actions taken, with supporting documentation, to correct the deficiencies noted in the notification of noncompliance. When a certifying agent receives such an application, the certifying agent will treat the application as a new application and begin a new application process.

A certifying agent has limited authority to deny certification without first issuing a notification of noncompliance. This authority may be exercised when the certifying agent has reason to believe that an applicant for certification has willfully made a false statement or otherwise purposefully misrepresented its operation or its compliance with the requirements for certification.

Continuation of Certification. Each year, the certified operation must update its organic production or handling system plan and submit the updated information to the certifying agent to continue certification. The updated organic system plan must include a summary statement, supported by documentation, detailing deviations from, changes to, modifications to, or other amendments to the previous year's organic system plan. The updated organic system plan must also include additions to or deletions from the previous year's organic system plan, intended to be undertaken in the coming year. The certified operation must update the descriptive information about its business and other information as deemed necessary by the certifying agent to determine compliance with the Act and regulations.

Following receipt of the certified operation's updated information, the certifying agent will arrange and conduct an on-site inspection of the certified operation. As a benchmark, certifying agents should follow auditing guidelines prescribed by ISO Guide 10011–1. Upon completion of the inspection and a review of updated information, the certifying agent will determine whether the operation continues to comply with the Act and regulations. If the certifying agent determines that the operation is in compliance, certification will continue. If any of the information specified on the certificate of organic operation has changed, the certifying agent will issue an updated certificate of organic operation. If the certifying agent finds that the operation is not complying with the Act and regulations, a written notification of noncompliance will be issued as described in § 205.662.

In addition to annual inspections, a certifying agent may conduct additional on-site inspections of certified operations to determine compliance with the Act and regulations. The Administrator or State program's governing State official may also require that additional inspections be performed by the certifying agent to determine compliance with the Act and regulations. Additional inspections may be announced or unannounced and would be conducted, as necessary, to obtain information needed to determine compliance with identified requirements.

Such on-site inspections would likely be precipitated by reasons to believe that the certified operation was operating in violation of one or more requirements of the Act or these regulations. The policies and procedures regarding additional inspections, including how the costs of such inspections are handled, would be the responsibility of each certifying agent. Misuse of such authority would be subject to review by the Department during its evaluation of a certifying agent for reaccreditation and at other times in response to complaints. Certified production and handling operations could file complaints with the Department at any time should they believe a certifying agent abuses its authority to perform additional inspections.

Certification After Suspension or Revocation of Certifying Agent's Accreditation. When the Administrator revokes or suspends a certifying agent's accreditation, affected certified operations will need to make application for certification with another accredited certifying agent. The certification of the production or handling operation remains in effect during this transfer of the certification. The certified production or handling operation may seek certification by any qualified certifying agent accredited by the Administrator. To minimize the burden of obtaining the new certification, the Administrator will oversee transfer of the original certifying agent's file on the certified operation to the operation's new certifying agent.

Upon initiation of suspension or revocation of a certifying agent's accreditation, or upon suspension or revocation of a certifying agent's accreditation, the Administrator may initiate proceedings to suspend or revoke the certification of operations certified by the certifying agent. The Administrator's decision to suspend or revoke a producer's or handler's certification in light of the loss of its certifying agent's accreditation would be made on a case-by-case basis. Actions such as fraud, bribery, or collusion by the certifying agent, which cause the Administrator to believe that the certifying agent's clients do not meet the standards of the Act or these regulations, might require the immediate initiation of procedures to suspend or revoke certification from some or all of its client base. Removal of accreditation, regardless of the reason, in no way affects the appeals rights of the certifying agent's clients. Further, a certified operation's certification will remain in effect pending the final resolution of any proceeding to suspend or revoke its certification.

A private-entity certifying agent must furnish reasonable security for the purpose of protecting the rights of operations certified by such certifying agent. This security is to ensure the performance of the certifying agent's contractual obligations. As noted elsewhere in this proposed rule, the specific amount and type of security that must be furnished by a private certifying agent will be the subject of future rulemaking by the Department. We anticipate that the amount of the security will be tied to the number of clients served by the certifying agent and the anticipated costs of certification that may be incurred by its clients in the event that the certifying agent's accreditation is suspended or revoked. We anticipate that the security may be in the form of cash, surety bonds, or other financial instrument (such as a letter of credit) administered in a manner comparable to cash or surety bonds held under the Perishable Agricultural Commodities Act.

Certification—Changes Based on Comments

This subpart differs from our first proposal in several respects as follows:

(1) *On-site Inspection Requirements.* We have amended the general requirements provision concerning on-site inspections. The first proposal required production and handling operations to permit an annual on-site

inspection by the certifying agent. A few commenters suggested that the term, ''inspection,'' be made plural and that the section citations be amended to include the section on additional inspections. The section on additional inspections addressed the certifying agent's authority to perform on-site inspections in addition to the annual on-site inspection.

The commenters believe that ''inspection'' should apply to all situations when on-site inspections must be or could be performed, including the initial site inspection for a new certification as well as, for instance, compliance inspections. Commenters believe that these changes are needed to assure access to the certified operation and that an applicant's agreement to permit any and all necessary on-site inspections should be clearly stated as a general requirement for certification.

We had intended for the general requirements provision concerning on-site inspections to include all instances in which an on-site inspection might be appropriate. Accordingly, we have amended the requirement by replacing the phrase, ''an annual on-site inspection,'' with the phrase, ''on-site inspections.'' This terminology would cover initial, annual, and additional inspections needed for certification, continuation of certification, and to determine whether the operation is in compliance with program requirements. To ensure complete access to the production or handling operation for the purpose of conducting on-site inspections and determining compliance with the requirements of the National Organic Program (NOP), we have added a requirement that the operation permit complete access to the production or handling operation, including noncertified areas and structures. The general requirements provision on on-site inspections is found at § 205.400(c).

(2) *Providing Access to Records.* We have clarified the meaning of providing access to the records that the certified operation must maintain by adding ''during normal business hours for review and copying'' to the regulation. The first proposal required that certified organic operations maintain records for not less than 5 years from the date of their creation. It also required the certified operation to allow authorized representatives of the Secretary, the applicable governing State official, and the certifying agent access to such records to determine compliance with the Act and regulations.

Several comments were received regarding these recordkeeping requirements. Most of these comments were received from organic producer organizations and certifying agents. A few commenters questioned the necessity of maintaining records for 5 years, requested a different period for different records, and requested clarification on the meaning of providing access. Section 6511(d) of the Act requires organic production or handling operations to maintain records for 5 years. Accordingly, we have made no change to the retention period in this proposal. The clarification on the meaning of providing access to records is found at § 205.400(d).

(3) *Notification of Drift.* We have amended the requirement that production and handling operations immediately notify the certifying agent concerning any application of a prohibited substance by adding the phrase, ''including drift.'' A few commenters suggested adding a requirement that the certified operation notify the certifying agent when an organically certified field is contaminated by drift. They stated that drift is the most common reason for prohibiting the organic label on otherwise organically produced product.

We agree that the certified operation should immediately report any drift of a prohibited substance onto an organic field to its certifying agent. Accordingly, § 205.400(f)(1) provides that an applicant seeking to receive or maintain organic certification must immediately notify the certifying agent concerning any application, including drift, of a prohibited substance. This provision applies to new applicants as well as to ongoing certified operations. Contamination by drift could occur during the time period between application for and approval of certification. Accordingly, an applicant for certification would be required to notify the certifying agent of any contact with a prohibited substance.

(4) *Applicant Requirements.* We have added the requirement that applicants for certification include other information necessary to determine compliance with the Act and regulations. Commenters suggested that the we add a provision to the application regulations requiring applicants for certification to submit other information deemed necessary by the certifying agent. They stated that this authority is needed to assure that applicants are fully cooperative and responsive throughout the certification process.

We believe the requested authority would be helpful to certifying agents. However, we believe the authority for certifying agents to request other information they deem necessary must be qualified by the requirement that the information be necessary to determine compliance with the Act and regulations. Accordingly, we have provided certifying agents with the authority to request other information necessary to determine compliance with the Act and regulations. This addition is found at § 205.401(d).

(5) *Requirement for Notification of Noncompliance.* We have replaced the first proposal's section on ''preliminary evaluation of an applicant for certification'' with a new section on ''review of application.'' We have revised the section to clarify that certifying agents will issue notices of noncompliance only after the initial on-site inspection of an applicant's operations. We also allow applicants to voluntarily withdraw their application for certification at any time.

This change was in response to comments on the first proposal's requirement that applicants for certification report, to the certifying agent with whom they have applied, the receipt of a notice of noncompliance received from another certifying agent. A State organic growers association stated that this requirement places a stigma on applicants who, for example, applied for certification before the operation was ready to meet all requirements for certification. This commenter suggested that notification of previous denial only be required after an applicant has been denied certification. The commenter went on to say that, if the language in the original proposal is maintained, there should be a time limit of within the past 3 or 5 years of denial. Another commenter suggested that certifying agents have the option of recommending that noncompliant applicants withdraw their applications rather than be denied certification. As an alternative, one of the commenters suggested that denial of certification to an unprepared applicant should not have to be reported on a subsequent application to another certifying agent unless the first noncompliance notice led to a denial of certification.

We continue to believe that it is in the best interest of the program and consumers to require applicants to report the receipt of notices of noncompliance and denial of certification to any certifying agent to whom they make application. However, we also believe that operations should not be unnecessarily stigmatized because they applied for certification before the operation was ready to meet all requirements for certification.

Accordingly, this proposal requires that an applicant report the receipt of a notice of noncompliance or denial of certification to any certifying agent to whom application is made but allows applicants to voluntarily withdraw their application at any time.

An applicant that voluntarily withdrew its application prior to the issuance of a notice of noncompliance would not be issued a notice of noncompliance. Similarly, an applicant that voluntarily withdrew its application prior to the issuance of a notice of certification denial would not be issued a notice of certification denial.

(6) *Residue Testing.* We have revised the verification of information provisions to provide that the on-site inspection of an operation must verify that prohibited substances have not been and are not being applied to the operation. Verification would be through means which, at the discretion of the certifying agent, may include the collection and testing of soil; water; waste; seeds; plant tissue; and plant, animal, and processed products samples.

Comments from certifying agents suggested adding a provision that would allow a certifying agent to collect samples of substances from the operation for residue testing. They stated that such testing is necessary to detect unreported use or accumulation of prohibited substances. Section 6506(a)(6) of the Act requires periodic residue testing by certifying agents of products produced by certified organic operations. It is our intent that collection of samples for residue testing may be conducted as part of initial on-site inspections, as well as during on-site inspections of certified organic operations. The inspector could collect samples of soil; water; waste; seeds; plant tissues; and plant, animal, and processed products. Collection of such samples would be at the discretion of the certifying agent. To maintain the integrity of the inspection process, it is necessary that the certifying agent or inspector collect such samples first hand, rather than receive the samples from the applicant. We have made the requested addition at § 205.403(c)(3).

(7) *Postinspection Conference Requirements.* We have amended the postinspection conference requirements. We have changed all references to ''postinspection conference'' to ''exit interview.'' We have removed the requirement that the inspector discuss his or her observations regarding the operation's compliance or ability to comply with the Act and regulations. This requirement has been replaced with the requirement that the inspector confirm the accuracy and completeness of inspection observations and information gathered during the on-site inspection. The inspector can use the exit interview to request any additional information necessary to establish eligibility for certification. Finally, this amendment requires the inspector to raise and discuss during the exit interview any known issues of concern.

Certifying agents commented that it would be inappropriate for an inspector to discuss observations and possible violations of compliance at an exit interview. They stated that requiring exit interviews places the inspector in the position of providing observations and feedback to the applicant before the inspector is able to confer with the certifying agent. Some certifying agents expressed concern that exit interviews could result in inspectors providing false or misleading information to the applicant. Some commenters requested that exit interviews be held only for the purpose of checking the accuracy and completeness of inspector observations made and the information obtained during the inspection. Other commenters requested that the exit interviews requirement be removed from these regulations.

We believe that qualified inspectors should be capable of competently discussing an applicant's compliance or ability to comply with these regulations. However, we also believe that a certifying agent should have the opportunity to decide whether to allow its inspectors to discuss issues of compliance at an exit interview. Accordingly, we have amended the exit interview requirements as noted above. These amended requirements are found at § 205.403(d).

(8) *Additional Inspections.* We have added a new provision that additional inspections may be announced or unannounced at the discretion of the certifying agent or as required by the Administrator or State program's governing State official. This change was made in response to commenters who requested the addition of a requirement that certifying agents conduct unannounced site visits in addition to the initial and annual inspections. We believe that unannounced on-site inspections are appropriate and valuable in both monitoring and investigating compliance with the Act and regulations. The requested addition is found at § 205.403(a)(2)(iii).

(9) *Requirements for Written Inspection Reports.* We have removed the requirement that the certifying agent require an inspector to prepare and submit to the certifying agent, within 30 days of completing an inspection, a written report that describes the inspector's observations and assessments of the inspected operation's compliance or ability to comply with the Act and regulations. A variety of comments, pro and con, were received on this requirement. Certifying agents questioned whether the 30-day timeframe was reasonable. Other commenters suggested that, rather than specifying a time period, the section should stress the need for timely reporting. A commenter suggested that an inspector's observations and assessments on the inspected operation include the inspector's recommendations on approval of certification. Other commenters stated that the requirement amounted to micro management of a certifying agent's business. This latter group of commenters believe that the setting of a time period for inspector reporting involves a policy matter that should be determined by the certifying agent. We agree with the commenters who stated that setting deadlines for the filing of inspection reports is an internal policy matter better left to certifying agents.

We believe that policies and procedures regarding inspector reporting are the purview of the certifying agent. Certifying agents would be expected to develop and implement inspector reporting requirements for on-site inspections internal to their own operations. Such policies and procedures and a certifying agent's performance in making timely certification decisions would be subject to review during accreditation and reaccreditation of the certifying agent. Accordingly, we have removed the provision.

Removal of this requirement does not eliminate the need for a written on-site inspection report or the importance of timely inspection reporting by an inspector to the certifying agent. Certifying agents are expected to make timely decisions regarding whether to certify an applicant and whether a certified operation is in compliance with the Act and regulations. Applicants with complaints regarding timeliness of service could forward their complaints to the Administrator.

(10) *Responsibilities of Certifier in the Application Process.* We have replaced the list of requirements to be reviewed by a certifying agent in determining an applicant's eligibility for certification with a general statement on determination of eligibility. Commenters requested the addition of a provision requiring certifying agents to verify implementation of the organic system plan. We agree that an on-site

inspection of an ongoing operation must include assessment of the operation's application of its organic system plan. Because an on-site inspection of a new applicant's operation would be conducted at a time when the operation can demonstrate its organic capabilities, the operation must be able to show that it is satisfactorily carrying out its organic system plan.

It was our intent that certifying agents would verify implementation of the applicant's organic system plan during the certifying agent's review of the on-site inspection report and application. However, our list of requirements to be reviewed by a certifying agent in determining an applicant's eligibility for certification did not specifically reference verification of implementation of the organic system plan. We have decided to replace the list of requirements to be reviewed with a general statement on determination of eligibility. This statement provides: ''If the certifying agent determines that the organic system plan and all procedures and activities of the applicant's operation are in compliance with the requirements of this part and that the applicant is able to conduct operations in accordance with the plan, the agent shall approve certification.'' We believe this general statement, in combination with the requirement that the certifying agent review the application, the on-site inspection report, the results of any analyses for substances conducted, and any additional information requested from or supplied by the applicant, adequately addresses the commenters' concerns. This revision to the approval of certification requirements is found at § 205.404(a).

(11) *Information Included on the Certificate of Organic Operation.* We have amended the regulations specifying what information must be included on a certificate of organic operation. Comments received from organic operations, certifying agents, and consumers recommended that certifying agents provide additional information on certificates of organic operation. Specifically, they recommended that all certificates include: (1) The certifying agent's name and address; (2) an expiration date; (3) the physical location of certified operations, including separate fields and facilities; (4) the name of the certified operation's contact person responsible for compliance with program requirements; (5) the name and address of the certified operation; and (6) the crops and products certified. The commenters believe such information, especially a date on which the certificate expires, to be vital to assuring accountability and compliance with the program.

We believe it would be beneficial to persons with concerns regarding a certified production or handling operation to have ready access to information concerning the name, address, and telephone number of the certifying agent. Further, because the certificate of organic operation would be an official document of the certifying agent, it would be appropriate for this information to appear on every certificate. Accordingly, we have added the name, address, and telephone number of the certifying agent to the information which must be included on every certificate. This addition is found at § 205.404(b)(4).

We disagree with the commenters who requested that certificates of organic operation display an expiration date. We believe annual expiration of a certificate would place an unnecessary burden on certifying agents and certified operations. Annual expiration of certificates is also inconsistent with the fact that an operation's certification does not expire. In fact, once an operation is certified as an organic operation, its certification remains in effect until surrendered by the certified operation or suspended or revoked by the certifying agent, the State program's governing State official, or the Administrator. All certified operations are required to annually update their organic system plan. If the updated plan causes information on the certificate to be incorrect, the certifying agent will issue a new certificate with the correct information. This provides a mechanism for ensuring that certificates are updated as necessary on an annual bases. We have not included the recommended addition in this proposal.

For clarification, we have added § 205.404(c). This section provides that once certified a production or handling operation's organic certification continues in effect until surrendered by the organic operation or suspended or revoked by the certifying agent, the State program's governing State official, or the Administrator.

We disagree with the commenters who requested that certificates display the physical location of certified operations, including separate fields and facilities, and the name of the certified operation's contact person responsible for compliance with program requirements. We believe that the location of a certified operation's fields and facilities has no relationship to the operation's status as a certified organic operation. Therefore, such information should only be made available with the written consent of the certified operation. The name of the certified operation's contact person would be releasable information. We believe, however, that such detail is unnecessarily burdensome to the certifying agent and will only serve to clutter the certificate. By requiring the name, address, and telephone number of the certifying agent, as noted above, the certificate would provide interested persons with a contact for obtaining releasable information concerning the certified operation. Further, the certifying agent is the first line of compliance under this program and, as such, is the person to whom all questions and concerns should be addressed about certified operations.

We agree with the commenters who requested that certificates display the name and address of the certified operation because such information is potentially beneficial to consumers. Accordingly, we have added the name and address of the certified operation to the information which must be included on every certificate. This addition is found at § 205.404(b)(1).

The first proposal required that the certificate list the category(ies) and type(s) of products produced by the certified operation. Commenters were apparently confused about the meaning of category(ies) and type(s) of products. We have, therefore, revised the requirement to provide that a certificate of organic operation would specify the categories of organic operation, including, crops, wild crops, livestock, or processed products produced by the certified operation. This revision is found at § 205.404(b)(3).

(12) *Certifiers Authority to Deny Certification.* We have added authority for certifying agents to deny certification to applicants who do not meet the requirements for certification. The first proposal required certifying agents to forward their recommendations for denial of certification to the Administrator. Commenters stated that authority for denial of certification should rest with the certifying agents. They also contended that referral to the Administrator for denial of certification establishes a bureaucratic process, which would create unnecessary delays to the denial process and increased cost to applicants. Many commenters suggested the appeals process is sufficient to protect the interests of the Secretary.

We have determined that it is reasonable to authorize certifying agents to deny certification. Denial by the certifying agent would provide the applicant with a more timely decision on its eligibility for certification. A more timely decision would provide an

earlier opportunity for applicants to appeal a denial of certification. Authority for certifying agents to deny certification to applicants who do not meet the requirements for certification is found at section 205.405.

This proposal requires certifying agents to evaluate the applicant's corrective actions taken and supporting documentation or written rebuttal submitted in response to a notification of noncompliance. Certifying agents are authorized to perform on-site inspections to verify corrections to deficiencies or statements contained in a rebuttal, if necessary, to assure full compliance with the certification requirements. The certifying agent will issue the applicant a written notice of denial of certification if the corrective action or rebuttal is not sufficient for the applicant to qualify for certification.

We believe the denial of certification provisions should clearly state an applicant's options and rights upon receiving a notice of denial of certification. Accordingly, § 205.405(c)(1)(ii) provides that a notice of denial of certification must state the reasons for denial and the applicant's right to reapply for certification, request mediation, or file an appeal. An applicant who has received a written notice of denial of certification may apply for certification again at any time with any certifying agent, may request mediation to resolve a dispute with the certifying agent, or may file an appeal with the Administrator as outlined in § 205.663 for mediation and § 205.681 for appeals. Applicants subject to an approved State program would seek mediation or appeal in accordance with the rules of the approved State program.

(13) *Willful Misrepresentations or False Statements by Applicants.* We have included authority for certifying agents to deny certification if the agent has reason to believe that the applicant has willfully made a false statement or otherwise purposefully misrepresented its operation or compliance with the certification requirements. Such false statements would, in most cases, be verified during an on-site inspection. This authority was provided to certifying agents in the first proposal relative to certified operations. The first proposal, however, did not reference an applicant's willful making of a false statement or otherwise purposefully misrepresenting its operation or compliance with the certification requirements. Certifying agents commented that applicants for certification also may make false statements or misrepresent facts. They suggested that the regulations reflect a certifying agent's authority in such cases. We agree with the commenters and have added § 205.405(f). This section authorizes denial of certification without first issuing a notification of noncompliance when the certifying agent has reason to believe that the applicant has willfully made a false statement or otherwise purposefully misrepresented its operation or compliance with the certification requirements.

Certification—Changes Requested But Not Made

This subpart retains from our first proposal regulations on which we received comments as follows:

(1) *Timeliness of Applicant's Notification to Certifiers.* A commenter suggested that ''immediately'' in the requirement that production and handling operations immediately notify the certifying agent concerning any application of a prohibited substance be replaced with ''within 2 days.'' No justification was given for the recommended change, and the change has not been made. ''Immediately notify'' means that the applicant or certified operation must at once notify its certifying agent upon learning that a prohibited substance has come in contact with any portion of its operation or production. The certifying agent will evaluate the circumstances surrounding the event and decide whether the certified operation acted within the intent of this requirement. This requirement is found at § 205.400(f)(1).

(2) *Notification of Changes to Certifying Agent.* Commenters questioned how the certified operation would know what changes in its certified operation or any portion of its operation would require reporting to its certifier. Certified operations are responsible for being familiar with the requirements of the Act and these regulations. Further, they have an obligation to contact their certifying agent when they have questions regarding compliance with this program. As a rule, certified operations should contact their certifying agent whenever the change is not covered under their approved organic system plan. The requirement that a certified operation notify its certifying agent concerning any change in its certified operation that may affect its compliance with the Act and regulations is found at § 205.400(f)(2).

(3) *Tests for Soil Fertility and Irrigation Water.* Certifying agents suggested that applicants for certification be required to submit test results for soil fertility and irrigation water quality to prove compliance with the NOP. We recognize that increasing soil fertility through organic production practices is a goal of the organic industry. However, soil fertility will not qualify or disqualify an applicant for organic certification. An applicant who has independently had such tests conducted may, but is not required to, include them with the application. While the Act requires that handlers only use in their products water that meets all Safe Drinking Water Act requirements, no similar requirements are placed on producers and the water they use to irrigate their crops. For these reasons, we are not requiring applicants for certification to submit soil fertility or irrigation water quality test results.

(4) *Timeliness of On-site Inspection.* The first proposal required a certifying agent to conduct an initial on-site inspection within a reasonable time following a favorable preliminary evaluation of an application for certification. Several commenters asked what constitutes reasonable time between submission of an application and an on-site inspection. Others stated that, when determining what constitutes reasonable time, consideration should be given to factors such as when the application was submitted relative to when activities demonstrating compliance can be observed and when the inspection can be scheduled to assure the presence of the applicant.

We stated in the first proposal that we did not specify a time within which an inspection must be conducted because the time would vary according to when the application was submitted and the type of operation to be inspected. Timely service will be in the best interest of certifying agents since applicants may forward complaints regarding service to the Administrator. Such complaints could have an impact on a certifying agent's reaccreditation or continued accreditation. Further, our original position is consistent with those commenters requesting flexibility in determining what constitutes reasonable time. Accordingly, we have made no changes in this proposal regarding what constitutes reasonable time. This requirement is found at § 205.403(b).

(5) *Additional On-site Inspections.* Some organic associations asked what would trigger a decision to conduct an additional on-site inspection. Commenters expressed the concern that certifying agents could conduct additional, unneeded inspections at the expense of operators who would have to pay the costs of the inspections. Other commenters asked who would pay for the additional on-site inspections. Some certifying agents suggested that guidelines need to be established under

which additional inspections must be conducted. A certifying agent suggested that additional inspections could be conducted based on the inspector's observations, the certifier's recommendation, and, possibly, third-party complaints.

The authority for on-site inspections is necessary for monitoring and compliance purposes at the discretion of the certifying agent, the Administrator, or a State program's governing State official. Such on-site inspections would likely be precipitated by reasons to believe that the certified operation was operating in violation of one or more requirements of the Act or these regulations. The on-site inspection would be conducted, as necessary, to obtain information needed to determine compliance with identified requirements.

We believe policies and procedures regarding additional inspections, including how the costs of such inspections are handled, are the responsibility of each certifying agent. Misuse of such authority would be subject to review by the Department during its evaluation of a certifying agent for reaccreditation and at other times in response to complaints. Certified production and handling operations could file complaints with the Department at any time should they believe a certifying agent abuses its authority to perform additional inspections. Accordingly, we have made no changes in this proposal based on these comments.

(6) *Annual Renewal of Certification.* Commenters requested annual renewal of certification rather than updates to a continuing certification program. Other commenters requested that the notice of certification have an ending date or be issued for an established period of time. An industry association commented that the proposed continuation of certification regulations requires a certified operation to annually certify that it is complying with the Act and these regulations. This commenter stated that the proposed continuation of certification procedures changes the process of recertification to one more closely resembling self-certification. Another industry association stated that certification until surrendered by the certified operation or suspended or revoked would make the assurance of compliance extremely difficult, if not impossible. This commenter further stated that certifying agents will be unable to effectively monitor applicants or gain needed information. This commenter recommended that renewal paperwork include the items specified in the continuation of certification regulations but that certifying agents use their own discretion as to the forms and information needed. Similarly, a certifying agent commented that certification must be renewed with an application on an annual basis and that no operation can be certified for life. This commenter recommended requiring a yearly application and other documentation deemed necessary by the certifying agent.

We disagree with the commenters. We prefer continuous certification due to the very real possibility that the renewal process might not always be completed before expiration of the certification period. Expiration of the certification period would result in termination of the operation's certification. Even a short period of interruption in an operation's organic status could have severe economic ramifications. Further, we believe that a regular schedule of expiration of certification is unnecessary inasmuch as all certified operations are required to annually update their organic system plan and submit any changes to their certifying agent. Accordingly, this proposal retains the provision for continuous certification.

(7) *Timing of On-site Inspections.* A State certifying agent and an industry organization stated that requiring an on-site inspection after receipt of the renewal application is not consistent with current practice. The State certifying agent stated that it moved the renewal date to January 1 of each year to make the renewal process less burdensome to its certified producers. This commenter went on to say that the annual inspection conducted during the appropriate growing or processing season is used to evaluate the organic operation in the renewal process. The State certifying agent further stated that an additional inspection at renewal time would not be useful if it was not an appropriate time to observe production practices at the organic operation. Both commenters requested elimination of the requirement that the certifying agent arrange and conduct an on-site inspection following receipt of the operation's annual submission of information. These commenters also requested that a determination of noncompliance be based on on-site inspections conducted during the previous certification year and a review of the information annually submitted by the certified operation.

We disagree with the commenters. Certifying agents are required to schedule on-site inspections for a time when land, facilities, and activities that demonstrate the operation's compliance or capability to comply with the applicable production or handling provisions of the NOP may be observed. Accordingly, the initial certification must have followed an on-site inspection performed when the operation was able to demonstrate its compliance or capability to comply. The certified operation, therefore, should be fulfilling its annual continuation of certification obligations at a time when it can demonstrate its compliance with the Act and regulations. The commenters' recommendations are not accepted.

Certification—Additional Provisions

Upon further review of the certification provisions in the first proposal, we have decided to propose the following additions and changes.

(1) *Requirements for Business Information.* We have revised the business information required of all applicants for certification as an organic operation. First, the application must include the name of the person who completed the application. Certifying agents will use this information when following up on information within the application. Second, we have removed the requirement that the application include the names of personnel responsible for maintaining compliance with the Act and regulations. We believe this information is unnecessary since the person responsible for overseeing compliance is the certifying agent. Third, we have added the requirement that when the applicant is a corporation, the application must include the name, address, and telephone number of the person authorized to act on the applicant's behalf. Fourth, we have removed the requirement that the applicant for certification submit a statement of compliance. We have also removed the ''Statement of Compliance'' section which required the submission of a statement of compliance with the application for certification. We have removed this requirement because we have determined that it creates an unnecessary burden upon applicants for certification. Section 205.400(a) requires that a person seeking to receive or maintain organic certification must comply with the Act and applicable production and handling regulations. Accordingly, it is unnecessary to require a separate document through which the applicant for certification agrees to comply with the Act and regulations. The requirements for the submission of business information with the request for certification are found at § 205.401(b).

(2) *Disclosure of Previous Applications.* The first proposal

required that the request for certification include the name(s) of any organic certifying agent(s) to which application had previously been made, the year(s) of application, and the outcome of the application(s) submission. We have amended this requirement by adding ''including a copy of any notification of noncompliance or denial of certification issued to the applicant for certification and a description of the actions taken by the applicant to correct the deficiencies noted in the notification of noncompliance, including evidence of such correction.'' We have added this provision to clarify what we mean by ''the outcome of the application(s) submitted.'' This provision is found at § 205.401(c).

(3) *On-site Inspections.* We have combined the arranging for inspection, verification of information, postinspection conference, and additional inspection regulations of the first proposal into a new on-site inspections section, § 205.403. We made this change for the purposes of clarification and the removal of redundancies.

(4) *Additional Inspections.* We have revised the on-site inspections requirements to provide that a State program's governing State official may require a certifying agent to conduct an additional inspection of a production or handling operation to determine the operation's compliance with the Act and these regulations. We have provided State program governing State officials with authority to require additional inspections because such officials will have compliance responsibilities under their State programs and will need such authority to carry out their responsibilities. These requirements are found at § 205.403(a).

(5) *Notifications of Noncompliance.* We have added at § 205.405(b) a provision which identifies for applicants for certification what their options are when they receive a notification of noncompliance. Such applicants may correct the deficiencies and submit a description and supporting documentation of correction to the certifying agent, correct the deficiencies and submit a new application to another certifying agent along with the notification of noncompliance and a description and supporting documentation of correction, or submit written information to the certifying agent to rebut the noncompliance described in the notification of noncompliance.

(6) *Reapplying After a Notice of Noncompliance or Denial of Certification.* We have added a new provision which requires a certifying agent to treat an application for certification as a new application when such application includes a notification of noncompliance or a notice of denial of certification. While the new application may contain the same organic system plan and other information provided in the unsuccessful application for certification, it must also provide any new information or changes in operations which may have occurred since the filing of the unsuccessful application. The updated information concerning the applicant's operation must include a description of actions taken, with supporting documentation, to correct the deficiencies identified in the notification of noncompliance. This new provision is found at § 205.405(e).

Subpart F—Accreditation of Certifying Agents

This subpart sets forth the requirements for a national program to accredit State and private entities as certifying agents to certify domestic or foreign organic production or handling operations. This subpart also provides that USDA will accept a foreign certifying agent's accreditation to certify organic production or handling operations if: (1) USDA determines, upon the request of a foreign government, that the standards under which the foreign government authority accredited the foreign certifying agent meet the requirements of this part; or (2) the foreign governmental authority that accredited the certifying agent acted under an equivalency agreement negotiated between the United States Government and the foreign government.

This National Organic Program (NOP) accreditation process will facilitate national and international acceptance of United States organically produced agricultural commodities. The accreditation requirements in these regulations will replace the organic assessment voluntary, fee-for-service program, established by AMS under the Agricultural Marketing Act of 1946. That assessment program verifies that State and private organic certifying agents comply with the requirements prescribed under the International Organization for Standardization/International Electrotechnical Commission Guide 65, ''General Requirements for Bodies Operating Product Certification Systems'' (ISO Guide 65).[2] ISO Guide 65 provides the general requirements that a certifying agent would need to meet to be recognized as competent and reliable. That assessment program was originally established to enable organic certifying agents in the absence of a U.S. national organic program to comply with European Union (EU) requirements beginning on June 30, 1999. That assessment program verifies that State and private organic certifying agents are operating third-party certification systems in a consistent and reliable manner, thereby facilitating uninterrupted exports of U.S. organic agricultural commodities to the EU. ISO Guide 65 is used as a benchmark in developing the accreditation program described in this proposed rule. Certifying agents accredited under the NOP that maintain compliance with the Act and these regulations will meet or exceed the requirements of ISO Guide 65; therefore, the organic assessment program is no longer needed.

Participation in the NOP does not preclude the accredited certifying agent from conducting other business operations, including the certification of agricultural products, practices, and procedures. An accredited certifying agent may not, however, engage in any business operations or activities which would involve the agent in a violation of or a conflict of interest under the NOP.

Proposal Description

The Administrator will accredit qualified domestic and foreign applicants in the areas of crops, livestock, wild crops, or handling or any combination thereof to certify domestic or foreign production or handling operations as certified organic operations. Qualified applicants will be accredited for 5 years.

Application Process. Certifying agents will apply to the Administrator for accreditation to certify production or handling operations operating under the NOP. The certifying agent's application must include basic business information, must identify each area of operation for which accreditation is requested and the estimated number of each type of operation to be certified annually, and must include a list of each State or foreign country where it currently certifies production or handling operations and where it intends to certify such operations.

[2] ISO/IEC Guide 65 is available for viewing at USDA–AMS, Transportation and Marketing Programs, Room 2945-South Building, 14th and Independence Ave., SW, Washington, DC, from 9:00 a.m. to 4:00 p.m., Monday through Friday (except official Federal holidays). A copy may be obtained from the American National Standards Institute, 11 West 42nd Street, New York, NY 10036; Website: www.ansi.org; E-mail: ansionline@ansi.org; Telephone: 212–642–4900; Facsimile: 212–398–0023.

Certifying agents must also submit personnel, administrative, conflict of interest, current certification, and other documents and information to demonstrate their expertise in organic production or handling techniques, their ability to comply with and implement the organic certification program, and their ability to comply with the requirements for accreditation.

The administrative information submitted by the applicant should include copies of their procedures for certifying operations, for ensuring compliance of their certified operations with the Act and regulation, for complying with recordkeeping requirements, and for making information available to the public about certified operations. The procedures for certifying operations encompass the processes used by the certifying agent to evaluate applicants, make certification decisions, issue certification certificates, and maintain the confidentiality of any business information submitted by the certified operation. The procedures for ensuring compliance of the certified operations would include the methods used to review and investigate certified operations, for sampling and residue testing, and to report violations.

The personnel information submitted with the application should demonstrate that the applicant uses a sufficient number of adequately trained personnel to comply with and implement the organic certification program. The certifying agent will also have to provide evidence that its responsibly connected persons, employees, and contractors with inspection, analysis, and decision-making responsibilities have sufficient expertise in organic production or handling techniques to successfully perform the duties assigned. They must also show that these employees have revealed existing or potential conflicts of interest.

Applicants who currently certify production or handling operations must also submit a list of the production and handling operations currently certified by them. For each area in which the applicant requests accreditation, the applicant should furnish copies of inspection reports and certification evaluation documents for at least three operations. If the applicant underwent any other accrediting process in the year previous to the application, the applicant should also submit the results of the process.

Certifying agents are prohibited from providing advice concerning organic practices or techniques to any certification applicant or certified operation for a fee, other than as part of the fees under the certification program. The Administrator will provide oversight of the fees to ensure that the schedule of fees filed with the Administrator is applied uniformly and in a nondiscriminatory manner. The Administrator may inform a certifying agent that its fees appear to be unreasonable and require that the certifying agent justify the fees. The Administrator will investigate the level of fees charged by an accredited certifying agent upon receipt of a valid complaint or under compelling circumstances warranting such an investigation. Certifying agents are prohibited from providing advice concerning organic practices or techniques to any certification applicant or certified operation for a fee, other than as part of the fees under the certification program.

Statement of Agreement. Upon receipt of the certifying agent's application for accreditation, the Administrator will send a statement of agreement to the person responsible for the certifying agent's day-to-day operations for signature. The statement of agreement affirms that, if granted accreditation as a certifying agent under this subpart, the applicant will carry out the provisions of the Act and the regulations in this part. Accreditation will not be approved until this statement is signed and returned to the Administrator.

The statement of agreement will include the applicant's agreement to accept the certification decisions made by another U.S. Department of Agriculture (USDA)-accredited certifying agent as equivalent to its own and the applicant's agreement to refrain from making false or misleading claims about its accreditation status, the USDA accreditation program, or the nature or qualities of products labeled as organically produced. Further, the statement will include the applicant's agreement to pay and submit the fees charged by AMS and to comply with, implement, and carry out any other terms and conditions determined by the Administrator to be necessary. Applicants are also required to affirm through this statement of agreement that they will: (1) Conduct an annual performance appraisal for each inspector used; (2) have an annual program evaluation conducted of their certification activities by their staff, an outside auditor, or a consultant who has expertise to conduct such evaluations; and (3) implement measures to correct any deficiencies in compliance with the Act and regulations identified in an inspector performance appraisal or program evaluation.

A private entity certifying agent must additionally agree to hold the Secretary harmless for any failure on the agent's part to carry out the provisions of the Act and regulations. A private entity certifying agent's statement will also include an agreement to furnish reasonable security for the purpose of protecting the rights of operations certified by such certifying agent. Such security will be in an amount and according to such terms as the Administrator may by regulation prescribe. A private entity certifying agent must agree to transfer all records or copies of records concerning its certification activities to the Administrator if it dissolves or loses its accreditation. A private entity certifying agent must also agree to make such records available to any applicable State program's governing State official.

Approval of Accreditation. Upon receiving all the required information, including the statement of agreement, and the required fee, the Administrator will determine if the applicant meets the requirements for accreditation. The Administrator's determination will be based on a review of the information submitted and, if necessary, a review of the information obtained from a site evaluation. The Administrator will notify the applicant of approval of accreditation in writing. The notice of accreditation will state the area(s) for which accreditation is given, the effective date of the accreditation, and, for a private-entity certifying agent, the amount and type of security that must be established.

Certifying agents who apply for accreditation and do not meet the requirements for accreditation will be provided, in accordance with § 205.665, with a notification of noncompliance and given an opportunity to come into compliance. After receipt of a notification of noncompliance, the applicant may submit a description of the actions taken to correct the noted deficiencies and evidence demonstrating such corrections or file an appeal with the Administrator. If the applicant is successful in its appeal or provides acceptable evidence demonstrating correction of the deficiencies, the Administrator will notify the applicant of accreditation. If the applicant fails to correct the deficiencies, fails to report the corrections by the date specified in the notification of noncompliance, fails to file an appeal by the date specified in the notification of noncompliance, or is unsuccessful in its appeal, the Administrator will issue a written notification of accreditation denial to the applicant. An applicant who has

received written notification of accreditation denial may apply for accreditation again at any time.

Once accredited, a certifying agent may establish a seal, logo, or other identifying mark to be used by certified production and handling operations. However, the certifying agent may not require use of its seal, logo, or other identifying mark on any product sold, labeled, or represented as organically produced as a condition of certification. The certifying agent also may not require compliance with any production or handling practices other than those provided for in the Act and regulations as a condition for use of its identifying mark. This provision does not apply to States with more restrictive requirements approved by the Administrator or private-entity certifying agents certifying operations within such States.

Site Evaluations. One or more representatives of the Administrator will perform site evaluations for each certifying agent in order to examine the certifying agent's operations and to evaluate compliance with the Act and regulations. Site evaluations will include an on-site review of the certifying agent's certification procedures, decisions, facilities, administrative and management systems, and production or handling operations certified by the certifying agent. A site evaluation of an accreditation applicant will be conducted before or within a reasonable time after issuance of the applicant's notification of accreditation. Certifying agents will be billed for each site evaluation conducted in association with an initial accreditation, amendments to an accreditation, and renewals of accreditation. Certifying agents will not be billed by USDA for USDA-initiated site evaluations conducted to determine compliance with the Act and regulations.

As noted above, a certifying agent may be accredited prior to a site evaluation. If the Administrator finds, following the site evaluation, that an accredited certifying agent is not in compliance with the Act or regulations, the Administrator will issue the certifying agent a written notification of noncompliance. If the certifying agent fails to correct the deficiencies, report the corrections by the date specified in the notification of noncompliance, or file an appeal by the date specified in the notification of noncompliance, the Administrator will begin proceedings to suspend or revoke the accreditation. A certifying agent that has had its accreditation suspended may apply for accreditation again at any time. A private-entity certifying agent whose accreditation is revoked will be ineligible for accreditation for a period of not less than 3 years following the date of such determination.

Peer Review Panels. The Administrator may establish a peer review panel to assist in evaluating applicants for accreditation. Peer review panels will be used at the discretion of the Administrator following the site evaluation of a certifying agent, but under no circumstances will the Administrator convene a peer review panel when the peer review pool does not contain sufficient persons qualified to peer review the certifying agent.

To be eligible to serve on a peer review panel, the applicant for membership in the peer review pool must provide the Administrator with a written description and, upon request, supporting documentation of its qualifications to conduct peer reviews. The applicant for membership in the peer review pool must address possible limitations on availability to serve and include information concerning commercial interests with any person who may seek to become or who is an accredited certifying agent. No person who has or has had a commercial interest, including an immediate family interest or the provision of consulting services, in an applicant for accreditation or renewal of accreditation will be appointed to a panel evaluating such applicant for accreditation or renewal of accreditation. Persons accepted to the pool may serve until notified that their appointment has been rescinded by the Administrator or until they are no longer qualified, whichever occurs first. Peer reviewers will serve without compensation.

Peer review panels will consist of at least three but no more than five members. A Department representative will preside over the panel. A peer review panel will include no fewer than two members who possess sufficient expertise in the certifying agent's areas of accreditation. Peer review panels may include up to two members with expertise in other disciplines, including organizational management and finance; member(s) from the approved State organic certification program when the applicant is a private entity that will operate within the State; and member(s) from a foreign government's organic program when the applicant is a private entity that will operate within the country.

Each person on a peer review panel must individually review the site evaluation report prepared by the Department's evaluator(s) and any other information that may be provided by the Administrator relevant to continuing or renewing the accreditation status of a certifying agent. Information about the certifying agent received as part of the review process is confidential information, and peer reviewers must not release, copy, quote, or otherwise use material from the information received other than in the report required to be submitted. Each peer reviewer must agree to treat the information received for review as confidential.

A peer review panel meeting will be held solely for the purposes of exchanging information. Any meeting or conference call will be conducted in a manner that will ensure the actions of panel members are carried out on an individual basis with any opinions and recommendations by a member being made individually. We do not believe that it is usual to have consensus in peer review or that it is the best use of USDA resources or the time of peer reviewers to seek consensus under a single report. Further, requiring a consensus report may make peer review panels subject to the Federal Advisory Committee Act, which might stifle meaningful dialog between reviewers, increase the cost and time required of peer reviewers for peer review service, and result in problems obtaining volunteers for service on peer review panels.

Peer review panel members will prepare and submit individual reports, including recommendations, to the Administrator regarding a certifying agent's ability to conduct and perform certification activities. The Administrator will consider the reports when determining whether to continue or renew the certifying agent's accreditation. Copies of the peer review panel reports will be provided, upon request, to the certifying agent, and written responses from the certifying agent may be submitted for consideration by the Administrator. Copies of peer review panel reports may be provided to any person requesting such reports under the Freedom of Information Act.

Continuing Accreditation. An accredited certifying agent must submit annually to the Administrator, on or before the anniversary date of the issuance of the notification of accreditation, the following reports and fees: (1) A complete and accurate update of its business information, including its fees, and information evidencing its expertise in organic production or handling and its ability to comply with these regulations; (2) information supporting any changes requested in the areas of accreditation; (3) a description of measures implemented in the

previous year and any measures to be implemented in the coming year to satisfy any terms and conditions specified in the most recent notification of accreditation or notice of renewal of accreditation; (4) the results of the most recent inspector performance appraisals and annual program evaluation and a description of adjustments to the certifying agent's operation and procedures implemented or to be implemented in response to the appraisals and evaluation; and (5) the required AMS fees.

Certifying agents will keep the Administrator informed of their certification activities by: (1) Providing the Administrator with a copy of any notice of denial of certification, notification of noncompliance, notification of noncompliance correction, notification of proposed suspension or revocation, and notification of suspension or revocation issued simultaneously with its issuance; and (2) on a quarterly calendar basis, the name, address, and telephone number of each operation granted certification.

One or more site evaluations will occur during the 5-year period of accreditation to determine whether an accredited certifying agent is complying with the Act and regulations. USDA will establish an accredited certifying agent compliance monitoring program, which will involve no less than one randomly selected site evaluation of each certifying agent during its 5-year period of accreditation. Larger and more diverse operations, operations with clients marketing their products internationally, and operations with a history of problems should expect more frequent site evaluations by USDA. Operations with clients marketing their products internationally will be annually site evaluated to meet the ISO-Guide 61 [3] requirement for periodic surveillance of accredited certifying agents. USDA may also conduct site evaluations during investigations of alleged or suspected violations of the Act or regulations and in followup to such investigations. Such investigations will generally be the result of complaints filed with the Administrator alleging violations by the certifying agent. Compliance site evaluations may be announced or unannounced at the discretion of the Administrator. Certifying agents will not be billed by USDA for USDA-initiated site evaluations conducted to determine compliance with the Act and regulations.

An accredited certifying agent must provide sufficient information to persons seeking certification to enable them to comply with the applicable requirements of the Act and these regulations. The certifying agent must maintain strict confidentiality with respect to its clients and not disclose to third parties (with the exception of the Secretary or the applicable State program's governing State official or their authorized representatives) any business-related information concerning any client obtained while implementing these regulations except as authorized by regulation. A certifying agent must make the following information available to the public: (1) Certification certificates issued during the current and 3 preceding calender years; (2) a list of producers and handlers whose operations it has certified, including for each the name of the operation, type(s) of operation, and the effective date of the certification, during the current and 3 preceding calender years; and (3) the results of laboratory analyses for residues of pesticides and other prohibited substances conducted during the current and 3 preceding calender years. A certifying agent may make other business information available to the public if permitted in writing by the producer or handler. This information will be made available to the public at the public's expense.

An accredited certifying agent must maintain records according to the following schedule: (1) Records obtained from applicants for certification and certified operations must be maintained for not less than 5 years beyond their receipt; (2) records created by the certifying agent regarding applicants for certification and certified operations must be maintained for not less than 10 years beyond their creation; and (3) records created or received by the certifying agent pursuant to the accreditation requirements, excluding any records covered by the 10-year requirement must be maintained for not less than 5 years beyond their creation or receipt. Examples of records obtained from applicants for certification and certified operations include organic production system plans, organic handling system plans, application documents, and any documents submitted to the certifying agent by the applicant/certified operation. Examples of records created by the certifying agent regarding applicants for certification and certified operations include certification certificates, notice of denial of certification, notification of noncompliance, notification of noncompliance correction, notification of proposed suspension or revocation, notification of suspension or revocation, correspondence with applicants and certified operations, on-site inspection reports, documents concerning residue testing, and internal working papers and memoranda concerning applicants and certified operations. Examples of records created or received by the certifying agent pursuant to the accreditation requirements include operations manuals; policies and procedures documents (personnel, administrative); training records; annual performance appraisals and supporting documents; conflict of interest disclosure reports and supporting documents; annual program evaluation working papers, memoranda, letters, and reports; fee schedules; quarterly reports of operations granted certification; application materials submitted to the NOP; correspondence received from and sent to USDA; and annual reports to the Administrator.

The certifying agent must make all records available for inspection and copying during normal business hours by authorized representatives of the Secretary and the applicable State program's governing State official. In the event that the certifying agent dissolves or loses its accreditation, it must transfer to the Administrator and make available to any applicable State program's governing State official all records or copies of records concerning its certification activities.

Certifying agents are also required to prevent conflicts of interest and to require the completion of an annual conflict of interest disclosure report by all personnel designated to be used in the certification operation. Coverage of the conflict of interest provisions extends to immediate family members of the certifying agent; responsibly connected persons of the certifying agent; and any employee, inspector, contractor, or other personnel of the certifying agent. A certifying agent may not certify a production or handling operation if the certifying agent or a responsibly connected party of such certifying agent has or has held a commercial interest in the production or handling operation, including an immediate family interest or the provision of consulting services, within the 12-month period prior to the application for certification. A certifying agent may certify a production or handling operation if any employee, inspector, contractor, or other personnel

[3] ISO/IEC Guide 61 is available for viewing at USDA–AMS, Transportation and Marketing Programs, Room 2945—South Building, 14th and Independence Ave., SW, Washington, DC, from 9:00 a.m. to 4:00 p.m., Monday through Friday (except official Federal holidays). A copy may be obtained from the American National Standards Institute, 11 West 42nd Street, New York, NY 10036; Website: www.ansi.org; E-mail: ansionline@ansi.org; Telephone: 212–642–4900; Facsimile: 212–398–0023.

of the certifying agent has or has held a commercial interest, including an immediate family interest or the provision of consulting services, within the 12-month period prior to the application for certification. However, any such person must be excluded from work, discussions, and decisions in all stages of the certification process and the monitoring of the entity in which they have or have held a commercial interest. The acceptance of payment, gifts, or favors of any kind, other than prescribed fees, from any business inspected is prohibited. However, a certifying agent that is a not-for-profit organization with an Internal Revenue Code tax exemption or, in the case of a foreign certifying agent, a comparable recognition of not-for-profit status from its government, may accept voluntary labor from certified operations. Certifying agents are also prohibited from providing advice concerning organic practices or techniques to any certification applicant or certified operation for a fee, other than as part of the fees under the certification program.

No accredited certifying agent may exclude from participation in or deny the benefits of the NOP to any person due to discrimination because of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status.

Renewal of Accreditation. To avoid a lapse in accreditation, certifying agents must apply for renewal of accreditation 6 months prior to the fifth anniversary of issuance of the notification of accreditation and each subsequent renewal of accreditation. The accreditation of certifying agents who make timely application for renewal of accreditation will not expire during the renewal process. The accreditation of certifying agents who fail to make timely application for renewal of accreditation will expire as scheduled unless renewed prior to the scheduled expiration date. Certifying agents with an expired accreditation must not perform certification activities under the Act and these regulations.

Following receipt of the certifying agent's annual report and fees, the results of a site evaluation, and, when applicable, the reports submitted by a peer review panel, the Administrator will determine whether the certifying agent remains in compliance with the Act and regulations and should have its accreditation renewed. Upon a determination that the certifying agent is in compliance with the Act and regulations, the Administrator will issue a notice of renewal of accreditation. The notice of renewal will specify any terms and conditions that must be addressed by the certifying agent and the time within which those terms and conditions must be satisfied. Renewal of accreditation will be for 5 years. Upon a determination that the certifying agent is not in compliance with the Act and regulations, the Administrator will initiate proceedings to suspend or revoke the certifying agent's accreditation. Any certifying agent subject to a proceeding to suspend or revoke its accreditation may continue to perform certification activities pending resolution of the proceedings to suspend or revoke the accreditation.

Accreditation—Changes Based on Comments

This subpart differs from our first proposal in several respects as follows:

(1) *Equivalency of Imported Organic Products.* We have removed the regulations on equivalency of imported organic products included in the first proposal. In this proposal, we have added foreign certifying agents as entities eligible for accreditation as certifying agents qualified to certify domestic and foreign organic production and handling operations. We have also added to subpart A definitions for private entity and State entity. We have defined ''private entity'' as any domestic or foreign nongovernmental for-profit or not-for-profit organization providing certification services. We have defined ''State entity'' as any domestic or foreign governmental subdivision providing certification services.

In commenting on the first proposal, several commenters expressed confusion as to how the Secretary would determine equivalency of imported organic products. They also expressed confusion as to how the Secretary would ensure that imported products met the same requirements as those produced domestically. We have addressed these concerns by adding foreign certifying agents as private or state entities that may be accredited under the NOP. We have also provided that USDA will accept a foreign certifying agent's accreditation to certify organic production or handling operations if: (1) USDA determines, upon the request of a foreign government, that the standards under which the foreign government authority accredited the foreign certifying agent meet the requirements of this part; or (2) the foreign governmental authority that accredited the certifying agent acted under an equivalency agreement negotiated between the United States Government and the foreign government. These changes ensure that all certifying agents, including foreign private and state certifying agents, will be required to meet the same requirements to be recognized as qualified to certify organic production or handling operations. This change provides foreign private and state certifying agents with transparent standards for accreditation.

A commenter raised concerns that we acted in violation of international agreements and domestic policy by proposing rules that were contrary to internationally accepted organic standards and, thus, created an unacceptable barrier to trade. The Act directs the Secretary to establish national standards governing the marketing of certain agricultural products as organically produced products. In accordance with our international agreements, this proposal ensures that, with respect to accreditation under this subpart, products imported from the territory of any country are being accorded treatment no less favorable than that accorded to products of U.S. origin. However, in accordance with our international trade agreements and upon implementation of this program, the Administrator will give positive consideration to accepting as equivalent technical regulations of other countries, even if these regulations differ from our own, provided such regulations fulfil the objectives of this proposed program. Any such equivalency agreements will be negotiated on a case-by-case basis, and ample opportunity for public comment will be provided before and during the negotiation process.

Two commenters requested that the Secretary recognize international accreditation systems for foreign organic certification programs and establish the requirements for approval of such systems in this proposal. We have instead proposed for the purposes of this rule that all certifying agents, regardless of their country of origin, meet the same requirements for accreditation through the provisions of this subpart.

One commenter requested that all imported organic products be labeled by their respective country of origin. The purpose of this proposal is to provide the requirements for the marketing of agricultural products in the United States that are labeled or sold as organic. The issue of country-of-origin labeling of imported products is not related to this proposal or the Act. Further, regulations pertaining to the labeling of organic agricultural products should not be used to enforce country-of-origin labeling requirements.

Several commenters stated that the first proposal did not take into account

the use of equivalency to ensure the marketing of U.S. organic products in foreign markets. The Department will work to oppose other countries' organic regulations that would prohibit entry of U.S. organic product produced under the Act or these regulations. As appropriate, the U.S. Government may represent U.S. organic interests in international government-to-government bodies. However, neither of these objectives is intended to be achieved by this rule.

(2) *Accreditation Requirements Regarding Expertise of Employees.* We have added a new regulation to the general requirements for accreditation. This regulation requires that the certifying agent ensure that its responsibly connected persons, employees, and contractors with inspection, analysis, and decision-making responsibilities have sufficient expertise in organic production or handling techniques to sufficiently perform the duties assigned. Certifying agents were required under the first proposal to use a sufficient number of adequately trained personnel, including inspectors. They were also required to conduct an annual performance appraisal of each inspector.

Commenters felt that the proposed rule did not sufficiently ensure that certifying agents would employ qualified individuals. One of these commenters requested that we require organic certification inspectors to participate in an inspector accreditation program, such as that offered by the Independent Organic Inspectors Association. We believe that inspector participation in an inspector accreditation program should be left to the discretion of the inspector and certifying agent. However, we believe that the new requirement combined with the requirements from the first proposal should ensure that responsibly connected persons, employees, and contractors of an accredited certifying agent are qualified to perform their inspection, analysis, and decision-making duties. This new regulation is found at § 205.501(a)(5) of this proposal.

(3) *Recordkeeping Requirements.* We have proposed a new § 205.510(b), which identifies three categories of records and their retention periods. This new paragraph was added to address commenter concern that the requirement that an accredited certifying agent maintain records about all of its activities for 10 years was excessive and unnecessary. Commenters suggested a 5- to-7-year retention period. We agree that for some records, a retention period of 10 years may be excessive. Accordingly, in this proposal, we are proposing three retention periods. First, records created by the certifying agent regarding applicants for certification and certified operations would have to be maintained for not less than 10 years beyond their creation. We believe this retention period to be consistent with the Act's requirement that the certifying agent maintain all records concerning its activities for a period of not less than 10 years. Second, records obtained from applicants for certification and certified operations would have to be maintained for not less than 5 years beyond their receipt. This retention period is the same as that required by the Act for the retention of records by the certified operation. Since the certified operation can dispose of its records 5 years after their creation, the certifying agent should also be able to dispose of those records it receives from the certified operation 5 years after their receipt. Third, records created or received by the certifying agent for USDA accreditation would have to be maintained for not less than 5 years beyond their creation or receipt.

(4) *Conflict of Interest Provisions.* We have made three changes which we believe will strengthen the conflict of interest provisions. We have made these changes because we concur with the comment from a research foundation stating that the provisions for preventing conflicts of interest needed to be significantly strengthened. First, we have added a new § 205.501(a)(11)(v), which requires the completion of an annual conflict of interest disclosure report by all personnel designated to be used in the certification of an operation, including administrative staff, certification inspectors, members of any certification review and program evaluation committees, contractors, and all parties responsibly connected to the certifying agent. Second, coverage of the conflict of interest provisions has been extended to immediate family members of the certifying agent; responsibly connected persons of the certifying agent; and any employee, inspector, contractor (to be used in the certification of an operation), or other personnel of the certifying agent. Immediate family members would include the spouse; minor children, including legally adopted children; or blood relatives who reside in the immediate household of a certifying agent; responsibly connected person of the certifying agent; or any employee, inspector, contractor, or other personnel of the certifying agent. Third, this proposal lists contractors among those persons who are prohibited from accepting payment, gifts, or favors of any kind, other than regular fees from any business inspected by the certifying agent. This addition, which is found at § 205.501(a)(11), was made to clarify that contractors, including contract inspectors, are prohibited from accepting payment, gifts, or favors of any kind, other than regular fees.

(5) *Use of Voluntary Labor.* We have added an exception to the prohibition of the acceptance of payment, gifts, or favors of any kind. The exception provides that any certifying agent that is a not-for-profit organization with an Internal Revenue Code tax exemption or, in the case of a foreign certifying agent, a comparable recognition of not-for-profit status from its government may accept voluntary labor from certified operations. Internal Revenue Code tax exemption or, in the case of a foreign certifying agent, a comparable recognition from its government is required as verification of the certifying agent's status as a not-for-profit organization. This change was made to clarify our original intent that not-for-profit certifying agents would be allowed to accept volunteer labor from persons certified by the certifying agent.

In the preamble to the first proposal, we stated that we would not consider a volunteer who performs services for a not-for-profit certifying agent as providing favors to any particular individual in that agency and, therefore, would not consider the certifying agent as being in a conflict of interest situation by accepting such services from volunteers. We have made this clarification because a commenter expressed the belief that the certifying agent should be allowed to receive donations of time, food, and money beyond any mandatory fees from persons they certify. The Act prohibits certifying agents from accepting payments, gifts, or favors of any kind from a business inspected, other than prescribed fees. Accordingly, this exception is limited to acceptance of voluntary labor by not-for-profit certifying agents. While § 205.501(a)(11)(iii) prohibits the acceptance of payments, gifts, or favors of any kind, other than prescribed fees, from any business inspected for certification as a producer or handler of organic agricultural products, the paragraph does not prohibit the accredited certifying agent from accepting payments, gifts, or favors of any kind, including time, food, or money, from persons for whom they do not provide inspections for certification as a producer or handler of organic agricultural products.

(6) *Certification Fees.* We have removed the requirement that a certifying agent charge only such fees to applicants for certification and operations it certifies that the Secretary determines are reasonable. We have made this change because we concur with those commenters who expressed the belief that certifying agents should be permitted to set their own fees without the approval of the Secretary. However, we continue to believe that the Administrator should retain oversight of the fees, not for the purpose of setting the fees or of dictating the level of the fees, but for the purpose of determining if any certifying agent's fees are so high as to be unreasonable and to ensure that the schedule of fees filed with the Administrator are applied uniformly and in a nondiscriminatory manner. The Administrator should also retain the ability to inform a certifying agent that its fees appear to be unreasonable and to require a justification for the level of fees set by the certifying agent. We further believe that the Administrator should retain the ability to investigate the level of fees charged by an accredited certifying agent if a complaint is made or if compelling circumstances warrant such an investigation. Accordingly, we have proposed at § 205.501(a)(15) that a certifying agent must charge applicants for certification and certified production and handling operations only those fees and charges that it has filed with the Administrator. We have also included at § 205.642 regulations with respect to fees charged by certifying agents to producers and handlers. Section 205.642 is discussed under fees in subpart G of this preamble.

(7) *State Standards That Vary From the National Organic Program.* We have added an exception to the regulation which prohibited certifying agents from requiring, as a condition for use of the certifying agent's identifying mark, compliance with any farming or handling requirements other than those provided for in the Act and regulations. The exception provides that the requirement does not apply to States with more restrictive requirements approved by the Secretary or private entity certifying agents certifying production or handling operations within States with more restrictive requirements approved by the Secretary. This change was made because we agree with the State commenters who stated that the prohibition on requiring compliance with any farming or handling requirements other than those provided for in the Act and regulations would prohibit States from requiring that their more restrictive standards, approved by the USDA, be met as a requirement for use of the State's logo on organically produced products. We did not intend to prohibit States from requiring that their more restrictive standards be met as a requirement for use of the State's logo on organically produced products. Including this exception in § 205.501(b)(2) will permit States with more restrictive requirements approved by the Secretary and private entity certifying agents certifying production or handling operations within the borders of such States to require that the State's more restrictive standards be met as a requirement for use of their logo or other identifying mark on organically produced products.

Certifying agents may not require a certified operation to meet production or handling standards greater than those established by the Department or, when applicable, an approved State organic certification program as a condition for using its logo or other identifying mark. However, a certifying agent may verify, upon the request of a producer or handler certified by the certifying agent, that the producer or handler is meeting contractual specifications which include requirements in addition to those of the Act and regulations.

(8) *Time Period for Public Access to Information.* For the requirement that certifying agents describe the procedures they will use for making information available to the public, we have changed the time period from ''during the 10-year period preceding the receipt of the request from the public'' to ''during the current and 3 preceding calendar years.'' Commenters stated that the required 10-year period was excessive and unnecessary. The Act requires public access to certification documents and laboratory analyses that pertain to certification. However, the Act does not specify that a certifying agent must provide access to its records throughout their 10-year retention period. We agree with the commenters that public access to the records the certifying agent is required to keep should be limited to a reasonable period short of the full retention period. Such a reasonable period, we believe, would be the current calendar year and the 3 calendar years preceding the calendar year of the request. Accordingly, § 205.504(b)(5) requires certifying agents to describe the procedures they will use for making information available to the public during the current and 3 preceding calendar years. This time period will lessen the burden on certifying agents while assuring reasonable public access to such records.

(9) *Scope of Information for Public Release.* We have expanded the scope of information for public release which must be included in the list of producers and handlers whose operations the certifying agent has certified. Specifically, certifying agents will have to include the name of the operation and type(s) of operation in its list of producers and handlers it has certified. This change is included in section § 205.504(b)(5)(ii). Commenters requested that the list be expanded to include the name of the operation, its physical location(s), certification history, type(s) of operation, acreage (when applicable), and person responsible for organic regulation compliance. While we agree that the name of the operation and type(s) of operation should be available to the public, we believe that the certified operation's physical location(s), certification history, and acreage are confidential information which has no relationship to the operation's status as a certified organic operation. Therefore, such information should only be made available with the written consent of the certified operation. We also believe that it is unnecessary to list a person responsible for organic regulation compliance since the applicant ultimately has that responsibility. Therefore, these requested additions have not been made. We have also removed the separate requirement that certifying agents identify for the public the organic agricultural products produced by each certified operation. We have taken this action because the information is available on the certificates and the list of producers and handlers required to be released by the certifying agent to the public. These requirements are found at § 205.504(b)(5)(i) and (ii).

(10) *Release of Nonconfidential Business Information.* We have removed the requirement that certifying agents provide a description of the procedures to be used to make nonconfidential business information, as permitted by the producer or handler and approved by the Secretary, available to the public. This requirement has been replaced with the requirement that the certifying agent provide a description of the procedures to be used to make other business information, as permitted in writing by the producer or handler, available to the public. Commenters objected to the requirement that the Secretary approve the release of nonconfidential business information that the producer or handler had authorized the certifying agent to

release. They believed that this requirement lacked justification and created unnecessary costs. We concur that this requirement is unnecessary. However, we believe that the producer's or handler's approval must be obtained in writing, which is reflected in this proposal at § 205.504(b)(5)(v).

(11) *Submission of Applicant's Financial Policies and Procedures.* We have removed the requirement that a certifying agent include with its application for accreditation a description of its policies and procedures for collection and disbursement of funds and documents that identify anticipated sources of income, including all fees to be collected from producers and handlers. Commenters stated that they did not believe the submission of applicant financial policies and procedures was necessary. We have decided that the information requested probably would not fully meet our needs in determining that certification decisions were not influenced by the certifying agent's concern for the certification decision's financial impact on the certifying agent or in determining compliance with the conflict of interest provisions of the Act and these regulations. Accordingly, this requirement is not included in this proposal.

(12) *Submission of Information Concerning Current Certification Activities.* We have changed the voluntary submission of information and documents concerning current certification activities to a required submission. Commenters stated that the submission of a list of all farms, wild-crop harvesting operations, and handling operations currently certified by the applicant should be required. They went on to say that the submission of copies of the inspection reports and certification evaluation documents for production or handling operations certified by the applicant during the previous year should remain optional. They also said the submission of results from any accreditation process of the applicant's operation by an accrediting body during the previous year for the purpose of evaluating its certification activities should remain optional.

We agree with the commenters that a list of all operations currently certified by the applicant should be a required submission. We also believe that copies of inspection reports, certification evaluation documents, and accreditation results should be a required submission from all applicants currently certifying production or handling operations. Accordingly, at § 205.504(d) we have made the submission of information and documents concerning current certification activities mandatory for certifying agents currently certifying production or handling operations.

This change has been made because of the value such information and documents would have in assisting the Department in evaluating an applicant for accreditation. However, we have limited the submission of inspection reports and certification evaluation documents for production and handling operations certified by the applicant. The applicant is required to submit copies of at least 3 different inspection reports and certification evaluation documents for production or handling operations certified by the applicant during the previous year for each area of operation for which accreditation is requested. We have limited the submission to reduce the reporting burden on certifying agents. The Administrator may, however, require that the certifying agent submit additional inspection reports and certification evaluation documents.

We recognize that a newly organized certifying agent with no experience would be unable to supply the information. An applicant's inability to provide the information and documentation required by the revised paragraph due to lack of experience would not be prejudicial to the Department's evaluation of the application.

(13) *Site Evaluations.* We have revised the site evaluation provisions to clarify the scope of an evaluation, to specify that the evaluation will be arranged and conducted by a representative of the Administrator, and to specify when evaluations shall or may be conducted. These changes are made in response to commenters who suggested adding details to the regulatory text regarding the nature of site evaluations. The revised section provides that site evaluations of accredited certifying agents shall: (1) Be conducted for the purpose of examining the certifying agent's operations and evaluating its compliance with the Act and regulations; (2) include an on-site review of the certifying agent's certification procedures, decisions, facilities, administrative and management systems, and production or handling operations certified by the certifying agent; (3) be conducted by a representative(s) of the Administrator; and (4) be conducted after application for renewal of accreditation but prior to the issuance of a notice of renewal of accreditation. This revised section provides that an initial site evaluation of an accreditation applicant would be conducted before or within a reasonable period of time after issuance of the applicant's notification of accreditation. Section 205.508 also provides that one or more site evaluations will be conducted during the period of accreditation to determine whether an accredited certifying agent is complying with the general requirements for accreditation.

(14) *Eligibility for Peer Review Panels.* We have added a new regulation addressing eligibility for peer review panels. Commenters expressed concern that peer review pool applicants be free of conflicts of interest and possess the necessary expertise in organic production or handling. The first proposal provided that candidates for membership in the peer review panel pool would be required to submit a letter to the Program Manager of the NOP requesting appointment, describing their qualifications, and identifying conflicts of interest. We believe that there is value to the applicants for membership in the peer review panel pool and the general public in addressing eligibility for peer review panels in the regulatory text. Accordingly, we have added a new regulation at § 205.509(b) which provides that applicants for membership in the peer review panel pool must provide the Administrator with a written description and, upon request, supporting documentation of their qualifications to conduct peer reviews. Such description must include information concerning the applicant's training and expertise in organic production or handling methods and in evaluating whether production or handling operations are using a system of organic production or handling. Applicants must also address their possible limitations on availability to serve. Further, applicants would be required to include information concerning their commercial interests and those of their immediate family members, within the 12-month period prior to application, with any person who may seek to become or who is an accredited certifying agent. No person who has or has had a commercial interest, including an immediate family interest or the provision of consulting services, in an applicant for accreditation or renewal of accreditation will be appointed to or accept appointment to a panel evaluating the applicant. This provision was added for the purpose of avoiding conflicts of interest by peer reviewers. This new regulation also provides that persons accepted to the pool may serve until notified that their appointment has been rescinded by the Administrator or until

they are no longer qualified, whichever occurs first.

(15) *Composition of Peer Review Panels.* We have revised the regulations concerning the composition of peer review panels. Commenters requested that the peer review panel consist of at least two members who are not USDA employees, rather than not AMS employees. We agree with this suggested change, which clarifies what had been our intent. This change is included in § 205.509(c). Section 205.509(c) provides that peer review panels shall consist of at least three but no more than five members. This section provides that peer review panels must include a Department representative who will preside over the panel and no fewer than two members from the peer review pool who possess sufficient expertise in the relevant areas of accreditation. Additionally, section 205.509(c) provides that peer review panels may include up to two members with expertise in other disciplines, including organizational management and finance; member(s) from the approved State organic certification program when the applicant is a private entity seeking accreditation within the State; and member(s) from a foreign government's organic program when the applicant is a private entity that will operate within the country. We have added authorization for these additional members to broaden the scope and depth of expertise available to peer review panels.

Commenters also expressed concern that the peer review panels consist of at least one member from a State organic certification program. We do not believe that the composition of peer review panels regulations needs to be amended to accommodate this concern. To the extent possible, accredited private certifying agents will peer review private certifying agents, and accredited State certifying agents will peer review State certifying agents.

(16) *Renewal of Accreditation.* We have revised the renewal of accreditation provisions to, among other things, require that an accredited certifying agent's application for accreditation renewal be received 6 months prior to the fifth anniversary of issuance of the notification of accreditation and each subsequent renewal of accreditation. The first proposal provided that an accredited certifying agent would request renewal of accreditation on or before the fifth anniversary of issuance of the notice of confirmation of accreditation and each subsequent renewal of accreditation. Commenters expressed concern about whether the accredited certifying agent's accreditation would lapse during the renewal process. They suggested that certifying agents should submit their application for renewal of accreditation 6 months prior to the fifth anniversary of issuance of the notice of confirmation.

We believe that clarification regarding the status of the certifying agent's accreditation during the renewal process is appropriate. We also concur with the commenters' suggestion that certifying agents should submit their applications for renewal of accreditation 6 months prior to the fifth anniversary of issuance of the notice of confirmation. We have replaced ''notice of confirmation of accreditation,'' however, with ''notification of accreditation'' because this proposal eliminates the section on confirmation of accreditation. Accordingly, we have provided in this proposal at § 205.510(c) that: (1) An accredited certifying agent's application for accreditation renewal must be received 6 months prior to the fifth anniversary of issuance of the notification of accreditation and each subsequent renewal of accreditation; (2) the accreditation of certifying agents who make timely application for renewal of accreditation will not expire during the renewal process; (3) the accreditation of certifying agents who fail to make timely application for renewal of accreditation will expire as scheduled unless renewed prior to the scheduled expiration date; (4) certifying agents with an expired accreditation must not perform certification activities under the Act and regulations; and (5) following receipt of the information submitted by the certifying agent, the results of any site evaluation, and, when applicable, the reports submitted by a peer review panel, the Administrator will determine whether the certifying agent remains in compliance with the Act and regulations and should have its accreditation renewed.

These changes would provide the Department with sufficient time to fully process the certifying agent's application for accreditation renewal prior to the accreditation's scheduled date of expiration. This revised regulation also clarifies that a certifying agent's accreditation will not expire during the accreditation renewal process if the certifying agent has made timely application for renewal. It also makes clear that the accreditation of certifying agents who fail to make timely application for renewal of accreditation will expire as scheduled unless renewed prior to the scheduled expiration date. This regulation also provides that certifying agents with an expired accreditation must not perform certification activities under the Act and these regulations.

(17) *Denial of Accreditation.* We have revised the denial of accreditation regulations to clarify that after receipt of a notification of noncompliance, the applicant may submit a description of the actions taken to correct the noted deficiencies and evidence demonstrating such corrections, rather than submitting a new application. We have taken this action because commenters were confused by our reference to a new application in the denial of accreditation regulations. The denial of accreditation regulations are found at § 205.507 in this proposal.

Accreditation—Changes Requested But Not Made

This subpart retains from our first proposal regulations on which we received comments as follows:

(1) *Durations of Accreditation and Reporting Requirements.* Commenters expressed concern regarding the duration of accreditation and whether the interval of required reporting is adequate. An association expressed concern regarding the economic impact of accreditation on small certifying agents. This commenter stated that small certifying agents should not be accredited more often than every 5 years. An international organic federation expressed the belief that accreditation for 5 years is too long. The commenter went on to say that certification bodies are expanding rapidly and that annual reports cannot be relied upon to fully convey the consequent changes. This commenter believes that many of the conditions of accreditation may relate to operational aspects that cannot be addressed in an annual report.

Annual reporting by the certifying agent, under this proposal, would provide: (1) A complete and accurate update of applicant information and expertise and ability information previously submitted; (2) information supporting any changes being requested in the areas of accreditation; (3) the measures that were implemented in the previous year and any measures to be implemented in the coming year to satisfy any terms and conditions determined by the Administrator to be necessary as specified in the most recent notification of accreditation; and (4) the results of the most recent inspector performance appraisal and program evaluation and adjustments to the certifying agent's operation and procedures implemented and intended to be implemented in response to the appraisals and evaluations. This proposal includes a requirement at

§ 205.501(a)(14) that the certifying agent submit to the Administrator a copy of each notification of: (1) Denial of certification; (2) noncompliance; (3) noncompliance correction; (4) proposed suspension or revocation; and (5) suspension or revocation, simultaneously with its issuance.

We believe that these reporting requirements, coupled with feedback from applicants for certification, certified operations, and other interested parties, will provide the Department with sufficient information regarding the certifying agent and its operation to determine whether a site visit is necessary to evaluate the certifying agent's suitability to remain accredited. Under this proposal, the Department will conduct one or more site evaluations during the period of accreditation to determine whether the accredited certifying agent is complying with the requirements for accreditation. Accordingly, we believe the duration of accreditation period first proposed was correct, and we are, therefore, reproposing this time period at § 205.500(b).

(2) *Performance Appraisals and Program Evaluation.* Comments from State departments of agriculture and some certifiers indicated that the annual inspector performance appraisal and annual program evaluation requirements duplicated State requirements. The commenters asked what the required scope and depth of evaluations was expected to be, whether third party evaluators would be required to be used to assess the performance of the operation, and whether existing performance appraisal and program evaluation practices of a certifying agent would be used to meet the annual inspector performance appraisal and program evaluation requirements.

We do not intend for States to develop dual performance appraisal and program evaluation programs. We believe that performance appraisals and program evaluations conducted to meet State requirements will also meet the requirements of this proposal. State and private agency personnel performance appraisals and program evaluations would be expected to be consistent with good management practices and appropriate to the organization's size and structure. This could be different for different organizations. Therefore, we are not prescribing the specific performance appraisal system or instrument to be used to assess inspector performance, the specific program evaluation methods that must be used, or that third parties must conduct the required program evaluation. Accordingly, we have not changed the questioned provisions, which appear at § §205.501(a)(6) and (7). We have, however, revised § 205.501(a)(7) to clarify that the annual program evaluation can be conducted by the certifying agency staff, an auditing entity, or a consultant who has expertise to conduct program evaluations.

(3) *''Open Records'' Requirements.* Commenters expressed the belief that confidentiality requirements for certifying agents might conflict with State requirements for ''open records.'' We recognize this potential for conflicting requirements. Records collected and maintained under the NOP are subject to the confidentiality provisions of the Act and these regulations. However, a State-entity certifying agent will be subject to its State ''open records'' laws when such laws conflict with the confidentiality provisions of the Act and these regulations. Records collected and maintained under the NOP by a private entity certifying agent will always be subject to the confidentiality requirements of the Act and these regulations. Accordingly, pursuant to the Act, we are reproposing the confidentiality provisions at § 205.501(a)(10).

To clarify that authorized representatives of the Secretary or the applicable State program's governing State official may act on behalf of the Secretary or the State program's governing State official and must be given access to the records, we have added the phrase, ''or their authorized representatives,'' to § 205.501(a)(10). Such representative could be a member of the NOP staff, a Department compliance officer, or other official. This provision is standard practice and is necessary for Government oversight of a regulatory program.

(4) *List of Confidential Records.* One commenter requested a definitive list of the records that had to be kept confidential. We cannot create such a list because it is not possible to describe every record that would be characterized as a business-related record. Such records would include, however, organic production and handling plans, records that are related to trade secrets and commercial or financial information obtained from applicants for certification, and records or information compiled for an investigation into alleged noncompliance with the Act and regulations.

(5) *Time Period for Prohibition of Commercial Interest.* We received many comments regarding the prohibition of commercial interest in an organic production or handling operation during the 12 months prior to certification. Several States and industry associations stated that the prohibition of commercial interest should apply to the 12 months after as well as the 12 months prior to certification. These commenters offered no reasoning for their position. A research foundation recommended that the prohibition of commercial interest should be for 3 years before and after the application for certification. This commenter stated that the conflict of interest provisions needed significant strengthening. A producer commenter stated that the prohibition of commercial interest should be for an indefinite period, not for 12 months. Some commenters recommended that certifying agents and responsible parties and employees of certifying agents be barred from accepting employment for 1 to 3 years from any certified production or handling operation in which they participated in any manner in the operation's certification. An accreditation service stated it believed there would be a conflict of interest should a consulting or business connection arise between an inspector and a production or handling operation following the site evaluation. This commenter presented the example of an inspector being offered employment during the site evaluation but not taking the position until 6 months after the site evaluation. Many commenters, however, supported our proposed prohibition of commercial interest in an organic operation during the 12 months prior to certification.

We disagree with the recommendations calling for a longer precertification conflict of interest prohibition period and with the recommendations for a postcertification prohibition period for those persons no longer associated with the certifying agent. Regarding the recommendations for a longer precertification prohibition period, we continue to believe that 12 months is a sufficient period to ensure that any previous commercial interest would not create a conflict of interest situation for two reasons. First, this time period is consistent with similar provisions governing conflicts of interest for government employees. Second, we have added a new section, 205.501(a)(11)(v), which requires the completion of an annual conflict of interest disclosure report by all personnel designated to be used in the certification operation, including administrative staff, certification inspectors, members of any certification review and program evaluation committees, contractors, and all parties

responsibly connected to the certification operation. This requirement will assist certifying agents in complying with the requirements to prevent conflicts of interest. We also continue to believe that a longer prohibition period would have the effect of severely curtailing most certifying agents' ability to comply with the Act's requirement that they employ persons with sufficient expertise to implement the applicable certification program. Accordingly, we have decided to repropose the prohibition on commercial interest in an applicant for certification for a 12-month period prior to the application for certification at section § 205.501(a)(11).

Regarding the recommendations for a postcertification prohibition period for those persons no longer associated with the certifying agent, we believe such a period is unnecessary. We take this position because certifying agents and their responsibly connected parties, employees, inspectors, contractors, and other personnel are prohibited from engaging in activities or associations at any time during their affiliation with the certifying agent which would result in a conflict of interest. While associated with the certifying agent, all employees, inspectors, contractors, and other personnel are expected to disclose to the certifying agent any offer of employment they have received and not immediately refused. They are also expected to disclose any employment they are seeking and any arrangement they have concerning future employment with an applicant for certification or a certified operation. The certifying agent would then have to exclude that person from work, discussions, and decisions in all stages of the certification or monitoring of the operation making the employment offer. If a certifying agent or a responsibly connected party of the certifying agent has received and not immediately refused an offer of employment, is seeking employment, or has an arrangement concerning future employment with an applicant for certification, the certifying agent may not accept or process the application. Further, certifying agents and responsibly connected parties may not seek employment or have an arrangement concerning future employment with an operation certified by the certifying agent while associated with that certifying agent. Certifying agents and responsibly connected parties must sever their association with the certifying agent when such person does not immediately refuse an offer of employment from a certified operation. Accordingly, we have decided not to include a postcertification prohibition period in this proposal.

(6) *Conflicts of Interest.* Some commenters stated that they understood the proposed conflict of interest provisions to prohibit certifying agents from certifying any organic operation owned or operated by a member of the certifying agent's board of directors or from certifying any organic operation owned or operated by an employee of the certifying agent. One commenter stated that because certification arose from the ranks of organic farmers, there are many certification personnel, including inspectors, who also farm or have family who farm. This commenter stated that it should be permissible for a certifying agent to review and certify an organic operation owned or operated by a responsibly connected person or employee, provided that the responsibly connected person or employee is excluded from the decision-making process with respect to the organic operation to be certified.

The commenters are correct in their interpretation that the first proposal prohibited certifying agents from certifying an operation when the certifying agent or a responsibly connected party of such certifying agent has or has held a commercial interest in the operation. This prohibition is limited, however, to the 12-month period prior to the application for certification. The first proposal did not prohibit certifying agents from certifying an operation when an employee of the certifying agent has or has held a commercial interest in the operation. The first proposal prohibited a certifying agent from using an employee in any phase of the certification process when such employee has or has held a commercial interest in an operation making application for certification within the 12-month period prior to the application for certification. A responsibly connected party is any person who is a partner, officer, director, holder, manager, or owner of 10 percent or more of the voting stock of an applicant for or a recipient of certification or accreditation.

We believe that a certifying agent and a responsibly connected party of such certifying agent hold positions of power and authority which preclude the certification of an operation in which they have or have held a commercial interest during the 12-month period prior to an application for certification. The certifying agent's control over the employment of an agent's employee makes it unreasonable to expect an employee of a certifying agent to impartially carry out the employee's duties when the certifying agent or a responsibly connected party of such agent has an interest in the applicant. Such is not true of an employee who is subordinate to the certifying agent or a responsibly connected party of the certifying agent. Accordingly, we have reproposed the requirement that a certifying agent prevent conflicts of interest by: (1) Not certifying a production or handling operation if the certifying agent or a responsibly connected party of such certifying agent has or has held a commercial interest within the 12-month period prior to the application for certification and (2) excluding any person with a conflict of interest from work, discussions, and decisions in all stages of the certification process and the monitoring of certified production or handling operations for all entities in which the person has or has held a commercial interest within the 12-month period prior to the application for certification. Both of these provisions are found in § 205.501(a)(11).

(7) *Defining Commercial Interest.* A research foundation recommended that the provisions for preventing conflicts, found in this proposal at § 205.501(a)(11), be strengthened by changing ''a commercial interest in the operation'' to ''a commercial interest in the operation or the marketing or distribution of its products.'' We believe that the recommended addition is unnecessary because ''commercial interest'' covers all business transactions between the certifying agent or responsibly connected parties, employees, inspectors, contractors, or other personnel of the certifying agent and the applicant for certification or certified operation. This interpretation would not apply to voluntary labor provided, in accordance with § 205.501(a)(11)(iii), by a certified operation to a certifying agent that is a not-for-profit organization with an Internal Revenue Code tax exemption. Further, this interpretation would not apply to the providing of advice, in accordance with § 205.501(a)(11)(iv), concerning organic practices or techniques to any certification applicant or certified operation when such advice is covered by fees under the applicable certification program established under the Act.

(8) *Provision of Information to Producers and Conflicts of Interest.* Commenters were concerned about the effect that some of the conflict of interest provisions would have on certifying agents that provide producers with information on organic practices through forums such as in-house publications, conferences, workshops, informational meetings, and field days

for a fee. Specifically, they were concerned about the impact of the conflict of interest provision requiring that certifying agents prevent conflicts of interest by not providing advice concerning organic practices or techniques to any certification applicant or certified organic production or handling operation for a fee, other than as part of the fees established under the applicable certification program established under the Act. These commenters requested that the paragraph be rewritten to clarify that such activities would not be prohibited. We also received a comment stating that advice relating to improving production yields, market access, etc., is not the function of an inspector and can lead to a nonmonetary conflict of interest. This commenter stated that advice, where given, should be restricted to issues related to the understanding and implementation of the standards.

Certifying agents have historically provided advice concerning organic practices or techniques to any certification applicant or certified organic production or handling operation for a fee through forums such as in-house publications, conferences, workshops, informational meetings, and field days. Such activities and their fees would not be prohibited under the Act or these regulations, provided that such activities were not required as a condition for production or handling certification. Section 205.503(c) would require that the applicant for accreditation provide a copy of the applicant's schedule of fees for all services to be provided under these regulations by the applicant. We would consider such activities to be voluntary participation activities provided by the certifying agent to producers, handlers, and other interested persons under the NOP. We also believe that it is appropriate, as well as industry practice, during an on-site inspection for inspectors to provide advice on a wide range of issues related to an on-site inspection of a production or handling operation. Accordingly, the conflict of interest provisions found at § 205.501(a)(11) have not been rewritten as requested by the commenters.

(9) *Equivalency of Certification Decisions.* We received a variety of comments suggesting changes to the requirement that accredited certifying agents accept the certification decisions made by another USDA-accredited certifying agent as equivalent to its own. Several of these commenters asked whether States with more restrictive standards could challenge certification decisions made by any accredited certifying agents. A few commenters representing State programs stated that States should be able to maintain control over which certifying agents operate within their State. Other commenters suggested that the requirement be amended to: (1) Require that a certifying agent accept the certification decisions made by another USDA-accredited certifying agent as equivalent to its own only after the certifying agent's accreditation has been confirmed by the Department; (2) provide that if a certifying agent doubts the accuracy of another certifying agent's determination, the certifying agent questioning the accuracy can file a complaint with the Secretary; and (3) authorize an accredited certifying agent to request additional documentation from another certifying agent if questions arise regarding the other certifying agent's certification activities or the activities or product of a production or handling operation certified by the other certifying agent.

No organic product may be produced or handled to organic standards lower than the standards of the NOP. To certify organic production or handling operations to the national standards or to more restrictive State standards approved by the Secretary, the certifying agent must be accredited by the Administrator. While States may set more restrictive standards than the national organic standards for product produced or handled within their State, those requirements do not apply to organic product produced or handled outside of such State. Further, a State government may not prevent the marketing or sale in the State of organic product produced in another State to this program's national organic standards. State organic certification programs approved by the Secretary would be required to treat all accredited certifying agents equally. Likewise under this program, accredited certifying agents in one State cannot refuse to recognize another State's product which is certified to these national organic standards.

We disagree with the suggestion to allow certifying agents to challenge the decisions of certifying agents that have not yet had their accreditation confirmed by the Department. We believe that allowing a certifying agent to challenge the certification decisions made by a certifying agent that has not had its site evaluation would create an insurmountable barrier for persons wanting to become accredited under the NOP, especially persons establishing new operations. The proposed accreditation procedures are sufficiently rigorous to permit a well-founded assessment of the applicant's capabilities and qualifications and will allow all eligible certifying agents to receive timely accreditation. We will only accredit certifying agents that we believe possess the expertise and ability to implement the proposed certification program. This includes newly established certifying agents who might require a longer period of time between accreditation and a site evaluation to allow the certifying agent to perform sufficient certification activities for the Department to perform a meaningful site evaluation.

Should questions arise regarding a certifying agent's certification activities, a certified production or handling operation's activities, or the organic status of a certified production or handling operation's product, the questioning certifying agent could report a complaint or allegation of noncompliance, with the certification provisions of this part, to the State program's governing State official or the Administrator. As appropriate, the State program's governing State official or the Administrator will investigate such complaints or allegations. Certifying agents are not authorized to investigate allegations or suspicions of noncompliance by other certifying agents, nor are certifying agents allowed to take unilateral action against an accredited certifying agent, such as refusal to recognize the certification decisions made by another certifying agent.

For the above reasons, we have not changed the requirement that a certifying agent accept the certification decisions made by another USDA-accredited certifying agent as equivalent to its own. This requirement is located at § 205.501(a)(12).

(10) *False or Misleading Claims.* Commenters objected to the requirements that an accredited certifying agent must refrain from making false or misleading claims about its accreditation status, the USDA accreditation program for certifying agents, or the nature or qualities of products labeled as organically produced. A few of these commenters stated that the requirements exceed the authority given by the Act by introducing claims other than those concerning representations of nonorganic product as organic. Additionally, a few commenters believed that the term, ''misleading,'' is too broad and could be interpreted to mean that the certifying agent could make no negative claims about the USDA accreditation program. They suggested that the requirements be amended by removing the reference to misleading claims. Another commenter

believed that the phrase, ''or the nature or qualities of products labeled as organically produced,'' should be deleted because it is vague and would unduly limit the freedom of certifying agents to share information with consumers, farmers, processors, and other interested parties regarding the attributes of organic food and organic production systems, including nutritional properties, freshness, taste, and less reliance on synthetic substances.

We disagree with the commenters who stated that the requirements exceed the authority given by the Act by introducing claims other than those concerning representations of nonorganic product as organic. Claims regarding accreditation status, the USDA accreditation program for certifying agents, and the nature and quality of products labeled as organically produced all fall under the authority of the Act. We believe that the requirements are needed to prevent the dissemination of inaccurate or misleading information to consumers about organically produced products. We further believe that the changes suggested by the commenters would undermine the goal of a uniform NOP by allowing certifying agents to make claims that would state or imply that organic products produced by operations that they certify are superior to those of operations certified by other certifying agents. These requirements would not prohibit certifying agents from sharing factual information with consumers, farmers, processors, and other interested parties regarding verifiable attributes of organic food and organic production systems. Accordingly, the requirements are reproposed in this proposal without change at § 205.501(a)(13).

(11) *Notification of Status of Certified Operations.* Comments received on the requirements addressing documentation to be submitted by certifying agents to the Department regarding the status of certified operations suggested that: (1) The public should have access to the notification of certification status documentation; (2) annual reporting by certifying agents of the name of each operation whose application for certification has been approved is sufficient; and (3) the required reporting should only include the name of those operations certified during the quarter being reported rather than a listing of all operations certified by the certifying agent. First, we believe that the Freedom of Information Act adequately provides for public access to information. Second, we need the required information to facilitate oversight and to ensure that we have relatively current data for responding to inquiries involving the granting of certifications by certifying agents. It was not our intent to have certifying agents update their list of certified entities quarterly. Our intent was to receive on a quarterly basis a listing of all certifications granted by the certifying agent during the quarter being reported. Accordingly, no changes have been made on the basis of these comments to the requirements found in this proposal at § 205.501(a)(14).

(12) *Certifier Compliance With Terms and Conditions Deemed Necessary.* Commenters objected to the requirement that certifying agents must comply with and implement other terms and conditions deemed necessary by the Secretary. This requirement is consistent with § 6515(d)(2) of the Act, which requires a certifying agent to enter into an agreement with the Secretary under which such agent shall agree to such other terms and conditions as the Secretary determines appropriate. Accordingly, this requirement, found at § 205.501(a)(17), is unchanged in this proposal except to change ''Secretary'' to ''Administrator'' since the Administrator will be responsible for administration of the NOP.

(13) *Limitations on the Use of Certifying Agent's Marks.* Private certifying agents disagreed with the provision that prohibited certifying agents from requiring, as a condition of use of the certifying agent's identifying mark, compliance with any production or handling requirements other than those provided for in the Act and regulations. Private certifying agents commented that they should be allowed to use their identifying mark to recognize additional achievements by producers and handlers that exceed the requirements proposed in the national organic standards. The commenters' position is the same as that suggested by public input prior to publication of the first proposal.

We believe that the private certifying agents' position advocating the use of their identifying mark to recognize additional achievements is inconsistent with § 6501(2) of the Act, which provides that a stated purpose of the Act is to assure consumers that organically produced products meet a consistent national standard. Accordingly, we are reproposing the provision prohibiting certifying agents from requiring, as a condition of use of the certifying agent's identifying mark, compliance with any production or handling requirements other than those provided for in the Act and regulations or under an approved State organic certification program. This reproposed provision is found at § 205.501(b).

(14) *Additional Requirements for Private Certifying Agents.* Commenters expressed concern regarding the three additional requirements for a certifying agent who is a private person. First, private certifying agents expressed concern regarding the requirement that private certifying agents hold the Secretary harmless for any failure on their part to carry out the provisions of the Act and regulations. Their concern focused on the fact that applicants for certification can appeal a certifying agent's refusal to certify to the Secretary and that a certifying agent's recommendation to suspend or revoke a certification can be appealed to the Secretary. They believe that, without the authority to independently deny, suspend, or revoke certification, the certifying agent becomes liable for the actions of the Secretary.

We disagree with the assertion that the certifying agent becomes liable for the actions of the Secretary. The provision clearly states that private certifying agents hold the Secretary harmless for any failure on their part. This in no way would make the certifying agent responsible for any failure on the part of the Department. Further, the wording of this provision is consistent with § 6515(e)(1) of the Act, which provides that private certifying agents shall agree to hold the Secretary harmless for any failure on the part of the certifying agent to carry out the provisions of the Act. Accordingly, we are reproposing this regulation at § 205.501(c)(1).

Second, commenters expressed concern regarding the requirement that certifying agents furnish reasonable security, in an amount and according to terms as the Secretary may by regulation prescribe, for the purpose of protecting the rights of production and handling operations certified by such certifying agent. The commenters expressed concern regarding what would be the dollar amount of the security, how the dollar amount of the security would be determined, and in what form the security might be furnished. Several commenters expressed concern over the availability of errors and omissions insurance. The commenters also expressed a belief that guidance on what reasonable security might entail will be needed by accreditation applicants to evaluate their costs for accreditation.

A private-entity certifying agent must furnish reasonable security for the purpose of protecting the rights of operations certified by such certifying agent. This security is to ensure the performance of the certifying agent's

contractual obligations. As noted elsewhere in this proposed rule, the specific amount and type of security that must be furnished by a private certifying agent will be the subject of future rulemaking by the Department. Such rulemaking will provide for public input and will occur prior to the call for applications for accreditation. We anticipate that the amount of the security will be tied to the number of clients served by the certifying agent and the anticipated costs of certification that may be incurred by its clients in the event that the certifying agent's accreditation is suspended or revoked. We anticipate that the security may be in the form of cash, surety bonds, or other financial instrument (such as a letter of credit) administered in a manner comparable to cash or surety bonds held under the Perishable Agricultural Commodities Act. Accordingly, we are reproposing this regulation at § 205.501(c)(2).

Third, commenters expressed concern regarding the requirement that a private person accredited as a certifying agent must transfer to the Secretary and make available to any applicable State program's governing State official all records or copies of records concerning the private certifying agent's certification activities in the event that the certifying agent dissolves or loses its accreditation. This requirement is consistent with § 6515(c)(3) of the Act, which provides that if any private person that was certified under the Act is dissolved or loses its accreditation, all records or copies of records concerning such person's activities under the Act shall be transferred to the Secretary and made available to the applicable State program's governing State official. In addition to being consistent with the Act, we believe that this regulation is necessary to ensure the continuity and integrity of the NOP. Accordingly, we are reproposing this regulation at § 205.501(c)(3).

(15) *Public Access to Applicant Information.* The first proposal included provisions regarding what information had to be submitted by an accreditation applicant. Commenters requested the addition of a paragraph addressing public access to this information about the applicant's organization and intended certification activities. We have not made this requested change because the proposed recordkeeping and availability requirements under this program, coupled with the Freedom of Information Act, adequately provide for public access to information. The regulations on applicant information are found at § 205.503 and include two additions to the provisions of the first proposal. This proposal requires the applicant to provide the name of the person responsible for the certifying agency's day-to-day operations and to submit a copy of its schedule of fees for all services to be provided under these regulations.

(16) *Application Requirements for States.* Commenters stated that State certifying agents should not be required to submit documents and information regarding personnel, administrative policies and procedures, and financial policies and procedures to demonstrate evidence of expertise and ability. They believe that the requirements should not apply to States that have established hiring procedures, standard qualifications for job descriptions, and statewide policies for training, evaluating, and supervising personnel. They also stated that administrative policy and procedure review should be limited to organic program administration, not to agencywide policies or procedures such as financial policies.

We acknowledge that States have established hiring procedures, standard qualifications for job descriptions, administrative procedures, and statewide policies for training, evaluating, and supervising personnel and that such policies and procedures would be applicable to State certifying agents. This fact, however, does not make States uniquely different from private accreditation applicants who would have similar policies and procedures in exercising good business practices. State certifying agents cannot be exempt from these requirements simply because they are a government agency.

We anticipate that a State will submit its established policies and procedures to meet the requirements for demonstrating its expertise in organic production and handling techniques and its ability to fully comply with and implement the national organic certification program. A stated purpose of the Act is the establishment of national standards. We believe such national standards extend to uniform requirements for State and private certifying agents unless otherwise provided by the Act. We further believe the required information is essential to enable the Administrator to make a determination concerning approval of an application for accreditation. Accordingly, the requirements for demonstrating expertise in organic production and handling techniques and an ability to fully comply with and implement the national organic certification program remain the same for private and State certifying agents. These requirements are found at § 205.504.

(17) *Public Access to Information on Certified Operations.* Commenters requested that the public be provided information about a certified operation's farming practices, use of pesticides, and livestock production practices. All production and handling operations must meet the requirements of the national organic certification program to be certified. An accredited certifying agent will determine whether an operation meets those requirements. Certified operations can be held to no other standards except, if applicable, the requirements of an approved State organic certification program. Accordingly, we believe access to the requested information is unnecessary. We also believe the information to be confidential business information that should not be released to the public. Therefore, we have made no changes to the proposed rule to accommodate the commenters' request.

(18) *Conflicts of Interest.* The first proposal required a description of procedures intended to be implemented to prevent the occurrence of conflicts of interest. It also required the identification of any food or agriculture-related business interests of all personnel intended to be used in the certification operation, including administrative staff, certification inspectors, members of any certification review and evaluation committees, all parties responsibly connected to the certification operation, and immediate family members, that may result in a conflict of interest. Commenters stated that existing State policies should be sufficient to prevent conflicts of interest. They also stated that lists of the business interests of all inspectors, program staff, and their families are unnecessary.

We agree with the commenters that existing State policies should be sufficient to prevent conflicts of interest. However, we disagree with the commenters' assertion that lists of the business interests of all inspectors, program staff, and their families are unnecessary. At § 6515(h), the Act places responsibility for the prevention of conflicts of interest with the certifying agent. We, however, have responsibility for ensuring that the certifying agent complies with that responsibility. We believe these requirements will provide the Administrator with information essential to the identification of conflicts of interest. A stated purpose of the Act is the establishment of national standards. We believe such national standards extend to uniform conflict of

interest requirements for State and private certifying agents. Further, for conflict of interest standards to achieve their intended effectiveness, they must be uniformly applied to both State and private certifying agents. The required information is also essential to the Administrator's determination of the applicant's suitability for accreditation. As the commenters point out, States have established conflict of interest policies and procedures. Thus, the required information should be readily available for submission to the Administrator with minimal inconvenience to the certifying agent. Accordingly, we have made no changes in this proposal based on these comments. Regulations concerning conflicts of interest are found at §§ 205.501(a)(11) and 205.504(c) in this proposal.

(19) *Accreditation Prior to Site Evaluation.* Commenters expressed concern that applicants could be accredited prior to a site evaluation of the applicant's facilities and operations. Most, however, recognized the need for accreditation decisions on written materials as opposed to further delay to program implementation. A few of the commenters urged USDA to complete the site evaluations during the implementation phase. The first proposal provided that an initial site evaluation of the operation of each certifying agent must be performed for the purpose of verifying its compliance with the Act and regulations. Two restrictions concerning timing were placed on the performance of an initial site evaluation. First, the site evaluation had to be performed within a reasonable period of time after the date on which the agent's notice of approval of accreditation was issued. Second, the site evaluation had to be performed after the agent had conducted sufficient certification activities for the Administrator to examine its operations and evaluate its compliance with the general requirements for accreditation.

We never intended that a site evaluation be required prior to accreditation. While site evaluations could be conducted before approval, we believe accreditation approval without a site evaluation is appropriate. We believe that the commenters' concerns are adequately addressed by the first proposal, which provided for a well-founded assessment of the applicant's qualifications and capabilities through a sufficiently rigorous review of the application and supporting documentation. In cases where the document review raises concerns regarding the applicant's qualifications and capabilities and the Administrator deems it necessary, a preapproval site evaluation would be conducted.

As noted above, a site evaluation to verify compliance with the Act and regulations would be conducted within a reasonable time period after the date on which the agent's notice of approval of accreditation was issued. Following the site evaluation, the certifying agent's accreditation would be continued provided the certifying agent is in compliance with the Act and regulations. Should it be found that the accredited certifying agent is not in compliance with the Act and regulations, the Administrator will issue the certifying agent a notification of noncompliance and afford the certifying agent an opportunity to correct the deficiencies. If the deficiencies are not corrected, the Administrator will begin proceedings to suspend or revoke the certifying agent's accreditation.

We also believe that: (1) Conducting a site evaluation of a newly established certifying agent before it had begun any certification activities might not contribute information that would be useful for the Department's evaluation; (2) previously existing certifying agents also would need time to make adjustments in their operations to comply with the NOP regulations; and (3) requiring full site evaluations and peer reviews to be conducted prior to granting accreditation would further delay implementation of the Act. Accordingly, we have made no changes to the application requirements found at § 205.502 or the site evaluation requirements found at § 205.508 on the basis of these comments.

(20) *Conditional Accreditation.* Commenters suggested that the rule provide for conditional accreditation of certifying agents. We disagree with the concept of conditional accreditation. We believe accreditation before a site evaluation to be the most effective means of providing new certifying agents with the opportunity to participate in the NOP. New certifying agents need to be unconditionally accredited to sell their services to potential organic clients. Such certifying agents need organic clients to demonstrate to the Administrator their compliance with the Act and regulations relative to the certification of organic producers or handlers. Furthermore, the Act does not provide for conditional accreditation. Accordingly, the proposed accreditation program for initial accreditation provides for: (1) Review and analysis of the applicant's application and evidence of expertise and ability, (2) approval of accreditation upon determination that the applicant meets the requirements for accreditation, and (3) site evaluation to determine compliance with the Act and regulations.

(21) *Application Fees Incurred From Notifications of Noncompliance.* Commenters questioned whether a new application for accreditation, following the correction of deficiencies identified in the notification of noncompliance, would require a second application fee. The commenters stated that fees paid for the initial application should cover timely resubmission of the application after correction of deficiencies. In this proposal, we have replaced the flat fee for accreditation with an hourly user fee system, which will involve billing for actual time used in the accreditation process. Accordingly, there will be additional costs to applicants who submit a description of the actions taken to correct the deficiencies noted in the notification of noncompliance.

(22) *Peer Review Panels.* Comments were received expressing various opinions regarding the peer review panel provisions of the first proposal. First, commenters stated that peer review panels should participate in site evaluations. Prior to publishing the first proposal, the Department received some public input which also suggested the use of peer reviewers in the site evaluation process. As noted in the first proposal, we did not provide for such participation because we believed that the use of peer reviewers could pose an excessive burden on the certifying agents, would increase the costs of conducting site evaluations, and could delay site evaluations and because AMS staff are well qualified to perform the site evaluations. We have made no change to our proposal as a result of this comment.

Second, commenters stated that peer review panels should participate in the initial review of an application for accreditation. We believe this would not be an effective use of panel members' talents and expertise and would not be cost effective. We have made no change to our proposal as a result of this comment.

Third, an industry association stated that section 6516(a) of the Act clearly states that the Secretary shall consider a report, not three to five individual reports, in determining whether to approve an applicant for accreditation. We do not agree that the Act requires a single report, nor do we believe that it is usual to have consensus in peer review. We also believe that it is impractical to bring peer reviewers together for the purpose of reviewing the information provided and drafting a single report. The Administrator could convene a peer review panel meeting or

conference call if necessary. Such meeting or conference call would be conducted in a manner that would ensure the actions of panel members are carried out on an individual basis with any opinions and recommendations by a member being made individually. A peer review panel meeting or conference call will be held solely to give and receive information. Such meeting or conference call will not be held for the purpose of achieving consensus by the peer review panel. The written report of each panel member would reflect the particular knowledge, expertise, and opinion that its author-member brings to the panel. The Administrator will consider all points in the individual reports in making a determination as to the continued operation of the accredited certifying agent. We have made no change to our proposal as a result of this comment.

Fourth, commenters stated that the peer review panel regulations should be revised to specify what situations, other than continuation or renewal of accreditation, would trigger a peer review; that a peer review panel should be used in determining noncompliance with accreditation requirements; and that a peer review panel should be convened to review any decision of noncompliance prior to initiation of proceedings to suspend or revoke a certifying agent's accreditation. The first proposal provided that the Administrator may convene a peer review panel at any time for the purpose of evaluating a certifying agent's activities under the Act and regulations. This provision would provide flexibility for the Administrator to seek recommendations from peer reviewers at other times when it may be necessary to evaluate a certifying agent's compliance with the Act and regulations. We do not believe that it is practical or necessary to require the use of peer review panels in determining noncompliance and decisions to suspend or revoke an accreditation. We have made no change to our proposal as a result of these comments.

(23) *Purpose of Annual Reporting Requirements.* At least one commenter was confused regarding the purpose for having certifying agents submit annual reports to the Administrator. The reports would update information and evidence of expertise and ability previously submitted by the certifying agent; support any changes being requested in the areas of accreditation; describe the measures that were implemented in the previous year and any measures to be implemented in the coming year to satisfy any terms and conditions determined by the Administrator to be necessary, as specified in the most recent notification of accreditation or notice of renewal of accreditation; and describe the results of the most recent inspector performance appraisals and program evaluation and adjustments to the certifying agent's operation and procedures implemented and intended to be implemented in response to the appraisals and program evaluation. The first proposal stated that this information would be reviewed by the Administrator to determine whether the certifying agent was maintaining its accreditation by satisfying the requirements of the Act and regulations and to assess the need for a site evaluation. We believe that an annual process of reviewing information submitted by certifying agents is necessary so that the Administrator can be informed of any changes in the procedures and personnel used by the certifying agents. We have made no change to our proposal as a result of this comment.

Accreditation—Additional Provisions

Upon further review of the accreditation provisions in the first proposal, we have decided to propose the following additions and changes.

(1) *Access to Records.* We have added the requirement that the records maintained by the certifying agent under the Act and regulations be made available for copying by authorized representatives of the Secretary and the applicable State program's governing State official. This addition is necessary to ensure that authorized representatives are able to obtain copies of records applicable to a review or an investigation regarding compliance with the Act and regulations. This addition, found at § 205.501(a)(9), is authorized under section 6506 of the Act.

(2) *Conflicts of Interest.* A conflict of interest regulation in the first proposal required that certifying agents prevent conflicts of interest by not certifying an operation through the use of any employee that has or has held a commercial interest in the operation, including the provision of consulting services, within the 12-month period prior to the application for certification. This regulation was closely related to a second regulation which required certifying agents to prevent conflicts of interest by not assigning an inspector to perform an inspection of an operation if the inspector has or has held a commercial interest in the operation, including the provision of consulting services, within the 12 months prior to conducting the inspection. For clarification, this proposal combines the regulations at § 205.501(a)(11)(ii). This new regulation provides for excluding any person, including contractors, with conflicts of interest from work, discussions, and decisions in all stages of the certification process and the monitoring of certified production and handling operations for all entities in which such person has or has held a commercial interest, including an immediate family interest or the provision of consulting services, within the 12-month period prior to the application for certification. This regulation would permit a certifying agent to certify the operation of an employee or contractor or an employee's or contractor's immediate family member provided the employee or contractor was not used in certifying the production or handling operation.

(3) *Reporting Requirements for Certifying Agents.* The first proposal required a certifying agent to submit to the Administrator a copy of each notification of noncompliance issued simultaneously with its issuance to the certification applicant or the certified operation. It also required a certifying agent to submit to the Administrator on a quarterly calendar basis the name of each operation certified. In this proposal, we have expanded the provision to provide that certifying agents must submit to the Administrator: (1) A copy of any notice of denial of certification, notification of noncompliance, notification of noncompliance correction, notification of proposed suspension or revocation, and notification of suspension or revocation issued simultaneously with its issuance; and (2) on a quarterly calendar basis, the name, address, and telephone number of each operation granted certification. This information is needed to facilitate oversight and to ensure that we have relatively current data for responding to inquiries involving the granting of certifications by certifying agents. These changes are included in § 205.501(a)(14).

We anticipate using the data collected under § 205.501(a)(14) to establish and maintain 2 Internet databases. The first Internet database would be accessible to the general public and would include the names and other appropriate data on certified organic production and handling operations. The second Internet database would be password protected and only available to accredited certifying agents and USDA. This second database would include data on production and handling operations issued a notification of noncompliance, noncompliance correction, denial of certification, certification, proposed suspension or revocation of certification, and

suspension or revocation of certification. Certifying agents would use the second Internet database during their review of an application for certification.

(4) *Requirements for Nondiscrimination.* We have included at § 205.501(d) the provision that no private or State entity accredited as a certifying agent under subpart F shall exclude from participation in or deny the benefits of the NOP to any person due to discrimination because of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status. This regulation is consistent with USDA regulations which prohibit discrimination in its programs and activities.

(5) *Submission of Policies and Procedures.* The first proposal required an applicant for accreditation as a certifying agent to submit documents and information to demonstrate the applicant's expertise in organic farming or handling techniques, its ability to fully comply with and implement the organic certification program, and its ability to comply with the requirements for accreditation. Much of the documentation and information required involved submission of a description of a policy or procedure to be used by the certifying agent. In this proposal we have changed the requirement from submission of a description of the policy or procedure to submission of a copy of the actual policy or procedure. This will facilitate the Department's determination of an applicant's eligibility for accreditation by providing more complete information. By requiring a copy of each policy and procedure, which should already be in the possession of the applicant, rather than a description of each, we have lessened the burden on applicants for accreditation. This change is found in § 205.504 of this proposal.

(6) *Public Access to Certification Certificates.* In this proposal, we have added the requirement that certifying agents make copies of certification certificates issued during the current and 3 preceding calendar years available to the public. Such documents may be useful to consumers wishing to verify that an operation is certified to produce and label agricultural products as organic. Copies of certification certificates will be especially valuable in assisting handlers in assuring that the products they receive labeled as organic were produced and handled by certified organic operations. This requirement is found at § 205.504(b)(5)(i).

(7) *Submission of Residue Testing Procedures.* We believe that applicants for accreditation should provide evidence of expertise and ability in meeting the sampling and residue testing requirements of these regulations. Therefore, we have added the requirement that applicants for accreditation submit a copy of the procedures to be used for residue testing. This requirement is found at § 205.504(b)(6). Residue testing requirements are found at § 205.670.

(8) *Elimination of Section on Confirmation of Accreditation.* We have amended the section on approval of accreditation by adding the duration of accreditation provision formerly included in the first proposal's section on confirmation of accreditation. We have also eliminated the section on confirmation of accreditation. We have taken this action to eliminate the confusion created by having a section on approval of accreditation and a section on confirmation of accreditation.

(9) *Denial of Accreditation.* We have amended the denial of accreditation regulations and eliminated the section on denial of confirmation of accreditation. We have taken this action to eliminate the confusion created by having a section on denial of accreditation and a section on denial of confirmation of accreditation. We have added to the denial of accreditation regulations that a notification of noncompliance can be issued based on the findings of a site evaluation.

Under the first proposal's denial of accreditation regulations, the Administrator could institute proceedings to deny accreditation to an applicant who did not correct the deficiencies noted in a notification of noncompliance within the time specified. In this proposal, we have amended these regulations to provide that the Administrator will provide the applicant with a written notification of accreditation denial or begin proceedings to suspend or revoke the certifying agent's accreditation if accredited prior to a site evaluation. Such action will be taken when the applicant fails to correct the deficiencies, report the corrections by the date specified, or file an appeal by the date specified in the notification of noncompliance.

We have also clarified that an applicant who has received written notification of accreditation denial or had its accreditation suspended may apply for accreditation again at any time. Additionally, we have provided that a private certifying agent whose initial accreditation is revoked following an initial site evaluation will be ineligible for accreditation for a period of not less than 3 years following the date of such determination. This period of ineligibility is consistent with section 6519(e) of the Act. These changes are included in § 205.507.

A certifying agent accredited prior to an initial site evaluation whose site evaluation reveals that the certifying agent is not properly adhering to the provisions of the Act or these regulations will be subject to suspension of its accreditation. A private certifying agent accredited prior to an initial site evaluation who's site evaluation reveals that the certifying agent has violated the provisions of the Act and these regulations or that falsely or negligently certifies any production or handling operation that does not meet the terms and conditions of this national organic certification program as an organic operation will be subject to revocation of its accreditation. Section 205.660(b) of subpart G provides that the Secretary may initiate suspension or revocation proceedings against a certified operation upon initiation of suspension or revocation proceedings against or upon suspension or revocation of the certified operation's certifying agent's accreditation.

(10) *Peer Review Panels.* We have removed the provision which provided that the Administrator may convene a peer review panel at any time for the purpose of evaluating an applicant for accreditation or a certifying agent's activities under the Act and regulations. This change has been made because peer review panels will only be used to assist in the evaluation of applicants for accreditation, amendment to an accreditation, and renewal of accreditation.

Subpart G—Administrative

The National List of Allowed and Prohibited Substances

Proposal Description

This subpart contains criteria for determining which substances and ingredients are allowed or prohibited in products to be sold, labeled, or represented as ''organic'' or ''made with organic (specified ingredients).'' It establishes the National List of Allowed and Prohibited Substances (National List) and identifies specific substances which may or may not be used in organic production and handling operations. Sections 6504, 6510, 6517, and 6518 of the Organic Foods Production Act (OFPA) of 1990 provide the Secretary with the authority to develop the National List. The contents of the National List are based upon a Proposed National List, with

annotations, as recommended to the Secretary by the National Organic Standards Board (NOSB). The NOSB is established by the OFPA to advise the Secretary on all aspects of the National Organic Program (NOP). The OFPA prohibits synthetic substances in the production and handling of organically produced agricultural products unless such synthetic substances are placed on the National List.

The first category of the National List includes synthetic substances allowed for use in organic crop production. The second category includes nonsynthetic substances prohibited for use in organic crop production. The third category of the National List includes synthetic substances allowed for use in organic livestock production. The fourth category includes nonsynthetic substances prohibited for use in organic livestock production. The fifth category of the National List includes nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients).'' The final category of the National List includes nonorganically produced agricultural products allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients).'' This subpart also outlines procedures through which an individual may petition the Secretary to evaluate substances for developing proposed National List amendments and deletions.

National List (General)

The NOSB is responsible for making the recommendation of whether a substance is suitable for use in organic production and handling. The OFPA authorizes the NOSB to develop and forward to the Secretary a Proposed National List and any subsequent proposed amendments. In March 1995, the NOSB initiated a petition process to solicit public participation in identifying specific materials to be added to the National List. The NOSB convened a Technical Advisory Panel (TAP) to review substances identified in the petition process and made extensive recommendations on a Proposed National List during its meetings in 1995 and 1996. In 1999, the NOSB selected materials left from the original petition process to authorize a second round of TAP reviews. The NOSB used these updated TAP reviews to make additional recommendations on the Proposed National List at its October 1999 meeting. With the exception of four substances on which the Secretary did not concur with the NOSB recommendations and minor formatting changes, the National List in this proposal corresponds to the recommendations on allowed and prohibited substances made by the NOSB. The National List in this proposal has also been developed in consultation with the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA), and the Food Safety Inspection Service (FSIS) of USDA. Additionally, we have made changes in response to public comment received on the first proposal.

Nothing in this subpart alters the authority of other Federal agencies to regulate substances appearing on the National List. FDA establishes safety regulations on approved and prohibited uses of substances in food production and processing. FSIS has the authority to determine efficacy and suitability regarding the production and processing of meat, poultry, and egg products. FDA and FSIS restrictions on use or combinations of food additives or ingredients take precedence over the approved and prohibited uses specified in this proposal. Any combinations of substances in food processing not already addressed in FDA and FSIS regulations must be approved by FDA and FSIS prior to use. Use-of-substance requirements are proposed by FDA and FSIS in rulemaking actions and are frequently updated with revised use requirements. It is important that certified organic producers and handlers of both crop and livestock products consult with FDA regulations in 21 CFR parts 170 through 199 and FSIS regulations in this regard. All feeds, feed ingredients, and additives for feeds used in the production of livestock in an organic operation must comply with the Federal Food, Drug, and Cosmetic Act (FFD&CA). Animal feed labeling requirements are published in 21 CFR part 501, and new animal drug requirements and a listing of approved animal drugs are published in 21 CFR parts 510–558. Food (feed) additive requirements, a list of approved food (feed) additives generally recognized as safe substances (GRAS), substances affirmed as GRAS, and substances prohibited from use in animal food or feed are published in 21 CFR parts 570–571, 21 CFR part 573, 21 CFR part 582, 21 CFR part 584, and 21 CFR part 589, respectively. Furthermore, the Food and Drug Administration has worked closely with the Association of American Feed Control Officials (AAFCO) and recognizes the list of additives and feedstuffs published in the AAFCO Official Publication, which is updated annually.

National List—Changes Based On Comments

This subpart differs from our first proposal in several respects as follows:

(1) *Genetically Engineered Organisms (GEO's).* To solicit public comment on the use of genetically engineered organisms in organic production and handling, we included two such materials on the National List in the first proposal. As discussed in Production and Handling—Subpart C, we received many thousands of comments opposing the use of substances or organisms produced through genetic engineering in organic production and handling. Many commenters expressed strong concerns that GEO's do not meet current consumer expectations of organic agriculture or an organically produced product. They stated that existing national and international organic certification standards clearly and consistently prohibit GEO's. Accordingly, this proposal prohibits GEO's and their derivatives and the products of GEO's and their derivatives in any product or ingredient that is sold, labeled, or represented as organic. As a result of the prohibition, the National List does not contain any materials derived from GEO's.

(2) *Inclusion of Substances not Recommended by the NOSB.* The first proposal allowed some synthetic substances in organic crop production and handling that the NOSB had not included on the proposed National List. Citing the statutory requirements of the OFPA, commenters were overwhelmingly opposed to adding substances to the National List that had not been recommended by the NOSB. Every substance on the National List in this proposal was favorably recommended by the NOSB.

With four exceptions, the National List included in this proposal contains every substance that the NOSB recommended to allow in organic production and handling. The Secretary has not accepted the NOSB recommendations to allow sulfur dioxide in the production of wine labeled as ''made with organic grapes.'' Additionally, the Secretary has not concurred with the NOSB recommendation to allow the antibiotics, Streptomycin and Terramycin, in organic crop production or to allow livestock producers to administer synthetic Oxytocin for approved organic veterinary practices. The Secretary decided not to add sulfur dioxide to the National List because its use produces sulfites, which are

prohibited in the OFPA. Streptomycin and Terramycin were not added to the National List for use in crop production in order to be consistent with this proposal's prohibition on the use of all antibiotics in animal production. The Secretary's decision not to allow livestock producers to administer synthetic Oxytocin is based on extensive public comment that opposed the use of animal drugs including hormones in organic livestock operations. Many certifying agencies have allowed producers to administer Oxytocin to animals that experience severe complications resulting from labor. While most of the public comment strongly opposed the use of synthetic hormones in organic dairy production, Oxytocin has some uses that do not involve lactation but are instead related to an animal's postpartum survival. Not allowing Oxytocin in organic operations is responsive to the public comment opposing the use of synthetic hormones but does preclude the use of an animal medication that some producers have previously been able to use in emergency situations.

(3) *Prohibited Nonsynthetic Substances.* The National List in the first proposal contained no prohibited nonsynthetic (natural) substances. Many commenters requested that the four nonsynthetic substances which the NOSB proposed to prohibit be added to the National List. We agree with this position, and this proposal lists ash from manure burning, mined sodium fluoaluminate, strychnine, and tobacco dust as natural substances that are prohibited in organic crop production and handling. In addition, we have included arsenic and lead salts on the National List of prohibited natural substances in accordance with provisions of the OFPA.

(4) *Annotations on National List Substances.* The National List in the first proposal did not include all of the annotations originally developed by the NOSB for the materials it recommended to include on the National List. The OFPA stipulates that when basing the National List upon the NOSB's recommendations, the Secretary shall include ''an itemization, by specific use or application,'' of each synthetic substance permitted or natural substance prohibited. This itemization, commonly known within the organic industry as an annotation, has been used by existing State and private certification agents to regulate the use of allowed materials. Annotations can establish allowable sources or procedures for obtaining a substance, specify the crops or conditions for which it may be applied, establish use restrictions based on environmental monitoring, or create other conditions to govern the use of a substance.

Many commenters stated that removing annotations diminished the NOSB's role in advising the Secretary on the content of the National List. Commenters also stated that annotations are essential for ensuring that substances are used in a manner which is consistent and compatible with a system of organic production and handling. Considering how annotations have been applied in regulating the use of allowed substances by State and private certifying agents, we have incorporated every feasible NOSB-proposed annotation in this proposal.

(5) *Incidental Additives.* The first proposal stated that a nonagricultural synthetic substance occurring as an incidental additive, including a processing aid, could be used in organic production and handling without having to be added to the National List. This position was based on FDA and FSIS regulations which require that active ingredients, but not incidental additives, appear on a product label. Because incidental additives were not active ingredients in organically processed food under these regulations, the first proposal maintained that they were not prohibited by the OFPA and would not need to be added to the National List.

Thousands of commenters responded with varying opinions on this subject. Many commenters approved of the proposed approach, generally stating that processing aids are essential and needed for most agricultural products. These commenters felt that eliminating their use entirely would greatly limit handlers' ability to produce a wide variety of organic products. However, other commenters strongly opposed allowing the use of any nonagricultural synthetic substance that had not been petitioned, reviewed, and recommended by the NOSB; published for comment in the **Federal Register**; and then added by the Secretary to the National List. Some commenters protested the use of any synthetic incidental additives in organic handling operations. They stated that their use is not consistent with the principles of organic agriculture and that consumers currently do not believe that such aids and additives are used in organically processed products.

Prior to the first proposal, the NOSB reviewed this issue and recommended allowing both synthetic and nonsynthetic incidental additives in processed organic products. The NOSB's 1995 recommendation stated that nonsynthetic, nonagricultural products used as ingredients, processing aids, or incidental food additives should be categorically allowed in organically processed products unless specifically prohibited and that synthetic, nonagricultural products should not be used as ingredients, processing aids, or incidental food additives unless specifically included on the National List. The NOSB applied these recommendations to processed foods labeled ''organic'' and ''made with organic (specified ingredients).'' However, the OFPA does not allow the categorical allowance for nonsynthetic, nonagricultural products. Section 6510(a)(4) of the OFPA requires that any nonorganically produced ingredient added to an organic product must be included on the National List.

The NOSB revisited this issue at its February 1999 meeting when it adopted criteria for accepting (adding to the National List) a synthetic processing aid or adjuvant. These criteria are an interpretation and application of the general evaluation criteria for synthetic substances contained in the OFPA that the NOSB will apply to processing aids and adjuvants. To review the adopted criteria, the public can visit the USDA NOP website: www.ams.usda.gov/nop/nosbfeb99.html or write Program Manager, Room 2945 South Building, U.S. Department of Agriculture, AMS, Transportation and Marketing Programs, NOP, PO Box 96456, Washington, DC 20090–6456. The NOSB adopted these criteria as internal guidelines for evaluating processing aids and adjuvants. The adopted criteria do not supercede the criteria contained in the OFPA, or replace FDA's authority to regulate food additives.

We are proposing that to be used in or on a processed product labeled as ''organic'' or ''made with organic (specified ingredients),'' a nonagricultural substance, whether synthetic or nonsynthetic, must be included on the National List. This position supports the NOSB recommendation that synthetic substances be allowed in organic processed foods but incorporates the National List requirement reflected in public comment. We have divided the materials on this list (§ 205.605) in the current proposal to reflect the recommended distinction made by the NOSB between synthetic and nonsynthetic substances. This distinction does not affect how the substances may be used. We recognize that many commenters, basing their argument on the OFPA, objected to allowing any synthetic substances in processed organic products. However, we believe that the OFPA does allow

synthetic substances, when added to the National List, to be used in this manner. The criteria utilized by the NOSB for evaluating processing aids and adjuvants are very restrictive and, if applied to all incidental additives, should minimize the number of substances added to the National List.

(6) *Inert Ingredients in Formulated Products.* The first proposal addressed the presence of synthetic inert ingredients in formulated products used as production inputs in organic crop or livestock operations. Formulated products are multiingredient compounds including pesticides, fertilizers, and animal drugs and feeds. In accordance with the OFPA, we proposed that a formulated product containing an inert ingredient could be used, provided that the substance did not appear on EPA's List 1 as an Inert of Toxicological Concern. We also prohibited the use of synthetic inerts not on EPA List 1 if the substance was also used as an active ingredient that had not been added to the National List. To review or to receive the most current listing of the EPA Inerts, the public can visit EPA's Internet home page at http://www.epa.gov/opprd001/inerts/lists.html, or write to Registration Support Branch (Inerts), Registration Division (Mail Code 7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

The first proposal interpreted the statutory prohibition on EPA List 1 inerts as allowing the use of synthetic inert ingredients that were not specifically prohibited. This allowed the use of products containing synthetic inert substances (provided that they were not also used as active substances) included on the other EPA inert lists: List 2, Potentially Toxic Inerts; List 3, Inerts of Unknown Toxicity; and List 4, Inerts of Minimal Concern. We also applied the term, ''inert,'' to all nonactive ingredients contained in any formulated product used in organic production. This meant that the nonactive ingredients in animal feeds (fillers or additives), animal drugs (excipients), and fertilizers (carriers or adjuvants) would only be prohibited if they were classified by the EPA as List 1 inerts.

We received many comments stating that our restrictions on inert ingredients were too permissive and would result in many traditionally prohibited materials being used in organic production. Commenters stated that the statutory prohibition on EPA List 1 inerts did not imply that all other inerts should be allowed and argued that the NOSB had the authority to prohibit additional substances. Citing the uncertainty associated with EPA List 2 (potentially toxic) and EPA List 3 (unknown toxicity) inert ingredients, they questioned how such substances could satisfy the criteria in OFPA for adding synthetic substances to the National List. Commenters also opposed expanding the definition of inert to include nonactive ingredients in all formulated products. They stated that the EPA classifies only those inerts used in pesticides, and that many of the substances routinely used in other types of formulated products were not subject to review. Therefore, substances not used in pesticides would not appear on any EPA list and would be allowed. Finally, commenters cited the disparity between the allowance for synthetic inert ingredients in the first proposal and the more restrictive substance review procedures used by existing organic certifying agents.

The NOSB responded to the provisions for inert ingredients contained in the first proposal. At its meeting in March 1998, the NOSB stated that synthetic compounds should not be allowed in production inputs unless they appear on the National List. In February 1999, the NOSB voted to prohibit EPA List 1 and 2 inerts, prohibit EPA List 3 inerts unless specifically allowed by the NOSB, and allow EPA List 4 inerts unless specifically prohibited. The NOSB also recommended full disclosure of all ingredients in formulated products, called for an expedited review of EPA List 3 inerts currently in common use in organic production, and endorsed an 18-month phase-out period for EPA List 3 inerts not ultimately allowed.

In this proposal, only EPA List 4 inerts are allowed as ingredients in formulated products used in organic production. This would not include varieties of EPA List 4 substances such as corn starch, lecithin, or citric acid that are the product of excluded methods. Additionally, the term inert is restricted to nonactive ingredients in pesticides. Synthetic nonactive ingredients in formulated products used as production inputs, including fertilizers, animal drugs, and feeds, must be included the National List. While the OFPA prohibits using a fertilizer containing synthetic ingredients or a commercially blended fertilizer containing prohibited materials, the requirement does not apply to synthetic substances included on the National List. The NOSB recommended and the Secretary concurs that certain synthetic substances used in fertilizer-formulated products should be included on the National List. We have retained the provision from the first proposal prohibiting the use of any formulated product containing a EPA List 1 Inert. Using the criteria established in the OFPA for evaluating synthetic substances, the NOSB may review inert ingredients on EPA List 2 or 3 as well as other synthetic, nonactive substances used in formulated products for inclusion on the Proposed National List it forwards to the Secretary.

We recognize that inert ingredients in pesticides and similar substances in other formulated products pose one of the most problematic examples of the use of synthetic materials in organic production. For example, verifying the use of inerts and similar substances such as fillers, carriers, additives, and excipients has been difficult because they are not required to appear on ingredient labels, and formulators typically treat product formulas as confidential information. At times, certifying agents have been unable to determine the exact composition of formulated products proposed for use in organic production. In other instances, organic producers have applied formulated products containing inert ingredients and similar substances that are not specifically allowed. We are challenged with balancing standard practice with the strict statutory requirement that producers and handlers apply only those synthetic substances added to the National List. As sanctioned by OFPA, synthetic substances can be used in organic production as long as they appear on the National List. The development and maintenance of the National List has been and will be designed to allow the use of a minimal number of synthetic substances that are acceptable to the organic industry and meet the OFPA criteria.

Two principles will be essential for responding to this challenge: greater disclosure of the contents of formulated products and an expedited review of inert ingredients and other nonactive substances. The OFPA recognized the need for disclosure by requiring the NOSB to work with formulators to obtain a complete list of ingredients in their products. The NOSB has initiated this work, and its effort is ongoing as of the date of this publication. It is our understanding from the comments, hearings, and information considered by the NOSB that the organic industry has made considerable progress on disclosure of inert ingredients since the passage of OFPA. Formulators have responded to the incentive to provide products using EPA List 4 inert ingredients, and certifying agents have

gained greater access to information on product composition. EPA has expressed its willingness to expedite the review of its List 2 and 3 inerts, which the NOSB identifies as particularly important in formulated products widely used in organic operations. The organic industry should clearly understand that NOSB evaluation of the wide variety of inert ingredients and other nonactive substances will require considerable coordination between the NOP, the NOSB, and industry. Materials review can be anticipated as the NOSB's primary activity during NOP implementation. Considering the critical nature of this task, the organic industry should make a collaborative effort to prioritize for NOSB review those substances which are essential to organic production and handling.

We recognize that more work is needed for this policy to satisfy the needs of organic producers and handlers, product formulators, and consumers. We are requesting comment on the proposed requirements for inert ingredients in formulated products. We are sensitive that an abrupt prohibition on synthetic substances which may have knowingly or unknowingly been used in the past but which are not added to the National List may disrupt many well-established and accepted production systems. However, our assessment is that the benefits of a clear policy consistent with the OFPA, NOSB recommendations, and public comment outweigh the costs. The net effect will be greater consumer confidence in USDA's organic label and more products that are tailored to the needs of organic producers.

(7) *Use of Veterinary Medicines.* The OFPA prohibits certain routine uses of veterinary medications (specifically subtherapeutic doses of antibiotics) but allows their administration in the presence of illness. The first proposal added antibiotics to the National List because their use had been evaluated and approved by applicable regulatory agencies, pursuant to FDA requirements, and because they had to be included on the National List to be used in organic livestock production.

We received many comments opposing the use of antibiotics in organic livestock production. Commenters expressed general concern over microbial resistance to antibiotics and expressed a desire to source food products without antibiotics. This proposal removes antibiotics from the National List of approved synthetic substances for livestock use.

(8) *Removal of Substances from the National List.* The first proposal outlined a petition process for amending the National List and included an extensive list of information to be provided for reviewing a substance. Some commenters recommended that this section be amended to include procedures for deleting substances from the National List. The OFPA and the first proposal indicated that the NOSB would review substances added to the National List at least on a 5-year basis and recommend to the Secretary any substances that should be removed. We concur with commenters that removal of a substance should not have to wait for such a review cycle. Thus, a petition to remove a substance from the National List may be filed at any time. The information contained in the petition for removal of a substance will be provided by AMS upon request. The NOSB will evaluate substance removal petitions and forward a recommendation to the Secretary. Commenters suggested that any changes to the National List be published in the **Federal Register** for public comment. All proposed changes to the National List will be published in the **Federal Register**.

(9) *Use of Sulfur Dioxide.* The first proposal allowed the use of sulfur dioxide in crop production and as an ingredient in or on organic processed products. The NOSB had recommended that sulfur dioxide be permitted in the processing of organic wine and for smoke bombs used underground to control rodents. Numerous commenters opposed the use of sulfur dioxide in organic wine because its use produces sulfites, which are prohibited in the OFPA, as a by-product. We concur with the commenters and further believe that the trend in the organic industry, as evidenced by the California Department of Food and Agriculture's Preliminary Organic Materials List of September 1998, is to prohibit all uses of sulfur dioxide except in underground rodent control. Therefore, we are proposing to allow sulfur dioxide for underground control of rodents and to prohibit its use as an ingredient in or processed food including the production of organic wine.

National List—Additional Provisions

Upon further review of the provisions in the first proposal, we have decided to propose the following additions and changes.

(1) *New Additions to the National List.* During the October 1999 meeting, the NOSB reviewed substances and made new recommendations to the Proposed National List. The Secretary concurs with the recommendations from that meeting and this proposal adds those substances with the applicable annotations to the National List. These substances are: Potassium Bicarbonate (205.601(d)), Glycerin (2005.603(a)), Phosphoric Acid (205.603(a) and 205.605(b)), Ivermectin (205.603(a)), Chlorhexidine (205.603(a)), and Ethylene (205.605(b)). This proposal establishes conditions that allow producers to administer the parasiticide Ivermectin to breeder stock and dairy stock in organic livestock operations. Treating organically managed slaughter stock with Ivermectin is prohibited. These provisions are based on the recommendations developed by the NOSB at its October 1999 meeting. The NOSB's recommendations from that meeting were derivative of many years of work addressing how to establish and enforce the conditions allowing use of synthetic parasiticides. The OFPA identifies livestock parasiticides as a category of substances which may be included on the National List and also prohibits the use of synthetic internal parasiticides on a routine basis. The determination of what constitutes a routine basis for parasiticide use has been challenging given the diversity of animals, production systems, and environmental factors which are covered by a national organic standard.

In this proposal, the conditions under which Ivermectin may be used apply to the health care history of the animal prior to treatment and the certification of products derived from the animal after treatment. The pretreatment conditions are designed to ensure that the producer is using a comprehensive management system to prevent the introduction and transmission of parasites among the animals in his or her care. Producers must document in their organic system plan preventative practices such as quarantine and fecal exams for all incoming stock, appropriate pasture rotation and management, culling of infested livestock, and vector and intermediate host control. A producer may administer an allowed synthetic parasiticide only after all applicable management practices and nonsynthetic treatments have been employed. A producer must receive the approval of their certifying agent before using a synthetic parasiticide. In collaboration with the NOSB, we will be developing program manuals detailing preventive management practices for specific livestock species to assist producers and certifying agents in determining when the use of synthetic parasiticides is allowable.

This proposal also contains provisions addressing the posttreatment condition of livestock which are administered Ivermectin. These conditions are included as an

annotation to Ivermectin on the National List and are consistent with the requirements contained in § 205.238(b)(1)(2) of the regulatory text for administering any allowed synthetic parasiticide. In compliance with the recommendations of the NOSB, we are proposing that a producer may not administer Ivermectin to breeder stock during the last third of gestation if the progeny is to be sold, labeled, or represented as organically produced. Additionally, a producer must observe a 90-day withdrawal period before selling milk or milk products produced from an animal treated with Ivermectin as organically produced. The Food and Drug Administration exercises responsibility for determining and enforcing the withdrawal intervals for animal drugs. No food safety arguments are used or implied to support the use of extended withdrawal periods. Rather, we determined that extended withdrawal periods are more compatible with consumer expectations of organically raised animals.

Ivermectin is the first synthetic parasiticide that the Secretary has proposed adding to the National List, and allowing its use could significantly affect organic management practices. The FDA has approved 18 animal drugs containing Ivermectin that are labeled for use on one or more animals including beef and dairy cattle, sheep, swine, and several minor species. A total of 11 of these drugs are not covered by this proposed rule: three have additional synthetic active ingredients not on the National List and eight others are labeled for nonfood uses. (They are used on horses not for food use, dogs, and cats.) While there are no approved uses of Ivermectin on lactating dairy animals, the remaining seven food-use products could be administered to breeder stock and dairy stock either prior to lactation or during a dry period.

Future NOSB meetings will consider new proposals of substances to be added to the National List.

(2) *Petition Process to Amend the National List.* We are modifying the contents of the petition for amending the National List that was contained in the first proposal. We are proposing that any person requesting a change in the National List should request a copy of the petition procedures from the NOP Program Manager. The procedures will include a list of information that has to be provided for consideration of a change in the National List. Under the provisions in the first proposal, the NOP would be required to go through rulemaking every time it sought to update contents of the petition. Under this proposal, the NOP will amend the requirements of the petition process and publish the changes in the **Federal Register**. This revised process will help to expedite amending the National List and keep the National List more current. We anticipate that amendments to the National List will be made on an annual basis, depending upon the number of substance petitions filed. Substances petitioned for inclusion onto the National List will be reviewed by the NOSB, which will forward a recommendation to the Secretary. All amendments to the National List will be published for comment in the **Federal Register**.

State Organic Certification Programs

The Act provides that each State may implement a certification program for producers and handlers of agricultural products that have been produced and handled within the State, using organic methods that meet the requirements of this regulation. Each State organic certification program must be approved by the Secretary. A State organic certification program's organic standards and requirements cannot exceed these National Organic Program (NOP) regulations unless the State petitions for, and the Secretary approves, more restrictive requirements. The sections covering State programs, beginning with § 205.620, establish: (1) The requirements for a State organic certification program and amending such a program; and (2) the process for initial approvals of programs and program amendments. A process for review and approval of a State's organic certification program every 5 years will be addressed in subsequent rulemaking.

Proposal Description

There are a wide variety of organic certification programs now operating in different States. Approximately 31 States currently have, or are developing, their own State organic certification programs. At least 13 of those use State government agencies or contracted private certifying agents to certify organic operations in the State. Thus, at least 19 States do not have State organic programs and approximately 37 States do not have State Government or State-designated private certifying agents. Under this proposal, States may utilize these NOP standards and requirements and not have State oversight or responsibility for administration of the NOP in the State. On the other hand, a State may petition the Secretary for approval to add its unique State requirements to the NOP and agree to administer the national program in the State.

Requirements of a State Organic Certification Program. Under the Act and the NOP, a State, through the State program's governing State official, must submit to the Secretary a copy of the proposed State organic certification program. The governing State official must submit an affidavit or memorandum of understanding agreeing to meet the 11 general requirements of an organic program, as specified in section 6506(a) of the Act. Specifically, the governing State official must agree to: (1) Require that product sold or represented as organic must be produced and handled only by certified organic operations; (2) require that participating organic producers and handlers establish organic plans for their operations; (3) allow certified producers and handlers to appeal adverse decisions under appeal provisions of these regulations; (4) require that certified operations certify annually that they have complied with the NOP; (5) provide for annual on-site inspections of certified operations by certifying agents; (6) require periodic residue testing by certifying agents; (7) provide for appropriate and adequate enforcement procedures which are consistent with the NOP; (8) protect against conflict of interests as specified in these regulations; (9) provide for public access to certification documents; (10) provide for collection of reasonable fees; and (11) require other terms and conditions as may be established by the Secretary. The NOP will assume these responsibilities in States that do not have an approved State organic certification program.

Supporting materials must be submitted addressing these general requirements, including such documentation as: authorizing State statutes, program goals and objectives, a description of the State's organic program office, codified compliance and appeals processes, and other information as may be requested by the Secretary. Written material must assess the State organic certification program's ability and willingness to administer the 11 general requirements for organic programs. Administration of these general requirements may require development of a unique working relationship between the State organic program and the NOP.

With the approval of its State organic certification program, the State must assume responsibility for administration of these 11 general requirements and any approved, more restrictive requirements in the State. For instance, a State's responsibilities will include oversight of certified organic production and handling operations to ensure that

products sold or represented as organic are produced and handled pursuant to these regulations. A State's organic certification program must include noncompliance and appeals procedures similar in force and effect to those outlined in the Compliance and Appeals provisions of this subpart. We expect that every State has in place official compliance procedures and formal appeal procedures which are used to enforce the State's regulatory programs. Those procedures should provide opportunity, as do the procedures in this subpart, for entities that may not be in compliance with State regulations, to come into compliance with those regulations. Such procedures should be clearly addressed in the State's organic certification application.

A proposed State organic certification program and any proposed amendment to such a program must be approved by the Secretary prior to being implemented by the State. A State may have other organic State sponsored projects, such as research and promotion programs, tax incentives, or transition assistance for organic producers within the State. Such programs would not be subject to the Secretary's approval, provided they do not conflict with the purposes of the Act.

Under certain circumstances, a State organic program may have more restrictive requirements in the State than corresponding NOP requirements for production and handling of organic product and certification of organic production and handling operations. These more restrictive requirements must be based on unique environmental conditions or specific production or handling practices particular to the State or portion of the State. Any environmental condition cited in the proposed amendment must be of a nature that implementation of these NOP regulations will be insufficient to correct the condition. The environmental condition must necessitate use of more restrictive practices or requirements rather than the corresponding practices and requirements provided in these regulations. Any such condition that is limited to a specific geographic area of the State will be required of organic production and handling operations active only in that geographic area. If approved by the Secretary, the more restrictive requirements will become the NOP regulations for appropriate organic producers and handlers in the State or area of the State.

We do not expect that a State's request for more restrictive requirements will cover a wide range of organic production and handling standards. Rather, the increased requirements are likely to be limited to a specific production or handling practice or a more restricted use of approved National List substances to address needs or critical conditions in a specified geographic area(s). For instance, to protect an endangered lake or estuary, a State may have more restrictive buffer zone requirements than are provided in this regulation. Such a State may request that its more restrictive buffer zone requirements be established as the minimum buffer zone requirements of this regulation.

A State's more restrictive standards will not be applied to production and handling activities outside the State or a specified geographic area in the State. Further, the more restrictive standards do not apply to marketing of organic product and, thus, will not be used to restrict access of organic product produced in other States.

Section 205.621 provides that a State program's governing State official will submit to the Secretary a copy of a proposed State organic program or request for approval of any substantive amendment to a State's approved program.

State Program Approval Process. We envision the request and approval process will occur during the period between publication of the final rule and the projected effective date of the this national program (which will be announced in the final rule). Because requirements of a State organic program cannot exceed the requirements of this program unless warranted by unique conditions in the State, some State organic programs currently in effect may elect to discontinue their programs when the NOP becomes effective. Those programs simply will not request approval of their programs and their State organic requirements, in effect under the State program, will be superseded on the effective date of the NOP. State organic certification programs which seek approval of their programs will submit the required material and continue operations until the effective date of the NOP. We envision that all approved State organic certification programs will become effective under the NOP on the day the program becomes effective. A State wishing to establish a new State organic certification program under the NOP may submit the State program request and supporting material at any time. New programs submitted after this program becomes effective will be subject to the same review and approval process.

The submitted copy of the State organic certification program must be in its final form and ready for implementation. It cannot be altered by the State during the review process unless the change is cleared with the Secretary.

Amendments to State Programs. For amendment of a State organic program, the State program's governing State official must submit a copy of the proposed amendments and justification for them. The supporting material must document the unique environmental or ecological conditions or production practices in the State that necessitate use of more restrictive organic requirements. The supporting material must also explain how the more restrictive requirements will address the environmental condition. Likewise, the supporting material must explain how the increased requirements are better suited to agricultural conditions in the State.

Because State organic certification program requirements cannot be less restrictive than NOP requirements, any amendment to lower such requirements could only entail a relaxation of a more restrictive requirement previously approved by the Secretary. Thus, an amendment to relax a State program's requirement also must be reviewed by the Secretary. A decrease in a State organic certification program's more restrictive requirements must be justified, based on documented changes in the unique conditions or practices which warranted the increase in requirements.

Written materials supporting an amendment must assess how the more restrictive requirements further the purposes of and are consistent with the Act and these regulations. The written material should acknowledge that the more restrictive State requirements will not be used to limit or restrict access of organic products produced in other States or foreign countries to markets in the State. Also, supporting materials must explain how the amended requirements would affect the State program's governing State official's ability to administer the 11 general requirements. A request to relax a requirement also must address these issues.

The Secretary will review each State's application based on how closely it complies with the purposes and intent of the Act and the provisions of the NOP and how well its administrative capabilities and processes match up with the needs of the State's program.

The Act provides that the Secretary's review and determination of a new State organic certification program or a

program amendment will take no more than 6 months. AMS will notify the public upon approval of each State program. The public information will be made available to national agricultural news media and to all news media in the State. AMS will identify, among other things, any more restrictive certification requirements that are included in the approved State program.

A denial of a new program or program amendment will include a written explanation of why the proposal is denied and what changes will be needed for the program to be approved. The State may implement needed changes and submit a new program or program amendment.

Section 205.622 establishes that State organic certification programs will be reviewed at least once every 5 years by the Secretary and that a determination will be made within 6 months of the anniversary date as to continuation of the State organic certification program. We will issue appropriate procedures regarding this requirement at a later date, after AMS and the States have had an opportunity to administer the NOP and State programs.

State Programs—Changes Based On Comments

There are no changes based on comments.

State Programs—Changes Requested But Not Made

(1) *Allowing more restrictive State standards.* About a third of those commenting on State organic certification program provisions complained that the first proposal gave USDA complete control over State organic standards. A few suggested that a State with higher organic requirements should be able to prohibit the in-State sale of products certified only to the NOP or other State organic program requirements. Another commented that the NOP should ''defer'' to other State organic certification programs with higher standards.

While paragraph (b)(1) of section 6507 of the Act provides that States may establish more restrictive organic certification requirements, paragraph (b)(2) establishes parameters for those requirements. More restrictive State organic program requirements must: Further the purposes of the Act; be consistent with the Act; not discriminate against other States' agricultural commodities; and be approved by the Secretary before becoming effective. As noted above, we expect that a State's more restrictive requirements are likely to cover specific production or handling practices such as more restricted use of approved National List substances or farming practices to address a State or area's particular environmental conditions.

The Secretary must employ some consistent and common criteria for approving States requests for more restrictive State organic programs. The criteria for establishing such requirements must be consistent with the purposes of the Act. We believe the need to preserve, protect, and enhance unique environmental or farming conditions is a common criterion for all States. We believe such criteria are consistent with the stated goals of most, if not all, State organic programs and organic trade and farming organizations.

The more restrictive standards will not be applied to production and handling activities outside the geographic area of the State. Further, the more restrictive standards do not apply to marketing of organic product and, thus, will not be used to restrict access of organic product produced in other States. Clearly, prohibiting the sale of other States' products is prohibited by the Act as well as other national laws covering interstate commerce in the United States. If some States were to restrict access to State markets, the purposes and the benefits of the national program would be lost.

Discriminatory marketing practices are prohibited under section 6507(b)(2)(c) of the Act. Thus, the purpose of more restrictive State organic requirements cannot be, as the commenters suggest, to allow claims of more organic or purer product. States will not be able to promote their products as being more organic because their products were produced under more restrictive State requirements. More restrictive State organic requirements will be authorized only as needed to respond to special environmental or production conditions in the State which necessitate more restrictive requirements. Any State's request for less restrictive or lower organic standards than are required under this program will not be approved by the Secretary.

(2) *Treatment of private and State certifying agents.* Some private certifying agents commented that the first proposal would permit accredited State certifying agents to establish more restrictive standards than these regulations but prohibit private certifying agents from establishing their own more restrictive requirements. Under this program, State certifying agents will not unilaterally establish organic standards or requirements in a State. A State program's governing State official may, upon approval of the Secretary, establish a State organic certification program as an entity of the State's department of agriculture or other similar State government agency. The Act provides this authority to the State government and does not provide similar authority to private certifying agents. Private certifying agents are not government entities and have no official regulatory or administrative authorities over agricultural activities in the State. State certifying agents as well as private certifying agents will act as service providers, certifying to national and, where applicable, to particular State organic requirements.

Again, commenters appear to miss an essential point of this national program. The only mandatory organic standards and requirements are those of the NOP and the unique requirements approved for a State organic certification program by the Secretary. A private certifying agent may believe its more restrictive requirements result in a more organic or purer product and may want to certify producers and handlers only to those requirements. However, neither State certifying agents nor private certifying agents will be able to require that client operations or organic product be certified to more restrictive standards than the standards of this program or approved State standards. The only other more restrictive requirements that may be certified to may be requirements made at the request of handlers or manufacturers who are purchasing the organic product or ingredient. For example, a producer could request a certifying agent to certify certain production practices required for export to a foreign manufacturer. Such certification can be made only at the request of the producer or handler being certified. Both State and private certifying agents may certify to the requested more restrictive contract requirements, provided those more restrictive requirements are consistent with these regulations and provided the certifying agents have the necessary technical qualifications to carry out the certification.

Similarly, one commenter stated that the NOP should not prevent a private certifying agent from having and advertising its own higher organic standards. While a private certifying agent may have the capability to certify to certain higher organic requirements, a handler certified by the certifying agent may not claim on product labels or in market information that its products are more organic, purer, or better than product certified by other certifying agents or State organic programs.

In this regard, certifying agents, whether they are State or private certifying agents, may not use different seals, logos, or other identifying marks to distinguish between organic operations certified to NOP requirements and a State's approved more restrictive requirements, the certifying agent's preferred requirements, or the client's requested higher requirements. We believe that if certifying agents were allowed to use more than one seal or identifying mark, based on various standards certified to, the marketplace would be inundated with a variety of different certifying agent seals, logos, and identifying marks. This would add to consumer confusion, complicate the marketplace, and jeopardize benefits of this program.

(3) *Private certifying agent concerns.* Several commenters expressed concern that private certifying agents are at a disadvantage vis-a-vis State certifying agents. They stated that a State organic program or a State certifying agent could initiate policies that would limit the activities or effectiveness of private certifying agents. However, this proposed program does not alter the current situation in that State and private certifying agents operate in the same States. If a requested State organic certification program proposes a requirement or procedure that will have a negative affect or discriminate against private certifying agents operating in the State, the Secretary will not approve the requirement or procedure.

Some commenters asked whether these national regulations will affect a State's accreditation of private certifying agents operating in the State. A few believe that States should be allowed to continue or establish separate accreditation programs for private certifying agents.

We believe accreditation of certifying agents is a core responsibility for USDA. Establishment of a single national accreditation program is an essential part of the NOP. States will not accredit private certifying agents. As stated elsewhere in this proposal, any accreditation responsibilities of a State's current organic certification program will cease with implementation of this program. Pursuant to the Compliance provisions of this subpart, the governing State official or designee charged with compliance oversight under the State program may investigate and notify the NOP of possible compliance violations on the part of certifying agents operating in the State. However, the State may not pursue compliance actions or remove accreditation of any certifying agent accredited by the Secretary. That authority is the sole responsibility of the Secretary.

If more restrictive State requirements are approved by the Secretary, we will review certifying agent qualifications in the State and determine whether they are able to certify to the approved, more restrictive requirements. Our accreditation responsibilities must include oversight of both State and private certifying agents, including any foreign certifying agents that may operate in a State, and to monitoring their compliance with accreditation requirements.

(4) *Public comment on State applications.* One commenter suggested that USDA publish for comment in the **Federal Register**, a summary of each State's proposed organic program and any requested program amendments. The commenter claimed that an approved State organic certification program will effectively substitute the State's program for the NOP in the State. Thus, the commenter contends, those proposed State programs and program amendments should be made available for public comment. After consideration of the implications of the comment, we do not believe that the **Federal Register** notification process is the proper venue for receiving comments on a proposed State program which is applicable only to residents and business entities in the State. We assume that the governing State official is submitting the request on behalf of the organic producers and handlers in the State. Further, the appropriateness of the State's requested more restrictive requirements should stand on the merits of each proposal and not on whether commenters in other States believe the proposed requirements are warranted. Certified organic producers and handlers outside the State will not be subject to the more restrictive standards or requirements of the State program. The more restrictive standards will not be used to restrict market access of organic product produced in other States or countries. Thus, there is no reason to receive public comment on requested State requirements from individuals not directly affected by the proposed requirements.

The commenter suggested that AMS also publish a summary of each proposed program and any amendments to a program in a newspaper of general circulation in the State. AMS will issue a public information notices which will announce each approved State organic certification program and any approved amendments of a State program. The notices will identify the unique characteristics of the approved State program that warranted the more restrictive organic production or handling requirements. We also will include a summary of the new program on the NOP homepage.

(5) *State program consistencies.* Several commenters asked for clarification of the first proposal's terms, ''consistent'' and ''substantive amendments,'' used in regard to State programs operating under the NOP. Being ''consistent'' with the NOP means that a State program's written standards or requirements must be at least equal to the standards and requirements of the NOP. This is provided for in the Act. Further, in allowing State organic programs to have more restrictive or higher standards, the Act requires that those more restrictive standards and requirements be consistent with the purposes of the Act. To be ''consistent'' with the purposes of the Act means that the requested, more restrictive standards or requirements are of such a nature that they do not undermine the application of uniform national organic standards. Thus, if a request for more restrictive State organic standards is determined to not be consistent with uniform national organic standards, the State program will not be approved by the Secretary. The administrative procedures used by the State in administering the 11 general requirements of the State's organic program should have the same force and effect of the procedures use by AMS in administering this program.

The same commenters asked for clarification of the term, ''substantive amendments,'' in obtaining USDA approval of more strict amendments for one State's organic certification program. ''Substantive amendments'' means changes that would increase the quantitative or qualitative standards or specific requirements for an operation's or a product's certification under the State organic program. Once this national program is operating, if a question arises as to whether a desired change in a State organic certification program is considered substantive or not, the State program's governing State official should raise the issue with the Secretary.

State Programs—Additional Provisions

(1) *State program responsibilities.* This subpart establishes that a State organic certification program which petitions for approval by the Secretary will have increased responsibilities under the NOP. Our first proposal did not suggest qualifying factors or other information that had to be submitted by the State program's governing State official. This proposal specifies the 11 general requirements, addressed above, and the needs-based environmental

conditions or special production practices for establishing more restrictive requirements. Those factors establish our revised position that a State must agree to incurring increased responsibilities and obligations to be approved as a State organic certification program under the NOP. For instance, as discussed above, a State with an approved organic certification program will oversee compliance and appeals procedures for certified organic operations in the State. Those procedures must provide due process opportunities such as rebuttal, mediation, and correction procedures in this proposal. Once approved by the Secretary, the State governing official or designee must effectively administer the State's organic certification program in a manner that is consistent and equitable for the certified parties involved in compliance actions.

A State's organic certification program may include other programs and projects which the State government may conduct to promote or increase organic production and handling in the State. Such programs may include organic promotion and research projects, transition assistance, a directory of organic production and handling operations in the State, a consumer referral program, or certifications given to retail operations which market organic foods. This proposal will not prohibit such State activities, provided those activities do not establish production or handling standards that work against the purposes of the NOP. Such programs may not advertise, promote, or otherwise infer that the State's organic products are more organic or better than organic product produced in other States. Such programs and projects should be beyond the scope of this national program and, if so, will not be subject to the Secretary's review.

(2) *Renewal of State program.* The final section provides that reviews of State organic certification programs will be conducted at least once every 5 years, as required in paragraph (c) of section 6507. The intent of the provision is not changed in this proposal. We will provide further information regarding reviews of State programs before the first 5-year period is completed. We expect that, with experiences gained from a few years of program operation, we will be able to propose more appropriate procedures, guidelines, and requirements to assure proper reviews of operating State organic programs.

Fees. This portion of subpart G sets forth the regulations on fees and other charges to be assessed for accreditation and certification services under the National Organic Program (NOP). These regulations address the kinds of fees and charges to be assessed by the Department for the accreditation of certifying agents, the level of such fees and charges, and the payment of such fees and charges. These regulations also address general requirements to be met by certifying agents in assessing fees and other charges for the certification of producers and handlers as certified organic operations. Finally, these regulations address the Secretary's oversight of a certifying agent's fees and charges for certification services.

Proposal Description

Fees and Other Charges for Accreditation. Fees and other charges will be assessed and collected from applicants for initial accreditation and accredited certifying agents submitting annual reports or seeking renewal of accreditation. Such fees will be equal as nearly as may be to the cost of the accreditation services rendered under these regulations. Fees-for-service will be based on the time required to render the service provided calculated to the nearest 15-minute period. Activities to be billed on the basis of time used include the review of applications and accompanying documents and information, evaluator travel, the conduct of on-site evaluations, review of annual reports and updated documents and information, and the preparation of reports and any other documents in connection with the performance of service. The hourly rate will be the same as that charged by the Agricultural Marketing Service (AMS), through its Quality System Certification Program, to certification bodies requesting conformity assessment to the International Organization for Standardization ''General Requirements for Bodies Operating Product Certification Systems'' (ISO Guide 65).

Applicants for initial accreditation and accredited certifying agents submitting annual reports or seeking renewal of accreditation during the first 18 months following the effective date of subpart F will receive service without incurring an hourly charge for such service.

Applicants for initial accreditation and renewal of accreditation must pay at the time of application, effective 18 months following the effective date of Subpart F, a nonrefundable fee of $500.00. This fee will be applied to the applicant's fees-for-service account.

When service is requested at a place so distant from the evaluator's headquarters that a total of one-half hour or more is required for the evaluator(s) to travel to such place and back to the headquarters, or at a place of prior assignment on circuitous routing requiring a total of one-half hour or more to travel to the next place of assignment on the circuitous routing, the charge for such service will include all applicable travel charges. Travel charges may include a mileage charge administratively determined by the Department, travel tolls, or, where the travel is made by public transportation (including hired vehicles), a fee equal to the actual cost thereof. If the service is provided on a circuitous routing the travel charges will be prorated among all the applicants and certifying agents furnished the service involved on an equitable basis. Travel charges will become effective for all applicants for initial accreditation and accredited certifying agents on the effective date of subpart F. The applicant or certifying agent will not be charged a new mileage rate without notification before the service is rendered.

When service is requested at a place away from the evaluator's headquarters, the fee for such service shall include a per diem charge if the employee(s) performing the service is paid per diem in accordance with existing travel regulations. Per diem charges to applicants and certifying agents will cover the same period of time for which the evaluator(s) receives per diem reimbursement. The per diem rate will be administratively determined by the Department. Per diem charges shall become effective for all applicants for initial accreditation and accredited certifying agents on the effective date of subpart F. The applicant or certifying agent will not be charged a new per diem rate without notification before the service is rendered.

When costs, other than fees-for-service, travel charges, and per diem charges are associated with providing the services, the applicant or certifying agent will be charged for these costs. Such costs include, but are not limited to, equipment rental, photocopying, delivery, facsimile, telephone, or translation charges incurred in association with accreditation services. The amount of the costs charged will be determined administratively by the Department. Such costs will become effective for all applicants for initial accreditation and accredited certifying agents on the effective date of subpart F.

Payment of Fees and Other Charges. Applicants for initial accreditation and renewal of accreditation must remit the nonrefundable fee along with their application. Remittance must be made payable to the Agricultural Marketing Service, USDA, and mailed to: Program Manager, USDA–AMS–TMP–NOP,

Room 2945-South Building, PO Box 96456, Washington, DC 20090–6456 or such other address as required by the Program Manager. All other payments for fees and other charges must be received by the due date shown on the bill for collection, made payable to the Agricultural Marketing Service, USDA, and mailed to the address provided on the bill for collection. The Administrator will assess interest, penalties, and administrative costs on debts not paid by the due date shown on a bill for collection and collect delinquent debts or refer such debts to the Department of Justice for litigation.

Fees and Other Charges for Certification. Fees charged by a certifying agent must be reasonable, and a certifying agent may charge applicants for certification and certified production and handling operations only those fees and charges that it has filed with the Administrator. The certifying agent must provide each applicant with an estimate of the total cost of certification and an estimate of the annual cost of updating the certification. The certifying agent may require applicants for certification to pay at the time of application a nonrefundable fee of no more than $250.00 which must be applied to the applicant's fees-for-service account. The certifying agent must provide all persons inquiring about the application process with a copy of its fee schedule.

Fees—Changes Based on Comments. This portion of subpart G differs from our first proposal in several respects as follows:

(1) *Application and Administrative Fees.* We have removed the provisions which required certifying agents to pay application and administrative fees. These fee provisions have been replaced with provisions for the assessment of fees for service equal as nearly as may be to the cost of the accreditation services rendered under these regulations. In other words, we will be assessing fees and charges only for activities related to accreditation. These fees and charges will be assessed and collected from applicants for initial accreditation and accredited certifying agents submitting annual reports or seeking renewal of accreditation. The balance of costs incurred by the NOP will be funded through appropriations. We have retained the requirement, with modification, that certifying agents reimburse the Department for travel, per diem, and related other costs associated with providing accreditation services. We have taken these actions in an attempt to minimize the cost of this program on certifying agents. Certifying agents will be charged for the actual time and travel expenses necessary for the NOP to perform accreditation services.

This proposed program is similar to the Quality Systems Certification Program (QSCP) established pursuant to 7 CFR part 54. The QSCP is an audit-based program administered by AMS through its Livestock and Seed Program, which provides meatpackers, processors, producers, and other businesses in the livestock and meat trade with the opportunity to have special processes or documented quality management systems verified. Since the procedures used for accrediting State and private entities as accredited organic certifying agents are similar to those used to certify other types of product or system certification programs under the QSCP, we have decided to use this existing program and its staff in examining certifying agents' operations and evaluating their compliance with the Act and these regulations. Using the QSCP and its staff will enable the NOP to provide the necessary services without creating a separate bureaucracy. Hourly fees to be charged for services under this program will be the same as those under the QSCP, currently estimated at $95.00 per hour.

This fee of approximately $95.00 is greater than the $42.20 base rate charged under the voluntary user-fee-funded program established by AMS to verify that State and private organic certifying agents in the United States comply with the requirements prescribed under ISO Guide 65. This program, administered by the AMS Livestock and Seed Program, applied the aggregate meat grading rate for services to this ISO Guide 65 verification program for State and private organic certificating agents. The grading rate of $42.20 was the only rate for which AMS was authorized to charge at the time that the program to assess ISO Guide 65 conformity by organic certifying agents was implemented. This was not the actual audit rate of approximately $95.00 for such services. The AMS Livestock and Seed Program will engage in rulemaking to establish audit fees for its QSCP. As noted above, those fees are expected to be approximately $95.00 per hour. The NOP will notify accredited certifying agents of proposed rate changes and final actions on such rates by AMS.

To minimize the economic impact of implementing the NOP on certifying agents, we have decided to provide services for accreditation during the first 18 months following the effective date of new subpart F without an hourly charge for all applicants for initial accreditation and accredited certifying agents. This represents full subsidization of the hourly costs for accreditation by the Department during the first 18 months of operation. This 18-month subsidization of the hourly costs will prove especially beneficial to any applicant for accreditation that submits a substandard application or has difficulty establishing eligibility for accreditation. Certifying agents will be charged for accreditation service at the published hourly rate on the first day of the nineteenth month following the effective date of subpart F.

Over 15,000 comments were received on fees, with all opposing the first proposal's fee provisions. In addition to comments from consumers, comments were received from State agencies, organic growers, grower associations, and certifying agents. Most of these commenters expressed the belief that the proposed fees would price small certifying agents out of the organic industry. Almost half of the over 15,000 comments suggested a sliding-scale fee system, rather than the flat fee system in the first proposal, to accommodate the economic needs of small certifying agents. We have not accepted the concept of a sliding-scale fee system. Rather, as noted above, we are proposing that certifying agents be charged for the actual time and travel expenses necessary for the NOP to perform accreditation services. Under this fee system, smaller certifying agents should pay less in hourly charges to obtain and maintain certification than larger certifying agents. This assumption, however, is contingent on the quality of all documentation submitted to the Department, certifying agent recordkeeping, and the efficiency of the certifying agent in meeting the requirements of this part. The fees and other charges for accreditation regulations are found in § 205.640.

(2) *Payment by Certified Check.* We have removed the requirement that the payment of fees and charges to the Department be by certified check or money order. We have made this change because we agree with commenters that this requirement is unnecessary and potentially burdensome.

Nearly all industry commenters opposed the form and method of payments stated throughout the original fee sections. Commenters stated that payment by certified check or money order was unnecessary and would create an additional burden on individual producers, handlers, and private certifiers. A few State commenters stated that it was insulting for the U.S. Department of Agriculture (USDA) to require a State government agency to pay for its accreditation with a certified check.

(3) *Producer and Handler Fees to the Department.* We have removed the provisions which required the payment of certification fees by producers and handlers to the Department. We have taken this action because we believe that the goal of recovering program costs through fees and other costs charged to producers and handlers for certification as certified organic operations should be balanced against the Act's purpose to facilitate interstate commerce in fresh and processed food.

We received over 15,000 comments all opposing the first proposal's fee provisions for producers and handlers. Comments were received from consumers, State agencies, organic growers, grower associations, and certifying agents. Most of these commenters stated that the proposed fees would price small producers and handlers out of the organic industry. Hundreds of these commenters stated that the proposed fees favor large production operations. Almost half of the over 15,000 comments suggested a sliding-scale fee system, rather than the flat fee system proposed in the first proposal, to accommodate the economic needs of small producers and handlers. Hundreds more suggested that small producers and processors be exempt from the payment of fees.

Most of the State agency, organic grower, grower association, and certifying agent (industry) commenters spoke to the very small size and family-farm nature of the average organic production operation and how those operations would be affected by the proposed fees. Commenters from this group who offered estimates suggested that one-third to over one-half of organic producers in their area or State are very small organic producers operating at or near the exemption level of $5,000 in annual sales. They said those operating just above the exemption level could be forced out of organic production by the extra fee and the increased certification charges passed down by certifying agents who would have to pay the proposed accreditation charges.

Commenters, industry and consumer, stated that, rather than encouraging growth and new participation in organic agriculture, the costs of certification would stifle growth and discourage small producer participation in organic agriculture. An industry commenter stated that exempt producers who might want to be certified so they could market their product as organic would be dissuaded from doing so because of the cost of certification. Industry commenters also stated that the additional USDA fee on small handlers would make small organic handling operations marginal. A few State agencies commented that many small organic producers also conduct their own on-farm handling and that these operations would be forced out of the organic industry by the excessive handler fee and reporting burdens.

The comment, that exempt producers who might want to be certified so they could market their product as organic would be dissuaded from doing so because of the cost of certification, requires clarification. It may be true that such producers would be dissuaded from seeking certification because of the cost of certification. It is not true, however, that exempt producers must be certified to sell or label their production as organic. The Act exempts small producers, those who produce no more than $5,000 in agricultural products, from the requirement that a person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with the Act.

Industry commenters recommended complete changes to the proposed fee structure. Most, like the consumer commenters, suggested a sliding scale for fees based on either size or sales volume. Several industry commenters stated that the Act does not require that USDA recover all program costs from assessments on producers, handlers, and certifying agents. They cited section 6522 of the Act as authorizing the use of appropriated funds to carry out the program. Some industry commenters suggested that appropriated funds should be used to cover all administrative and overhead costs and that fees collected from the industry should only be used for specific program activities such as accreditation. A few industry commenters suggested that organic farmers not be charged an AMS fee but that each be required to sign an affidavit of compliance with program requirements.

After further discussions within the Department and review of the comments, we have determined that the fee structure for the NOP should be modified to reduce costs to all organic sectors. We acknowledge that the fees proposed in the first proposal might have discouraged industry growth and might not have facilitated interstate commerce of organic products. Because we believe that fees and other costs charged to producers and handlers for certification as certified organic operations should be kept to a minimum to encourage industry participation and growth, we have removed the regulations which provided for the payment of fees to the Department by certified production and handling operations.

(4) *Estimated Cost of Certification.* We have added, at § 205.642, the requirement that the certifying agent must provide each applicant with an estimate of the total cost of certification and an estimate of the annual cost of updating the certification. Additionally, the certifying agent must provide all persons inquiring about the application process with a copy of its fee schedule. We have added these provisions to ensure that producers and handlers have early and ready access to the information they need to consider cost in selecting an agent to certify their production or handling operation. We consider this to be especially important because, as noted in the preamble to subpart F, we have removed the requirement that the certifying agent charge only such fees to applicants for certification and operations it certifies that the Secretary determines are reasonable. We have removed this requirement because we concur with those commenters who expressed the belief that certifying agents should be permitted to set their own fees without the approval of the Secretary. We have also removed this requirement because we concur with the commenters' belief that production and handling operations are free to consider cost in selecting an agent to certify their production or handling operation.

Fees—Changes Requested But Not Made. This subpart retains from our first proposal regulations on which we received comments as follows:

(1) *Accreditation Charges Billed to State Certifying Agents.* Several State certifying agents stated that State certifying agents should not be assessed accreditation charges. Commenters stated that most State certifying agents could face large accreditation costs because they have many county or regional offices which would be considered subsidiaries of the headquarters office. They stated that these charges would have to be passed on to producers and handlers or paid with supplemental State funds. A few State certifying agents stated that USDA should pay the States, rather than vice versa, because of the State organic programs' contributions to the national program. At least one State representative commented that accreditation fees for State certifying agents should be less than for private certifying agents because State certifying agents should require less review and oversight by AMS.

We disagree with those commenters who recommended that State certifying agents not be assessed accreditation

charges, be charged less for accreditation, or be paid to certify production or handling operations. We view such actions as constituting unacceptable preferential treatment of State certifying agents to the detriment of private-entity certifying agents. Accordingly, under this proposal, State-entity certifying agents will be assessed fees for accreditation under the same fee structure as private-entity certifying agents.

(2) *Subsidization.* Some industry commenters stated that national governments in Europe provide direct subsidies and other economic incentives for their farmers to grow organic. A few questioned why the organic industry would be charged for services while some USDA programs are provided without cost to other agricultural sectors, and USDA actually pays some farmers not to grow some commodities. Industry commenters and many consumer commenters stated that it was unfair for this proposed program to charge all costs to a fledgling agricultural industry composed mostly of small, family farmers and marginal operations. Finally, a few industry commenters proposed the philosophical argument that program fees penalize those who protect the earth and that USDA should charge traditional producers who damage the earth with chemical applications and nonsustainable cultural practices.

AMS is primarily a user-fee-based Federal agency. The Act at section 6506(a)(10) requires the collection of fees from producers, handlers, and certifying agents. We are, therefore, unable to provide for the full subsidization of producers, handlers, and certifying agents as espoused by some commenters. Accordingly, this proposal provides for the payment of fees by producers, handlers, and certifying agents. We have, however, proposed regulations in this proposal which we believe will minimize the economic impact of the NOP on producers, handlers, and certifying agents.

Fees—Additional Provisions. Upon further review of the fee provisions in the first proposal, we have decided to propose the following additions.

(1) *Certification Fees Charged by Certifying Agents.* We have added, at § 205.642, regulations addressing general requirements to be met by certifying agents in assessing fees and other charges for the certification of producers and handlers as certified organic operations. First, fees charged by a certifying agent must be reasonable, and a certifying agent may charge applicants for certification and certified production and handling operations only those fees and charges that it has filed with the Administrator. This is a general requirement for accreditation and is also found at § 205.501(a)(15) in subpart F on accreditation. This regulation does not prohibit certifying agents from providing and charging for services outside the NOP. Services that certifying agents might provide outside the NOP include in-house publications, conferences, workshops, informational meetings, and field days. Certifying agents cannot require participation in such activities by certified operations or applicants for certification as a condition of certification.

Second, the certifying agent may require applicants for certification to pay at the time of application a nonrefundable fee of no more than $250.00 which must be applied to the applicant's fees-for-service account. We believe that this fee will help ensure that certifying agents are compensated for certification services provided to an applicant that is found to be not qualified to receive certification as an organic production or handling operation.

(2) *Fees Charged to Foreign Certifying Agents.* We have removed the provisions which required the payment of fees for import programs. We have taken this action because this proposal includes foreign State entities and foreign private entities which provide certification services under the accreditation requirements of this part. Accordingly, such entities are covered under the fees for accreditation provisions of § 205.640.

Compliance

This portion of subpart G sets forth the enforcement procedures for the National Organic Program (NOP). These procedures describe the compliance responsibilities of the Secretary, USDA, and Agricultural Marketing Service (AMS) officials acting on behalf of the Secretary. These procedures also describe responsibilities of State programs' governing State officials (governing State officials) and State and private certifying agents for compliance under the NOP. The NOP is the AMS office that reviews applications and initiates approvals of accreditation of new certifying agents, conducts oversight of accredited certifying agents, and reviews and recommends continuation of accreditation of certifying agents. These provisions also address the rights of certified production and handling operations and accredited certifying agents operating under the NOP. Approval or denial of applications for certification and accreditation are addressed under subparts E and F, respectively.

Proposal Description

The Secretary is required under the Act to review the operations of State organic certification programs, accredited certifying agents, and certified production or handling operations for compliance with the Act and these regulations. The Program Manager of the NOP may carry out oversight of compliance proceedings on behalf of the Secretary and the Administrator. However, most reviews and analyses of certification noncompliance will be conducted by the certifying agent which certified the operation. With regard to certifying agents, the Program Manager may initiate proceedings to suspend or revoke the accreditation of a certifying agent for failure to conduct accreditation activities or maintain accreditation requirements pursuant to subpart F of this regulation.

In States with an approved State organic certification program, the State program's governing State official is responsible for administration of the State's compliance program for certified operations. Governing State officials also may review and investigate complaints of certifying agents operating in the State who may not be in compliance with the accreditation requirements of the Act and these regulations. They must notify the Program Manager of such noncompliance activities and make information regarding the violation available to the NOP for appropriate action.

The Program Manager may initiate proceedings to suspend or revoke a certified operation's certification if a certifying agent or State program's governing State official fails to take appropriate enforcement action or if an operation is found to be erroneously certified by a certifying agent whose accreditation has been suspended or revoked.

The compliance provisions of the NOP are consistent with the requirements of the Administrative Procedure Act (APA) (5 U.S.C. 553–559) in that this program provides for due process including an opportunity for hearing, appeal procedures, written notifications of noncompliance, and opportunities to demonstrate or achieve compliance before any suspension or revocation of organic certification or accreditation is invoked. An exception to the initial due process steps under the APA is provided in instances of willful violations. However, willful violations may be appealed pursuant to

the Appeals procedure in this subpart. A compliance action regarding certification carried out under an approved State program's compliance procedures will have the same force and effect as a certification compliance action carried out under these NOP compliance procedures. The notification process for denying applications for certification and applications for accreditation is laid out in subparts E and F respectively.

Noncompliance Procedure for Certified Operations. The Act provides for the enforcement of certified operations. Statutory oversight of production and handling operations by certifying agents includes review of organic plans, residue and tissue testing, authority to conduct investigations, and responsibility to report violations. Applicants for certification must meet certification requirements of the NOP, as determined by certifying agents.

Notification of Noncompliance. As noted above, the Program Manager or the governing State official may review and investigate a certified operation based on complaints and may initiate noncompliance proceedings established in this subpart. However, we expect that most compliance procedures will begin with a certifying agent's inspection, review, or investigation of such certified operation. Thus, this noncompliance procedure is proposed based on that process.

A written notification of noncompliance will be sent to the certified operation if a certifying agent's inspection, review, or investigation reveals any noncompliance with the Act or these regulations. Noncompliance may include, among other things, production or handling practices or conditions, use of substances, or labeling which are not in compliance with subparts C, Production and Handling, or E, Certification, of this regulation. The results of a residue test may trigger a noncompliance notification. A noncompliance notification may encompass the entire operation or a portion of the operation. For instance, a violation at one farm may not warrant loss of certification at other farms of the certified operation not affected by the violation.

A notification of noncompliance will provide: (1) A description of each condition, action, or item of noncompliance; (2) the facts upon which the notification is based; and (3) the date by which the certified operation must rebut the notification or correct the noncompliance. A certified operation may continue to sell its product as organic upon receiving a notification of noncompliance and throughout the noncompliance proceeding and any appeal procedure which might follow the compliance proceeding.

All written notifications sent by certifying agents and governing State officials, as well as rebuttals, requests for mediation, and notices of correction of deficiencies sent by certified operations will be sent to the addressee's place of business by a delivery service which provides dated return receipts. This will help assure completed communications and timely compliance procedures.

If a certified operation believes the notification of noncompliance is incorrect or not well-founded, the operation may submit a rebuttal to the certifying agent, providing supporting data to refute the facts stated in the notification. Rebuttals are provided to allow certifying agents and certified operations to informally resolve noncompliance notices. Rebuttals should be helpful in resolving differences which may be the result of misinterpretation of requirements, misunderstandings, or incomplete information. Alternatively, the certified operation may correct the identified deficiencies and submit proof of such corrections. When the operation demonstrates that each noncompliance has been corrected or otherwise resolved, the certifying agent will send the certified operation a written notification of noncompliance resolution.

Proposed Suspension or Revocation of Certification. If the noncompliance is not resolved and is not in the process of being resolved by the date specified in the notification, the certifying agent will send the certified operation a written notification of proposed suspension or revocation of certification for the entire operation or a portion of the operation affected by the noncompliance. The notification will state: (1) The reasons for the proposed suspension or revocation; (2) the proposed effective date of the suspension or revocation; (3) the impact of the suspension or revocation on the certified operation's future eligibility for certification; and (4) that the certified operation has a right to request mediation or to file an appeal. The impact of a proposed suspension or revocation may include the suspension period or whether the suspension or revocation applies to the entire operation or to a portion or portions of the operation. A governing State official may not suspend or revoke certification of an entity's certified operations in other States. Likewise, a certifying agent may not suspend or revoke certification of an entity's operations which the certifying agent does not certify.

If a certifying agent determines that correction of a noncompliance is not possible, the notification of noncompliance and the proposed suspension or revocation of certification may be combined in one notification of proposed suspension or revocation. The certified operation will have an opportunity to appeal that suspension or revocation decision.

Mediation. A certified operation may request mediation of any dispute regarding denial of certification or proposed suspension or revocation of certification. Mediation is not required prior to filing an appeal but is offered as an option which may resolve the noncompliance more quickly than the next step, which is filing an appeal. If a State program is in effect, the mediation procedures established in the State program, as approved by the Secretary, must be followed. Mediation will be requested in writing to the applicable certifying agent. The dispute will be mediated by a qualified mediator mutually agreed upon by the parties to the mediation. The parties to the mediation will have no more than 30 days to reach an agreement following a mediation session. If mediation is unsuccessful, the certified operation will have 30 days from termination of mediation to appeal the proposed suspension or revocation to the Administrator.

Any agreement reached during or as a result of the mediation process must be in compliance with the Act and these regulations. Also, the Secretary reserves the right to review any mediated settlement to assure that the terms of the settlement conform with the requirements of the Act and the NOP.

Suspension or Revocation. The certifying agent will suspend or revoke the certified operation's certification when the operation fails to resolve the issue through rebuttal or mediation, fails to complete needed corrections, or does not file an appeal. The operation will be notified of the suspension or revocation by written notification. The certifying agent must not send a notification of suspension or revocation to a certified operation that has requested mediation or filed an appeal.

The decision to suspend or revoke certification will be based on the seriousness of the noncompliance and on whether the noncompliance is a willful action by the certified operation. Such decisions must be made on a case-by-case basis. Section 6519 of the Act establishes that willful violations include making a false statement, knowingly affixing a false label, or

otherwise violating the purposes of the Act. Certifying agents are responsible for investigating whether a violation is a willful act and advising the Program Manager or governing State official of the results of such investigation. However, only the Program Manager or governing State official may make the final determination that a violation is willful.

If a suspected willful noncompliance is not a serious violation, a proposed suspension rather than revocation may be issued. Revocation is reserved for serious instances of willful noncompliance and other serious violations.

The certifying agent may determine that a lesser penalty of suspension is warranted by the noncompliance. A proposal to suspend certification may be issued for violations that are inadvertent or cannot be proven to be willful. A suspension may be applicable only to one area of operation or one field or farm unit where the noncompliance occurred.

A certified operation that has had its certification revoked will not be eligible to receive certification for an operation in which such operation or person has an interest for 5 years following the date of revocation. If an individual is the owner of a certified operation or is the principal officer or director of operations who is fully responsible for complying with certification requirements of this part, a suspension or revocation could be issued in the individual's name. The effect would be that another operation would be ineligible for organic certification if that individual is listed as a principal in the operation. The Secretary may waive an ineligibility period when it is in the best interests of the certification program.

Noncompliance Procedure for Certifying Agents. The Program Manager, on behalf of the Secretary, may initiate a compliance action against an accredited certifying agent who fails to carry out responsibilities entrusted to the certifying agent or maintain resources sufficient to meet accreditation requirements in subpart F. Compliance proceedings may be initiated as a result of annual reviews for continuation of accreditation, as a result of site visits, or as a result of investigations initiated in response to complaints of noncompliant activities. Compliance proceedings also may be initiated on recommendation of a governing State official.

A written notification of noncompliance will be sent by the Program Manager to an accredited certifying agent when an inspection, review, or investigation of such person reveals any noncompliance with the Act or these regulations. A notification of noncompliance will provide a description of each noncompliance found and the facts upon which the notification is based. Additionally, the notification will provide the date by which the certifying agent must rebut the noncompliance notice or correct each noncompliance described.

When documentation received by the Program Manager demonstrates that each noncompliance has been resolved, the Program Manager will send the certifying agent a written notification of noncompliance resolution.

If a noncompliance is not resolved by rebuttal or correction of violations, the Program Manager will issue a proposed suspension or revocation of accreditation. The notification will state whether the certifying agent's entire business, field office, or offices in a geographic area or in a specified technical field of accreditation are to be suspended or revoked. For instance, if a private certifying agent with field offices in different geographic areas is cited for a compliance violation in one area, the Program Manager could determine that only the accreditation of the noncompliant operation should be suspended or revoked.

If the Program Manager determines that the noncompliance cannot be immediately or easily corrected, the Program Manager may combine the notification of noncompliance and the proposed suspension or revocation in one notification. The notification of proposed suspension or revocation of accreditation will state the reasons and effective date for the proposed suspension or revocation. Such notification will also state the impact of a suspension or revocation on future eligibility for accreditation and the certifying agent's right to file an appeal.

If the Program Manager has reason to believe that a certifying agent has willfully violated the Act or regulations, the Program Manager may issue a notification of proposed revocation of accreditation. The proposed revocation may be for the certifying agent's entire accreditation business, a particular field office, or a specified technical area of accreditation. This notification, because it involves a willful violation, will be sent without first issuing a notification of noncompliance.

The certifying agent may file an appeal of the Program Manager's determination, pursuant to § 205.681. If the certifying agent fails to file an appeal of the proposed suspension or revocation, the Program Manager will suspend or revoke the certifying agent's accreditation. The certifying agent will be notified of the suspension or revocation by written notification.

A certifying agent whose accreditation is suspended or revoked must cease all certification activities in each area of accreditation and in each State for which its accreditation is suspended or revoked. Any certifying agent whose accreditation has been suspended or revoked must transfer to the Secretary all records concerning its certification activities that were suspended or revoked. The certifying agent must also make such records available to any applicable governing State official. The records will be used to determine whether operations certified by the certifying agent may retain their organic certification.

A certifying agent whose accreditation is suspended by the Secretary may at any time submit a new request for accreditation. Such request must be accompanied by evidence demonstrating correction of each noncompliance and actions taken to comply with and remain in compliance with the Act and regulations. A certifying agent whose accreditation is revoked by the Secretary will be ineligible to be accredited as a certifying agent under the Act and regulations for a period of not less than 3 years following the date of revocation.

State Programs' Compliance Procedures. A State program's governing State official may initiate noncompliance proceedings of certified organic operations operating in the State. Such proceedings may be initiated for failure of a certified operation to meet the production or handling requirements of this part or the State's more restrictive requirements, as approved by the Secretary. The governing State official must attempt to resolve the compliance violations through State mediation and reviews of corrections to operations.

The governing State official must promptly notify the Program Manager of commencement of enforcement proceedings initiated against certified operations. An enforcement proceeding, brought by a governing State official against a certified operation may be appealed in accordance with the appeal procedures of the State organic certification program. There will be no subsequent rights of appeal to the Secretary.

Compliance—Changes Based On Comments

This portion of subpart G differs from our first proposal in several respects as follows:

(1) *Authority of certifying agents.* We have provided accredited certifying

agents with authority to initiate noncompliance proceedings which may result in suspension or revocation of producer and handler certifications. A certifying agent's notification of proposed suspension or revocation of certification provides an opportunity for the certified operation to file an appeal in accordance with the appeal provisions of § 205.681. If a noncompliance procedure initiated by a certifying agent is not corrected, remains unresolved, and is not appealed, the certified operation's certification will be suspended or revoked. If the certified operation files an appeal, the action is turned over to the Program Manager or applicable governing State official for further resolution. The suspension or revocation will not become effective unless upheld by a ruling on the appeal.

Commenters expressed opposition to the notification of noncompliance with certification requirements and termination of certification provisions of the first proposal. Those provisions required a certifying agent to submit to the Administrator a notice of its recommendation to terminate the certification of a certified operation or any portion of a certified operation if the certifying agent had reason to believe the operation had ceased to comply with the Act and regulations. The commenters were opposed to the Secretary assuming authority for suspension or revocation of certification. The commenters stated that such decisions are the duty and responsibility of certifying agents, with the Secretary providing for appeals. Some commenters expressed the belief that the certifying agent's position is undermined by not having authority to suspend or revoke a certification for cause. Many commenters stated that certifying agents must have such authority in order to: (1) Achieve producer and handler compliance with the regulations; and (2) expedite the enforcement process. They believe that providing certifying agents with the authority to suspend or revoke a certification will preserve the NOP's integrity and increase consumer confidence in the quality of the organic products they purchase. Commenters stressed that, in addition to providing procedures for producer and handler appeals, the Department provides a system of checks and balances through the accreditation program.

We agree that certifying agents should have an important role to play in the suspension or revocation of the certification of production or handling operation that they certify. This proposal will enhance the certifying agent's authority to ensure that any production or handling operation it certifies is in compliance with the Act and regulations. We also agree that providing certifying agents with a more direct role in suspension or revocation proceedings will shorten the compliance process.

Accordingly, as noted above, we have provided accredited certifying agents with increased authorities in enforcement proceedings. They will make determinations to accept or reject rebuttals submitted in response to notifications of noncompliance. They will be responsible for defending their determinations, which must be consistent with the position of the NOP, in mediation processes. Finally, their decisions to propose suspension or revocation of producer and handler certifications will become effective unless appealed by the certified operation. Authority for certifying agents to take enforcement actions against certified operations is found in § 205.662.

(2) *Mediation.* We have added a new section authorizing certified operations to request mediation of any dispute regarding denial of certification or proposed suspension or revocation of certification. This section addresses the request for mediation, selection of the mediator, the time period for reaching an agreement, requirements of an agreement, and appealing a noncompliance decision if mediation is unsuccessful. The parties in the procedure must make administrative arrangements for the mediation and arrange for payment of any costs involved in the mediation. The Department will not finance or participate in such mediation. This additional provision is found at § 205.663.

Commenters requested that the Department authorize the use of alternative dispute resolution procedures and mediation. We support the idea of using mediation to resolve disputes with respect to denial of certification or proposed suspension or revocation of certification. Some States use mediation as a component of their appeal process. We believe mediation could prove effective in resolving many of the possible disputes between applicants for certification or certified operations and certifying agents. Without mediation, such disputes would probably be referred to the Administrator in the form of appeals. Mediation in some cases, however, may be of limited value because all agreements reached during mediation or as a result of the mediation process must be in compliance with the Act, these regulations, and any policies or procedures governing the NOP. While we presume a mediated settlement will be in accordance with the Act, the Secretary has authority to review and overrule a mediated settlement if the Secretary determines the settlement is not in accordance with Act and these regulations.

(3) *State certification program.* Commenters generally requested that States administer and enforce their own organic certification programs. We have added regulations in these provisions addressing States' enforcement of their programs regarding certified producers and handlers operating in the State. These regulations clarify a State's responsibility to provide for enforcement and appeal proceedings which are consistent with these regulations and for keeping the Secretary informed of such proceedings. We have added these regulations because we believe that a State must have the authority to initiate compliance actions to enforce its organic certification program. The regulations are found at § 205.668.

Regarding accreditation authorities, commenters stated that a State program's governing State official should have authority to suspend or revoke the accreditation of private certifying agents operating within the State. Sections 6515(j) and 6519(e) of the Act address suspension and revocation of accreditation by the Secretary or governing State official. While the Act may provide for the possibility of such authority being used by governing State officials, it also requires the Secretary to establish a workable accreditation program and it grants sole authority to the Secretary to accredit certifying agents. Therefore, the Secretary must have sole authority to suspend or revoke that accreditation.

This does not mean that governing State officials are denied a role in oversight of certifying agents operating in their States. If a governing State official believes a certifying agent operating in the State is not in compliance with the accreditation requirements of the Act or is not properly certifying producers or handlers to NOP and the State's approved unique organic certification requirements, the governing State official must investigate the possible noncompliance. If evidence of noncompliance is found, the governing State official must notify the Program Manager of such noncompliance activities and document those activities. The Program Manager will investigate such complaints of noncompliance.

(4) *Right of appeal.* We have added the requirement that any notification of proposed suspension or revocation must include a notice to the certified operation's or certifying agent's of its right to file an appeal. Commenters requested that the notification of proposed suspension or revocation provisions for certifying agents reference the appeals section. We agree with the commenters' request and add that all recipients of a notification of proposed suspension or revocation should be made aware of their appeal rights. Notification of appeal rights is found in § 205.662 for certified operations and § 205.665 for certifying agents.

Compliance—Changes Requested But Not Made

This subpart retains from our first proposal regulations on which we received comments as follows:

(1) *Revocation period.* Commenters stated that a 5-year period of ineligibility for certification after revocation of certification is too harsh a punishment to apply in all cases. Some commenters suggested that ''shall not be eligible'' should be replaced with ''may be deemed ineligible'' so that the penalty provision would be available for flagrant violations of the Act but would not have to be applied to all violations. A commenter suggested a maximum period of ineligibility of 3 years be established for certified operations. The commenter's justification was that organically produced agricultural products must be produced on land to which no prohibited substances have been applied for 3 years prior to harvest. This commenter also stated that the ineligibility waiver should be a local decision with notice to the Administrator.

Section 6519(c) of the Act requires certification ineligibility for 5 years unless reduced or eliminated by the Secretary. Revocation of a certification is a serious action subject to due process for the accused certified producer or handler. We believe that any noncompliance action, combination of noncompliance actions, or history of noncompliance activities deemed to warrant the revocation of certification also warrants ineligibility from certification for 5 years unless reduced or eliminated by the Secretary. If the noncompliance is not significant enough to warrant revocation of the operation's certification, the certifying agent, State program's governing State official, or Secretary may choose to suspend the operation's certification for a period of time less than the 5-year revocation period. We disagree with the suggestion that ineligibility waivers should be decided at the local level. Actions which are finalized by the governing State official, Administrator, or Secretary cannot be subject to reversal or waivers by certifying agents. Additionally, a national program such as this must have uniformity in application, which would be less likely if individual certifying agents were permitted to establish their own criteria for ineligibility waivers. Accordingly, the ineligibility and waiver provisions are unchanged in this proposal.

(2) *Accreditation sanctions.* Commenters stated that suspension and revocation of accreditation should be applied fairly to both private and State certifying agents. Governing State officials do not have any accreditation authorities under this proposal—which may reduce private certifying agents' concerns of unfair or unequal treatment. Accreditation compliance actions by the Program Manager and the Administrator will be conducted impartially and in accordance with the Administrative Procedure Act and Department policies.

Revocation would be based on a determination that a private certifying agent willfully violated the Act or these regulations or falsely or negligently certified a production or handling operation as an organic operation. The Act does not authorize the revocation of a State certifying agent's accreditation. However, because suspension of such entity can be established for any period of time, a suspension can be effectively equivalent to a revocation of accreditation. Accordingly, this proposal retains the provisions for the suspension of accreditation for private and State certifying agents and the revocation of accreditation for private certifying agents.

Compliance—Additional Provisions

Upon further review of the accreditation provisions in the first proposal, we have decided to propose the following additions and changes.

(1) *Enforcement rights of the Secretary.* We have added a general section addressing specific enforcement rights of the Secretary. First, this section clarifies that the Program Manager on behalf of the Secretary and the Administrator may inspect and review State organic certification programs, accredited certifying agents, and certified production or handling operations for compliance with the Act or regulations. The Program Manager has this oversight authority in States with State organic certification programs as well as in States without such programs.

Second, this section provides that the Program Manager may initiate proceedings to suspend or revoke a certified operation's certification when a certifying agent or governing State official fails to take appropriate enforcement action against a certified operation that is not in compliance with the Act or these regulations. We have added this provision because this proposal provides certifying agents and governing State officials with enforcement authorities, including the suspension and revocation of certifications. However, we believe the Secretary, through the Program Manager, must have authority to take such actions if a certifying agent or governing State official fails to carry out its responsibilities.

Third, this section provides that the Program Manager may initiate proceedings to suspend or revoke a certified operation's certification upon suspension or revocation of the operation's certifying agent's accreditation. We have added this provision to enable the Program Manager to suspend or revoke certification of any operation that a certifying agent certified following procedures or practices that are not in compliance with the Act or these regulations. This addition is found at § 205.660.

(2) *Certifying agent investigations.* We have added a section to clarify that certifying agents may investigate complaints of noncompliance with the Act or regulations concerning operations that they have certified. This section does not authorize a certifying agent to investigate certified operations that the certifying agent has not certified. Such complaints should be reported to the certifying agent that certifies the operation in question. This addition is found at § 205.661.

(3) *Certified operation rebuttals.* We have added a certified operation's right to rebut any noncompliance described in a notice of noncompliance. We believe this provision is necessary to clarify that certified operations should be able to present facts or arguments refuting the certifying agent's findings. We see this as an informal process between the certified operation and the certifying agent to clarify possible misunderstandings or misinterpretation of requirements, data, or information. The APA requires such opportunities prior to suspension or revocation. Certified operations that successfully refute a finding of noncompliance will receive a notification of noncompliance resolution. Any certified operation unable to successfully refute a finding of noncompliance must correct the

noncompliance or face possible suspension or revocation of its certification. This addition is found at § 205.662(a)(3).

(4) *Certifying agent rebuttals.* We also have added a certifying agent's right to rebut any accreditation noncompliance described in a notice of noncompliance issued by the Program Manager. This also will be an informal process and is consistent with the intent of the APA. We believe this provision is necessary to clarify that certifying agents should be able to present facts or arguments refuting the Program Manager's findings. Certifying agents that successfully refute a finding of noncompliance will receive a notification of noncompliance resolution. Any certifying agent unable to successfully refute a finding of noncompliance must correct the noncompliance or face possible suspension or revocation of its accreditation. This addition is found at § 205.665(a)(3).

(5) *Willful noncompliance.* We have also added authority for certifying agents and governing State officials to move directly to a notice of proposed revocation if a certification noncompliance is a willful, serious violation of these regulations. This will allow expedited action in dealing with serious violations of certification. The due process provisions of the APA provide an exception in cases of willful violations. Even though a noncompliance may be a willful act, the certified operation maintains the right to file an appeal of a proposed suspension or revocation of certification. Revocation of certification is reserved for serious instances of willful noncompliance and other serious violations. If a suspected willful violation is deemed not serious, a proposed suspension of certification rather than revocation may be issued.

Inspection and Testing, Reporting, and Exclusion From Sale

This portion of subpart G sets forth the inspection and testing requirements for agricultural products that have been produced on organic production operations or handled through organic handling operations.

Based on comments received regarding the first proposal, we have modified and restructured our residue testing requirements. Commenters were concerned about the cost of residue testing to certified operations and certifying agents, the determination of detectable levels of prohibited substances, and the exclusion of contaminated products from sale as organically produced.

Residue testing plays an important role in organic certification by providing a means for monitoring compliance with the National Organic Program (NOP) and by discouraging the mislabeling of agricultural products. This testing program provides State programs' governing State officials and certifying agents with a tool for ensuring compliance with three areas for testing: (1) Preharvest residue testing, (2) postharvest residue testing, and (3) testing for unavoidable residual environmental contamination levels.

Proposal Description

Under the residue testing requirements of the NOP, we propose that all agricultural products sold, labeled, or represented as organically produced be available for inspection by the Administrator, State program's governing State official, or certifying agent. Organic farms and handling operations must be made available for inspection under proposed Subpart E, Certification. In addition, products from the aforementioned organic operations may be required by the State program's governing State official or certifying agent to undergo preharvest or postharvest testing when there is reason to believe that agricultural products to be sold or labeled as organically produced have come into contact with prohibited substances. *The cost of such testing will be borne by the applicable certifying party and is considered a cost of doing business. Accordingly, certifying agents should make provisions for the cost of preharvest or postharvest residue testing when structuring certification fees.*

Preharvest and Postharvest Residue Testing. The main objectives of the residue testing program are to: (1) Ensure that certified organic production and handling operations are in compliance with the requirements set forth in this proposal; and (2) serve as a means for monitoring drift and unavoidable residue contamination of agricultural products to be sold or labeled as organically produced. Any detectable residues of a prohibited substance found in or on samples during chemical analysis will serve as a warning indicator to the State program's governing State official or certifying agent.

The request for preharvest or postharvest residue testing is based on the Administrator's, State program's governing State official's, or certifying agent's belief that an agricultural product has come into contact with one or more prohibited substances. The ''reason to believe'' could be triggered by various situations, for example: (1) The applicable authority receiving formal written complaint regarding the practices of a certified organic operation; (2) an open container of a prohibited substance found on the premises of a certified organic operation; (3) the proximity of a certified organic operation to a potential source of drift; (4) suspected soil contamination by historically persistent substances; or (5) when the product from a certified organic operation is unaffected when neighboring fields or crops are infested with pests. These situations do not represent all of the possible occurrences that would trigger an investigation. Preharvest or postharvest residue testing will occur on a case-by-case basis.

In each case, an inspector representing the Administrator, certifying agent, or State program's governing State official will conduct sampling. Testing for chemical residues must be performed in an accredited laboratory, defined as a laboratory that has met and continues to meet the requirements specified in the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 138) (FACT Act) for pesticide residue analyses of fresh fruit and vegetables and/or pesticide analysis of products derived from livestock and fowl. AMS is currently developing a regulation for the National Laboratory Accreditation Program (NLAP), which will accredit laboratories under the FACT Act. We expect that the NLAP will be implemented before or at the same time as the NOP. When conducting chemical analyses, the laboratory must incorporate the analytical methods described in the 16th edition of the *Official Methods of Analysis of the AOAC International* or other applicable validated methodology for determining the presence of contaminants in agricultural products.

When testing indicates that an agricultural product to be sold or labeled as organically produced contains residues of prohibited substances, certifying agents will compare the level of detected residues with a national mean of detection for the specific commodity/pesticide combination generated by the U.S. Department of Agriculture's (USDA) Pesticide Data Program (PDP). This national mean is defined as the mean level of detected pesticide residues as described in certain pesticide/commodity pairs or combinations established by USDA's Pesticide Data Program. The national mean for specific commodity/pesticide combinations will serve as a standard for the Administrator, State programs' governing State officials, and certifying

agents to assist in monitoring for illegal use violations. This information will be made available by USDA to aid State programs' governing State officials and certifying agents in making sound evaluations and decisions regarding detected levels of prohibited substances.

In addition, levels of unavoidable residual environmental contamination will be determined for crop-and site-specific agricultural commodities to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients).'' These levels will represent limits at which the Department may take compliance action to suspend the use of the contaminated area for organic agricultural production. Initially, unavoidable residual environmental contamination levels will be set for persistent prohibited substances (aldrin, dieldrin, chlordane, DDE, etc.) in the environment. In time, they may become more inclusive of prohibited residues as additional information becomes available. Unavoidable residual environmental contamination levels will be based on the unavoidability of the chemical substances and do not represent permissible levels of contamination where it is avoidable. Historical residue data gathered from Federal and State monitoring and testing programs will be used to determine these levels. They will be set by the Administrator, in consultation with the Food and Drug Administration (FDA) and Environmental Protection Agency (EPA).

After all tests and analyses have been concluded, the results must be provided to the Administrator. The results of analyses and tests will be available, kept on record, and reviewed by the Department to evaluate concentration levels of prohibited substances for specific regions and agricultural crops. Analyses and test results will also be available for public access, unless the residue testing is part of an ongoing compliance investigation. Information relative to an ongoing compliance investigation will be confidential and restricted to the public.

Detection of Prohibited Substances. In the case of residue testing and the detection of prohibited substances in or on agricultural products to be sold, labeled, or represented ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients),'' detectable residues of prohibited substances that exceed the national mean of detection for the respective commodity/pesticide combination or unavoidable residual contamination levels cannot be sold or labeled as organically produced. When such an agricultural crop is in violation of these requirements, the certification of that crop will be suspended for the period that the crop is in production. Certifying agents must follow the requirements specified in §§ 205.662 and 205.663 of Subpart G, Compliance. In addition, when a State program's governing State official or a certifying agent detects a prohibited substance in or on agricultural products to be sold or labeled as organically produced, the State program's governing State official or certifying agent may conduct an investigation to determine the cause of the prohibited substance.

If the investigation into the cause of a detectable residue level in a product indicates that the residue was the result of an intentional application of a prohibited substance, the Administrator is authorized to initiate proceedings to revoke or suspend the certification status of an operation or portion of that operation. When testing indicates that an agricultural product contains prohibited substances that exceed either the EPA tolerance level or FDA action level, as applicable, for the prohibited substance, the data revealing such information will be promptly reported to the appropriate regulatory health agencies.

Emergency Pest Eradication or Disease Treatment Programs. When a prohibited substance is applied to an organic production or handling operation due to a Federal or State emergency pest eradication or disease treatment program and the organic handling or production operation otherwise meets the requirements of this proposal, the certification status of the operation shall not be affected as a result of the application of the prohibited substance, provided that: (1) Any harvested crop or plant part to be harvested that has contact with a prohibited substance applied as the result of a Federal or State emergency pest eradication or disease treatment program cannot be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'; and (2) any livestock that are treated with a prohibited substance applied as the result of a Federal or State emergency pest or disease treatment program or product derived from such treated livestock cannot be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients).''

However, milk or milk products may be labeled or sold as organically produced beginning 12 months following the last date that the dairy animal was treated with the prohibited substance. Additionally, the offspring of gestating mammalian breeder stock treated with a prohibited substance may be considered organic if the breeder stock was not in the last third of gestation on the date that the breeder stock was treated with the prohibited substance.

Residue Testing—Changes Based on Comments

This portion of subpart G differs from our first proposal in several respects as follows:

Residue Testing. (1) We have revised the first proposal's section on residue testing and repositioned it under § 205.670(b).

Commenters disagreed with the provisions in the first proposal which required certifying agents to conduct residue testing of products produced and handled on operations that they had certified not less frequently than every 5 years. They stated that the first proposal's requirements for residue testing: (1) Were in excess of what the Act actually requires; (2) were more stringent than that of the industry norm; (3) would create an unnecessary burden on certifying agents and organic production and handling operations; and (4) would increase costs for certified production and handling operations. The commenters stated that the NOP's residue testing requirements should utilize existing Federal and State testing programs for the detection of pesticide residues. They also stated that residue testing should only be required when it is known or suspected that prohibited substances have been applied to organic products.

We disagree with the commenters' assertions regarding the first proposal's requirements for residue testing. However, in an attempt to minimize the burdens of residue testing, we have proposed that State programs' governing State officials and certifying agents may test agricultural inputs used for organic production and require preharvest or postharvest testing of any agricultural product to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' when there is reason to believe that the agricultural product has come into contact with prohibited substances. This change allows State programs' governing State officials and certifying agents to perform preharvest and postharvest residue testing on a case-by-case basis.

Commenters requested that the rule specify which laboratories are authorized to perform residue testing and what tests each laboratory would be accredited to perform. We have defined

an accredited laboratory as a laboratory that has met and continues to meet the requirements specified in the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 138) for pesticide residue analyses of fresh fruit and vegetables and/or pesticide residue analysis of products derived from livestock and fowl. Any laboratory that meets the specified requirements therein may be used in conducting residue tests. We have required that accredited laboratories be used to ensure consistency among data, testing methodology, reporting procedures, and other testing criteria needed to maintain analytical uniformity in the residue testing program. Validated analytical methodologies for determining the presence of contaminants in agricultural products, such as those described in the 16th edition of the *Official Methods of Analysis of the AOAC International,* may be used.

Tolerance Levels for Pesticide Residues. (2) We have prohibited the sale and labeling of agricultural products as organic when such products have been tested for prohibited substances and found to contain residues of prohibited substances at levels greater than the national mean of detection for the specific commodity/pesticide combination or levels greater than the unavoidable residual environmental contamination. Such agricultural products cannot be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients).'' The Administrator, State program's governing State official, or certifying agent may conduct an investigation of the applicable production or handling operation to determine the cause of the presence of any prohibited substance. If the investigation reveals that the presence of a prohibited substance was the result of intentional application of the prohibited substance, the Administrator may initiate proceedings to suspend or revoke the production or handling operation's certification.

(3) Commenters suggested that USDA adopt a uniform standard for the maximum allowable residue levels. Some commenters expressed the belief that it is impractical or too expensive to establish site-specific, unavoidable residual environmental contamination levels for every commodity/pesticide combination in every growing area. Others argued that the cause of contamination is irrelevant and that crops that exceed the maximum residue levels should not be allowed to be sold as organic. Finally, others argued that a single standard was needed because contaminated products would not be removed from the market immediately, pending determination of cause.

Organic standards, including provisions governing prohibited substances, are based on the method of production, not the content. The primary purpose of the residue testing approaches described in this proposal, then, is to provide an additional tool for State programs' governing State officials and certifying agents to use in monitoring and ensuring compliance with the NOP. We acknowledge that consumers have a reasonable expectation that organic products will contain minimal residues of prohibited substances. We are not allowing the use of prohibited substances. We are making provisions for the unavoidable occurrences of prohibited substances while ensuring that residue levels are consistent with consumer expectations.

This proposal adopts PDP's national means of detected residue for specific commodity/pesticide combinations and the unavoidable residual environmental contamination levels. Both standards have been adopted for the purpose of determining excessive prohibited substances on agricultural products to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients).''

The national mean of detected residue for a specific commodity/pesticide combination is derived from detections in the PDP monitoring program. As a result of mean values being based on conventional substances, we believe that residue values that fall above this mean, then, would be beyond reasonable consumer expectations for minimal residues. The situation is very similar with respect to unavoidable residual environmental contamination levels. Even though the presence of residues of certain persistent substances may not be the result of intentional application, we believe that excessive residue levels would not be consistent with the intentions of the Act. Accordingly, when levels of a persistent substance are detected above the unavoidable residual environmental contamination level, the product cannot be sold or labeled as organically produced.

Some commenters suggested that we use a percentage of the EPA tolerance of FDA action level, such as 5 or 10 percent, as a uniform standard for the maximum allowable residue level. We considered the comments but decided not to adopt them for the following reasons. The EPA tolerances for pesticides are defined as the maximum legal level of a pesticide residue in or on a raw or processed agricultural commodity, as set by the Environmental Protection Agency under the Federal Food Drug and Cosmetic Act, section 408. FDA action levels represent limits, at or above which FDA will take legal action against a food product to prevent poisonous or deleterious substances from entering the food supply. Both EPA tolerances and FDA action levels are public health-based standards. Our rationale for residue testing, as a tool for State programs' governing State officials and certifying agents to monitor compliance with the NOP, is different from these public health programs.

Accepting a percentage of EPA tolerance or FDA action levels could also pose a significant problem for analytical laboratories trying to analyze for prohibited substances. In some cases, pesticides have tolerances that are set near their analytical method's Limit of Quantification (LOQ). The LOQ is defined as the lowest level where analytical measurement becomes quantitatively meaningful. If the EPA tolerances are near the analytical method LOQ's, accurate determination of the levels at 5 to 10 percent of the tolerance may not be attainable for analytical instrumentation currently employed. Therefore, the Department could be setting a level of concern below the LOQ for some substances if it adopted this recommendation. As a fundamental principle, we have chosen not to set an enforcement level that could be below detection limits for some substances. As an alternative, we are proposing to use the PDP national mean of detected residues for specific commodity/pesticide combinations.

Other commenters suggested that USDA adopt a ''zero tolerance'' for residues of prohibited substances. Under this suggestion, products containing any detectable residues of a prohibited substance would not be allowed to be labeled as organically produced. This proposal does not adopt this suggestion. While standards strictly prohibit use of any substance not found on the approved National List, we recognize that some minimal residues may still be found in organic foods. We believe our proposed residue testing system and compliance provisions should be adequate to protect the integrity of agricultural products sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients).''

Several commenters expressed opposition to the first proposal not requiring residue testing in the event of drift. These commenters stated that organic producers should report all incidences of drift to their certifying agent. The commenters further stated that a crop should be tested for the

presence of prohibited substances when drift has or is suspected to have occurred. They also stated that when the test indicates levels of residues of prohibited substances that exceed 5 percent of the EPA tolerance level, the crop should be prohibited from being sold or labeled as organically produced.

In response to commenters' concern about contamination from drift, we have used some of their reasoning in the development of our residue testing program. Drift is defined as the physical movement of prohibited substances from the intended target site onto an organic production operation or any portion thereof. The National Organic Standards Board (NOSB or Board) recommended that agricultural products exposed to drift not be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' or fed to livestock on organic operations. The NOSB also recommended that preharvest tissue testing of crops suspected of receiving drift be required to verify the presence or absence of prohibited substances. This proposal addresses the problem of drift through the use of preharvest testing of crops suspected of receiving drift of a prohibited substance. Although drift may occur, especially in those agricultural regions where pesticide use on nonorganic lands is routine and heavy, exposure to drift does not constitute use of a prohibited substance. Therefore, preharvest testing provisions have been established for State programs' governing State officials and certifying agents to test when there is a reason to believe that agricultural products intended to be sold or labeled as organically produced have come into contact with prohibited substances. This will allow a State program's governing State official or certifying agent to determine whether the integrity of the product has been affected. We believe our proposed residue testing program and compliance provisions should be adequate to protect the integrity of agricultural products.

Residue Testing—Changes Requested but Not Made

(1) The original proposal provided that land subject to a Federal or State emergency disease or pest treatment program should not lose its organic certification and should not be required to be withheld from organic production for a period of 3 years. A few commenters stated that a field treated under such emergency situations should lose its certification and should be restricted for organic use for 3 years following the emergency treatment. The commenters stated this is necessary to maintain consumer confidence in organically produced products. We believe the first proposal is consistent with the requirements of the Act. The proposal provided that crops and livestock that had contact or been treated with a prohibited substance under such an official emergency treatment program could not be sold or labeled as organic. This proposal retains that prohibition.

Commenters suggested that producers work with the Federal or State agency which requires an emergency treatment program and arrange for use of materials that are compatible with organic production. While this may be possible under certain emergency treatment situations, it cannot be relied on as a solution to every emergency treatment situation. Appropriate alternative treatments may not be available, or the jurisdiction requiring the emergency program may not grant alternative treatments. Commenters also suggested that producers avoid planting crops that might be subject to pests or diseases targeted by emergency treatment programs to avoid emergency treatments. We do not believe that is a reasonable solution for producers. Emergency treatment programs are used in response to unforeseen infestations and diseases. Only hindsight would help organic producers determine which crops to produce. Further, the possibilities of damaging insect infestations or plant or animal diseases warranting an emergency treatment program are so numerous that an organic producer could be left with few or no alternative crops or livestock to produce. Cultural conditions and market factors also would limit selection of alternative organic production. Accordingly, the commenters' recommendation that loss of organic certification and an automatic 3-year prohibition on organic production from land or livestock treated under an official emergency treatment program is not accepted.

Residue Testing. (2) Commenters suggested that some of the responsibility of residue testing be removed from certifying agent responsibilities. They also suggested that residue testing requirements take into account current Federal and State testing requirements already in place for the detection of pesticide residues.

We have not adopted language that the Department would use current Federal and State testing requirements for the detection of pesticide residues in the residue testing program. Although State and Federal testing provide good sources of data on pesticide residues, the data may reflect criteria developed for different sampling purposes, showing wide variations in sample selection and indicating different laboratory capabilities and different levels of quantification between and within laboratories.

Residue Testing—Additional Provisions

Section 205.670(a) has been added. It provides that the Administrator, the State program's governing State official, and the applicable certifying agent have access, for inspection purposes, to all agricultural products being sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients).'' In addition, the organic products must be made available for examination by said authorities in the manner that they prescribe.

Public comments did not suggest this action. However, we believe it is necessary to officially grant the Administrator, the State program's governing State official, and the applicable certifying agent the authority to access all agricultural products subject to inspection under this section. This authority will help resolve conflicts that may arise regarding product accessibility during inspection and testing.

Adverse Action Appeal Process. This portion of subpart G sets forth the general framework for an appeal process for persons subject to compliance determinations under the National Organic Program (NOP). In this proposal, we are empowering certifying agents with the authority to make decisions concerning denial of certification and the suspension or revocation of certified operations. This empowerment of certifying agents makes the appeal process very important.

We envision two kinds of appeals will be filed under these procedures: (1) Producers and handlers appealing denial of certification and proposed suspension and revocation of certification decisions by certifying agents; and (2) certifying agents appealing denial of accreditation and proposed suspension and revocation decisions by the NOP Program Manager. The Administrative Procedure Act (APA) (5 U.S.C. 553–559) provides that entities such as certified operations and accredited certifying agents have the right to appeal any adverse actions taken against their certification or accreditation, respectively. Applicants for certification and applicants for accreditation who receive a denial of certification or accreditation may appeal that denial following this appeal

procedure. The appeal process is the same for applicants as for certified operations and accredited certifying agents.

The informal appeal process described in this section is an extension of the noncompliance proceeding outlined in the Compliance section of this subpart.

For certification proceedings, the NOP and the Administrator will oversee compliance proceedings and handle certification appeals from operations in States that do not have an approved State organic certification program. The Administrator will issue decisions to sustain or deny appeals. If an appeal is denied, the Secretary will initiate a formal administrative review process, which includes a hearing before an administrative law judge and review by the Department's Judicial Officer. The formal administrative review process will be conducted pursuant to the Department's Uniform Rules of Practice, 7 CFR 1.130 through 1.151. The formal administrative review will be the Department's final determination on the noncompliance proceeding. That decision may be appealed to the District Courts. This section addresses the informal appeal process which is used to arrive at the Administrator's decision to sustain or deny an appeal.

In States with approved State organic certification programs, the governing State official or designee will oversee certification compliance proceedings and handle appeals from certified operations in the State. The governing State official or designated appeals official will rule on appeals filed under a State organic certification program. Further appeal of that decision may be made to the district court system.

Proposal Description

These appeal procedures provide that persons subject to the Act who believe that they are adversely affected by a noncompliance decision of a certifying agent, Program Manager, or governing State official may appeal such decision to the Administrator or to the applicable State's appeal process. Under Compliance provision in this subpart, accredited certifying agents initiate noncompliance proceedings. If an appeal of a certification decision is filed, the process is referred to the Administrator or governing State official or designee, as applicable, to the State where the applicant or certified operation resides.

Certification Appeals

Applicants for certification may appeal a certifying agent's denial of certification. Certified operations may appeal a certifying agent's notification of proposed suspension or revocation of the operation's certification. These appeals will be made to the Administrator or to the applicable governing State official or designated official in the approved State organic certification program.

Certification appeals may be filed only after an applicant or a certified operation has been given opportunity to come into compliance with these regulations or otherwise resolve the specified noncompliance. Prior to filing an appeal, the applicant or certified operation must have failed in rebuttal, refused to make specified corrections, or made corrections which the certifying agent subsequently determined to not meet certification requirements of the NOP.

If the Administrator or governing State official sustains an appeal, the applicant or certified operation will be granted certification or continued certification, as applicable to the operation's status. The applicant or certified operation will not be required to correct the actions or conditions cited in the noncompliance notification. The act of sustaining the appeal will not be considered an adverse action and may not be appealed by the certifying agent which issued the notification.

If the Administrator or governing State official denies an appeal, a formal administrative proceeding will be initiated to deny, suspend, or revoke the certification. Such proceeding will be conducted pursuant to the Department's Uniform Rules of Practice or pursuant to the State's formal appeal procedures. Certified operations may continue to operate throughout this informal appeals process and the formal administrative proceedings.

Accreditation Appeals

Pursuant to § 205.665 of this subpart, all accredited certifying agents are subject to the Program Manager's review of their operations and any noncompliance actions resulting from such reviews. As provided in § 205.668, a State program's governing State official must advise the Program Manager if an investigation of a certifying agent reveals that the certifying agent is not in compliance with the Act or these regulations. The appeal process for applicants is the same as for accredited certifying agents.

An appeal may be filed with the Administrator only after the certifying agent fails to rebut the noncompliance notice and fails to correct the noncompliance specified. If the Administrator sustains an appeal, the applicant or certified operation will be granted certification or continued certification, as applicable to the operation's status. The applicant or certified operation will not be required to correct the actions or conditions cited in the compliance notification. If the appeal is denied, a formal administrative proceeding will be initiated to deny, suspend, or revoke the accreditation.

The certifying agent may continue to operate as a certifying agent throughout the informal appeals process and the formal administrative proceeding.

All appeals to the Administrator must be filed in writing and sent to: Administrator, USDA–AMS, Room 3071–S, PO Box 96456, Washington, DC 20090–6456. An appeal must include a copy of the adverse decision to be reviewed and a statement of the appellant's reasons for believing that the decision was not proper and not made in accordance with applicable program regulations, policies, or procedures. A certified operation must send a copy of its appeal, to its certifying agent. All written communications between parties involved in appeal proceedings must be sent to the recipient's place of business by a delivery service which provides dated return receipts. Appeals under a State's procedure will be filed pursuant to the State's appeal process, which should include addresses and filing periods, etc.

An appeal must be filed within the time provided in the letter of notification or at least 30 days from the date of receipt of the notice to deny, suspend, or revoke certification or accreditation. The appeal will be considered ''filed'' on the date received by the Administrator or, when applicable, the State program's governing State official or such official's designee. The Administrator will notify the appellant and the appellant's certifying agent that the appeal was received. Unless appealed in a timely manner, a notification to deny, suspend, or revoke a certification or an accreditation will become final. The applicant, certified operation, or certifying agent that does not file an appeal in the time period provided waives the right to further appeal of the compliance proceeding.

Appeals—Changes Based On Comments

These appeal regulations differ from our first proposal as follows:

(1) *Decision-making.* We have clarified who will be making decisions that may be appealed to the Administrator. This proposal provides that persons subject to the Act who, during noncompliance proceedings described in this subpart, believe that

they are adversely affected by a noncompliance decision of a certifying agent, Program Manager, or governing State official may appeal such decision to the Administrator or the State's designated appeals official. This clarification is found in § 205.680.

Commenters stated that the proposed appeals procedures limited appeals to decisions of the NOP staff. Commenters requested that the appeals procedures be available for decisions by the Secretary, any representative of the Secretary, and decisions by any certifying agent. What we meant in the first proposal was that appeals would be filed on decisions made by the Program Manager and certifying agents.

As noted above, we are empowering certifying agents to make decisions concerning denials of certification and suspension or revocation of certified operations' certifications. Certifying agents accredited under this program act on behalf of the Secretary and the Administrator to carry out certification services, including noncompliance actions. The Administrator or designated governing State official will make decisions to either sustain or deny appeals by certification applicants and certified operations, as applicable to the State.

The Program Manager will make decisions to deny applications for accreditation and to suspend or revoke certifying agents' accreditations. The Administrator will make all decisions to either sustain or deny appeals by accreditation applicants and certifying agents.

(2) *Appeal procedures.* Commenters requested detailed appeal procedures or the use of citations to identify existing Departmental appeal procedures which would be used for appeals filed under this program. We acknowledge that the first proposal lacked detailed appeals provisions. However, we believe this explanation is more informative and helpful for the commenters. The formal administrative procedure following the Department's Uniform Rules of Practice is required under the APA. The rules of practice are not included in individual rulemaking actions but may be found under 7 CFR 1.130 through 1.151. The combination of this informal appeal procedure followed by the formal administrative proceeding assures applicants, certified operations, and accredited certifying agents that they will be given full opportunity to respond to any noncompliance proceeding brought against their application or operation. Individual State programs will have their own, approved appeal procedures.

Commenters also recommended that the Department should use an independent USDA appeals division to avoid conflict of interest by the Program Manager or the Administrator in the handling of appeals. We believe this proposed appeal procedure ensures that appeals will be administered by persons not involved in the decision being appealed. This appeals procedure is consistent with the requirements of the APA.

Paragraph (a)(1) of § 205.681 provides that if the Administrator sustains an applicant's or certified operation's appeal of a certifying agent's noncompliance decision, the act of sustaining the appeal shall not be an adverse action subject to appeal by the affected certifying agent. We have included this provision because, as noted above, certifying agents are accredited by the Secretary to provide certification services as agents of the Secretary and the Administrator. Therefore, if the Administrator overrules a decision of an accredited certifying agent, that certifying agent cannot request an appeal of the Administrator's decision.

Appeals—Changes Requested But Not Made

None.

Appeals—Additional Provisions

(1) *State appeals procedures.* We are proposing that appeal proceedings in States with organic certification programs approved by the Secretary will be carried out in accordance with the official administrative appeal proceedings in each State. A State's appeal process will be included as part of the State's organic certification program. Because a State's appeal procedure is approved by the Secretary, the final determination for a certification appeal arrived at under that procedure is considered to have the effect of a decision by the Secretary. Approved State appeal processes are unique to each State and are not included in this regulation.

Certification appeals are made to the State program's governing State official or such official's designee. The governing State official or designee will administer the appeal pursuant to appeal procedures which have been approved by the Secretary. Rulings on such appeals, as noted in § 205.668, may not be appealed to the Secretary. The certification applicant or certified operation may make subsequent appeal to the Court of Appeals of the United States for the circuit in which such applicant or certified operation carries on business or in the United States Court of Appeals for the District of Columbia Circuit.

(2) *Accreditation appeals.* This proposal provides that the Program Manager carries out all compliance proceedings on accredited certifying agents. The Secretary has sole authority for accrediting certifying agents and, therefore, must retain sole authority for suspending or revoking that accreditation. A State program's governing State official must investigate any complaints of noncompliance on the part of a certifying agent operating in the State. If noncompliance activities or conditions are found, the governing State official must notify the Program Manager of those compliance violations or suspected compliance violations.

Miscellaneous

Section 205.690 provisions the Office of Management and Budget control number assigned to the information collection requirements of these regulations. Sections 205.691 through 205.699 are reserved.

List of Subjects in 7 CFR Part 205

Administrative practice and procedure, Agriculture, Animals, Archives and records, Foods, Imports, Labeling, Organically produced products, Plants, Reporting and recordkeeping requirements, Seals and insignia, Soil conservation.

For the reasons set forth in the preamble, it is proposed that Title 7, Chapter I of the Code of Federal Regulations be amended as follows:

1. Parts 205 through 209 which are currently reserved in subchapter K (Federal Seed Act), are removed.

2. A new subchapter M consisting of part 205 through 209 is added to read as follows:

SUBCHAPTER M—ORGANIC FOODS PRODUCTION ACT PROVISIONS

PART 205—NATIONAL ORGANIC PROGRAM

Subpart A—Definitions

Sec.

205.1 Meaning of words.
205.2 Terms defined.

Subpart B—Applicability

205.100 What has to be certified.
205.101 Exemptions and exclusions from certification.
205.102 Use of the term, ''organic.''
205.103 Recordkeeping by certified operations.
205.104 Foreign applicants.
205.105–205.199 [Reserved]

Subpart C—Organic Crop, Wild Crop, Livestock, and Handling Requirements

205.200 General.

205.201 Organic production and handling system plan.
205.202 Land requirements.
205.203 Soil fertility and crop nutrient management practice standard.
205.204 Seeds and planting stock practice standard.
205.205 Crop rotation practice standard.
205.206 Crop pest, weed, and disease management practice standard.
205.207 Wild-crop harvesting practice standard.
205.208–205.235 [Reserved]
205.236 Origin of livestock.
205.237 Livestock feed.
205.238 Livestock health care practice standard.
205.239 Livestock living conditions.
205.240–205.269 [Reserved]
205.270 Organic handling requirements.
205.271 Facility pest management practice standard.
205.272 Commingling and contact with prohibited substance prevention practice standard.
205.290 Temporary variances.

Subpart D—Labels, Labeling, and Market Information

205.300 Use of the term, ''organic.''
205.301 Product composition.
205.302 Calculating the percentage of organically produced ingredients.
205.303 Packaged products labeled ''100 percent organic'' or ''organic.''
205.304 Packaged products labeled ''made with organic (specified ingredients).''
205.305 Multiingredient packaged products with less that 50 percent organic ingredients.
205.306 Labeling of nonretail containers used for only shipping or storage of raw or processed agricultural products labeled as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients).''
205.307 Agricultural products in a form other than packages at the time of retail sale that are labeled or represented as ''100 percent organic'' or ''organic.''
205.308 Agricultural products in a form other than packages at the time of retail sale that are sold, labeled, or represented as ''made with organic (specified ingredients).''
205.309 Agricultural products produced on an exempt production operation.
205.310 USDA Seal.

Subpart E—Certification

205.400 General requirements for certification.
205.401 Application for certification.
205.402 Review of application.
205.403 On-site inspections.
205.404 Approval of certification.
205.405 Denial of certification.
205.406 Continuation of certification.
205.407–205.499 [Reserved]

Subpart F—Accreditation of Certifying Agents

205.500 Areas and duration of accreditation.
205.501 General requirements for accreditation.
205.502 Applying for accreditation.
205.503 Applicant information.
205.504 Evidence of expertise and ability.
205.505 Statement of agreement.
205.506 Approval of accreditation.
205.507 Denial of accreditation.
205.508 Site evaluations.
205.509 Peer review panel.
205.510 Annual report, recordkeeping, and renewal of accredition.
205.511–205.599 [Reserved]

Subpart G—Administrative

The National List of Allowed and Prohibited Substances
205.600 Allowed and prohibited substances and ingredients in organic production and handling.
≤205.601 Synthetic substances allowed for use in organic crop production.
205.602 Nonsynthetic substances prohibited for use in organic crop production.
205.603 Synthetic substances allowed for use in organic livestock production.
205.604 Nonsynthetic substances prohibited for use in organic livestock production. [Reserved]
205.605 Nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic,'' or ''made with organic (specified ingredients).''
205.606 Nonorganically produced agricultural products allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic ingredients.''
205.607 Amending the National List.
State Programs
205.620 Requirements of State organic certification programs.
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Fees
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205.642 Fees and other charges for certification.
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205.660 General.
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205.668 Noncompliance procudures under State organic certification programs.
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Inspection and Testing, Reporting, and Exclusion from Sale
205.670 Inspection and testing of agricultural product to be sold or labeled ''organic''.
205.671 Exclusion from organic sale.
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205.673—205.679 [Reserved]
Adverse Action Appeal Process
205.680 General.
205.681 Appeals.
205.682—205.689 [Reserved]
Miscellaneous
205.690 OMB control number.
205.691—205.699 [Reserved]

Authority: 7 U.S.C. 6501–6522.

Subpart A—Definitions

205.1 Meaning of words.

For the purpose of the regulations in this subpart, words in the singular form shall be deemed to impart the plural and vice versa, as the case may demand.

205.2 Terms defined.

Accredited laboratory. A laboratory that has met and continues to meet the requirements specified in the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 138) for pesticide residue analyses of fresh fruit and vegetables and/or pesticide residue analysis of products derived from livestock and fowl.

Accreditation. A determination made by the Secretary that authorizes a private, foreign, or State entity to conduct certification activities as a certifying agent under this part.

Act. The Organic Foods Production Act of 1990, as amended (7 U.S.C. 6501 *et seq.*).

Action level. The limit at or above which the Food and Drug Administration will take legal action against a product to remove it from the market. Action levels are based on unavoidability of the poisonous or deleterious substances and do not represent permissible levels of contamination where it is avoidable.

Administrator. The Administrator for the Agricultural Marketing Service (AMS), United States Departure of Agriculture, or the representative to whom authority has been delegated to act in the stead of the Administrator.

Agricultural inputs. All substances or materials used in the production or handling of organic agricultural products.

Agricultural product. Any agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock that is marketed in the United States for human or livestock consumption.

Allowed synthetic. A substance that is included on the National List of synthetic substances allowed for use in organic production, or handling.

Agricultural Marketing Service (AMS). The Agricultural Marketing Service of the United States Department of Agriculture.

Animal drug. Any drug as defined in section 201 of the Federal Food, Drug, and Cosmetic Act, as amended (21 U.S.C. 321), that is intended for use in livestock, including any drug intended for use in livestock feed but not including such livestock feed.

Annual seedling. A plant grown from seed that will complete its life cycle or produce a harvestable yield within the same crop year or season in which it was planted.

Area of operation. The types of operations: Crops, livestock, wild-crop harvesting, handling, or any combination thereof that a certifying agent may be accredited to certify under this part.

Audit trail. Documentation that is sufficient to determine the source, transfer of ownership, and transportation of any agricultural product labeled as ''100 percent organic,'' the organic ingredients of any agricultural product labeled as ''organic'' or ''made with organic (specified ingredients)'' or the organic ingredients of any agricultural product containing less than 50 percent organic ingredients identified as organic in an ingredients statement.

Biodegradable. Subject to biological decomposition into simpler biochemical or chemical components.

Biologics. All viruses, serums, toxins, and analogous products of natural or synthetic origin, such as diagnostics, antitoxins, vaccines, live microorganisms, killed microorganisms, and the antigenic or immunizing components of microorganisms intended for use in the diagnosis, treatment, or prevention of diseases of animals.

Breeder stock. Female livestock whose offspring may be incorporated into an organic operation at the time of their birth.

Buffer zone. An area located between a certified production operation or portion of a production operation and an adjacent land area that is not maintained under organic management. A buffer zone must be sufficient in size or other features (e.g., windbreaks or a diversion ditch) to prevent the possibility of unintended contact by prohibited substances applied to adjacent land areas with an area that is part of a certified operation.

Bulk. The presentation to consumers at retail sale of an agricultural product in unpackaged, loose form, enabling the consumer to determine the individual pieces, amount, or volume of the product purchased.

Certification or certified. A determination made by a certifying agent that a production or handling operation is in compliance with the Act and the regulations in this part, which is documented by a certificate of organic operation.

Certified operation. A crop or livestock production, wild-crop harvesting, or handling operation or portion of such operation that is certified by an accredited certifying agent as utilizing a system of organic production or handling as described by the Act and the regulations in this part.

Certifying agent. Any entity accredited by the Secretary as a certifying agent for the purpose of certifying a production or handling operation as a certified production or handling operation.

Certifying agent's operation. All sites, facilities, personnel, and records used by a certifying agent to conduct certification activities under the Act and the regulations in this part.

Claims. Oral, written, implied, or symbolic representations, statements, or advertising or other forms of communication presented to the public or buyers of agricultural products that relate to the organic certification process or the term, ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients),'' or, in the case of agricultural products containing less than 50 percent organic ingredients, the term, ''organic,'' on the ingredients panel.

Commercially available. The ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling, as determined by the certifying agent in the course of reviewing the organic plan.

Commingling. Physical contact between unpackaged organically produced and nonorganically produced agricultural products during production, transportation, storage or handling, other than during the manufacture of a multiingredient product containing both types of ingredients.

Compost. The product of a carefully managed process through which microorganisms break down plant and animal materials into more available forms suitable for application to the soil. Compost used in an organic operation must be produced in a facility in compliance with the Natural Resource Conservation Service's practice standard for a composting facility (Code 317) and must use methods to raise the temperature of the raw materials to the levels needed to stabilize nutrients and kill pathogens.

Control. Any method that reduces or limits damage by populations of pests, weeds, or diseases to levels that do not significantly reduce productivity.

Crop. A plant or part of a plant intended to be marketed as an agricultural product or fed to livestock.

Crop residues. The plant parts remaining in a field after the harvest of a crop, which include stalks, stems, leaves, roots, and weeds.

Crop rotation. The practice of alternating the annual crops grown on a specific field in a planned pattern or sequence in successive crop years, so that crops of the same species or family are not grown repeatedly without interruption on the same field. Perennial cropping systems employ means such as alley cropping, intercropping, and hedgerows to introduce biological diversity in lieu of crop sequencing.

Crop year. That normal growing season for a crop as determined by the Secretary.

Cultivation. Digging up or cutting the soil to prepare a seed bed; control weeds; aerate the soil; or work organic matter, crop residues, or fertilizers into the soil.

Cultural methods. Methods used to enhance crop health and prevent weed, pest, or disease problems without the use of substances; examples include the selection of appropriate varieties and planting sites; proper timing and density of plantings; irrigation; and extending a growing season by manipulating the microclimate with green houses, cold frames, or wind breaks.

Detectable residue. The amount or presence of chemical residue or sample component that can be reliably observed or found in the sample matrix by the current approved analytical methodology.

Disease vectors. Plants or animals that harbor or transmit disease organisms or pathogens which may attack crops or livestock.

Drift. The physical movement of prohibited substances from the intended target site onto an organic operation or portion thereof.

Emergency pest or disease treatment program. A mandatory program authorized by a Federal, State, or local agency for the purpose of controlling or eradicating a pest or disease.

Employee. Any person providing paid or volunteer services for a certifying agent.

Estimated National Mean. The mean level of detected pesticide residues as described in certain pesticide/commodity pairs or combinations established by USDA's Pesticide Data Program.

Excluded methods. Refers to a variety of methods used to genetically modify organisms or influence their growth and development by means that are not possible under natural conditions or processes and are not considered compatible with organic production. Such methods would include recombinant DNA, cell fusion, and micro- and macroencapsulation. Such methods would not include the use of traditional breeding, conjugation, fermentation, hybridization, in vitro fertilization, or tissue culture.

Feed. Edible materials which are consumed by livestock for their nutritional value. Feed may be concentrates (grains) or roughages (hay, silage, fodder). The term, ''feed,'' encompasses all agricultural commodities, including pasture ingested by livestock for nutritional purposes.

Feed Additive. A substance or combination of substances added to feed in micro quantities to fulfill a specific nutritional need, i.e., nutrients in the form of amino acids, vitamins, and minerals.

Feed Supplement. A feed used with another feed to improve the nutrient balance or performance of the total ration and intended to be:

(1) Diluted with other feeds when fed to livestock;

(2) Offered free choice with other parts of the ration if separately available; or

(3) Further diluted and mixed to produce a complete feed.

Fertilizer. A single or blended substance containing one or more recognized plant nutrient(s) which is used primarily for its plant nutrient content and which is designed for use or claimed to have value in promoting plant growth.

Field. An area of land identified as a discrete unit within a production operation.

Forage. Vegetable material in a fresh, dried, or ensiled state (pasture, hay, or silage) which is fed to livestock.

Handle. To sell, process, or package agricultural products, except such term shall not include the sale, transportation, or delivery of crops or livestock by the producer thereof to a handler.

Handler. Any person engaged in the business of handling agricultural products, including producers who handle crops or livestock of their own production, except such term shall not include final retailers of agricultural products that do not process agricultural products.

Handling operation. Any operation or portion of an operation (except final retailers of agricultural products that do not process agricultural products) that receives or otherwise acquires agricultural products and processes, packages, or stores such products.

Immediate family. The spouse, minor children, or blood relatives who reside in the immediate household of a certifying agent or an employee, inspector, contractor, or other personnel of the certifying agent. For the purpose of this part, the interest of a spouse, minor child, or blood relative who is a resident of the immediate household of a certifying agent or an employee, inspector, contractor, or other personnel of the certifying agent shall be considered to be an interest of the certifying agent or an employee, inspector, contractor, or other personnel of the certifying agent.

Inert ingredient. Any substance (or group of substances with similar chemical structures if designated by the Environmental Protection Agency) other than an active ingredient which is intentionally included in any pesticide product used in organic crop or livestock production and handling (40 CFR 152.3(m)).

Information panel. That part of the label of a packaged product that is immediately contiguous to and to the right of the principal display panel as observed by an individual facing the principal display panel, unless another section of the label is designated as the information panel because of package size or other package attributes (e.g., irregular shape with one usable surface).

Ingredient. Any substance used in the preparation of an agricultural product that is still present in the final commercial product as consumed.

Ingredients statement. The list of ingredients contained in a product shown in their common and usual names in the descending order of predominance.

Inspector. Any person retained or used by a certifying agent to conduct inspections of certification applicants or certified production or handling operations.

Inspection. The act of examining and evaluating the production or handling operation of an applicant for certification or certified operation to determine compliance with the Act and the regulations in this part.

Label. A display of written, printed, or graphic material on the immediate container of an agricultural product or any such material affixed to any agricultural product or affixed to a bulk container containing an agricultural product, except for package liners or a display of written, printed, or graphic material which contains only information about the weight of the product.

Labeling. All written, printed, or graphic material accompanying an agricultural product at any time or written, printed, or graphic material about the agricultural product displayed at retail stores about the product.

Livestock. Any cattle, sheep, goat, swine, poultry, or equine animals used for food or in the production of food, fiber, feed, or other agricultural-based consumer products; wild or domesticated game; or other nonplant life, except such term shall not include aquatic animals or bees for the production of food, fiber, feed, or other agricultural-based consumer products.

Lot. Any number of containers which contain an agricultural product of the same kind located in the same conveyance, warehouse, or packing house and which are available for inspection at the same time.

Market information. Any written, printed, audiovisual, or graphic information, including advertising, pamphlets, flyers, catalogues, posters, and signs, distributed, broadcasted, or made available outside of retail outlets that are used to assist in the sale or promotion of a product.

Mulch. Any material, such as wood chips, leaves, straw, paper, or plastic (on the National List), that serves to suppress weed growth, moderate soil temperature, or conserve soil moisture.

National List. A list of allowed and prohibited substances as provided for in section 6517 of the Act (7 U.S.C. 6517).

National Organic Program (NOP). The program authorized by the Act for the purpose of implementing its provisions.

National Organic Standards Board (NOSB). A Board established by the Secretary under 7 U.S.C. 6518 to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of the National Organic Program.

Natural resources of the operation. The physical, hydrological, and biological features of a production operation, including soil, water, wetlands, woodlands, and wildlife.

Nonagricultural substance. A substance that is not a product of agriculture, such as a mineral or a bacterial culture, that is used as an ingredient in an agricultural product. For the purposes of this part, a nonagricultural ingredient also includes any substance, such as gums, citric acid, or pectin, that is extracted from, isolated from, or a fraction of an agricultural product, so that the identity of the

agricultural product is unrecognizable in the extract, isolate, or fraction.

Nonsynthetic (natural). A substance that is derived from mineral, plant, or animal matter and does not undergo a synthetic process as defined in section 6502(21) of the Act (7 U.S.C. 6502(21)). For the purposes of this part, nonsynthetic is used as a synonym for natural as the term is used in the Act.

Nontoxic. Not known to cause any adverse physiological effects in animals, plants, humans, or the environment.

Nonretail container. Any container used for shipping or storage of an agricultural product that is not used in the retail display or sale of the product.

Organic. A labeling term that refers to an agricultural product produced in accordance with the Act and the regulations in this part.

Organic matter. The remains, residues, or waste products of any organism.

Organic system plan. A plan of management of an organic production or handling operation that has been agreed to by the producer or handler and the certifying agent and that includes written plans concerning all aspects of agricultural production or handling described in the Act and the regulations in subpart C of this part.

Peer review panel. A panel of individuals who have expertise in organic production and handling methods and certification procedures and who are appointed by the Administrator to assist in evaluating applicants for accreditation as certifying agents.

Person. An individual, group of individuals, contractor, corporation, association, organization, cooperative, or other entity.

Pesticide. Any substance which alone, in chemical combination, or in any formulation with one or more substances is defined as a pesticide in section 2(u) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136(u) *et seq*).

Petition. A request to amend the National List that is submitted by any person in accordance with this part.

Planting stock. Any plant or plant tissue, including rhizomes, shoots, leaf or stem cuttings, roots, or tubers, used in plant production or propagation.

Practice standard. The guidelines and requirements through which a production or handling operation implements a required component of its production or handling organic system plan. A practice standard integrates a series of allowed and prohibited actions, materials, and conditions to establish a minimum level performance for planning, conducting, and maintaining a function, such as livestock health care or facility pest management, essential to an organic operation.

Principal display panel. That part of a label that is most likely to be displayed, presented, shown, or examined under customary conditions of display for sale.

Private entity. Any domestic or foreign nongovernmental for-profit or not-for-profit organization providing certification services.

Processing. Cooking, baking, curing, heating, drying, mixing, grinding, churning, separating, extracting, cutting, fermenting, eviscerating, preserving, dehydrating, freezing, or otherwise manufacturing and includes the packaging, canning, jarring, or otherwise enclosing food in a container.

Producer. A person who engages in the business of growing or producing food, fiber, feed, and other agricultural-based consumer products.

Production lot number/identifier. Identification of a product based on the production sequence of the product showing the date, time, and place of production used for quality control purposes.

Prohibited substance. A substance whose use in any aspect of organic production or handling is prohibited or not provided for in the Act or the regulations of this part.

Records. Any information in written, visual, or electronic form that documents the activities undertaken by a producer, handler, or certifying agent to comply with the Act and regulations in this part.

Residue testing. An official or validated analytical procedure that detects, identifies, and measures the presence of chemical substances, their metabolites, or degradations products in or on raw or processed agricultural products.

Responsibly connected. Any person who is a partner, officer, director, holder, manager, or owner of 10 percent or more of the voting stock of an applicant or a recipient of certification or accreditation.

Retail food establishment. A restaurant; delicatessen; bakery; grocery store; or any retail outlet with an in-store restaurant, delicatessen, bakery, salad bar, or other eat-in or carry-out service of processed or prepared raw and ready-to-eat-food.

Routine use of parasiticide. The regular, planned, or periodic use of parasiticides.

Secretary. The Secretary of Agriculture or a representative to whom authority has been delegated to act in the Secretary's stead.

Sewage sludge. A solid, semisolid, or liquid residue generated during the treatment of domestic sewage in a treatment works. Sewage sludge includes, but is not limited to: domestic septage; scum or solids removed in primary, secondary, or advanced wastewater treatment processes; and a material derived from sewage sludge. Sewage sludge does not include ash generated during the firing of sewage sludge in a sewage sludge incinerator or grit and screenings generated during preliminary treatment of domestic sewage in a treatment works.

Slaughter stock. Any animal that is intended to be slaughtered for consumption by humans or other animals.

Soil and water quality. Observable indicators of the physical, chemical, or biological condition of soil and water, including the presence of environmental contaminants.

State. Any of the several States of the United States of America, its territories, the District of Columbia, and the Commonwealth of Puerto Rico.

State certifying agent. A certifying agent accredited by the Secretary under the National Organic Program and operated by the State for the purposes of certifying organic production and handling operations in the State.

State entity. Any domestic, tribal government, or foreign governmental subdivision providing certification services.

State organic certification program. A State program that meets the requirements of section 6506 of the Act, is approved by the Secretary, and is designed to ensure that a product that is sold or labeled as organically produced under the Act is produced and handled using organic methods.

State program's governing State official. The chief executive official of a State or, in the case of a State that provides for the statewide election of an official to be responsible solely for the administration of the agricultural operations of the State, such official, who administers a State organic certification program.

Synthetic. A substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes.

System of organic production and handling. A system that is designed to produce agricultural products by the use of methods and substances that maintain the integrity of organic

agricultural products until they reach the consumer. This is accomplished by using, where possible, cultural, biological, and mechanical methods, as opposed to using substances, to fulfill any specific function within the system so as to: Maintain long-term soil fertility; increase soil biological activity; ensure effective pest management; recycle wastes to return nutrients to the land; provide attentive care for farm animals; and handle the agricultural products without the use of extraneous synthetic additives or processing in accordance with the Act and regulations in this part.

Transplant. A seedling which has been removed from its original place of production, transported, and replanted.

Tolerance. The maximum legal level of a pesticide residue in or on a raw or processed agricultural commodity as set by the Environmental Protection Agency under FFDCA, Section 408.

Unavoidable residual environmental contamination (UREC). Background levels of naturally occurring or synthetic chemicals that are present in the soil or present in organically produced agricultural products that are below established tolerances.

Wild crop. Any plant or portion of a plant that is collected or harvested from an area of land that is not maintained under cultivation or other agricultural management.

Subpart B—Applicability

§ 205.100 What has to be certified.

(a) Except for operations exempt or excluded in § 205.101, each production or handling operation or specified portion of a production or handling operation that produces or handles crops, livestock, livestock products, or other agricultural products that are intended to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' must be certified according to the provisions of subpart E of this part and must meet all other applicable requirements of this part.

(b) Any production or handling operation that has been certified by a certifying agent on the date that the certifying agent first receives its accreditation under this part shall be considered certified to the national standards until the operation's anniversary date of certification. Such recognition shall only be available to those operations certified by a certifying agent that receives its accreditation within 18 months from the date of publication of the final rule implementing this part.

§ 205.101 Exemptions and exclusions from certification.

(a) *Exemptions.*

(1) A production or handling operation that sells agricultural products as ''organic'' but whose gross agricultural income from organic sales totals $5,000 or less annually is exempt from certification under subpart E of this part and from submitting an organic system plan for acceptance or approval under § 205.201 but must comply with the applicable organic production and handling requirements of subpart C of this part and the labeling requirements of § 205.309.

(2) A handling operation that is a retail food establishment or portion of a retail food establishment that handles organically produced agricultural products but does not process them is exempt from the requirements in this part.

(3) A handling operation or portion of a handling operation that handles agricultural products that contain less than 50 percent organic ingredients by total weight of the finished product (excluding water and salt) is exempt from the requirements in this part, except:

(i) The provisions for prevention of contact of organic products with prohibited substances set forth in § 205.272 with respect to any organically produced ingredients used in an agricultural product;

(ii) The labeling provisions of § 205.309; and

(iii) The recordkeeping provisions in paragraph (c) of this section.

(4) A handling operation or portion of a handling operation that handles agricultural products that contain at least 50 percent organic ingredients by total weight of the finished product (excluding water and salt) that chooses to not use the word, ''organic,'' on any panel other than the information panel is exempt from the requirements in this part, except:

(i) The provisions for prevention of contact of organic products with prohibited substances set forth in § 205.272 with respect to any organically produced ingredients used in an agricultural product;

(ii) The labeling provisions of § 205.309; and

(iii) The recordkeeping provisions in paragraph (c) of this section.

(b) *Exclusions.*

(1) A handling operation or portion of a handling operation is excluded from the requirements of this part, except for the requirements for the prevention of commingling and contact with prohibited substances as set forth in § 205.272 with respect to any organically produced products if such operation or portion of the operation only sells organic agricultural products labeled as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' that:

(i) Are packaged or otherwise enclosed in a container prior to being received or acquired by the operation; and

(ii) Remain in the same package or container and are not otherwise processed while in the control of the handling operation.

(2) A handling operation that is a retail food establishment or portion of a retail food establishment that processes or prepares, on the premises of the retail food establishment, raw and ready-to-eat food from agricultural products that are previously labeled as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' is excluded from the requirements in this part, except:

(i) The requirements for the prevention of contact with prohibited substances as set forth in § 205.272; and

(ii) The labeling provisions of § 205.309.

(c) *Records to be maintained by exempt operations.*

(1) Any handling operation exempt from certification pursuant to paragraph (a)(3) or (a)(4) of this section must maintain records sufficient to:

(i) Prove that ingredients identified as organic were organically produced and handled; and

(ii) Verify quanities produced from such ingredients.

(2) Records must be maintained for no less than 3 years beyond their creation and the operations must allow representatives of the Secretary and the applicable State program's governing State official access to these records for inspection and copying during normal business hours to determine compliance with the applicable regulations set forth in this part.

§ 205.102 Use of the term, ''organic.''

Any agricultural product that is sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' must be:

(a) Produced in accordance with the requirements specified in § 205.101 or §§ 205.202 through 205.207 or §§ 205.236 through 205.239 and all other applicable requirements of part 205;

(b) Handled in accordance with the requirements specified in § 205.101 or §§ 205.270 through 205.272 and all other applicable requirements of this part 205; and

(c) Produced and handled in compliance with the Federal Meat

Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (21) U.S.C. 451 *et seq.*), and the Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*), concerning meat, poultry, and egg products; the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*); the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*); and any other applicable Federal statute and its implementing regulations.

§ 205.103 Recordkeeping by certified operations.

(a) A certified operation must maintain records concerning the production, harvesting, and handling of agricultural products that are or that are intended to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients).''

(b) Such records must:

(1) Be adapted to the particular business that the certified operation is conducting;

(2) Fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited;

(3) Be maintained for not less than 5 years beyond their creation; and

(4) Be sufficient to demonstrate compliance with the Act and the regulations in this part.

(c) The certified operation must make such records available for inspection and copying during normal business hours by authorized representatives of the Secretary, the applicable State program's governing State official, and the certifying agent.

§ 205.104 Foreign applicants.

The regulations in this part, as applicable, apply equally to domestic and foreign applicants for accreditation, accredited certifying agents, domestic and foreign applicants for certification as organic production or handling operations, and certified organic production and handling operations unless otherwise specified.

§§ 205.105—205.199 [Reserved]

Subpart C—Organic Production and Handling Requirements

§ 205.200 General.

The producer or handler of a production or handling operation wishing to sell, label, or represent agricultural products as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' must comply with the applicable provisions of this subpart. Practices implemented in accordance with this subpart must maintain or improve the natural resources of the operation, including soil and water quality.

§ 205.201 Organic production and handling system plan.

(a) The producer or handler of a production or handling operation, except as exempt or excluded under § 205.101, wishing to sell, label, or represent agricultural products as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' must develop an organic production or handling system plan that is agreed to by the producer or handler and an accredited certifying agent. An organic system plan must meet the requirements set forth in this section to establish a system of organic production or handling. An organic production or handling system plan must include:

(1) A description of practices and procedures to be performed and maintained, including the frequency with which they will be performed;

(2) A list of each substance to be used as a production or handling input, indicating its composition, source, and location(s) where it will be used;

(3) A description of the monitoring practices and procedures to be performed and maintained, including the frequency with which they will be performed, to verify that the plan is effectively implemented;

(4) A description of the recordkeeping system implemented to comply with the requirements established in § 205.103;

(5) A description of practices and procedures to prevent commingling of organic and nonorganic products and to prevent contact of organic production and handling operations and products with prohibited substances; and

(6) Additional information deemed necessary by the certifying agent to evaluate compliance with the regulations.

(b) A producer may substitute a plan prepared to meet the requirements of another Federal, State, or local government regulatory program for the organic system plan: *Provided,* That, the submitted plan meets all the requirements of this subpart.

§ 205.202 Land requirements.

Any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' must:

(a) Have been managed in accordance with the provisions of §§ 205.203 through 205.206;

(b) Have had no prohibited substances, as listed in § 205.600, applied to it for a period of 3 years immediately preceding harvest of the crop; and

(c) Have distinct, defined boundaries and buffer zones such as runoff diversions to prevent the unintended application of a prohibited substance to the crop or contact with a prohibited substance applied to adjoining land that is not under organic management.

§ 205.203 Soil fertility and crop nutrient management practice standard.

(a) The producer must select and implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of soil and minimize soil erosion.

(b) The producer must budget and supply crop nutrients by properly utilizing manure or other animal and plant materials, mined mineral substances, and substances approved in § 205.601.

(c) The producer must manage animal and plant waste materials to maintain or improve soil organic matter content in a manner that does not contribute to contamination of crops, soil, or water by plant nutrients, pathogenic organisms, heavy metals, or residues of prohibited substances. Animal and plant waste materials include:

(1) Raw animal manure, which must be composted unless it is:

(i) Applied to land used for a crop not intended for human consumption;

(ii) Incorporated into the soil not less than 120 days prior to the harvest of a product whose edible portion has direct contact with the soil surface or soil particles; or

(iii) Incorporated into the soil not less than 90 days prior to the harvest of a product whose edible portion does not have direct contact with the soil surface or soil particles;

(2) Other uncomposted plant or animal wastes, such as aged, fully decomposed animal manure;

(3) A composted product produced in a facility in compliance with the Natural Resources Conservation Service's practice standard for a composting facility (Code 317); and

(4) A composted or uncomposted plant or animal waste material that has been chemically altered by a manufacturing process: *Provided,* That, the material is included on the National List of synthetic substances allowed for use in organic crop production established in § 205.601.

(d) In addition to crop rotations and plant and animal waste materials, a producer may supply soil and crop nutrients by applying:

(1) A mined substance of low solubility;

(2) A mined substance of high solubility, when justified by soil or crop tissue analysis;

(3) Ash obtained from the burning of a plant or animal material, except as prohibited in paragraph (e) of this section: *Provided,* That, the material burned has not been treated or combined with a prohibited substance or the ash is not included on the National List of nonsynthetic substances prohibited for use in organic crop production; and

(4) A crop nutrient supplement included on the National List of synthetic substances allowed for use in organic production, when justified by soil or crop tissue analysis.

(e) The producer must not use:

(1) Any fertilizer or commercially blended fertilizer or composted product that contains a synthetic substance not included on the National List of synthetic substances allowed for use in organic production;

(2) Sewage sludge (biosolids) as defined in 40 CFR part 503; and

(3) Burning as a means of disposal for crop residues produced on the operation: *Except,* That, prunings from perennial crops may be burned to suppress the spread of disease.

§ 205.204 Seeds and planting stock practice standard.

(a) The producer must use organically grown seeds, annual seedlings, and planting stock: *Except,* That,

(1) Nonorganically produced untreated seeds and planting stock may be used to produce an organic crop when an equivalent organically produced variety is not commercially available;

(2) Nonorganically produced seeds and planting stock that have been treated with a substance included on the National List of synthetic substances allowed for use in organic crop production may be used to produce an organic crop when an equivalent organically produced or untreated variety is not commercially available;

(3) Nonorganically produced annual seedlings may be used to produce an organic crop when a temporary variance has been granted in accordance with § 205.290(a)(2);

(4) Nonorganically produced planting stock to be used to produce a perennial crop may be sold, labeled, or represented as organically produced only after the planting stock has been maintained under a system of organic management for a period of no less than 1 year; and

(5) Seeds, annual seedlings, and planting stock treated with prohibited substances may be used to produce an organic crop when the application of the materials is a requirement of Federal or State phytosanitary regulations.

(b) The producer of an organic operation must not use seeds or planting stock produced with excluded methods.

§ 205.205 Crop rotation practice standard.

The producer must implement a crop rotation including, but not limited to, sod, cover crops, green manure crops, and catch crops that provide the following functions that are applicable to the operation:

(a) Maintain or improve soil organic matter content;

(b) Provide for pest management in annual and perennial crops;

(c) Manage deficient or excess plant nutrients; and

(d) Provide erosion control.

§ 205.206 Crop pest, weed, and disease management practice standard.

(a) The producer must use management practices to prevent crop pests, weeds, and diseases including, but not limited to:

(1) Crop rotation and soil and crop nutrient management practices, as provided for in §§ 205.203 and 205.205;

(2) Sanitation measures to remove disease vectors, weed seeds, and habitat for pest organisms; and

(3) Cultural practices that enhance crop health, including selection of plant species and varieties with regard to suitability to site-specific conditions and resistance to prevalent pests, weeds, and diseases.

(b) Pest problems may be controlled through mechanical or physical methods including, but not limited to:

(1) Augmentation or introduction of predators or parasites of the pest species;

(2) Development of habitat for natural enemies of pests;

(3) Nonsynthetic, nontoxic controls such as lures, traps, and repellents.

(c) Weed problems may be controlled through:

(1) Mulching with fully biodegradable materials;

(2) Mowing;

(3) Livestock grazing;

(4) Hand weeding and mechanical cultivation;

(5) Flame, heat, or electrical means; or

(6) Plastic or other synthetic mulches: *Provided,* That, they are removed from the field at the end of the growing or harvest season.

(d) Disease problems may be controlled through:

(1) Management practices which suppress the spread of disease organisms; or

(2) Application of nonsynthetic biological, botanical, or mineral inputs.

(e) When the practices provided for in paragraphs (a) through (d) of this section are insufficient to prevent or control crop pests, weeds, and diseases, a biological or botanical substance or a substance included on the National List of synthetic substances allowed for use in organic production may be applied to prevent, suppress, or control pests, weeds, or diseases: *Provided,* That, the producer implements measures to evaluate and mitigate the effects of repetitive use of the same or similar materials on pest resistance and shifts in pest, weed, or disease types, and the substance is used in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act.

(f) The producer or handler of an organic operation must not use a pest, weed, or disease control substance produced through excluded methods.

§ 205.207 Wild-crop harvesting practice standard.

(a) Any area from which a wild crop that is intended to be sold, labeled, or represented as organic is harvested must have had no prohibited substance, as set forth in § 205.600, applied to it for a period of 3 years immediately preceding the harvest of the wild crop.

(b) A wild-crop must be harvested in a manner that ensures that such harvesting or gathering will not be destructive to the environment and will sustain the growth and production of the wild crop.

§§ 205.208—205.235 [Reserved]

§ 205.236 Origin of livestock.

(a) Livestock or edible livestock products that are to be sold, labeled, or represented as organic must be from livestock under continuous organic management from birth or hatching: *Except,* That,

(1) *Poultry.* Poultry or edible poultry products must be from poultry that has been under continuous organic management beginning no later than the second day of life;

(2) *Dairy Animals.* Milk or milk products must be from animals that have been under continuous organic management beginning no later than 1 year prior to the production of the milk or milk products that are to be sold, labeled, or represented as organic.

(3) *Nonedible products.* Nonedible livestock products must be from animals that have been under continuous organic management not less than 1 year prior to harvest of the nonedible product.

(4) *Breeder stock.* Livestock used as breeder stock may be brought from a nonorganic operation onto an organic operation at any time: *Provided,* That, if such livestock are gestating and the offspring are to be raised as organic

livestock, the breeder stock must be brought onto the facility prior to the last third of pregnancy.

(b) The following are prohibited:

(1) Livestock or edible livestock products that are removed from an organic operation and subsequently managed on a nonorganic operation may be not sold, labeled, or represented as organically produced.

(2) Breeder or dairy stock that has not been under continuous organic management since birth may not be sold, labeled, or represented as organic slaughter stock; and

(3) No organism produced by excluded methods may be used for breeding purposes or for the production of livestock products intended to be sold, labeled, or represented as organic.

(c) The producer of an organic livestock operation must maintain records sufficient to preserve the identity of all organically managed animals and edible and nonedible animal products produced on the operation.

§ 205.237 Livestock feed.

(a) The producer of an organic livestock operation must provide livestock with a total feed ration composed of agricultural products, including pasture and forage, that is organically produced and, if applicable, organically handled: *Except,* That, nonagricultural products and synthetic substances allowed under § 205.603 may be used as feed additives and supplements.

(b) The producer of an organic operation must not:

(1) Use animal drugs, including hormones, to promote growth;

(2) Provide feed supplements or additives in amounts above those needed for adequate nutrition and health maintenance for the species at its specific stage of life;

(3) Feed plastic pellets for roughage;

(4) Feed formulas containing urea or manure;

(5) Feed mammalian or poultry slaughter by-products to mammals or poultry; or

(6) Use feed, feed additives, and feed supplements in violation of the Federal Food, Drug, and Cosmetic Act.

§ 205.238 Livestock health care practice standard.

(a) The producer must establish and maintain preventive livestock health care practices, including:

(1) Selection of species and types of livestock with regard to suitability for site-specific conditions and resistance to prevalent diseases and parasites;

(2) Provision of feedstuffs sufficient to meet nutritional requirements, including vitamins, minerals, and other additives or supplements;

(3) Establishment of appropriate housing, pasture conditions, and sanitation practices to minimize the occurrence and spread of diseases and parasites;

(4) Provision of conditions which allow for exercise, freedom of movement, and reduction of stress appropriate to the species;

(5) Performance of physical alterations as needed to promote the animal's welfare and in a manner that minimizes pain and stress; and

(6) Administration of vaccines and other veterinary biologics.

(b) When preventive practices and veterinary biologics are inadequate to prevent sickness, a producer may administer synthetic medications: *Provided,* That, such medications are allowed under § 205.603. Parasiticides allowed under § 205.603 may be used on

(1) Breeder stock, when used prior to the last third of gestation for progeny that are to be sold, labeled, or represented as organically produced; and

(2) Dairy stock, when used a minimum of 90 days prior to the production of milk or milk products that are to be sold, labeled, or represented as organic.

(c) The producer of an organic livestock operation must not:

(1) Sell, label, or represent as organic any animal or edible product derived from any animal treated with antibiotics, any substance that contains a synthetic substance not allowed under § 205.603, or any substance that contains a nonsynthetic substance prohibited in § 205.604.

(2) Administer any animal drug, other than vaccinations, in the absence of illness;

(3) Administer hormones;

(4) Administer synthetic parasiticides on a routine basis;

(5) Administer synthetic parasiticides to slaughter stock;

(6) Administer animal drugs in violation of the Federal Food, Drug, and Cosmetic Act; or

(7) Withhold medical treatment from a sick animal in an effort to preserve its organic status. All appropriate medications must be used to restore an animal to health when methods acceptable to organic production fail. Livestock treated with a prohibited substance must be clearly identified and shall not be sold, labeled, or represented as organically produced.

§ 205.239 Livestock living conditions.

(a) The producer of an organic livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including:

(1) Access to shade, shelter, exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the climate, and the environment;

(2) Access to pasture for ruminants;

(3) Appropriate clean, dry bedding. If the bedding is typically consumed by the animal species, it must comply with the feed requirements of § 205.237;

(4) Shelter designed to allow for:

(i) Natural maintenance, comfort behaviors, and opportunity to exercise;

(ii) Temperature level, ventilation, and air circulation suitable to the species; and

(iii) Reduction of potential for livestock injury;

(b) The producer of an organic livestock operation may provide temporary confinement for an animal because of:

(1) Inclement weather;

(2) The animal's stage of production;

(3) Conditions under which the health, safety, or well being of the animal could be jeopardized; or

(4) Risk to soil or water quality.

(c) The producer of an organic livestock operation must manage manure in a manner that does not contribute to contamination of crops, soil, or water by plant nutrients, heavy metals, or pathogenic organisms and optimizes recycling of nutrients.

§§ 205.240—205.269 [Reserved]

§ 205.270 Organic handling requirements.

(a) Mechanical or biological methods, including, but not limited to, cooking, baking, heating, drying, mixing, grinding, churning, separating, extracting, slaughtering, cutting, fermenting, eviscerating, preserving, dehydrating, freezing, chilling, or otherwise manufacturing, and the packaging, canning, jarring, or otherwise enclosing food in a container may be used to process an agricultural product intended to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' for the purpose of retarding spoilage or otherwise preparing the agricultural product for market.

(b) Nonagricultural substances allowed under § 205.605 and nonorganically produced agricultural products allowed under § 205.606 may be used in or on a processed agricultural product intended to be sold, labeled, or represented as ''organic'' or ''made with organic (specified ingredients).''

(c) The handler of an organic handling operation must not use in or on an

agricultural product intended to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'':

(1) Ionizing radiation for any purpose;

(2) An ingredient produced with excluded methods; or

(3) A volatile synthetic solvent or any other synthetic processing aid not allowed under § 205.605 as ingredients in or on processed products labeled as organic or made with organic ingredients.

§ 205.271 Facility pest management practice standard.

(a) The producer or handler of an organic facility must use management practices to prevent pests, including, but not limited to:

(1) Removal of pest habitat, food sources, and breeding areas;

(2) Prevention of access to handling facilities; or

(3) Management of environmental factors, such as temperature, light, humidity, atmosphere, and air circulation to prevent pest reproduction.

(b) Pests may be controlled through:

(1) Augmentation or introduction of predators or parasites for the pest species;

(2) Mechanical or physical controls including, but not limited to, traps, light, or sound; or

(3) Nontoxic, nonsynthetic controls, such as lures and repellents.

(c) If the practices provided for in paragraphs (a) and (b) of this section are not effective to prevent or control facility pests, a nonsynthetic biological or botanical substance or a synthetic substance may be applied to prevent, suppress, or control pests: *Provided,* That, the substance is applied in the manner consistent with its label as approved by the Federal, State, and local regulatory authorities.

(d) The handler of an organic handling operation who applies a nonsynthetic biological or botanical substance or a synthetic substance for the prevention or control of a pest must include in the organic handling plan a list of all measures taken or intended to be taken to prevent contact between the substance and any ingredient or finished product intended to be sold, labeled, or represented as ''organic'' or ''made with organic (specified ingredients).''

(e) The handler of an organic handling operation who applies a nonsynthetic biological or botanical substance or a synthetic substance for the prevention or control of a pest must include in the organic handling plan an evaluation of the effects of repetitive use of the same or similar materials on pest resistance and shifts in pest types.

§ 205.272 Commingling and contact with prohibited substance prevention practice standard.

(a) The handler of an organic handling operation must implement measures necessary to prevent the commingling of organic and nonorganic products and protect organic products from contact with prohibited substances.

(b) The following methods and substances are prohibited for use in the handling of any agricultural product intended to be sold, labeled, or represented as ''100 per cent organic,'' ''organic,'' or ''made with organic (specified ingredients)'':

(1) Packaging materials and storage containers or bins that contain a synthetic fungicide, preservative, or fumigant;

(2) The use or reuse of any bag or container that had previously been in contact with any substance in such a manner as to compromise the organic integrity of any products unless, after use for conventional products, the reusable bin or container has been thoroughly cleaned and poses no risk of prohibited materials contacting the organic product.

§§ 205.273—205.289 [Reserved]

§ 205.290 Temporary variances.

(a) Temporary variances from the requirements in §§ 205.203 through 205.207, 205.236 through 205.239, and 205.270 through 205.272 may be established by the Administrator for the following reasons:

(1) Natural disasters declared by the Secretary;

(2) Damage caused by wind, flood, excessive moisture, tornado, earthquake, fire, or other business interruption; and

(3) Practices used for the purpose of conducting research or trials of techniques, varieties, or ingredients used in organic production or handling.

(b) A certifying agent may recommend in writing to the Administrator a temporary variance from a standard set forth in subpart C of this part for organic production or handling operations: *Provided,* That, such variance may only be recommended for the reasons listed in paragraph (a) of this section.

(c) The Administrator will provide written notification to certifying agents upon establishment of a temporary variance applicable to the certifying agent's certified production or handling operations. When establishing a temporary variance, the Administrator shall specify the period of time it shall remain in effect, subject to extension as the Administrator deems necessary.

(d) A certifying agent, upon notification from the Administrator of the establishment of a temporary variance, must notify each production or handling operation it certifies within the affected geographical area or the individual organic production or handling operation(s) to which the temporary variance applies.

(e) Temporary variances may not be requested for any practice, material, or procedure otherwise prohibited in these regulations.

Subpart D—Labels, Labeling, and Market Information

§ 205.300 Use of the term, ''organic.''

(a) The term, ''organic,'' may only be used on labels and in labeling of raw or processed agricultural products, including ingredients, that have been produced and handled in accordance with the regulations in this part.

(b) Products for export, produced and certified to foreign national organic standards or foreign contract buyer requirements, may be labeled in accordance with the organic labeling requirements of the receiving country or contract buyer: *Provided,* That, the shipping containers and shipping documents meet the labeling requirements specified in § 205.306(c).

(c) Products produced in a foreign country and exported for sale in the United States must be certified pursuant to subpart E of this part and labeled pursuant to this subpart D.

§ 205.301 Product composition.

(a) *Products sold, labeled, or represented as ''100 percent organic.''* A raw or processed agricultural product sold, labeled, or represented as ''100 percent organic'' must contain (by weight or fluid volume, excluding water and salt) not less than 100 percent organically produced raw or processed agricultural product. No such product or product ingredient may contain or be created using excluded methods or be produced using sewage sludge or ionizing radiation. If labeled as an organic food product, such product must be labeled pursuant to § 205.303.

(b) *Products sold, labeled, or represented as ''organic.''* A raw or processed agricultural product sold, labeled, or represented as ''organic'' must contain (by weight or fluid volume, excluding water and salt) not less than 95 percent organically produced raw or processed agricultural product. Any remaining product ingredients must consist of nonagricultural substances or nonorganically produced agricultural products approved in the National List of Allowed and Prohibited Substances in subpart G of this part and must not

contain or be created using excluded methods or be produced using sewage sludge or ionizing radiation. If labeled as an organic food product, such products must be labeled pursuant to § 205.303.

(c) *Products sold, labeled, or represented as ''made with organic (specified ingredients).''* Multiingredient agricultural product sold, labeled, or represented as ''made with organic (specified ingredients)'' must contain (by weight or fluid volume, excluding water and salt) at least 50 percent organically produced agricultural products which are produced and handled pursuant to requirements in subpart C of this part. The nonorganic ingredients must not contain or be created using excluded methods or be produced using sewage sludge or ionizing radiation. If labeled as an organic food product, such products must be labeled pursuant to § 205.304.

(d) *Products with less than 50 percent organic ingredients.* The organic ingredients in multiingredient agricultural product containing less than 50 percent organic ingredients (by weight or fluid volume, excluding water and salt) must be produced and handled pursuant to requirements in subpart C of this part. The nonorganic ingredients may be produced and handled without regard to the requirements of this part. Multiingredient agricultural product containing less than 50 percent organically produced ingredients may represent the organic nature of the product only as provided in § 205.305.

(e) All ingredients identified as ''organic'' in the ingredient statement of any product must not:

(1) Be produced using excluded methods or products of excluded methods as ingredients or processing aids;

(2) Be produced using sewage sludge;

(3) Be processed using ionizing radiation;

(4) Be processed using processing aids not approved on the National List of Allowed and Prohibited Substances in subpart G of this part: *Except,* That, products labeled as ''100 percent organic,'' if processed, must be processed using no processing aids;

(5) Contain sulfites, nitrates, or nitrites added during the production or handling process;

(6) Be produced using nonorganic ingredients when organic ingredients are not available; or

(7) Include organic and nonorganic forms of the same ingredient.

§ 205.302 Calculating the percentage of organically produced ingredients.

(a) The percentage of all organically produced ingredients in an agricultural product sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients),'' or that include organic ingredients must be calculated by:

(1) Dividing the total net weight (excluding water and salt) of combined organic ingredients by the total weight (excluding water and salt) of the finished product.

(2) Dividing the fluid volume of all organic ingredients (excluding water and salt) by the fluid volume of the finished product (excluding water and salt) if the product and ingredients are liquid. If the liquid product is identified on the principal display panel or information panel as being reconstituted from concentrates, the calculation should be made on the basis of single-strength concentrations of the ingredients and finished product.

(3) For products containing organic ingredients in both solid and liquid form, dividing the combined weight of the solid ingredients and the weight of the liquid ingredients (excluding water and salt) by the total weight (excluding water and salt) of the finished product.

(b) The percentage of all organically produced ingredients in an agricultural product must be rounded down to the nearest whole number and indicated on the information panel above the ingredient statement with the words, ''contains X percent organic ingredients.''

(c) The percentage must be calculated by the handler who affixes the label on the consumer package and verified by the certifying agent of the handler.

§ 205.303 Packaged products labeled ''100 percent organic'' or ''organic.''

(a) Agricultural products in packages described in § 205.301(a) and (b) may display, on the principal display panel, information panel, and any other panel of the package and on any labeling or market information concerning the product, the following terms:

(1) The term, ''100 percent organic'' or ''organic,'' as applicable, to modify the name of the product;

(2) The USDA Seal;

(3) The seal, logo, or other identifying mark of the certifying agent which certified the production or handling operation producing the finished product and any other certifying agent which certified production or handling operations producing raw organic product or organic ingredients used in the finished product: *Provided,* That, the handler producing the finished product maintain records, pursuant to this part, verifying organic certification of the operations producing such ingredients, and: *Provided further,* That, such seals or marks are not, individually, displayed more prominently than the USDA Seal.

(b) Agricultural products in packages described in § 205.301(a) and (b) must:

(1) On the information panel of multiingredient products and consistent with the labeling requirements of the Food and Drug Administration, declare the total percentage of organic ingredients in the product.

(2) In the ingredient statement, modify each organic ingredient of multiingredient products with the word, ''organic'': *Except,* That, ingredients in multiingredient products labeled ''100 percent organic'' are not required to modified with the term ''organic.'' Any water or salt included as an ingredient will not be identified as organic.

(3) On the information panel, below the information identifying the handler or distributor of the product and preceded by the statement, ''Certified organic by * * *,'' or similar phrase, identify the name of the certifying agent that certified the handler of the finished product: *Except,* That, the business address or telephone number of the certifying agent may be included in such label.

§ 205.304 Packaged products labeled ''made with organic (specified ingredients).''

(a) Agricultural products in packages described in § 205.301(c) may display on the principal display panel, information panel, and any other panel and on any labeling or market information concerning the product:

(1) The statement, ''made with organic (specified ingredients)'': *Provided,* That, display of the statement is consistent with labeling requirements of the Food and Drug Administration and:

(i) Does not list more than three organic ingredients;

(ii) Does not exceed one-half the size of the largest type size on the panel; and

(iii) Appears in its entirety in the same type size, style, and color without highlighting; and

(2) The seal, logo, or other identifying mark of the certifying agent that certified the handler of the finished product.

(b) Agricultural products in packages described in § 205.301(c) must:

(1) On the information panel and consistent with the labeling requirements of the Food and Drug Administration, declare the total percentage of organic ingredients in the product.

(2) In the ingredient statement, modify each organic ingredient with the word, ''organic.'' Any water or salt included as an ingredient will not be identified as organic.

(3) On the information panel, below the information identifying the handler or distributor of the product and preceded by the statement, ''Certified organic by * * *,'' or similar phrase, identify the name of the certifying agent that certified the handler of the finished product: *Except,* That, the business address or telephone number of the certifying agent may be included in such label.

(c) Agricultural products in packages described in § 205.301(c) must not display the USDA Seal.

§ 205.305 Multiingredient packaged products with less than 50 percent organic ingredients.

(a) Agricultural products with less than 50 percent organic ingredients must:

(1) On the information panel and consistent with the labeling requirements of the Food and Drug Administration, declare the total percentage of organic ingredients in the product.

(2) In the ingredient statement, modify each organic ingredient with the word, ''organic.''

(b) Agricultural products with less than 50 percent organic ingredients must not display:

(1) The USDA Seal and

(2) Any certifying agent's seal, logo, or other identifying mark.

§ 205.306 Labeling of nonretail containers used for only shipping or storage of raw or processed agricultural products labeled as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients).''

(a) Nonretail containers used only to ship or store raw or processed agricultural product labeled as containing organic ingredients may display the following terms or marks:

(1) The name and contact information of the certifying agent which certified the handler which assembled the final product;

(2) Identification of the product as ''organic product'';

(3) Special handling instructions needed to maintain the organic integrity of the product;

(4) The USDA Seal;

(5) The seal, logo, or other identifying mark of the certifying agent that certified the organic production or handling operation that produced or handled the finished product.

(b) If not required under other Federal labeling regulations, nonretail containers used to ship or store raw or processed agricultural product labeled as containing organic ingredients must display the production lot number of the product, if applicable.

(c) Shipping containers of domestically produced product labeled as organic intended for export to international markets may be labeled consistent with any shipping container labeling requirements of the foreign country of destination or the container labeling specifications of a foreign contract buyer: *Provided,* That, the shipping containers and shipping documents accompanying such organic product be clearly marked ''For export only'' and: *Provided further,* That, proof of such container marking and export must be maintained by the handler, consistent with recordkeeping requirements for exempt and excluded operations under § 205.101.

§ 205.307 Agricultural products in other than packaged form at the point of retail sale that are sold, labeled, or represented as ''100 percent organic'' or ''organic.''

(a) Agricultural products labeled or represented as ''100 percent organic'' or ''organic'' in retail display, labeling, and display containers may use the term, ''100 percent organic'' or ''organic,'' as applicable, to modify the name of the product: *Provided,* That, such products are assembled in a manufacturing facility certified in accordance with the requirements of this part; and, *Provided further,* Than, the word, ''organic,'' is used to modify the organic ingredients listed in the ingredient statement of the products.

(b) The retail display, labeling, and display containers may use:

(1) The USDA Seal;

(2) The seal, logo, or other identifying mark of the certifying agent that certified the production or handling operation producing the finished product and any other certifying agent which certified operations producing raw organic product or organic ingredients used in the finished product: *Provided,* That, such seals or marks are not, individually, displayed more prominently than the USDA Seal.

§ 205.308 Agricultural products in other than packaged form at the point of retail sale that are sold, labeled, or represented as ''made with organic (specified ingredients).''

(a) Retail displays, display containers, and market information of agricultural products containing between 50 and 95 percent organic ingredients may use the phrase, ''made with organic (specified ingredients)'' *Provided,* That, such products have been assembled at a manufacturing facility certified in accordance with the requirements of this part, and:

(1) Such statement does not list more than three organic ingredients, and

(2) In any such display of the product's ingredient statement, the organic ingredients must be modified as ''organic.''

(b) Such agricultural products labeled as ''made with organic (specified ingredients)'' in retail displays, display containers, and market information may display the certifying agent's seal, logo, or other identifying mark.

§ 205.309 Agricultural products produced on an exempt or excluded operation.

(a) An agricultural product organically produced or handled on an exempt or excluded operation must not:

(1) Display the USDA Seal or any certifying agent's seal or other identifying mark which represents that the production or handling operation as a certified organic operation, or

(2) Be represented as a certified organic product to any buyer.

(b) An agricultural product organically produced or handled on an exempt or excluded operation may be identified as an organic product or organic ingredient in a multiingredient product produced by the exempt or excluded operation. Such product or ingredient must not be identified as ''organic'' in a product processed by others.

(c) Such product is subject to labeling requirements specified in paragraph (a) of § 205.300, and paragraphs (e)(1) through (e)(7) of § 205.301.

§ 205.310 USDA Seal.

(a) The USDA Seal described in paragraphs (b) and (c) of this section may be used only for agricultural products (raw or processed) described in § 205.301(a) and (b).

(b) The USDA Seal must replicate the form and design of the example in figure 1 and must be printed legibly and conspicuously:

(1) On a white, light colored, or transparent background with contrasting dark color words and shield outline or on a dark colored background with contrasting white or light colored words and shield outline; or

(2) On a white background with dark blue colored words and red shield outline.

BILLING CODE 3410–02–P

Figure 1

BILLING CODE 3410–02–C

Subpart E—Certification

§ 205.400 General requirements for certification.

A person seeking to receive or maintain organic certification under the regulations in this part must:

(a) Comply with the Act and applicable organic production and handling regulations of this part;

(b) Establish, implement, and update annually an organic production or handling system plan that is submitted to an accredited certifying agent as provided for in § 205.200;

(c) Permit on-site inspections with complete access to the production or handling operation, including noncertified areas and structures, by the certifying agent as provided for in § 205.403;

(d) Maintain all records applicable to the organic operation for not less than 5 years beyond their creation and allow authorized representatives of the Secretary, the applicable State program's governing State official, and the certifying agent access to such records during normal business hours for review and copying to determine compliance with the Act and the regulations in this part, as provided for in § 205.104;

(e) Submit the applicable fees charged by the certifying agent; and

(f) Immediately notify the certifying agent concerning any:

(1) Application, including drift, of a prohibited substance to any field, production unit, site, facility, livestock, or product that is part of an operation; and

(2) Change in a certified operation or any portion of a certified operation that may affect its compliance with the Act and the regulations in this part.

§ 205.401 Application for Certification.

A person seeking certification of a production or handling operation under this subpart must submit a request for certification to a certifying agent. The request must include the following information:

(a) An organic production or handling system plan, as required in § 205.200;

(b) The name of the person completing the application; the applicant's business name, address, and telephone number; and, when the applicant is a corporation, the name, address, and telephone number of the person authorized to act on the applicant's behalf.

(c) The name(s) of any organic certifying agent(s) to which application has previously been made, the year(s) of application, and the outcome of the application(s) submission, including a copy of any notification of noncompliance or denial of certification issued to the applicant for certification and a description of the actions taken by the applicant to correct the deficiencies noted in the notification of noncompliance, including evidence of such correction and;

(d) Other information necessary to determine compliance with the Act and the regulations in this part.

§ 205.402 Review of application.

(a) Upon acceptance of an application for certification a certifying agent must:

(1) Review the application to ensure completeness pursuant to § 205.401;

(2) Determine by a review of the application materials whether the applicant appears to comply or may be able to comply with the applicable requirements of subpart C of this part;

(3) Verify that an applicant who previously applied to another certifying agent and received a notification of noncompliance, pursuant to § 205.405(a), has submitted documentation to support the correction of any deficiencies identified in such notification, as required in § 205.405(b); and

(4) Schedule an on-site inspection of the operation to determine whether the applicant qualifies for certification if the review of application materials reveals that the production or handling operation may be in compliance with the applicable requirements of subpart C of this part.

(b) The certifying agent shall communicate to the applicant its findings on the review of application materials specified in § 205.402(a).

(c) The applicant may withdraw its application at any time. An applicant who withdraws its application shall be liable for the costs of services provided up to the time of withdrawal of its application. An applicant that voluntarily withdrew its application prior to the issuance of a notice of noncompliance will not be issued a notice of noncompliance. Similarly, an applicant that voluntarily withdrew its application prior to the issuance of a notice of certification denial will not be issued a notice of certification denial.

§ 205.403 On-site inspections.

(a) *On-site inspections.*

(1) A certifying agent must conduct an initial on-site inspection of each production unit, facility, and site that is included in an operation for which certification is requested and an on-site inspection of each certified operation annually thereafter, for the purpose of determining whether to approve the request for certification or whether the certification of the operation should continue.

(2)(i) A certifying agent may conduct additional on-site inspections of applicants for certification and certified operations to determine compliance with the Act and the regulations in this part.

(ii) The Administrator or State program's governing State official may require that additional inspections be performed by the certifying agent for the purpose of determining compliance with the Act and the regulations in this part.

(iii) Additional inspections may be announced or unannounced at the discretion of the certifying agent or as required by the Administrator or State program's governing State official.

(b) *Scheduling.* The initial on-site inspection must be conducted within a reasonable time following a determination that the applicant appears to comply or may be able to comply with the requirements of subpart C of this part. On-site inspections must be conducted when the applicant or an authorized representative of the applicant who is knowledgeable about the operation is present and at a time when land, facilities, and activities that demonstrate the operation's compliance with or capability to comply with the applicable provisions of subpart C of this part can be observed, except that this requirement does not apply to unannounced on-site inspections.

(c) *Verification of information.* The on-site inspection of an operation must verify:

(1) The operation's compliance or capability to comply with the Act and the regulations in this part;

(2) That the information, including the organic production or handling system plan, provided in accordance with §§ 205.401, 205.406, and 205.200, accurately reflects the practices used or to be used by the applicant for

certification or by the certified operation;

(3) That prohibited substances have not been and are not being applied to the operation through means which, at the discretion of the certifying agent, may include the collection and testing of soil; water; waste; seeds; plant tissue; and plant, animal, and processed products samples.

(d) *Exit interview.* The inspector must conduct an exit interview with an authorized representative of the inspected operation to confirm the accuracy and completeness of inspection observations and information gathered during the on-site inspection. The inspector must also address the need for any additional information as well as any issues of concern.

§ 205.404 Approval of certification.

(a) Within a reasonable time after completion of the initial on-site inspection, a certifying agent must review the on-site inspection report, the results of any analyses for substances conducted, and any additional information requested from or supplied by the applicant. If the certifying agent determines that the organic system plan and all procedures and activities of the applicant's operation are in compliance with the requirements of this part and that the applicant is able to conduct operations in accordance with the plan, the agent shall approve certification. The approval may include restrictions as a condition of continued certification.

(b) The certifying agent must issue a certificate of organic operation which specifies the:

(1) Name and address of the certified operation;

(2) Effective date of certification;

(3) Categories of organic operation, including crops, wild crops, livestock, or processed products produced by the certified operation; and

(4) Name, address, and telephone number of the certifying agent.

(c) Once certified, a production or handling operation's organic certification continues in effect until surrendered by the organic operation or suspended or revoked by the certifying agent, the State program's governing State official, or the Administrator.

§ 205.405 Denial of certification.

(a) When the certifying agent has reason to believe, based on a review of the information specified in § 205.402 or § 205.404, that an applicant for certification is not able to comply or is not in compliance with the requirements of this part, the certifying agent must provide a written notification of noncompliance to the applicant pursuant to § 205.662(a). When correction of a noncompliance is not possible, a notification of noncompliance and a notification of denial of certification may be combined in one notification.

(b) Upon receipt of such notification of noncompliance, the applicant may:

(1) Correct deficiencies and submit a description of the corrective actions taken with supporting documentation to the certifying agent;

(2) Correct deficiencies and submit a new application to another certifying agent: *Provided*, That, the applicant must include a complete application, the notification of noncompliance received from the first certifying agent, and a description of the corrective actions taken with supporting documentation; or

(3) Submit written information to rebut the noncompliance described in the notification of noncompliance.

(c) After issuance of a notification of noncompliance, the certifying agent must:

(1) Evaluate the applicant's corrective actions taken and supporting documentation submitted or the written rebuttal, conduct an on-site inspection if necessary, and;

(i) When the corrective action or rebuttal is sufficient for the applicant to qualify for certification, issue the applicant an approval of certification pursuant to § 205.404; or

(ii) When the corrective action or rebuttal is not sufficient for the applicant to qualify for certification, issue the applicant a written notice of denial of certification.

(2) Issue a written notice of denial of certification to an applicant who fails to respond to the notification of noncompliance.

(3) Provide notice of approval or denial to the Administrator, pursuant to § 205.501(a)(14).

(d) A notice of denial of certification must state the reason(s) for denial and the applicant's right to:

(1) Reapply for certification pursuant to §§ 205.401 and 205.405(e);

(2) Request mediation pursuant to § 205.663 or, if applicable, pursuant to a State program; or

(3) File an appeal pursuant to § 205.681 or, if applicable, pursuant to a State program of the denial of certification.

(e) An applicant for certification who has received a written notification of noncompliance or a written notice of denial of certification may apply for certification again at any time with any certifying agent, in accordance with §§ 205.401 and 205.405(e). When such applicant submits a new application to a certifying agent other than the agent who issued the notification of noncompliance or notice of denial of certification, the applicant for certification must include a copy of the notification of noncompliance or notice of denial of certification and a description of the actions taken, with supporting documentation, to correct the deficiencies noted in the notification of noncompliance.

(f) A certifying agent who receives a new application for certification, which includes a notification of noncompliance or a notice of denial of certification, must treat the application as a new application and begin a new application process pursuant to § 205.402.

(g) Notwithstanding paragraph (a) of this section, if a certifying agent has reason to believe that an applicant for certification has willfully made a false statement or otherwise purposefully misrepresented the applicant's operation or its compliance with the certification requirements pursuant to this part, the certifying agent may deny certification pursuant to paragraph (c)(1)(ii) of this section without first issuing a notification of noncompliance.

§ 205.406 Continuation of certification.

(a) To continue certification, a certified operation must annually submit the following information, as applicable, to the certifying agent:

(1) An updated organic production or handling system plan which includes:

(i) A summary statement, supported by documentation, detailing any deviations from, changes to, modifications to, or other amendments made to the previous year's organic system plan during the previous year; and

(ii) Any additions or deletions to the previous year's organic system plan, intended to be undertaken in the coming year, detailed pursuant to § 205.200;

(2) Any additions to or deletions from the information required pursuant to § 205.401(b); and (3) Other information as deemed necessary by the certifying agent to determine compliance with the Act and the regulations in this part.

(b) Following the receipt of the information specified in paragraph (a) of this section, the certifying agent shall arrange and conduct an on-site inspection of the certified operation, pursuant to § 205.403.

(c) If the certifying agent has reason to believe, based on the on-site inspection and a review of the information specified in § 205.404, that a certified operation is not complying with the requirements of the Act and the

regulations in this part, the certifying agent shall provide a written notification of noncompliance to the operation in accordance with § 205.662.

(d) If the certifying agent determines that the certified operation is complying with the Act and the regulations in this part and that any of the information specified on the certificate of organic operation has changed, the certifying agent must issue an updated certificate of organic operation pursuant to § 205.404(b).

§§ 205.407–205.499 [Reserved]

Subpart F—Accreditation of Certifying Agents

§ 205.500 Areas and duration of accreditation.

(a) The Administrator shall accredit a qualified domestic or foreign applicant in the areas of crops, livestock, wild crops, or handling or any combination thereof to certify a domestic or foreign production or handling operation as a certified operation.

(b) Accreditation shall be for a period of 5 years from the date of approval of accreditation pursuant to § 205.506.

(c) In lieu of accreditation under paragraph (a) of this section, USDA will accept a foreign certifying agent's accreditation to certify organic production or handling operations if:

(1) USDA determines, upon the request of a foreign government, that the standards under which the foreign government authority accredited the foreign certifying agent meet the requirements of this part; or

(2) The foreign government authority that accredited the foreign certifying agent acted under an equivalency agreement negotiated between the United States and the foreign government.

§ 205.501 General requirements for accreditation.

(a) A private or State entity accredited as a certifying agent under this subpart must:

(1) Have sufficient expertise in organic production or handling techniques to fully comply with and implement the terms and conditions of the organic certification program established under the Act and the regulations in this part;

(2) Demonstrate the ability to fully comply with the requirements for accreditation set forth in this subpart;

(3) Carry out the provisions of the Act and the regulations in this part, including the provisions of §§ 205.402 through 205.406 and § 205.670;

(4) Use a sufficient number of adequately trained personnel, including inspectors and certification review personnel, to comply with and implement the organic certification program established under the Act and the regulations in subpart E of this part;

(5) Ensure that its responsibly connected persons, employees, and contractors with inspection, analysis, and decision-making responsibilities have sufficient expertise in organic production or handling techniques to successfully perform the duties assigned.

(6) Conduct an annual performance appraisal for each inspector used by the certifying agent and implement measures to correct any deficiencies in compliance with the Act and the regulations in this part that are identified in the appraisal;

(7) Have an annual program evaluation of its certification activities conducted by the certifying agent's staff, an outside auditor, or a consultant who has expertise to conduct such evaluations and implement measures to correct any deficiencies in compliance with the Act and the regulations in this part that are identified in the evaluation;

(8) Provide sufficient information to persons seeking certification to enable them to comply with the applicable requirements of the Act and the regulations in this part;

(9) Maintain all records pursuant to § 205.510(b) and make all such records available for inspection and copying during normal business hours by authorized representatives of the Secretary and the applicable State program's governing State official;

(10) Maintain strict confidentiality with respect to its clients under the applicable organic certification program and not disclose to third parties (with the exception of the Secretary or the applicable State program's governing State official or their authorized representatives) any business-related information concerning any client obtained while implementing the regulations in this part, except as provided for in § 205.504(b)(5);

(11) Prevent conflicts of interest by:

(i) Not certifying a production or handling operation if the certifying agent or a responsibly connected party of such certifying agent has or has held a commercial interest in the production or handling operation, including an immediate family interest or the provision of consulting services, within the 12-month period prior to the application for certification;

(ii) Excluding any person, including contractors, with conflicts of interest from work, discussions, and decisions in all stages of the certification process and the monitoring of certified production or handling operations for all entities in which such person has or has held a commercial interest, including an immediate family interest or the provision of consulting services, within the 12-month period prior to the application for certification;

(iii) Not permitting any employee, inspector, contractor, or other personnel to accept payment, gifts, or favors of any kind, other than prescribed fees, from any business inspected, except that a certifying agent that is a not-for-profit organization with an Internal Revenue Code tax exemption, or in the case of a foreign certifying agent a comparable recognition of not-for-profit status from its government, may accept voluntary labor from certified operations;

(iv) Not providing advice concerning organic practices or techniques to any certification applicant or certified operation for a fee, other than as part of the fees under the applicable certification program established under the Act; and

(v) Requiring all persons identified in § 205.504(a)(2) to complete an annual conflict of interest disclosure report.

(12) Accept the certification decisions made by another USDA-accredited certifying agent as equivalent to its own;

(13) Refrain from making false or misleading claims about its accreditation status, the USDA accreditation program for certifying agents, or the nature or qualities of products labeled as organically produced;

(14) Submit to the Administrator:

(i) A copy of any notice of denial of certification issued pursuant to § 205.405, notification of noncompliance, notification of noncompliance correction, notification of proposed suspension or revocation, and notification of suspension or revocation sent pursuant to § 205.662, simultaneously with its issuance and

(ii) On a quarterly calender basis, the name, address, and telephone number of each operation granted certification;

(15) Charge applicants for certification and certified production and handling operations only those fees and charges that it has filed with the Administrator;

(16) Pay and submit fees to AMS in accordance with § 205.640; and

(17) Comply with, implement, and carry out any other terms and conditions determined by the Administrator to be necessary.

(b) A private or State entity accredited as a certifying agent under this subpart may establish a seal, logo, or other identifying mark to be used by production and handling operations certified by the certifying agent to indicate affiliation with the certifying

agent: *Provided,* That, the certifying agent:

(1) Does not require use of its seal, logo, or other identifying mark on any product sold, labeled, or represented as organically produced as a condition of certification and

(2) Does not require compliance with any production or handling practices other than those provided for in the Act and the regulations in this part as a condition of use of its identifying mark: *Provided,* That, this provision does not apply to States with more restrictive requirements approved by the Secretary or private entity certifying agents certifying production and handling operations within States with more restrictive requirements approved by the Secretary.

(c) A private entity accredited as a certifying agent must:

(1) Hold the Secretary harmless for any failure on the part of the certifying agent to carry out the provisions of the Act and the regulations in this part;

(2) Furnish reasonable security, in an amount and according to such terms as the Administrator may by regulation prescribe, for the purpose of protecting the rights of production and handling operations certified by such certifying agent under the Act and the regulations in this part; and

(3) Transfer to the Administrator and make available to any applicable State program's governing State official all records or copies of records concerning the person's certification activities in the event that the certifying agent dissolves or loses its accreditation.

(d) No private or State entity accredited as a certifying agent under this subpart shall exclude from participation in or deny the benefits of the National Organic Program to any person due to discrimination because of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status.

§ 205.502 Applying for accreditation.

(a) A private or State entity seeking accreditation as a certifying agent under this subpart must submit an application for accreditation which contains the applicable information and documents set forth in §§ 205.503 through 205.505 and the fees required in § 205.640 to: Program Manager, USDA–AMS–TMP–NOP, Room 2945–South Building, PO Box 96456, Washington, DC 20090–6456.

(b) Following the receipt of the information and documents, the Administrator will determine, pursuant to § 205.506, whether the applicant for accreditation should be accredited as a certifying agent.

§ 205.503 Applicant information.

A private or State entity seeking accreditation as a certifying agent must submit the following information:

(a) The business name, primary office location, mailing address, name of the person(s) responsible for the certifying agent's day-to-day operations, contact numbers (telephone, facsimile, and Internet address) of the applicant, and, for an applicant who is a private person, the entity's taxpayer identification number;

(b) The name, office location, mailing address, and contact numbers (telephone, facsimile, and Internet address) for each of its organizational units, such as chapters or subsidiary offices, and the name of a contact person for each unit;

(c) Each area of operation (crops, wild crops, livestock, or handling) for which accreditation is requested and the estimated number of each type of operation anticipated to be certified annually by the applicant along with a copy of the applicant's schedule of fees for all services to be provided under these regulations by the applicant;

(d) The type of entity the applicant is (e.g., government agricultural office, for-profit business, not-for-profit membership association) and for:

(1) A State entity, a copy of the official's authority to conduct certification activities under the Act and the regulations in this part,

(2) A private entity, documentation showing the entity's status and organizational purpose, such as articles of incorporation and by-laws or ownership or membership provisions, and its date of establishment; and

(e) A list of each State or foreign country in which the applicant currently certifies production and handling operations and a list of each State or foreign country in which the applicant intends to certify production or handling operations.

§ 205.504 Evidence of expertise and ability.

A private or State entity seeking accreditation as a certifying agent must submit the following documents and information to demonstrate its expertise in organic production or handling techniques; its ability to fully comply with and implement the organic certification program established in §§ 205.100 and 205.101, §§ 205.201 through 205.203, §§ 205.300 through 205.303, §§ 205.400 through 205.406, and §§ 205.661 and 205.662; and its ability to comply with the requirements for accreditation set forth in § 205.501:

(a) *Personnel.*

(1) A copy of the applicant's policies and procedures for training, evaluating, and supervising personnel;

(2) The name and position description of all personnel to be used in the certification operation, including administrative staff, certification inspectors, members of any certification review and evaluation committees, contractors, and all parties responsibly connected to the certifying agent;

(3) A description of the qualifications, including experience, training, and education in agriculture, organic production, and organic handling, for:

(i) Each inspector to be used by the applicant and

(ii) Each person to be designated by the applicant to review or evaluate applications for certification; and

(4) A description of any training that the applicant has provided or intends to provide to personnel to ensure that they comply with and implement the requirements of the Act and the regulations in this part.

(b) *Administrative policies and procedures.*

(1) A copy of the procedures to be used to evaluate certification applicants, make certification decisions, and issue certification certificates;

(2) A copy of the procedures to be used for reviewing and investigating certified operation compliance with the Act and the regulations in this part and the reporting of violations of the Act and the regulations in this part to the Administrator;

(3) A copy of the procedures to be used for complying with the recordkeeping requirements set forth in § 205.501(a)(9);

(4) A copy of the procedures to be used for maintaining the confidentiality of any business-related information as set forth in § 205.501(a)(10);

(5) A copy of the procedures to be used for making the following information available to any member of the public upon request:

(i) Certification certificates issued during the current and 3 preceding calender years;

(ii) A list of producers and handlers whose operations it has certified, including for each the name of the operation, type(s) of operation, and the effective date of the certification, during the current and 3 preceding calender years;

(iii) The results of laboratory analyses for residues of pesticides and other prohibited substances conducted during the current and 3 preceding calender years; and

(iv) Other business information as permitted in writing by the producer or handler; and

(6) A copy of the procedures to be used for sampling and residue testing pursuant to § 205.670.

(c) *Conflicts of interest.*

(1) A copy of procedures intended to be implemented to prevent the occurrence of conflicts of interest, as described in § 205.501(a)(11).

(2) For each person identified in § 205.504(a)(2), a conflict of interest disclosure report, identifying any food- or agriculture-related business interests, including business interests of immediate family members, that cause a conflict of interest.

(d) *Current certification activities.* An applicant who currently certifies production or handling operations must submit:

(1) A list of all production and handling operations currently certified by the applicant;

(2) Copies of at least 3, the Administrator may require additional, different inspection reports and certification evaluation documents for production or handling operations certified by the applicant during the previous year for each area of operation for which accreditation is requested; and

(3) The results of any accreditation process of the applicant's operation by an accrediting body during the previous year for the purpose of evaluating its certification activities.

(e) *Other information.* Any other information the applicant believes may assist in the Administrator's evaluation of the applicant's expertise and ability.

§ 205.505 Statement of agreement.

(a) A private or State entity seeking accreditation under this subpart must sign and return a statement of agreement prepared by the Administrator which affirms that, if granted accreditation as a certifying agent under this subpart, the applicant will carry out the provisions of the Act and the regulations in this part, including:

(1) Accept the certification decisions made by another USDA accredited certifying agent as equivalent to its own;

(2) Refrain from making false or misleading claims about its accreditation status, the USDA accreditation program for certifying agents, or the nature or qualities of products labeled as organically produced;

(3) Conduct an annual performance appraisal for each inspector to be used by the certifying agent and implement measures to correct any possible deficiencies identified in compliance with the Act and the regulations in this part;

(4) Have an annual internal program evaluation conducted of its certification activities by certifying agent staff, an outside auditor, or a consultant who has the expertise to conduct such evaluations and implement measures to correct any deficiencies identified in compliance with the Act and the regulations in this part;

(5) Pay and submit fees to AMS in accordance with § 205.640; and

(6) Comply with, implement, and carry out any other terms and conditions determined by the Administrator to be necessary.

(b) A private entity seeking accreditation as a certifying agent under this subpart must additionally agree to:

(1) Hold the Secretary harmless for any failure on the part of the certifying agent to carry out the provisions of the Act and the regulations in this part;

(2) Furnish reasonable security, in an amount and according to such terms as the Administrator may by regulation prescribe, for the purpose of protecting the rights of production and handling operations certified by such certifying agent under the Act and the regulations in this part; and

(3) Transfer to the Administrator and make available to the applicable State program's governing State official all records or copies of records concerning the certifying agent's certification activities in the event that the certifying agent dissolves or loses its accreditation.

§ 205.506 Approval of accreditation.

(a) Accreditation will be approved when:

(1) The accreditation applicant has submitted the information required by §§ 205.503 through 205.505;

(2) The accreditation applicant pays the required fee in accordance with § 205.640(c); and

(3) The Administrator determines that the applicant for accreditation meets the requirements for accreditation as stated in § 205.501, as determined by a review of the information submitted in accordance with §§ 205.503 through 205.505 and, if necessary, a review of the information obtained from a site evaluation as provided for in § 205.508.

(b) On making a determination to approve an application for accreditation, the Administrator will notify the applicant of approval of accreditation in writing, stating:

(1) The area(s) for which accreditation is given;

(2) The effective date of the accreditation; and

(3) For a certifying agent who is a private entity, the amount and type of security that must be established to protect the rights of production and handling operations certified by such certifying agent.

(c) The accreditation of a certifying agent shall continue in effect until such time as the certifying agent fails to renew accreditation as provided in § 205.510(b), the certifying agent voluntarily ceases its certification activities, or accreditation is suspended or revoked pursuant to § 205.665.

§ 205.507 Denial of accreditation.

(a) If the Administrator has reason to believe, based on a review of the information specified in §§ 205.503 through 205.505 or after a site evaluation as specified in § 205.508, that an applicant for accreditation is not able to comply or is not in compliance with the requirements of the Act and the regulations in this part, the Administrator shall provide a written notification of noncompliance to the applicant in accordance with § 205.665(a).

(b) The applicant may:

(1) File, with the Administrator, an appeal of the deficiencies identified in the notification of noncompliance; or

(2) Submit to the Administrator a description of the actions taken to correct the deficiencies identified in the notification of noncompliance and evidence demonstrating such corrections.

(c) If an applicant fails to correct the deficiencies, fails to report the corrections by the date specified in the notification of noncompliance, fails to file an appeal of the notification of noncompliance by the date specified, or is unsuccessful in its appeal, the Administrator will provide the applicant with written notification of accreditation denial. An applicant who has received written notification of accreditation denial may apply for accreditation again at any time in accordance with § 205.502.

(d) If the certifying agent was accredited prior to the site evaluation and the certifying agent fails to correct the deficiencies, fails to report the corrections by the date specified in the notification of noncompliance, or fails to file an appeal of the notification of noncompliance by the date specified, the Administrator will begin proceedings to suspend or revoke the certifying agent's accreditation. An applicant who has had its accreditation suspended may apply for accreditation again at any time in accordance with § 205.502. A private entity certifying agent whose accreditation is revoked will be ineligible for accreditation for a period of not less than 3 years following the date of such determination.

§ 205.508 Site evaluations.

(a) Site evaluations of accredited certifying agents shall be conducted for the purpose of examining the certifying agent's operations and evaluating its compliance with the Act and the regulations of this part. Site evaluations shall include an on-site review of the certifying agent's certification procedures, decisions, facilities, administrative and management systems, and production or handling operations certified by the certifying agent. Site evaluations shall be conducted by a representative(s) of the Administrator.

(b) An initial site evaluation of an accreditation applicant shall be conducted before or within a reasonable period of time after issuance of the applicant's ''notification of accreditation.'' A site evaluation shall be conducted after application for renewal of accreditation but prior to the issuance of a notice of renewal of accreditation. One or more site evaluations will be conducted during the period of accreditation to determine whether an accredited certifying agent is complying with the general requirements set forth in § 205.501.

§ 205.509 Peer review panel.

The Administrator may establish a peer review panel to assist in evaluating applicants for accreditation, amendment to an accreditation, and renewal of accreditation as certifying agents. Peer reviewers will serve without compensation.

(a) *Peer review panel(s).*

(1) A peer review panel shall review the documentation provided by the Administrator after any site evaluation performed pursuant to §§ 205.508 and 205.510.

(2) The Administrator shall consider the reports received from each individual member of a peer review panel when determining whether to continue or renew the accreditation of a certifying agent.

(3) A peer review panel meeting shall be held solely for the purposes of giving and receiving information. Any meeting or conference call shall be conducted in a manner that will ensure the actions of panel members are carried out on an individual basis with any opinions and recommendations by a member being made individually.

(b) *Eligibility for peer review panels.*

(1) Applicants for membership in the peer review panel pool must:

(i) Provide the Administrator with a written description and, upon request, supporting documentation of their qualifications to conduct peer reviews. Such description must include information concerning the applicant's training and expertise in organic production or handling methods and in evaluating whether production or handling operations are using a system of organic production or handling.

(ii) Address possible limitations on availability to serve.

(iii) Include information concerning their commercial interests and those of their immediate family members, within the 12-month period prior to application, with any person who may seek to become or who is an accredited certifying agent. No person who has or has had a commercial interest, including an immediate family interest or the provision of consulting services, in an applicant for accreditation or renewal of accreditation within the preceding 12-month period shall be appointed to or accept appointment to a panel evaluating such applicant for accreditation or renewal of accreditation.

(2) Persons accepted to the pool may serve until notified that their appointment has been rescinded by the Administrator or until they are no longer qualified, whichever occurs first.

(c) *Composition of peer review panels.*

(1) Peer review panels convened by the Administrator shall consist of at least three but no more than five members.

(2) Peer review panels must include:

(i) A Department representative who shall preside over the panel and

(ii) No fewer than two members, drawn from the peer review pool, who possess sufficient expertise, as determined by the Administrator, in the areas of accreditation described in the application for accreditation or the notice of approval of accreditation for each certifying agent whose operations and performance are to be reviewed.

(3) Peer review panels may include:

(i) Up to two members with expertise in other disciplines, including organizational management and finance;

(ii) Member(s) from the approved State organic certification program when the applicant is a private entity that will operate within the State; and

(iii) Member(s) from a foreign government's organic program when the applicant is a private entity that will operate within the country.

(d) *Duties and responsibilities of panel members.*

(1) Each person on a peer review panel must individually review the site evaluation report prepared by the Department's evaluator(s) and any other information that may be provided by the Administrator relevant to continuing or renewing the accreditation status of a certifying agent;

(2) Information about the certifying agent received as part of the review process is confidential information, and peer reviewers must not release, copy, quote, or otherwise use material from the information received, other than in the report required to be submitted;

(3) Each peer reviewer must agree to treat the information received for review as confidential; and

(4) Each person on a peer review panel must provide an individual written report, including recommendations, to the Administrator regarding a certifying agent's ability to conduct and perform certification activities.

(e) *Peer review panel reports.* Copies of the peer review panel reports will be provided upon request to the certifying agent, and written responses from the certifying agent may be submitted for consideration by the Administrator.

§ 205.510 Annual report, recordkeeping, and renewal of accreditation.

(a) *Annual report and fees.* An accredited certifying agent must submit annually to the Administrator, on or before the anniversary date of the issuance of the notification of accreditation, the following reports and fees:

(1) A complete and accurate update of information submitted pursuant to §§ 205.503 and 205.504;

(2) Information supporting any changes being requested in the areas of accreditation described in § 205.500;

(3) A description of the measures implemented in the previous year and any measures to be implemented in the coming year to satisfy any terms and conditions determined by the Administrator to be necessary, as specified in the most recent notification of accreditation or notice of renewal of accreditation;

(4) The results of the most recent inspector performance appraisals and annual program evaluation and a description of adjustments to the certifying agent's operation and procedures implemented or to be implemented in response to the appraisals and evaluation; and

(5) The fees required in § 205.640(a).

(b) *Recordkeeping.* Certifying agents must maintain records according to the following schedule:

(1) Records obtained from applicants for certification and certified operations must be maintained for not less than 5 years beyond their receipt;

(2) Records created by the certifying agent regarding applicants for certification and certified operations must be maintained for not less than 10 years beyond their creation; and

(3) Records created or received by the certifying agent pursuant to the accreditation requirements of this subpart F, excluding any records covered by §§ 205.510(b)(2), must be maintained for not less than 5 years beyond their creation or receipt.

(c) *Renewal of accreditation.*

(1) An accredited certifying agent's application for accreditation renewal must be received 6 months prior to the fifth anniversary of issuance of the notification of accreditation and each subsequent renewal of accreditation. The accreditation of certifying agents who make timely application for renewal of accreditation will not expire during the renewal process. The accreditation of certifying agents who fail to make timely application for renewal of accreditation will expire as scheduled unless renewed prior to the scheduled expiration date. Certifying agents with an expired accreditation must not perform certification activities under the Act and these regulations.

(2) Following receipt of the information submitted by the certifying agent in accordance with paragraph (a) of this section, the results of a site evaluation, and, if applicable, the reports submitted by a peer review panel, the Administrator will determine whether the certifying agent remains in compliance with the Act and the regulations of this part and should have its accreditation renewed.

(d) *Notice of renewal of accreditation.* Upon a determination that the certifying agent is in compliance with the Act and the regulations of this part, the Administrator will issue a notice of renewal of accreditation. The notice of renewal will specify any terms and conditions that must be addressed by the certifying agent and the time within which those terms and conditions must be satisfied.

(e) *Noncompliance.* Upon a determination that the certifying agent is not in compliance with the Act and the regulations of this part, the Administrator will initiate proceedings to suspend or revoke the certifying agent's accreditation.

§§ 205.511—205.599 [Reserved]

Subpart G—Administrative

The National List of Allowed and Prohibited Substances

§ 205.600 Allowed and prohibited substances and ingredients in organic production and handling.

To be sold or labeled as ''organic,'' or ''made with organic (specified ingredients),'' the product must be produced and handled without the use of:

(a) Synthetic substances and ingredients, except as provided in § 205.601 and § 205.603.

(b) Nonagricultural substances used in or on processed products, except as otherwise provided in § 205.605;

(c) Nonsynthetic substances prohibited in § 205.602 or § 205.604; and

(d) Materials, processes, or techniques prohibited in § 205.301.

§ 205.601 Synthetic substances allowed for use in organic crop production.

In accordance with restrictions specified in this section and § 205.102 and § 205.200 through § 205.207, the following synthetic substances may be used:

(a) As algicides, disinfectants and sanitizers, including irrigation system cleaning systems

(1) Alcohols

(i) Ethanol

(ii) Isopropanol

(2) Chlorine Materials—*Except,* That, residual chlorine levels in the water shall not exceed the maximum residual disinfectant limit under the Safe Drinking Water Act.

(i) Calcium Hypochlorite

(ii) Chlorine Dioxide

(iii) Sodium Hypochlorite

(3) Hydrogen Peroxide

(4) Soap-Based Algicides/Demossers

(b) As herbicides, weed barriers, as applicable.

(1) Herbicides, Soap-Based—for use in farmstead maintenance (roadways, ditches, right of ways, building perimeters) and ornamental crops

(2) Mulches

(i) Newspaper or other recycled paper, without glossy or colored inks.

(ii) Plastic mulch and covers (petroleum-based other than polyvinyl chloride (PVC))

(c) As compost feedstocks—Newspapers or other recycled paper, without glossy or colored inks

(d) As animal repellents—Soaps, Ammonium—for use as a large animal repellant only, no contact with soil or edible portion of crop

(e) As insecticides (including acracides or mite control)

(1) Ammonium Carbonate—for use as bait in insect traps only, no direct contact with crop or soil

(2) Boric Acid—structural pest control, no direct contact with organic food or crops

(3) Elemental Sulfur

(4) Lime Sulfur—including calcium polysulfide, fungicides, or insecticides if no alternatives

(5) Oils, Horticultural—as dormant, suffocating, and summer oils

(6) Petroleum-Based Oils—on woody plants for dormant and summer pest control, *Except,* That, a petroleum-based material allowed as a pesticide is prohibited for use as a herbicide. Aromatic petroleum solvents as a subclass of petroleum-based oils are prohibited.

(7) Soaps, Insecticidal

(8) Sticky Traps/Barriers

(f) As insect attractants—Pheromones

(g) As rodenticides

(1) Sulfur Dioxide—underground rodent control only (smoke bombs)

(2) Vitamin D3

(h) As slug or snail bait—[Reserved]

(i) As plant disease control

(1) Coppers, Fixed—Copper Hydroxide, Copper Oxide, Copper Oxychloride, Includes products exempted from EPA tolerance, *Except,* That, copper-based materials shall be managed in a way that prevents excessive accumulation in the soil and shall not be used as herbicides.

(2) Copper Sulfate—Substance must be used in a manner that minimizes accumulation of copper in the soil.

(3) Hydrated Lime—not permitted for soil application or to cauterize mutilations or deodorize animal wastes

(4) Hydrogen Peroxide

(5) Oils, Horticultural, as dormant, suffocating, and summer oils, insecticides only

(6) Petroleum-Based Oils—*Except,* That, aromatic petroleum solvents as a subclass of petroleum-based oils are prohibited.

(7) Potassium Bicarbonate

(8) Elemental Sulfur

(j) As plant or soil amendments.

(1) Aquatic Plant Extracts (other than hydrolyzed)—Extraction process is limited to the use of Potassium Hydroxide or Sodium Hydroxide; solvent amount used is limited to that amount necessary for extraction.

(2) Humic Acids—naturally occurring deposits, water and alkali extracts only

(3) Lignin Sulfonate—chelating agent, dust suppressant, floatation agent

(4) Micronutrients—not to be used as a defoliant, herbicide, or desiccant. Those made from nitrates or chlorides are not allowed. Soil deficiency must be documented by soil or tissue test.

(i) Soluble Boron Products

(ii) Sulfates, carbonates, oxides, or silicates of zinc, iron, magnesium, manganese, molybdenum, selenium, and cobalt

(5) Liquid Fish Products—can be pH adjusted with sulfuric, citric or phosphoric acid. The amount of acid used shall not exceed the minimum needed to lower the pH to 3.5

(6) Vitamins, B1, C, and E

(k) As plant growth regulators—[Reserved]

(l) As floating agents in postharvest handling
(1) Lignin Sulfonate
(2) Sodium Silicate—for tree fruit and fiber processing
(m) As synthetic inert ingredients as classified by the Environmental Protection Agency (EPA), for use with a synthetic substance listed in this section and used as an active ingredient in accordance with any limitations on the use of such synthetic substances—EPA List 4—Inerts of Minimal Concern
(n)–(z) [Reserved]

§ 205.602 Nonsynthetic substances prohibited for use in organic crop production.

(a) Ash from manure burning
(b) Arsenic
(c) Lead salts
(d) Sodium Fluoaluminate (Mined)
(e) Strychnine
(f) Tobacco Dust
(g)-(z) [Reserved]

§ 205.603 Synthetic substances allowed for use in organic livestock production.

Any substance in the following categories may be used in organic livestock production in accordance with any restrictions specified in this section and § 205.102 and § 205.236 through § 205.239.
(a) As disinfectants, sanitizers, and medical treatments as applicable
(1) Alcohols
(i) Ethanol—disinfectant and sanitizer only, prohibited as a feed additive
(ii) Isopropanol—disinfectant only
(2) Aspirin—approved for health care use to reduce inflammation
(3) Chlorine Materials—disinfecting and sanitizing facilities and equipment. Residual chlorine levels in the water shall not exceed the maximum residual disinfectant limit under the Safe Drinking Water Act
(i) Calcium Hypochlorite
(ii) Chlorine Dioxide
(iii) Sodium Hypochlorite
(4) Chlorohexidine—Allowed for surgical procedures conducted by a veterinarian. Allowed for use as a teat dip when alternative germicidal agents and/or physical barriers have lost their effectiveness
(5) Electrolytes—without antibiotics
(6) Glucose
(7) Glycerin—Allowed as a livestock teat dip, must be produced through the hydrolysis of fats or oils
(8) Iodine
(9) Hydrogen Peroxide
(10) Magnesium Sulfate
(11) Parasiticides—Ivermectin—Prohibited in slaughter stock, allowed in emergency treatment for dairy and breeder stock when organic system plan-approved preventive management does not prevent infestation. Milk or milk products from a treated animal cannot be labeled as provided for in subpart D of this part for 90 days following treatment. In breeder stock, treatment cannot occur during the last third of gestation if the progeny will be sold as organic
(12) Phosphoric Acid—allowed as an equipment cleaner
(13) Vaccines and Biologics
(b) As topical treatment, external parasiticide or local anesthetic as applicable.
(1) Iodine
(2) Lidocaine—as a local anesthetic. Use requires a withdrawal period of 90 days after administering to livestock intended for slaughter and 7 days after administering to dairy animals
(3) Lime, Hydrated—(Bordeaux mixes)
(4) Mineral Oil—for topical use and as a lubricant
(5) Procaine—as a local anesthetic, use requires a withdrawal period of 90 days after administering to livestock intended for slaughter and 7 days after administering to dairy animals
(6) Copper Sulfate
(c) As feed supplements—Milk Replacers—without antibiotics, as emergency use only, no nonmilk products or products from BST treated animals
(d) As feed additives
(1) Trace Minerals, including:
(i) Copper Sulfate
(ii) Magnesium Sulfate
(2) Vitamins—accepted for enrichment or fortification, limited to those approved by the FDA for livestock use
(e) As fillers and excipients
(f)–(z) [Reserved]

§ 205.604 Nonsynthetic substances prohibited for use in organic livestock production. [Reserved]

§ 205.605 Nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients).''

The following nonagricultural substances may be used only in accordance with any restrictions specified in this section and § 205.102, § 205.270, and § 205.300 through § 205.310.
(a) *Nonsynthetics allowed:*
(1) Agar-agar
(2) Acids
(i) Alginic
(ii) Citric—produced by microbial fermentation of carbohydrate substances
(iii) Lactic
(3) Baking Powder—aluminum-free
(4) Bentonite
(5) Calcium Carbonate
(6) Calcium Chloride
(7) Carrageenan
(8) Cornstarch (Native)
(9) Dairy Cultures—non-EM
(10) Diatomaceous Earth—food filtering aid only
(11) Enzymes—must be derived from edible, nontoxic plants, nonpathogenic fungi, or nonpathogenic bacteria
(12) Gums—Water extracted only (arabic, guar, locust bean, carob bean)
(13) Kaolin
(14) Kelp—for use only as a thickener and dietary supplement
(15) Lecithin—unbleached
(16) Nitrogen—Oil-free grades
(17) Oxygen—Oil-free grades
(18) Pectin (high-methoxy)
(19) Perlite—for use only as a filter aid in food processing
(20) Potassium Chloride
(21) Potassium Iodide
(22) Sodium Bicarbonate
(23) Sodium Carbonate
(24) Yeast—Nonsynthetic, non-EM
(i) Autolysate
(ii) Bakers
(iii) Brewers
(iv) Nutritional
(v) Smoked—growth on petrochemical substrate and sulfite waste liquor prohibited. Nonsynthetic smoke flavoring process must be documented
(b) *Synthetics allowed:*
(1) Alginates
(2) Ammonium Bicarbonate—for use only as a leavening agent
(3) Ammonium Carbonate—for use only as a leavening agent
(4) Ascorbic Acid
(5) Calcium Citrate
(6) Calcium Hydroxide
(7) Calcium Phosphates (monobasic and dibasic)
(8) Carbon Dioxide
(9) Chlorine Materials—disinfecting and sanitizing food contact surfaces, *Except,* That, residual chlorine levels in the water shall not exceed the maximum residual disinfectant limit under the Safe Drinking Water Act.
(i) Calcium Hypochlorite
(ii) Chlorine Dioxide
(iii) Sodium Hypochlorite
(10) Ethylene—allowed for post harvest ripening of tropical fruit
(11) Ferrous Sulfate—for iron enrichment or fortification of foods when required by regulation or recommended (independent organization)
(12) Glycerides (mono and di)—for use only in drum drying of food
(13) Glycerin—produced by hydrolysis of fats and oils
(14) Hydrogen peroxide

(15) Lecithin—bleached
(16) Magnesium Carbonate—for use only in agricultural products labeled ''made with organic (specified ingredients),'' prohibited in agricultural products labeled ''organic''
(17) Magnesium Chloride—derived from sea water
(18) Magnesium Stearate—for use only in agricultural products labeled ''made with organic (specified ingredients),'' prohibited in agricultural products labeled ''organic''
(19) Magnesium Sulfate
(20) Nutrient vitamins and minerals, in accordance with 21 CFR 104.20, Nutritional Quality Guidelines For Foods
(21) Ozone
(22) Pectin (low-methoxy)
(23) Phosphoric Acid—cleaning of food-contact surfaces and equipment only
(24) Potassium Acid Tartrate
(25) Potassium Tartrate made from Tartaric acid
(26) Potassium Carbonate
(27) Potassium Citrate
(28) Potassium Hydroxide—prohibited for use in lye peeling of fruits and vegetables
(29) Potassium Iodide—for use only in agricultural products labeled ''made with organic (specified ingredients),'' prohibited in agricultural products labeled ''organic''
(30) Potassium Phosphate—for use only in agricultural products labeled ''made with organic (specific ingredients),'' prohibited in agricultural products labeled ''organic''
(31) Silicon Dioxide
(32) Sodium Citrate
(33) Sodium Hydroxide—prohibited for use in lye peeling of fruits and vegetables
(34) Sodium Phosphates—for use only in dairy foods
(35) Tocopherols—derived from vegetable oil when rosemary extracts are not a suitable alternative
(36) Xanthan gum
(c)–(z) [Reserved]

§ 205.606 Nonorganically produced agricultural products allowed as ingredients in or on processed products labeled as organic or made with organic ingredients.

Any nonorganically produced agricultural product may be used in accordance with any restrictions specified in this section and § 205.102, § 205.270, and § 205.300 through § 205.310.

§ 205.607 Amending the National List.

(a) Any person may petition the National Organic Standard Board for the purpose of having a substance evaluated for recommendation to the Secretary for inclusion on or deletion from the National List in accordance with section 6517 of the Act.

(b) A person petitioning for amendment of the National List should request a copy of the petition procedures from the USDA at the address in § 205.607(c).

(c) A petition to amend the National List must be submitted to: Program Manager, USDA/AMS/TM/NOP, Room 2945 South Building, PO Box 96456, Washington, DC 20090–6456.

(d) A substance may be added to the National List only in the following categories:

(1) Synthetic substances allowed for use in organic crop or livestock production;

(2) Nonsynthetic substances prohibited for use in organic crop or livestock production; or

(3) Nonagricultural substances allowed for use as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients).''

State Programs

§ 205.620 Requirements of State organic certification programs.

(a) A State may establish a State organic certification program for production and handling operations within the State which produces and handles organic agricultural products.

(b) A State organic certification program must meet the general requirements for organic programs specified in the Act and be at least equivalent to the regulations in this part.

(c) A State organic certification program may contain more restrictive requirements based on unique environmental conditions or specific production or handling practices particular to the State or region of the United States, which necessitates the more restrictive requirement. Such additional requirements must further the purposes and be consistent with the Act and regulations in this part.

(d) A State organic certification program must assume enforcement obligations in the State for the requirements of this part and any more restrictive requirements approved by the Secretary.

(e) A State organic certification program and any amendments to such program must be approved by the Secretary prior to being implemented by the State.

§ 205.621 Submission and determination of proposed State organic certification programs and amendments to approved State organic certification programs.

(a) A State program's governing State official must submit to the Secretary a proposed State organic certification program and any proposed amendments to such approved program.

(1) Such submission must contain supporting materials that include statutory authorities, program description, a statement of acceptance of the general requirements for organic programs specified in the Act, documentation of unique environmental or ecological conditions or specific production practices particular to the State which necessitate more restrictive requirements than the requirements of this part, and other information as may be required by the Secretary.

(2) Submission of a request for amendment of an approved State organic certification program must contain supporting material that includes an explanation and documentation of the unique environmental or ecological conditions or specific production practices particular to the State or region, which necessitates the proposed amendment. Supporting material also must explain how the proposed amendment furthers and is consistent with the purposes of the Act and the regulations of this part.

(b) Within 6 months of receipt of submission, the Secretary will:

(1) Publish in the **Federal Register** for public comment, a summary of a proposed State organic certification program, and a summary of any proposed amendment to such program.

(2) After review of materials and documentation accompanying the proposal and consideration of comments received, notify the State program's governing State official of approval or disapproval of the proposed program or amendment of an approved program and, if disapproved, the reasons for the disapproval.

(c) After receipt of a notice of disapproval, the State program's governing State official may resubmitt a revised State organic certification program or amendment of such a program at any time.

§ 205.622 Review of approved State organic certification programs.

The Secretary will review a State organic certification program not less than once during each 5-year period following the date of the initial program approval. The Secretary will notify the State program's governing State official of approval or disapproval of the

program within 6 months after initiation of the review.

Fees

§ 205.640 Fees and other charges for accreditation.

Fees and other charges equal as nearly as may be to the cost of the accreditation services rendered under the regulations, including initial accreditation, review of annual reports, and renewal of accreditation, shall be assessed and collected from applicants for initial accreditation and accredited certifying agents submitting annual reports or seeking renewal of accreditation in accordance with the following provisions.

(a) *Fees-for-Service.*

(1) Except as otherwise provided in this section, fees-for-service shall be based on the time required to render the service provided calculated to the nearest 15-minute period, including the review of applications and accompanying documents and information, evaluator travel, the conduct of on-site evaluations, review of annual reports and updated documents and information, and the time required to prepare reports and any other documents in connection with the performance of service. The hourly rate shall be the same as that charged by the Agricultural Marketing Service (AMS), through its Quality Systems Certification Program, to certification bodies requesting conformity assessment to the International Organization for Standardization ''General Requirements for Bodies Operating Product Certification Systems'' (ISO Guide 65).

(2) Applicants for initial accreditation and accredited certifying agents submitting annual reports or seeking renewal of accreditation during the first 18 months following the effective date of subpart F of this part shall receive service without incurring an hourly charge for service.

(3) Applicants for initial accreditation and renewal of accreditation must pay at the time of application, effective 18 months following the effective date of subpart F of this part, a nonrefundable fee of $500.00 which shall be applied to the applicant's fees-for-service account.

(b) *Travel charges.* When service is requested at a place so distant from the evaluator's headquarters that a total of one-half hour or more is required for the evaluator(s) to travel to such place and back to the headquarters or at a place of prior assignment on circuitous routing requiring a total of one-half hour or more to travel to the next place of assignment on the circuitous routing, the charge for such service shall include a mileage charge administratively determined by the Department and travel tolls, if applicable, or such travel prorated among all the applicants and certifying agents furnished the service involved on an equitable basis or, where the travel is made by public transportation (including hired vehicles), a fee equal to the actual cost thereof. Travel charges shall become effective for all applicants for initial accreditation and accredited certifying agents on the effective date of subpart F of this part. The applicant or certifying agent will not be charged a new mileage rate without notification before the service is rendered.

(c) *Per diem charges.* When service is requested at a place away from the evaluator's headquarters, the fee for such service shall include a per diem charge if the employee(s) performing the service is paid per diem in accordance with existing travel regulations. Per diem charges to applicants and certifying agents will cover the same period of time for which the evaluator(s) receives per diem reimbursement. The per diem rate will be administratively determined by the Department. Per diem charges shall become effective, for all applicants for initial accreditation and accredited certifying agents on the effective date of subpart F of this part. The applicant or certifying agent will not be charged a new per diem rate without notification before the service is rendered.

(d) *Other costs.* When costs, other than costs specified in paragraphs (a), (b), and (c) of this section are associated with providing the services, the applicant or certifying agent will be charged for these costs. Such costs include, but are not limited to, equipment rental, photocopying, delivery, facsimile, telephone, or translation charges incurred in association with accreditation services. The amount of the costs charged will be determined administratively by the Department. Such costs shall become effective for all applicants for initial accreditation and accredited certifying agents on the effective date of subpart F of this part.

§ 205.641 Payment of fees and other charges.

(a) Applicants for initial accreditation and renewal of accreditation must remit the nonrefundable fee, pursuant to § 205.640(a)(3), along with their application. Remittance must be made payable to the Agricultural Marketing Service, USDA, and mailed to: Program Manager, USDA–AMS–TMP–NOP, Room 2945–South Building, PO Box 96456, Washington, DC 20090–6456 or such other address as required by the Program Manager.

(b) Payments for fees and other charges not covered under paragraph (a) of this section must be:

(1) Received by the due date shown on the bill for collection;

(2) Made payable to the Agricultural Marketing Service, USDA; and

(3) Mailed to the address provided on the bill for collection.

(c) The Administrator shall assess interest, penalties, and administrative costs on debts not paid by the due date shown on a bill for collection and collect delinquent debts or refer such debts to the Department of Justice for litigation.

§ 205.642 Fees and other charges for certification.

Fees charged by a certifying agent must be reasonable, and a certifying agent shall charge applicants for certification and certified production and handling operations only those fees and charges that it has filed with the Administrator. The certifying agent shall provide each applicant with an estimate of the total cost of certification and an estimate of the annual cost of updating the certification. The certifying agent may require applicants for certification to pay at the time of application a nonrefundable fee of no more than $250.00, which shall be applied to the applicant's fees-for-service account. The certifying agent shall provide all persons inquiring about the application process with a copy of its fee schedule.

§§ 205.643—205.649 [Reserved]

Compliance

§ 205.660 General.

(a) The National Organic Program's Program Manager, on behalf of the Secretary, may inspect and review certified production and handling operations and accredited certifying agents for compliance with the Act or regulations in this part.

(b) The Program Manager may initiate suspension or revocation proceedings against a certified operation:

(1) When the Secretary has reason to believe that a certified operation has violated or is not in compliance with the Act or regulations in this part.

(2) When a certifying agent or a State program's governing State official fails to take appropriate action to enforce the Act or regulations in this part; or

(c) The Program Manager may initiate suspension or revocation of a certifying agent's accreditation if the certifying agent fails to meet, conduct, or maintain

accreditation requirements pursuant to the Act or this part.

§ 205.661 Investigation of certified operations.

(a) A certifying agent may investigate complaints of noncompliance with the Act or regulations of this part concerning production and handling operations certified as organic by the certifying agent. A certifying agent must notify the Program Manager of all compliance proceedings and actions taken pursuant to this part.

(b) A State program's governing State official may investigate complaints of noncompliance with the Act or regulations in this part concerning organic production or handling operations operating in the State.

§ 205.662 Noncompliance procedure for certified operations.

(a) *Notification.* When an inspection, review, or investigation of a certified operation by a certifying agent or a State program's governing State official reveals any noncompliance with the Act or regulations in this part, a written notification of noncompliance shall be sent to the certified operation. Such notification shall provide:

(1) A description of each noncompliance;

(2) The facts upon which the notification of noncompliance is based; and

(3) The date by which the certified operation must rebut or correct each noncompliance and submit supporting documentation of each such correction when correction is possible.

(b) *Resolution.* When a certified operation demonstrates that each noncompliance has been resolved, the certifying agent or the State program's governing State official, as applicable, will send the certified operation a written notification of noncompliance resolution.

(c) *Proposed suspension or revocation.* When rebuttal is unsuccessful or correction of the noncompliance is not completed within the prescribed time period or is not adequate to demonstrate that each noncompliance has been corrected, the certifying agent or State program's governing State official shall send the certified operation a written notification of proposed suspension or revocation of certification of the entire operation or a portion of the operation, as applicable to the noncompliance. When correction of a noncompliance is not possible, the notification of noncompliance and the proposed suspension or revocation of certification may be combined in one notification. The notification of proposed suspension or revocation of certification shall state:

(1) The reasons for the proposed suspension or revocation;

(2) The proposed effective date of such suspension or revocation;

(3) The impact of a suspension or revocation on future eligibility for certification; and

(4) The right to request mediation pursuant to § 205.663 or to file an appeal pursuant to § 205.681.

(d) *Willfull violations.* Notwithstanding paragraph (a) of this section, if a certifying agent or State program's governing State official has reason to believe that a certified operation has willfully violated the Act or regulations in this part, the certifying agent or State program's governing State official shall send the certified operation a notification of proposed suspension or revocation of certification of the entire operation, or a portion of the operation, as applicable to the noncompliance.

(e) *Suspension or revocation.*

(1) If the certified operation fails to correct the noncompliance, to resolve the issue through rebuttal or mediation, or to file an appeal of the proposed suspension or revocation of certification, the certifying agent or State program's governing State official shall send the certified operation a written notification of suspension or revocation.

(2) A certifying agent or State program's governing State official must not send a notification of suspension or revocation to a certified operation that has requested mediation pursuant to § 205.663 or filed an appeal pursuant to § 205.681.

(f) *Ineligibility.* A certified operation or a person responsibly connected with an operation whose certification has been revoked will not be eligible to receive certification for a period of not more than 5 years following the date of such revocation, as determined by the Secretary.

§ 205.663 Mediation.

Any dispute with respect to proposed suspension or revocation of certification under this part shall, at the request of the applicant for certification or certified operation, be mediated by a qualified mediator mutually agreed upon by the parties to the mediation. If a State Program is in effect, the mediation procedures established in the State Program, as approved by the Secretary, will be followed. Mediation shall be requested in writing to the applicable certifying agent. The parties to the mediation shall have no more than 30 days to reach an agreement following a mediation session. If mediation is unsuccessful, the applicant for certification or certified operation shall have 30 days from termination of mediation to appeal the certifying agent's decision to the Administrator, pursuant to § 205.681. Any agreement reached during or as a result of the mediation process shall be in compliance with the Act and these regulations. The Secretary may review any mediated agreement for conformity to the Act and these regulations.

§ 205.664 [Reserved]

§ 205.665 Noncompliance procedure for certifying agents.

(a) *Noncompliance.* When an inspection, review, or investigation of an accredited certifying agent by the Program Manager reveals any noncompliance with the Act or regulations in this part, a written notification of noncompliance shall be sent to the certifying agent, as applicable. Such notification shall provide:

(1) A description of each noncompliance found;

(2) The facts upon which the notification of noncompliance is based; and

(3) The date by which the certifying agent must rebut or correct each noncompliance when correction is possible.

(b) *Resolution.* When each noncompliance has been resolved, the Program Manager shall send the certifying agent a written notification of noncompliance resolution.

(c) *Proposed suspension or revocation.* If rebuttal is unsuccessful or if correction of the noncompliance is not made within the prescribed time period or is not adequate to demonstrate that each noncompliance has been corrected, the Program Manager shall send a written notification of proposed suspension or revocation of accreditation to the certifying agent. The notification of proposed suspension or revocation shall state whether the certifying agent's accreditation or specified areas of accreditation are to be suspended or revoked. When correction of a noncompliance is not possible, the notification of noncompliance and the proposed suspension or revocation may be combined in one notification. The notification of proposed suspension or revocation of accreditation shall state:

(1) The reasons for the proposed suspension or revocation;

(2) The proposed effective date of the suspension or revocation;

(3) The impact of a suspension or revocation on future eligibility for accreditation; and

(4) The right to file an appeal pursuant to § 205.681.

(d) *Willfull violations.* Notwithstanding paragraph (a) of this section, if the Program Manager has reason to believe that a certifying agent has willfully violated the Act or regulations in this part, the Program Manager shall send a written notification of proposed suspension or revocation of accreditation to the certifying agent.

(e) *Suspension or revocation.* When the accredited certifying agent fails to file an appeal of the proposed suspension or revocation of accreditation, the Program Manager shall send a written notice of suspension or revocation of accreditation to the certifying agent.

(f) *Cessation of certification activities.* A certifying agent whose accreditation is suspended or revoked must:

(1) Cease all certification activities in each area of accreditation which its accreditation is suspended or revoked.

(2) Transfer to the Secretary and make available to any applicable governing State official all records concerning its certification activities that were suspended or revoked.

(g) *Eligibility.*

(1) A certifying agent whose accreditation is suspended by the Secretary under this section may at any time submit a new request for accreditation, pursuant to § 205.502. The request must be accompanied by evidence demonstrating correction of each noncompliance and corrective actions taken to comply with and remain in compliance with the Act and the regulations in this part.

(2) A certifying agent whose accreditation is revoked by the Secretary shall be ineligible to be accredited as a certifying agent under the Act and the regulations in this part for a period of not less than 3 years following the date of such revocation.

§§ 205.666 and 205.667 [Reserved]

§ 205.668 Noncompliance procedures under State organic certification programs.

(a) A State program's governing State official must promptly notify the Secretary of commencement of any enforcement proceeding against a certified operation and forward to the Secretary a copy of each notice issued.

(b) A noncompliance proceeding, brought by a State program's governing State official against a certified operation, shall be appealable pursuant to the appeal procedures of the State organic certification program. There shall be no subsequent rights of appeal to the Secretary. Final decisions of a State may be appealed to the United States District Court for the district in which such certified operation is located.

(c) A State program's governing State official may review and investigate complaints of noncompliance with the Act or regulations concerning accreditation of certifying agents operating in the State. When such review or investigation reveals any noncompliance, the State program's governing State official shall send a written report of noncompliance to the Program Manager. The report shall provide a description of each noncompliance and the facts upon which the notification of noncompliance is based.

§ 205.669 [Reserved]

Inspection and Testing, Reporting, and Exclusion from Sale

§ 205.670 Inspection and testing of agricultural product to be sold or labeled organic.

(a) All agricultural products that are to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' must be made accessible by certified organic production or handling operations for examination by the Administrator, the applicable State program's governing State official, or the certifying agent.

(b) The Administrator, applicable State program's governing State official, or the certifying agent may require preharvest or postharvest testing of any agricultural input used or agricultural product to be sold, labeled, or represented as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients)'' when there is reasonable cause to believe that the agricultural input or product has come into contact with a prohibited substance. Such tests must be conducted by the applicable State program's governing State official or the certifying agent at the official's or certifying agent's own expense.

(c) The preharvest or postharvest tissue test sample collection pursuant to paragraph (b) of this section must be performed by an inspector representing the Administrator, certifying agent, or applicable State program's governing State official. Sample integrity must be maintained in transit, and residue testing must be performed in an accredited laboratory. Chemical analysis must be made in accordance with the methods described in the 16th edition of the *Official Methods of Analysis of the AOAC International* or other applicable validated methodology determining the presence of contaminants in agricultural products.

(d) Results of all analyses and tests performed under this section:

(1) Must be provided to the Administrator promptly upon receipt; and

(2) Will be available for public access, unless the testing is part of an ongoing compliance investigation.

§ 205.671 Exclusion from organic sale.

(a) When residue testing detects prohibited substances at levels that are greater than the estimated national mean of detected residues for specific commodity/pesticide pairs, as demonstrated by USDA's Pesticide Data Program, or unavoidable residual environmental contamination, as determined by the Administrator, the agricultural product must not be sold, labeled, or represented as organically produced. The Administrator, the applicable State program's governing State official, or the certifying agent may conduct an investigation of the certified operation to determine the cause of the prohibited substance residue.

(b) If test results indicate a specific agricultural product contains pesticide residues or environmental contaminants that exceed the Food and Drug Administration's or the Environmental Protection Agency's regulatory tolerances, the data must be reported promptly to the appropriate public health agencies.

§ 205.672 Emergency pest or disease treatment.

When a prohibited substance is applied to a certified operation due to Federal or State emergency pest eradication or disease treatment program and the certified operation otherwise meets the requirements of this part, the certification status of the operation shall not be affected as a result of the application of the prohibited synthetic substance: *Provided,* That:

(a) Any harvested crop or plant part to be harvested that has contact with a prohibited substance applied as the result of a Federal or State emergency pest eradication or disease treatment program cannot not be sold, labeled, or represented as organically produced; and

(b) Any livestock that are treated with a prohibited substance applied as the result of a Federal or State emergency pest or disease treatment program or product derived from such treated livestock cannot be sold, labeled, or represented as organically produced: *Except,* That:

(1) Milk or milk products may be sold, labeled, or represented as organically

produced beginning 12 months following the last date that the dairy animal was treated with the prohibited substance; and

(2) The offspring of gestating mammalian breeder stock treated with a prohibited substance may be considered organic: *Provided,* That, the breeder stock was not in the last third of gestation on the date that the breeder stock was treated with the prohibited substance.

§§ 205.673—205.679 [Reserved]

Adverse Action Appeal Process

§ 205.680 General.

Persons subject to the Act who believe they are adversely affected by a noncompliance proceeding decision of the National Organic Program's Program Manager or a certifying agent may appeal such decision to the Administrator.

§ 205.681 Appeals.

(a) *Certification appeals.* An applicant for certification may appeal a certifying agent's notice of denial of certification, and a certified operation may appeal a certifying agent's notification of proposed suspension or revocation of certification to the Administrator: *Except,* That, when the applicant or certified operation is subject to an approved State organic certification program and the decision to deny, suspend, or revoke a certification is made by a certifying agent or a State program's governing State official, the appeal must be made to the State program's governing State official or such official's designee who will carry out the appeal pursuant to the State program's appeal procedures approved by the Secretary.

(1) If the Administrator sustains a certification applicant's or certified operation's appeal of a certifying agent's decision, the applicant will be issued organic certification, or a certified operation will continue its certification, as applicable to the operation. The act of sustaining the appeal shall not be an adverse action subject to appeal by the affected certifying agent.

(2) If the Administrator denies an appeal, a formal administrative proceeding will be initiated to deny, suspend, or revoke the certification. Such proceeding shall be conducted pursuant to the Department's Uniform Rules of Practice.

(b) *Accreditation appeals.* An applicant for accreditation and an accredited certifying agent may appeal a Program Manager's denial of accreditation or proposed suspension or revocation of accreditation to the Administrator.

(1) If the Administrator sustains an appeal, an applicant will be issued accreditation, or a certifying agent will continue its accreditation, as applicable to the operation.

(2) If the Administrator denies an appeal, a formal administrative proceeding to deny, suspend, or revoke the accreditation will be initiated. Such proceeding shall be conducted pursuant to the Department's Uniform Rules of Practice.

(c) An appeal of a noncompliance decision must be filed within the time period provided in the letter of notification or at least 30 days from the receipt of the notification. The appeal will be considered ''filed'' on the date received by the Administrator or by the State program's governing State official or such official's designee as provided in the State's approved appeal procedures. A decision to deny, suspend, or revoke certification or accreditation will become final and nonappealable unless the decision is appealed in a timely manner.

(d) All appeals to the Administrator must be filed in writing and addressed to Administrator, USDA–AMS, Room 3071–S, PO Box 96456, Washington, DC 20090–6456, and be copied to the certifying agent completely and simultaneously with submission to the Administrator. Appeals must include a copy of the adverse decision and a statement of the appellant's position that the decision was not made in accordance with applicable program regulations, policies, or procedures.

§§ 205.682—205.689 [Reserved].

Miscellaneous

§ 205.690 OMB control number.

The control number assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Public Law 96–511, is OMB number 0581–0181.

§§ 205.691—205.699 [Reserved]

PARTS 206–209—[RESERVED]

Dated: March 3, 2000.

Kathleen A. Merrigan,

Administrator, Agricultural Marketing Service.

Appendices to the Preamble

Appendix A.—Regulatory Impact Assessment for Proposed Rules Implementing the Organic Foods Production Act of 1990 (Executive Order 12866)

The following regulatory assessment is provided to fulfill the requirements of Executive Order 12866. This assessment consists of a statement of the need for the proposed action, a description of the baseline for the analysis, an examination of alternative approaches, and an analysis of the benefits and costs. Much of the analysis is necessarily descriptive of the anticipated effects of the proposed rule. Because basic market data on the prices and quantities of organic goods and services and the costs of organic production are limited, it is not possible to provide quantitative estimates of all benefits and costs of the proposed rule. The cost of fees and recordkeeping proposed by U.S. Department of Agriculture (USDA) are quantified, but the anticipated benefits are not. Consequently, the analysis does not estimate the magnitude or the direction (positive or negative) of net benefits.

The Need for the Proposed Action

The Organic Foods Production Act of 1990, Title XXI of the Food, Agriculture, Conservation and Trade Act of 1990, U.S.C. Title 7, mandates that the Secretary of Agriculture develop a national organic program. The OFPA states that the Secretary shall establish an organic certification program for farmers, wild-crop harvesters, and handlers of agricultural products that have been produced using organic methods as provided for in the OFPA. In addition, section 6514 of the OFPA requires the Secretary to establish and implement a program to accredit a State program's governing State official or any private person, who meets the requirements of the Act, as a certifying agent to certify that farm, wild-crop harvesting, or handling operations are in compliance with the standards set out in the regulation. As stated by the OFPA in section 6501, the regulations are proposed for the following purposes: (1) to establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organically produced products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced.

The OFPA was introduced at the request of the organic community after it experienced a number of problems in the marketing of organic products. Many consumers are willing to pay price premiums for organic food; hence, producers (farmers, ranchers, and wild-crop harvesters) and handlers have an economic incentive to label their products

organic. Because organic products cannot be distinguished from conventionally produced products by sight inspection, consumers rely on verification methods, such as certification by private entities or verification by retailers to ensure that organic claims are true. Where there has been no mandatory certification, consumers have been unable to verify organic product claims on their own, and may have been vulnerable to fraud from the mislabeling of organic products.

As organic production became better established in the 1980's, new certifying agencies were formed, and some States passed laws establishing standards for organic production. However, the standards for organic production, processing, handling, and labeling were different to some degree, causing disagreements between certifying agents over whose standards would apply to ingredients used in multi-ingredient organic processed products. Disagreements about standards also created sourcing problems for handlers of these multiingredient products.

Certifying agents are able to negotiate and maintain reciprocity agreements at some cost. These reciprocity agreements specify the conditions under which certifying agents recognize each others' standards. The current system of variable standards has led the organic industry to take on costs of private accreditation or shipment-by-shipment certification, required to gain access to some foreign markets such as the European Union (EU). These costs would be avoided if a national program were in place.

Baseline

The organic industry is characterized by an array of production and handling practices, self regulation and state regulation, and consumer perceptions. However, there are commonalities throughout the industry.

Certification

The United States currently has 49 certifying agents. There are 36 private certifying agencies and 13 States which have certification programs. Private certifying agents range from small nonprofit associations that certify only a few growers to large for-profit businesses operating in numerous States and certifying hundreds of producers. Typically, certifying agents review producers' organic production plans, inspect the farm fields and facilities to be certified, periodically reinspect, and may conduct soil tests and tests for residues of prohibited substances. In some cases, certifying agents negotiate reciprocity agreements with other agents.

State laws vary widely on organic certification and registration. Some States require only that an organic producer register and make certification voluntary. California is an example. Other States require certification by the State's own agents, while others accept certification by a private certifying agent. The least stringent requirement among States with organic legislation is that products marketed as organic comply with their definition of organic but both registration and certification are voluntary. Approximately half of the States have laws which regulate organic production and processing. Thirteen States operate programs to certify organic production. In many States producers may claim their product is organic but operate without certification or well-defined standards. On the other hand, many organic producers operate in States with no program and voluntarily secure third party certification to well-defined standards. Certification costs vary with farm size and across certifying agents. Illustrative certification costs are presented in Tables 2A and 2B.

Very few certifying agents operate with an external accreditation. There is no law which requires them to be accredited: The price may be unacceptably high in relation to expected benefits; the certifying agent may be unable to find an accrediting party willing to accredit the particular organic program the certifying agent is marketing; and State programs may believe that their status as a government entity obviates the need for external accreditation.

In 1999 USDA began verifying certifying agents to International Organization for Standardization (ISO) Guide 65. It is a valuable recognition that the certifying entity satisfies the business capacity standards of ISO Guide 65. European Union authorities have accepted verification of certifying agents to ISO Guide 65 as an interim measure to facilitate exports pending the establishment of a national organic program.

Organic Food Production

Organic production occurs in all States. An estimated 12,000 organic producers are operating in the United States. Most organic producers are small both in terms of value of sales and acreage. Small producers do not necessarily farm full-time, and may not depend solely on farm income for a livelihood. Some organic production occurs as a distinct part of a larger operation that includes conventional production practices.

Key production practices followed by certified organic producers include: abstaining from use of certain crop chemicals and animal drugs; ecologically based pest and nutrient management; segregation of organic fields and animals from nonorganic fields and animals; following an organic production plan with multiple goals, including sustainability; and record keeping to document practices and progress toward the plan's goals. Specific elements of organic production will vary, but organic systems generally share a core set of practices. For example, the certification standards of virtually all State and private U.S. certifying agents prohibit the use synthetic chemical herbicides and insecticides or animal growth hormones. And most certification standards include a three year ban on the use of prohibited substances on cropland before production can be certified as organic.

On the other hand, certification standards for organic livestock production have been more variable, for pasture, feed, and other practices. Until 1999, the USDA Food Safety and Inspection Service (FSIS) withheld approval for the use of organic labels on meat and poultry products pending the outcome of this rulemaking. However, the Secretary announced a change in policy in January 1999. Meat and poultry products may be labeled ''certified organic by (name of the certifying agent)'' if processors obtain prior label approval from FSIS and the claim meets certain basic criteria. However, many private and State certifying programs have not developed standards for livestock production.

The provisions of the New Hampshire organic program are summarized below to illustrate key elements of current organic standards. The New Hampshire program provisions are not substantially different from provisions in some State programs, private programs, and mirror provisions of USDA's proposed national program. Soil tests are required for initial certification and every three years afterward. Soil testing measures the quality of the soil for agricultural production and is different from residue testing. New Hampshire requires residue testing ''if the department believes that the produce or soil which certified produce was grown may have become contaminated with prohibited substances.'' (New Hampshire Rule AGR 906 Certification of Organically Grown Food, Agr 906.05 Laboratory Analysis) Other production standards include a written rotation plan, tillage systems that incorporate organic matter wastes into the topsoil, compliance with limits on the sources of manure and the timing of its application, prohibitions on the use of certain substances (*e.g.,* sewage sludge, synthetic sources of nitrates, synthetic growth regulators, and anhydrous ammonia), a list of accepted and prohibited weed and pest control practices, segregation of organic and nonorganic production, record keeping regarding fertilization, cropping, and pest management histories, separate sales records for organic and nonorganic production, and records of all laboratory analyses.

The New Hampshire program requires growers to pay a $100 annual inspection fee, and to provide a written description of their farm operation including the size of the farm, a field map, a three-year history of crop production, pest control, and fertilizer use, a crop rotation and a soil management plan, and a description of post-harvest storage and handling methods. Applicants for certification must also agree to comply with regulations controlling the use of the New Hampshire certified organic logo.

Organic Food Handling

In addition to growers, who actually produce and harvest products to be marketed as organic, there are handlers who transform and resell the organic products. Not all certifying agents have standards for handling organic products. Some have standards for parts of the food marketing system, such as retail food establishments, that are not explicitly covered by the OFPA or by the proposed regulation.

Definitions of processing and handling differ across certifying agents and State laws. Some States, such as Washington, distinguish between a processor and a handler, specifying 21 actions which constitute processing and defining a handler as anyone who sells, distributes, or packs organic products. Washington does not consider retail grocery stores and restaurants to be organic handlers or processors.

Marketing of Organic Food—Domestic and International

The marketing practices of organic producers range from roadside stands marketing directly to consumers, to marketing through wholesale markets, to direct marketing to restaurants and supermarkets. USDA does not have official national level statistics on organic retail sales. An industry trade publication reported estimates of retail sales of organic foods for a number of years in the 1990's (Table 1). The last published estimate was $3.5 billion in 1996 ($3.6 billion in 1998 dollars). To put this figure in context, total food expenditures by families and individuals were $606 billion in 1996 ($629 billion in 1998 dollars).

The United States is both an importer and an exporter of organic foods. The United States does not restrict imports of organic foods. In fact, U.S. Customs accounts do not distinguish between organic and conventional products. The largest markets for organic foods outside the United States are in Europe, Japan, and Canada. There is increasing pressure, particularly in Europe and Japan, for U.S. exports to demonstrate that they meet a national standard rather than a variety of private and State standards.

The EU is the largest market for organic food outside the United States. The organic food market in the EU was estimated to be worth $5.2 billion in 1997 (International Trade Centre UNCTAD/WTO 1999). The largest organic retail sales markets in the EU in 1997 were Germany ($1.8 billion), France ($720 million), and Italy ($750 million). Large organic markets outside the EU include Canada and Australia, with approximately $60 million and $68 million, respectively, in organic retail sales in 1997 (Lohr 1998). Import share of the organic food market in Europe ranged from 10 percent in France to 70 percent in the United Kingdom, was 80 percent in Canada, and varied from 0 to 13 percent in various Australian states.

Japan is another important market for U.S. organic products. Currently, Japan has voluntary labeling guidelines for 6 categories of non-conventional agricultural products: organic, transitional organic, no pesticide, reduced pesticide, no chemical fertilizer, and reduced chemical fertilizer. Total sales, including foods marketed as ''no chemical,'' and ''reduced chemical'' are forecast to jump 15 percent in 1999 to almost $3 billion. Imports of organic agricultural products were valued at $90 million in 1998. Given Japan's limited agricultural acreage, imports will likely provide an increasingly significant share of Japan's organic food supply (USDA FAS 1999a).

Recently, these markets have adopted or are considering to adopt procedures that may impede the importing of organic food. The EU regulations establishing the basis for equivalency in organic production among EU members and for imports from outside the EU were adopted in 1991 (Council Regulation 2092/91). The EU regulations only allow imports from non-EU countries whose national standards have been recognized as equivalent to the EU standards (Commission Regulation 94/92).

The Ministry of Agriculture, Forestry, and Fisheries (MAFF) in Japan recently announced proposed standards and third-party certification requirements. Under Japan's proposed standards, certifying agents from countries without national organic standards administered by a federal government will have to be accredited (registered) with MAFF to obtain approval to certify products destined for the Japanese market. The Japanese proposal includes provisions for country-to-country equivalency recognition of other national programs.

The Proposed Rule

The proposed rule follows the structure established in the OFPA. By adopting this alternative, the Department would follow legislative direction in the OFPA. All products marketed as organic will have to be produced and handled as provided in the OFPA and the regulations. Compared to current organic practices, the proposed rule sets a more stringent system of requirements.

Accreditation and Certification

The rule specifies the accreditation and certification process. Persons providing certification of organic production and handling must be accredited by USDA through the NOP. Applicants for accreditation must document their abilities to certify according to the national standards and to oversee their clients' compliance with the requirements of the OFPA and NOP regulations. Producers and handlers of organic products must be certified by an accredited certifying agent. Producers and handlers are required to document their organic plans and procedures to ensure compliance with the OFPA.

All certifying agents would have to be accredited, and certification by producers and handlers would not be voluntary. The exceptions are: (1) Growers and handlers with gross organic sales of $5,000 or less would be exempt from certification; and (2) a handling operation may be exempt or excluded from certification according to provisions described in the rule's subpart B, Applicability. For example, a handling operation that is a retail food establishment or portion of a retail food establishment would be exempt if it handles organically produced agricultural products but does not process them, and would be excluded from the requirement to be certified if it processes or prepares, on the premises of the retail food establishment, raw and ready-to-eat-food from agricultural products that are previously labeled as ''100 percent organic,'' ''organic,'' or ''made with organic (specified ingredients).'' However, this exemption does not extend to other provisions of the proposed rule such as prevention of contact with prohibited substances.

USDA will charge applicants for accreditation a $500 fee at the time of application. USDA will also charge applicants for costs over $500 for site evaluation of the applicant's business. The applicant would be charged for travel costs, per diem expenses, and any miscellaneous costs incurred with a site evaluation. Review of documents for renewal of accreditation will be charged at an hourly rate.

Producers and handlers will not pay certification fees to USDA. Certification fees will be established by the accredited certifying agents. USDA will not set fees. The rule requires certifying agents to submit a copy of their fee schedules to USDA, post their fees, and provide applicants estimates of the costs for initial certification and for renewal of certification.

Production and Handling

The rule establishes standards for organic production of crops and livestock and handling of organic products. These standards were developed from specific requirements in the OFPA, recommendations from the National Organic Standards Board (NOSB), review of existing organic industry practices and standards, public comments received on the 1997 proposal and subsequent issue papers, and public meetings.

The proposed rule establishes a number of requirements for producers and handlers of organic food. These requirements will affect farming operations, packaging operations, processing operations and retailers. Some of the major provisions are: (1) Land requirements; (2) crop nutrient requirements; (3) crop rotation requirements; (4) pest management requirements; (5) livestock management requirements; (6) processing and handling requirements; and (7) commingling requirements.

National List

The National List lists allowed synthetic substances and prohibited non-synthetic substances that may or may not be used in organic production and handling operations. The list identifies those synthetic substances, which would otherwise be prohibited, that may be used in organic production based on the recommendations of the NOSB. Only those substances on the National List may be used. The National List also identifies those natural substances that may not be used in organic production, as determined by the Secretary based on the NOSB recommendations.

Testing

When certifying agents have reason to believe organic products contain a prohibited substance, they may conduct residue tests. The rule incorporates the national mean of detected residues for specific commodity/pesticide pairs and clarifies how unavoidable residual environmental contamination would be used in residue testing.

Labeling

The rule also states how organic products may be labeled and permitted uses of the USDA organic seal. In addition to the USDA seal and the certifying agent's seal, information on organic food content may be displayed. It is important to note that small businesses who are certified may use the USDA seal.

Recordkeeping

The rule will require certifying agents, producers, and handlers to keep certain records. Certifying agents will be required to file periodic reports with USDA. Producers and handlers will be required to notify and submit reports to their certifying agent. While recordkeeping is a standard practice in

conventional and organic farming, the proposal adds recordkeeping and reporting requirements which do not exist for growers and handlers operating without certification. Similarly, certifying agents would face additional recordkeeping and reporting requirements, particularly those certifying agents operating without external accreditation. State and private certifying agents regulate the use of organic seals and logos. The proposed rule permits certifying agent logos and requires the name of the certifying agent on processed organic foods.

Alternatives to the Proposed Rule

As required by E.O. 12866, alternatives to the proposed rule were considered. The identified alternatives were the Status Quo and Industry-Developed Standards. The costs and benefits of each alternative were assessed to the extent possible.

Status Quo: The Organic Market in the Absence of Federal Regulation

This is the no program alternative. There would be no national standard or national program of accreditation and certification. Certification would be voluntary and certifying agents would not have third party accreditation. Some producers and handlers would operate with certification provided by private organizations or State programs. Other producers and handlers would characterize their foods as organic but would not be certified.

A mix of State and private programs may continue to operate according to varying standards. In States without organic laws or States where certification is voluntary, goods would be marketed as organic without third party certification. Even under this scenario, organic food produced in States with production standards and certification may be produced using similar practices because most State standards follow similar requirements: A 3 year transition, prohibited use of certain substances (lists of substances tend to overlap), practices which prevent commingling with conventional products, and where livestock standards exist, organic feed.

In addition, at the time the OFPA was enacted, the industry had been unable to agree on organic standards. Recently, there has been movement toward shared standards partly in response to efforts to develop national organic standards including the 1997 proposal and the public NOSB process. The Organic Trade Association (OTA) has developed ''American Organic Standards'' which the OTA Board recently ratified. The OTA describes itself as '' * * * a national association representing the organic industry in Canada, the United States and Mexico. Members include growers, shippers, processors, certifying agents, farmer associations, brokers, consultants, distributors and retailers. Established in 1985 as the Organic Foods Production Association of North America, the Organic Trade Association works to promote organic products in the marketplace and to protect the integrity of organic standards.'' (OTA website). Although there is substantial consensus on the draft standards, acceptance is not unanimous.

The draft standards developed through OTA correspond closely to many elements in the proposed national organic program. OTA envisions a system of accreditation and certification of producers and handlers but not restaurants and grocery stores. The list of allowed and prohibited substances mirrors the list developed by the NOSB. Production practices for crops and livestock include the common features in most State and private programs—a 3 year transition, no commingling, use of organic feed, limits on the use of antibiotics, requirements for an organic plan and recordkeeping. Hence, even in the absence of a national program, the organic industry may be moving toward a common standard.

Under the status quo-no national program alternative, producers and handlers who chose to be certified, or who are required by State laws to be certified, would pay fees that would vary depending on the market for the particular private certifying agent's service and whether a State certification program was operating with subsidized fees.

No federal funds would be used, there would be no transfer from federal taxpayers at large to organic market participants, and there would be no federal regulatory barriers to entry into organic production and handling.

International access for domestic organic products may be very influential on development of the organic industry in the United States. A food trade publication (The Natural Foods Merchandiser) tracked organic sales for a while in the 1990s showing annual growth in retail sales of 20–25 percent between 1990 and 1996 (Table 1). This growth took place in the absence of a national program.

In the absence of national standards, U.S. organic producers have been able to access European markets only by obtaining specific product permissions granted to individual importers by organic regulatory authorities in an EU member state (Byng, p. 27–28 1994). This process has required the importer to satisfy the authorities, through documentation and possible site inspection, that the product in question has been certified to and produced under equivalent standards of production and inspection. This case-by-case process of approving imports was intended as a temporary arrangement to accommodate non-EU countries that had not yet established government systems regulating organic production and certification. Another step State and private organic certifying agencies have taken to access international markets in the absence of a national program has been a voluntary, fee-for-service program to verify that they comply with the requirements prescribed under ISO Guide 65.

Governments in foreign markets and foreign private processors and retailers are expected to insist on additional verification that goods have been produced to acceptable organic standards. This would likely lead to an increased use of private accreditation services and of USDA's ISO Guide 65 verification service. USDA's ISO Guide 65 verification services are provided on a user fee basis with full cost recovery. These private accreditations and USDA's verifications would increase costs for certifying agents and producers and handlers. In addition, establishing reciprocity between certifying agents in the domestic organic market involves some cost and may stifle growth in trade of organic products, although the magnitude of these costs and their effects on growth is unknown.

Under the proposed national program, all applicants for accreditation will be assessed against ISO Guide 65, eliminating the need for a separate ISO Guide 65 assessment that exists for those exporting to the EU in the absence of a national program. Growth in the trade of organic products, particularly exports, may be jeopardized by a status quo-no program alternative because there would be no national program upon which to establish equivalency.

Industry-Developed Standards

As an alternative to the proposed national program, another national program could adopt industry-developed standards. For example, USDA could adopt the standards recently developed by the Organic Trade Association or other consensus standards and enforce those standards. Certification to these standards could be performed as it is currently, by private certifiers or by state programs. There could be variation among certifiers' standards, but producers and certifiers would not be able to prohibit use of a product meeting the national standard from the production of other ''organic'' products.

There are various enforcement mechanisms that are available under this alternative. The USDA could choose to enforce the adopted standards. Enforcement could be left to other federal agencies or State governments. For example, the Federal Trade Commission could regulate truth in advertising with respect to organic food; the USDA Food Safety Inspection Service could regulate labeling of organic meat and poultry products.

Adopting the industry standard as the USDA standard, the USDA could provide an acceptable national standard that would be necessary in establishing equivalency to access international organic markets, and eliminate the problems associated with establishing reciprocity in the domestic organic market.

It is important to note that it may be difficult to develop consensus industry standards. For example, while standards recently proposed by OTA were developed with significant industry input they may not represent the kind of consensus that is the result of this proposed rule.

Number of Affected Parties and Projections

In assessing the impacts of the rule, we have attempted to determine the number of certifying agents, private and State, that are currently operating, and considered the factors likely to affect the number of certifying agents after the rule is implemented. We have attempted to determine the number of currently operating producers and handlers that would be affected. And, we have considered the factors which might affect the number of producers and handlers after the program has been implemented.

For the analysis, the USDA assumes the following:

1. Forty-nine domestic certifying agents and ten foreign certifying agents will be affected by the proposed regulation.

2. Approximately 12,200 certified and non-certified organic producers will be affected by the proposed regulation. With the assumed growth rate of 14% for certified organic producers and approximately 8% for non-certified organic producers, the number of organic producers will grow to 17,150 in 2002.

3. Approximately 1,250 processors and handlers of organic food will be affected by the proposed action. This number will grow to 2,150 by 2002.

4. The number of retailers affected by the proposed action is not quantified.

Certifying Entities

We place the number of certifying agents currently operating at 49, including 13 State programs. The number of certifying agents has remained fairly stable, between 40 and 50, for some years, with entries and exits tending to offset each other. For purposes of estimating the paperwork burden described elsewhere, we assume no growth in the number of domestic certifying agents but project 10 foreign certifying agents in the first 3 years of the program.

Organic Producers

It is more difficult to establish the number of organic producers. Organic farming was not distinguished from conventional agriculture in the 1997 Census of Agriculture. Among the sources which give insight into the number of producers, the Organic Farming Research Foundation (OFRF) has conducted nationwide surveys of certified organic producers from lists provided by cooperating certifying agents (OFRF 1999). OFRF sent its 1997 survey to 4,638 organic producers.

Because OFRF did not obtain lists from all certifying organizations or their chapters (55 out of a total of 64 identified entities provided lists), its list count of 4,638 producers is likely an underestimate of the number of certified organic farms. If the average producer-to-certifying agent ratio (55 certifying agents to 4,638 producers) holds for the 9 certifying organizations that did not provide the list (9 certifying agents out of a 64 certifying agents), then the number of producer grows to 5,397 producers.

The different estimates of the number of certifying agents should be noted. The USDA estimates 49 certifying agents; the OFRF estimates 64 certifying agents. The difference stems from the USDA's not counting different chapters of certifying organizations separately.

The California Department of Food and Agriculture's organic registration program suggests that, at least for California, most organic producers are not certified. For the 1994–95 reporting period, CDFA reported that 1,372 farms registered as organic producers but only 517 of these farms were certified (Klonsky and Tourte, 1998a). Thus, one approach to projecting national totals from OFRF survey lists of certified producers would be to apply the 1994–95 ratio between producers registered and certified in California to the OFRF 1997 list count. This would suggest the number of non-certified producers to be 8,918, resulting in the total number of organic producers to be 14,315. However, it is important to note that California's structure of organic production may not be representative of the national profile. The number of non-certified producers may be higher or lower.

CDFA also reports the number of registered and certified producers by sales class. Many producers would likely be eligible for the small farm (sales less than $5,000) exemption provided for in the OFPA. Of 1,372 registered organic farms in California, 907 had sales of less than $10,000. Of the 517 certified farms, 188 had sales of under $10,000. If these ratios are applied to the number of producers calculated, then the number of certified producers with sales under $10,000 would be 1,962, and the number of organic producers in general with sales under $10,000 would be 9,463. Thus, there are potentially a large number of farms which could be exempt from certification requirements.

Dunn (1995a, 1995b, and 1997) has estimated the number of certified organic producers in the United States. Dunn (1995a, 1995b) estimated the number of certified producers at 4,060 in 1994. Dunn (1997) reported 4,856 certified organic farms in 1995. USDA's 1997 proposal relied on Dunn's 1995 estimate of 4,060 total certified producers. Dunn's numbers have been used because Dunn's 1995 work was an official USDA study. The methods used were reviewed by USDA and the resulting estimates are official USDA statistics. Although Dunn's 1997 estimates were not a USDA study, the 1997 study used the same approach as the 1995 study.

An adjustment is needed to account for the number of producers who are practicing organic agriculture but who are uncertified and would be affected by this proposed rule. We reject the idea of expanding by the certified-to-registered ratio reported in California for reasons previously stated. We assume that the number of organic-but-not-certified producers in 1999 is about 4,000. We adopt this figure recognizing that there may be 1,000 such farms in California, given that there were 855 in CDFA's report on 1995 registrations. The total number of organic farms for assessing the impact of the rule is 12,200 in 1999.

Data collected by AMS indicate that the number of certified organic farmers increased about 12 percent per year during the period 1990 to 1994. OFRF survey efforts indicate that growth has continued, though it is not clear whether the growth rate has changed. We use the average growth rate from Dunn's time series from 1991–1994, which was about 14 percent. The true rate of growth could be higher or lower. By applying the 14-percent growth rate to Dunn's (1995) estimate, the number of certified organic producer potentially affected in 1999 is 8,200 and 12,150 in 2002.

We have no national-level growth rates for not-certified organic farms. The limited times series from CDFA is of limited value in estimating a growth rate. We suspect it is less than the rate for certified farms because certification has value and organic producers would be expected to take advantage of the marketing advantages of certification. Furthermore, the emergence of State certification programs that appear to have lower certification fees than private certification entities may have encouraged more organic producers to be certified. Therefore, for purposes of analyzing the impacts of the rule for the Paperwork Reduction Act, we assume growth of non-certified organic producers from 4,000 in 1999 to 5,000 non-certified farms by 2002, making the total number of farms potentially affected by the rule, 17,150 farms. However, we request comment and/or data on the number and the growth of certified and non-certified organic farms.

Organic Handlers

Little information exists on the number of handlers. They include processors such as organic soup manufacturers, organic food packaging operations, and organic food wholesalers. USDA has estimated that there were 600 entities in this category in 1994 (Dunn 1995b). AMS estimated that the growth rate was 11 percent from 1990 through 1994 (Dunn 1995b). More recent data from CDFA registration records suggest a growth rate of about 28 percent (California Department of Health Services 1999). For projection purposes, we use a growth rate of 20 percent, which makes the number of handlers for 1999 1,250 and for 2002 2,150. Reasons for growth include the general increase in organic production and growth in the market for processed organic foods, including multiingredient products. Again, these projections are based on limited data from the early 1990's, and growth may have slowed or increased. We request comment and/or data on the number and the growth rate of processors and handlers in the organic industry.

Retail Food Establishments

Retailers of organic food are grocery stores, bakeries, restaurants and other establishments that process or prepare raw and ready-to-eat food. Most are not currently subject to either voluntary practices or mandatory standards of the organic industry. Although they are excluded from the certification requirements, they are subject to other processing, handling, and other production related requirements of the proposed rule. Hence, a new stratum of the organic industry will be regulated by the proposed rule.

Dunn's (1995a) estimates the number of certified retailers to be 31 in 1995. It is not clear whether Dunn's (1995a) definition of retailers and the proposed definition stated above are consistent. Hence, the total number of retailers that may be regulated remains unknown. USDA's Economic Research Service (ERS) reports there were 161,707 grocery stores in 1997 (ERS website). Many of these stores sell organic products and may be affected by the proposed rule. The effect of the proposed regulation on the growth of retailers remains unknown. We request comment and/or data on the number and the growth rate on the retailers of organic food.

Foreign Entities

The discussion of the number of affected parties has focused on domestic certifying agents, producers, and handlers. We recognize that foreign entities may apply for accreditation and foreign producers and handlers may be certified under the NOP. Furthermore, upon request of a foreign government, a foreign certifying agent may meet the requirements for accreditation when the Administrator determines that the certifying agent meets the requirements of the NOP.

At this time, we have no information regarding the number of foreign entities which may enter the NOP. We do not know how many foreign producers and handlers are marketing goods as organic, nor do we know how many will seek to be certified under the NOP. Accredited certifying agents will be able to certify operations outside the United States and foreign certifying agents may become accredited by USDA. It is likely that the costs for accreditation will be higher for foreign applicants for accreditation. Foreign applicants will face the same costs as domestic applicants but the levels of cost would reflect generally higher costs of foreign travel and per diem expenses for site evaluation and miscellaneous costs such as for translation of documents. For purposes of estimating the paperwork burden described elsewhere, we assume 10 foreign certifying agents in the first 3 years of the program. We request comment and/or data on the number and the growth rate of foreign entities that may export to the U.S. organic market.

Benefits of the Proposed Rule

The benefits from implementation of the proposed rule are: (1) Improved protection of buyers from misleading claims and more information on organic food; (2) reduced administrative costs; and (3) improved access to international organic markets. Not all benefits that may arise from the rule are quantifiable. Where economic data are available, they may relate to costs and are generally not adequate to quantify economic benefits.

Information

Potential benefits to consumers as a result of the proposed rule include more information on organic food, and protection from false and misleading organic food claims. Consumers may be misled by labels on processed and raw products claiming to be organic. In particular, with processed food, some of the ingredients may not be organically produced, or the product may contain less organic content than the consumer assumes. The USDA organic seal will provide consumers a quick tool to verify that goods offered for sale as organic are in fact organic. To the extent that consumers view the seal as an important information too, that is, product with the seal is perceived as more desirable, they may enhance the ability of producers to realize the price premiums associated with certified products.

There is anecdotal evidence to suggest that consumer fraud involving organic food does occur (Mergentime 1997). Criminal prosecutions involving felony pleas and fines have taken place (Mergentime 1997). However, we have no evidence to suggest that this problem is wide-spread (Mergentime 1995). Also, it is important to recognize that the organic industry's effort to police itself and the remedies provided by the judicial system may be adequate to address consumer fraud. Mergentime (1997) documents the effect of litigating fraud cases on the industry. However, we request comment and/or data on the extent and the severity of consumer fraud that may exist.

Some producers may have limited their organic livestock production because of uncertainty regarding the standards that would be used in the NOP. By removing the uncertainty, producers may increase production, thereby increasing the quantity of livestock products.

Reduced Administrative Costs

The proposed rule addresses the problem of existing certifying agents using different standards and not granting reciprocity to other certifying agents. By accrediting certifying agents, the rule would establish the requirements and enforcement mechanisms that would reduce inconsistent certification services and lack of reciprocity between certifying agents. In the current system, the certifying agent of a final product is not required to recognize the certification of an intermediate product. Both primary farmers and food handlers may face a risk of being unable to sell a certified organic product when more than one certifying agent is involved. By imposing a uniform standard of certification and production, costs associated with establishing reciprocity between certifying agents will be eliminated. However, the magnitude of this benefit cannot be gauged without quantification. In particular, with the increasing consensus within the organic industry, the benefit may not be large.

It is important to distinguish between consensus with respect to standards of production and consensus with respect to certifying agents practices. There is growing consensus regarding crop standards, livestock standards are more problematic. And, consensus is least evolved regarding standards of conduct and practice for certifying agents. There is no consensus regarding whether certifying agents should be accredited or who the accrediting body should be.

Industry-wide training costs may decrease. The proposed uniform standards of production, certification should enable organic inspectors to move more easily from one certifying agent to another than the current system.

In addition, USDA accreditation of certifying agents would present opportunities for sharing information about standards, practices, and the general requirements of the program through the NOP staff. USDA will undertake a number of outreach and education efforts in connection with the launch of the NOP. Compliance guides and other printed material will be prepared which will be more readily understood than the **Federal Register** document. NOP staff will participate at industry meetings and will likely host public information exchange meetings.

International Markets

The final national program rule is expected to lead to EU acceptance of NOP certified organic products. That is, it is anticipated that the EU would determine that the NOP is acceptable vis-a-vis EU regulation 2092/91. Article 11 of EU Reg. 2092/91 establishes the conditions under which organic products may be imported from third countries and addresses the framework for equivalency. The NOP is a national program that should be acceptable to the EU and other governments. The result would be the removal of trade restrictions, thereby possibly increasing the growth in exports of organic food products.

Currently, despite restricted access to the European market, the United States is the most important non-EU supplier of organic products to EU countries (Foreign Agriculture Service (FAS), 1995). Import authorizations have been granted for a number of raw and processed commodities, including sunflowers, buckwheat, beans, sugar, and apples. Demand is strong throughout the European market, and the organic market share was 1–2 percent of total food sales in 1997 (Collins).

Lohr (1998) cites several growth projections:

Annual growth rates of 25% to 30% have been experienced in the EU, the United States, and Japan for over five years, but growth is already slowing in some product categories (PSC, Scott) * * * Segger projects that the EU market will reach $58 billion and the U.S. market $47 billion by 2006. Ahmed suggests that the Australian market could grow to $571 million by 2000, whereas LaFond projects that the value of Canadian organics will reach $145 million by 2006. Mergentime forecasts the Japanese market will reach $2.6 billion by 2000 (Lohr, 1126).

Lohr further states that these projected future growth rates are based on straight-line extrapolations of current sales and growth rates without understanding the underlying market mechanisms and price elasticities (Lohr 1998).

Foreign acceptance of the U.S. national standard can be expected to expand the universe of consumers for U.S. producers and reduce costs of negotiating and documenting shipment by shipment.

Costs of the Proposed Rule

The costs of the proposed regulation are the direct costs of complying with the specific standards. It is important to note that while some costs associated with accreditation and certification are quantified, costs stemming from other provisions of the proposed regulations are not. In addition, this is a short-run analysis. The analysis examines the costs that may be incurred from 1999 to 2002. It is not possible at this time to conduct a longer-run analysis because we do not know enough about the fundamental supply and demand relationships to make economically sound long run projections.

Accreditation Costs

USDA has identified 36 private certifying agents and 13 State programs providing certification. These 49 entities are considered likely applicants during the first 18 months

during which USDA will not charge application fees or hourly fees for accreditation. An unknown number of new entrants to the certifying business may also apply. However, over the last 10 years, the number of certifying agents does not appear to have grown significantly, with the net effect of entries and exits maintaining a population of certifying agents at about 40–50.

The proposed rule would allow USDA to collect fees from certifying agents for USDA accreditation. Collecting fees from certifying agents only is administratively simpler and will enable State programs that want to keep client costs low to do so.

Applicants for accreditation will be required to submit a nonrefundable fee of $500 at the time of application, which is applied to the applicant's fees for service account. This means that the $500 fee paid at the time of application is credited against any subsequent costs of accreditation arising from the site evaluation. The $500 fee is the direct cost to applicants who are denied accreditation based on the initial review of the information submitted with their application. Charges for the site evaluation visit will cover travel costs from the USDA employees' duty station, per diem expenses for USDA employees performing the site evaluation, an hourly charge that we anticipate will not exceed $95 per hour (per each employee) for services during normal working hours (higher hourly rates will be charged for overtime and for work on holidays), and other costs associated with providing service to the applicant or certifying agent.

The anticipated hourly rate is the rate that USDA will charge for services under the Quality Systems Certification Program (QSCP). A separate rulemaking will establish the precise hourly rate that will be charged. Our preliminary estimate that the fee will be no more than $95 per hour is presented to give the public some indication of the rate that will be charged following the 18-month transition period. QSCP is an audit-based program administered by AMS, which provides meat packers, processors, producers, and other businesses in the livestock and meat trade with the opportunity to have special processes or documented quality management systems verified. The procedures for accreditation evaluation are similar to those used to certify other types of product or system certification programs under QSCP.

At present, the base per diem for places in the United States is $80 ($50 for lodging and $30 for meals and incidental expenses). Per diem rates are higher than $80 in most large cities and urbanized places. Travel costs will depend on where the certifying agent is located.

USDA estimates the costs of a site evaluation visit after the transition period will average $3,070–$4,850 depending on the characteristics of the applicant. This estimate is based on experience with the QSCP and more limited experience performing audits verifying that certifying agents meet ISO Guide 65. The cost of a site evaluation visit will vary with the cost of travel from the USDA reviewer's duty station to the applicant's place of business. In general, more distant and more remote locations will involve higher travel costs.

Accreditation will include verification of adherence to ISO Guide 65. Recent experience with USDA's program to verify organic certifying agents to ISO Guide 65 indicates that roughly 32 staff hours are required. Although much of the accreditation site evaluation will involve comparisons against ISO Guide 65, additional hours will be required because USDA will be evaluating additional aspects of the applicant's operation to determine if the applicant is qualified to perform as an accredited agent for the NOP. Based on experience with ISO Guide 65 verifications, we project that small applicants with a simple business structure will require 3 days and large applicants with more complex business structure will require 5 days. Thus, the total number of hours to be charged would range from 24 to 40 hours. At the base rate of $95.00, the charge for hours of service would be $2,280–$3,800.

Per diem costs would cover 3 to 5 days, totaling $240–$400. A review of domestic travel by USDA staff during fiscal year 1999, indicates that transportation costs ranging from $500–$600. Miscellaneous costs are estimated to add another $50 to each site visit. Thus, the total site visit cost would range from $3,070 to $4,850.

During the 18-month transition period, USDA intends to use 2 reviewers for site evaluation visits. One reviewer will come from the QSCP audit staff and will be familiar with the ISO Guide 65 verification; the other reviewer will come from the NOP staff and will be familiar with requirements of the organic program. The two will conduct the site evaluation jointly. We anticipate only one reviewer will be required after the transition period. During the 18 month transition period, applicants will be charged for travel and per diem costs for two persons, but not application fees or hourly fees. Thus, the estimated expenditures (travel and per diem) for these initial accreditations will be $1,530–$2,050. Table 3 estimates the total initial costs for an applicant to become accredited.

Currently few private certifying agents are operating with third party accreditation. Fetter (1999) reports that in a sample of 18 certification programs four programs were accredited and one had accreditation pending. All of these were large, private certifying agents. Those certifying agents currently accredited by third parties will likely pay less for USDA accreditation. In its first proposal, USDA stated at FR 62:65860, ''We are aware that certifiers currently may pay in excess of $15,000 for accreditation by a private organization.'' Commenters thought this figure was too high. One commenter, which operates the International Federation of Organic Agriculture Movements (IFOAM) Accreditation Programme under license to IFOAM, stated ''It is possible that the largest programme operating a chapter system with activities in many countries (which is included in their IFOAM evaluation) paid this amount in their first year. On the other hand the average cost to a medium sized certifier works out at around $3000 to $4000 per year.'' Another commenter stated ''At the present time IFOAM accreditation costs less than $10,000/year for the largest certifier and $3–5,000 for smaller certifiers.''

The direct costs of accreditation, if all currently operating certifying agents become accredited during the first 18 months following the final rule, is approximately $75,000 to $100,000. This figure is derived from the per firm costs in Table 3. After the first 18 months, the direct cost for accrediting 49 certifying agents would be approximately $150,000 to $238,000.

The 18 month period affects the distribution of program costs between the organic industry and the taxpayer. Some of the costs of accreditation would be absorbed by the NOP operation budget appropriated by Congress. In effect, the taxpayers are subsidizing the organic industry. Without this subsidy, the total cost of accreditation may approach $1 million.

Private certifying agents and state programs that do not mirror the proposed regulation may incur additional costs to change their programs to adopt the proposed national standards. The discussion on the effect of the proposed regulation on existing state programs is in ''State Program Costs.'' The cost associated with changing existing private certifying programs is not quantified.

Also, certifying agents who have been operating without third party accreditation will face new costs. Compared to the direct costs of $3,000–$5,000 per year indicated by the commenters, the direct costs of USDA accreditation will be smaller. The direct costs for certifying agents obtaining accreditation during the first 18 months, when USDA will not impose an application fee or hourly charges, will be limited to travel and per diem costs. Furthermore, USDA's charges are imposed every 5 years, not annually.

A national accreditation program may shrink the market for a third-party accreditation. Certifying agents will have little incentive to maintain or seek a second accreditation by a private organization unless that accreditation sufficiently enhances the market value of the certifying agent's services. Thus, the market will determine whether other accrediting entities continue to have a U.S. market for their services.

Training programs are currently offered by the Independent Organic Inspectors Association (IOIA), an organization of approximately 165 organic certification inspectors, and by some of the larger certifying agents (IOIA, p. 1). Costs to existing certifying agents to provide additional training to other staff are difficult to measure in the absence of information on current staff skill levels or the existence of formal training other than inspector training. Some agencies rely on volunteer staff who may have had no formal training, but the extent of this practice is unknown. AMS intends to offer assistance to certifying agents, producers, and handlers by providing guide books and other printed material that would enable participants to better understand the regulations. In addition, AMS intends to continue open and frequent communication with certifying agents and inspectors to provide as much information as possible to aid them in fulfilling the requirements of the regulations.

The OFPA requires that private certifying agents furnish reasonable security, such as a bond, for the purpose of protecting the rights of participants in the organic certification program. Specifics requirements regarding reasonable security have not yet been established. It is expected that there will be costs to certifying agents from these requirements.

Certification Costs

State laws vary widely on organic certification and registration. Some States require only that an organic producer register and make certification voluntary. Other States require certification by the State's own agents, while others accept certification by a private certifying agent. The least stringent requirement among States with organic legislation is that products marketed as organic comply with their definition of organic but both registration and certification are voluntary. Thirteen States operate programs to certify organic production. In many States producers may claim their product is organic but operate without certification or well-defined standards. On the other hand, many organic producers operate in States with no program and voluntarily secure third party certification to well-defined standards.

Under the proposed rule, USDA will not impose any direct fees on producers and handlers. Certifying agents will establish a fee schedule for their certification services that will be filed with the Secretary. Certifying agents will provide all persons inquiring about the application process with a copy of their fees. The certifying agent will provide each applicant with an estimate of the total cost of certification and an estimate of the annual costs of updating the certification. However, the certifying agent may require applicants to pay at the time of application a nonrefundable fee of no more than $250 which must be applied to the applicants' fee-for-services account. The $250 limit is proposed as a reasonable figure considering the interests of certifying agents and applicants.

The proposed maximum nonrefundable fee protects certifying agents by ensuring that they receive some payment for their work for applicants should the applicant lose interest or be found unqualified for certification. For the purposes of estimating the cost of the paperwork burden on certifying agents, USDA has valued their time at $27 per hour. Thus, the $250 limit, if the certifying agent chooses to require it, would cover approximately 9 hours of work. The $250 limit protects applicants from paying large fees up front when their ultimate eligibility for certification is unknown. The $250 limit is believed to be low enough to ensure producers and handlers can afford to take the first steps for certification but high enough to ensure certifying agents will have an incentive to initiate certification when the prospects that the applicant will qualify are unknown.

Some States charge minimal fees for certification by subsidizing operating costs from general revenues. The majority of certifying agents structure their fee schedules on a sliding scale based on a measure of size, usually represented by the client's gross sales of organic products but sometimes based on the acres operated (Fetter 1999 and Graf and Lohr 1999). Some certifying agents charge an hourly rate for inspection and audit services.

Graf and Lohr have applied fee schedules provided by nine certifying agents to four hypothetical farms—small, medium, large, and a super farm. Tables 2A and 2B summarizes the fees that Graf and Lohr found by applying schedules of each certifying agent to hypothetical farms. Total first-year costs and subsequent (renewal) year costs for certification are shown. The average cost for each size class should be interpreted with care because the reported average is not weighted by the number of clients certified. In their study, the Texas Department of Agriculture program is the low-cost certifying agent for all-size operations. The high-cost certifying agent differs across farm sizes. None of these certification programs mentions costs for residue testing, which the NOP will require in the form of preharvest testing when there is reason to believe that agricultural products have come in contact with prohibited substances. Preharvest testing is expected to be infrequent. Some certifying agents currently require soil nutrient testing and water quality testing. The estimated total initial costs for a producer or handler to become certified are presented in Table 3.

We have not extended the average costs reported in Tables 2A and 2B to aggregate certification costs for all organic farms because the number of organic farms is not known with precision, nor is their geographic location and there are no data to distribute the population of organic farms across size classes. Like conventional agriculture, the largest percentage of farms would be expected to fall in the smallest sales class. Many of the smallest farms would qualify for the small farm exemption from certification.

In addition, organic producers and handlers would incur the costs associated with becoming familiar with the national program. We request comment and/or data on the certification costs that may be imposed on the organic producers, handlers, processors, and retailers.

Production and Handling Costs

Producers and handlers currently active in the organic industry may bear costs under the proposed national standards. We believe that while some provisions of the proposed program mirror current industry practices, others differ. In addition to the cost associated with becoming familiar with the national program, any adjustments stemming from these differences will result in costs. These costs are only qualitatively discussed. This assessment does not include a provision-by-provision analysis of possible alternatives.

Producers

Producers of organic food will face numerous provisions that will regulate their production methods. As indicated in the Baseline section, many of the requirements are currently practiced by certified organic farmers. Farming operations that are not certified, but are registered with a State government such as California, receive copies of the State laws to which they must comply. Some organic producers are neither certified nor registered and therefore may not practice the requirements proposed. Major provisions are discussed to illustrate costs; other provisions may also impose additional costs. We request comment and/or data on the costs that may be imposed on the producers of organic products. In addition, we request comment and/or data on the similarities and differences between the current practices of private and State programs and the proposed requirements.

Land Requirement. The transition period, which would specify the time during which prohibited materials cannot be applied before a field can be certified as organic, is included in many private and State organic standards. The OFPA specifies a required transition period of 3 years before certifying a field. The effect of this provision on the currently certified organic farming operations may be minimal. Certifying agents currently enforce the 3 year transition period required by the OFPA. Producers who are registered in States requiring registration, receive copies of the State laws governing organic production which generally require a 3 year transition period.

The effect on small farming operations that are neither certified or registered may be significant. Small farming operations that have completed a 3 year transition period and can document the transition will not be affected by this requirement. To stay in the organic industry, those who have not completed the 3 year transition period must comply with the transition period requirement. They may incur the cost of organic production for a significant length of time, yet not be allowed to sell their products as organic. Hence, some small organic operations may exit the industry. We request comment and/or data on the magnitude of the cost associated with the provision. In addition, we request comment and/or data on the similarities and differences between the current practices of private and state programs and the proposed requirements.

Soil fertility and crop nutrients. Lacking information, we have not quantified the cost associated with this provision, but we assume that it may have costs Organic production historically rests on soil fertility management. Private and State certifying agents have well developed standards addressing care and treatment of the soil. The proposed rule includes requirements for the use of manure and a practice standard for composting which may impose additional costs to producers. However, not all organic farmers use manure for soil fertility and many farmers use composting practices that are consistent with the proposed rule. We believe that this requirement will have minimal impact on certified or registered organic producers. We request comment and/or data on the magnitude of the cost associated with the provision. In addition, we request comment and/or data on the similarities and differences between the current practices of private and State programs and the proposed requirements.

Materials list. Lists of approved synthetic materials, including soil amendments and

pesticides, vary from one State program to another. A detailed analysis of specific differences in the various existing materials lists shows them to be overlapping in most cases. The impact of the national program will be determined by how the national standards differ from current certification standards and from actual practice.

Farming operations, both certified and registered, may need to adjust their production methods to comply with the list. These adjustments will impose costs on these operations. However, most currently certified operations and those operating under a State program already adhere to a materials list. These lists overlap in most cases with each other and the National List in this proposal which should mitigate the costs for these operations. The magnitude of the costs resulting from these adjustments is not quantified. We request comment and/or data on the magnitude of the costs associated with the provision. In addition, we request comment and/or data on the similarities and differences between the current practices of private and state programs and the proposed requirements.

Animal drug use. Another common feature of organic standards is the restricted use of animal drugs for livestock. Where livestock standards have been adopted by existing State programs and by private certifying agents, most prohibit the use of animal drugs except for the treatment of a specific disease condition, and use of animal drugs is generally prohibited within 90 days prior to the sale of milk or eggs as organic. Some State and private certifiers allow the use of animal drugs in animals for slaughter if the producer extends the withholding period. Others prohibit the use of animal drugs. The standards in the proposed rule would prohibit the sale as organic of an edible products derived from an animal treated with antibiotics or other unapproved substances.

The proposed standards may not differ from existing State or private standards in prohibiting the use of drugs on healthy animals. However, the effect of this provision may differ among certified and registered organic farms. The effect on the certified farming operations is unknown. We assume that this provision may have costs, but the magnitude of these costs is not quantified. We request comment and/or data on the magnitude of the costs associated with the provision. In addition, we request comment and/or data on the similarities and differences between the current practices of private and state programs and the proposed requirements.

Other livestock requirements. Lacking information, we have not quantified the cost associated with this provision, but we assume that this provision may have costs due to the variability in current housing, feed and health care practices. We request comment and/or data on the magnitude of the costs associated with the provision. In addition, we request comment and/or data on the similarities and differences between the current practices of private and state programs and the proposed requirements.

Residue Testing. Lacking information, we have not quantified the cost associated with this provision, but we assume that this provision may have costs. We request comment and/or data on the magnitude of the costs associated with the provision. In addition, we request comment and/or data on the similarities and differences between the current practices of private and state programs and the proposed requirements.

Handling requirements. These requirements prohibit a handler from using ionizing radiation for any purpose, an ingredient produced with excluded methods, or a volatile synthetic solvent in or on a processed agricultural product intended to be sold, labeled, or represented as ''100 percent organic'', ''organic'' or ''made with organic (specified ingredients).'' We believe, however, that the additional costs associated with compliance may be small. We base this assumption on the thousands of comments on the first proposal, including comments from the organic industry, indicating that these practices are widely considered to be inconsistent with organic production and handling. Lacking information, we have not quantified the cost associated with this provision. We request comment and/or data on the magnitude of the costs associated with the provision In addition, we request comment and/or data on the similarities and differences between the current practices of private and state programs and the proposed requirements.

Handlers

Handlers of organic food may be defined and regulated differently across different certifying agents and States. Handlers may incur some cost associated with complying with the requirements of the proposed regulation. We request comment and/or data on the costs that may be imposed on the retailers of organic products. In particular, we request comment and/or data on costs associated with excluded methods, residue testing, and labeling. In addition, we request comment and/or data on the similarities and differences between the current practices of private and state programs and the proposed requirements.

Retail Food Establishments

Largely, retailers of organic food are not regulated. However, they are still subject to other requirements such as prevention of contamination of organic products with prohibited substances, and commingling organic with non organic products. Complying with these provisions may incur some cost. We request comment and/or data on the costs that may be imposed on the retailers of organic products.

Labeling Costs

Certified handlers will have to comply with requirements regarding the approved use of labels. The estimated annual cost for 1,977 certified handlers to determine the composition of 20 products to be reported on labels is $948,960. This figure is based on an average of 1 hour per product and an hourly cost of $27. Similarly, certified handlers will have to design their labels to comply with the regulation. This is expected to take 1 hour per label at $27 per hour for a compliance cost of $948,960. Total label costs for certified handlers are $1.9 million.

Any producers, processors, and retailers who are not currently certified but who package organic products are also subject to the labeling requirements. Any changes to existing labels and new labels that need to conform to the proposed regulation will incur a cost. The costs associated with these activities are not quantified. Hence, the lower bound on the labeling cost is approximately $2 million. We request comment and/or data on the extent the current labels will need to change to conform to the proposed regulation. In addition, we request comment and/or data on the similarities and differences between the current practices of private and state programs and the proposed requirements.

State Program Costs

A national program may impose additional costs on States by requiring changes in their existing programs. The proposed rule encompasses most of the principles of existing State programs. However, there are also departures.

Where State standards are below Federal standards or where elements of the Federal standards are missing from a State program, these States would be required to make changes in their programs that they might otherwise not make. Where State programs have standards in addition to the Federal standards and they are not approved by the Secretary, States also would be required to make changes in their programs. States without organic standards or whose current standards either would conform to those of the national program or would be approved by the Secretary would not incur additional costs resulting from required changes. Currently, USDA cannot predict which States may be required to adjust their existing programs.

States will be charged for accreditation, something none of them pay for now. The cost associated with this provision is discussed in the Accreditation Section.

Enforcement Costs

Enforcement costs will fall upon USDA's NOP, States operating State programs, and on certifying agents. Certifying agents will review clients' operations and will notify clients of deficiencies. Certifying agents can initiate suspension or revocation of certification. Certifying agents will be aware of these overhead costs and we assume that they will establish fee schedules that will cover these costs. Actual costs to certifying agents for enforcement activities will depend on the number of clients, how well informed clients are of their obligations, and client conduct. State programs will face the same obligations and types of costs as private certifying agents.

USDA's enforcement costs are costs associated with ensuring private certifying agents and State programs fulfill their obligations. USDA will bear costs of investigating complaints, monitoring use of the USDA organic seal and organic labeling, and taking corrective action when needed. USDA will bear costs related to reviewing an applicant's or certified operation's appeal and for administrative proceedings. We request comment on the costs of the

enforcement provisions of the proposed regulation.

Reporting and Recordkeeping Costs

The Paperwork Reduction Act of 1995 requires an estimate of the annual reporting and recordkeeping burden of the proposed NOP. Detailed descriptions of individual elements of that burden are presented in the proposal under the heading Paperwork Reduction Act of 1995. The estimated annual reporting and recordkeeping burden reported is approximately $6.8 million. This figure should be understood within the context of the requirements of the Paperwork Reduction Act. The Paperwork Reduction Act requires the estimation of the amount of time necessary for participants to comply with the proposed regulation in addition to the burden they currently have. Information gathered by AMS in auditing activities in conjunction with ISO Guide 65 verifications, leads us to believe that the paperwork burden on current certifying agents and certified operators will be 10 to 15 percent greater than their current business practices as a result of this proposal.

Certifying Agents. The regulation will impose administrative costs on certifying agents for reporting and recordkeeping. The actual amount of the additional administrative costs that would be imposed by the proposed rule is expected to be different for those entities which would begin their activities only after the national program is implemented. Certifying agents that currently are active in the organic industry already perform most of these administrative functions; therefore, the additional costs to them would depend upon the extent to which their current practices are different from the requirements of the proposed regulation. An estimate of the cost of compliance is the annual reporting and recordkeeping burden documented in the Paperwork Reduction Act of 1995 analysis. Table 4 shows the estimated annual costs for State certifying agents and for private or foreign certifying agents. Based on the projected number of States agents (13) and private or foreign agents (46) the total reporting and recordkeeping cost, which captures much of the compliance costs of the rule, is $1,113,192.

The following list describes several of the most significant proposed administrative requirements or optional submissions and the probable resources required for compliance. Details on the reporting and recordkeeping burdens estimated for each item are in the paperwork analysis.

1. A list of farmers, wild crop harvesters and handlers currently certified. This information can be compiled from existing records. After implementation, certifying agents will be required to submit on a quarterly basis a list of operations certified during that quarter.

2. A copy of procedures used for certification decisions, complying with recordkeeping requirements, maintaining confidentiality of clients' business-related information, preventing conflicts of interest, sampling and residue testing, training and supervising personnel, and public disclosure of prescribed information concerning operations they have certified and laboratory analyses. These policies may have to be created or modified to conform to the regulation.

3. Documentation on the qualifications of all personnel used in the certification operation, annual performance appraisals for each inspector and personnel involved in the certification, and an annual internal program evaluation. Existing certifying agents may already perform these operations. New certifying agents will have to establish procedures to achieve these things.

4. Documentation on the financial capacity and compliance with other administrative requirements (*e.g.,* fee structure, reasonable security to protect the rights of the certifying agents' clients as provided in the NOP, and business relationships showing absence of conflicts of interest). Some of this information can be compiled from existing records, *e.g.,* fee schedules, and some may be generated from other sources.

5. Copies, submitted to USDA, of notices issued involving denials of certification, noncompliance, and suspension or revocation of certification. This requirement will be fulfilled simultaneously with sending notices to applicants or clients.

6. An annual report to the Administrator including an update of previously submitted business information, information supporting any requested changes in the areas of accreditation, and steps taken to respond to previously identified concerns of the Administrator regarding the certifying agent's suitability for continued accreditation. The annual report requirement will draw on records created in the normal course of business.

7. Retention of records created by the certifying agent regarding applicants and certified operations for not less than 10 years, retention of records obtained from applicants and certified operations for not less than 5 years, and retention of other records created or received for USDA accreditation for not less than 5 years. This activity requires records and database management capabilities and resources (storage space, file cabinets, electronic storage, etc.). In an informal inquiry, AMS found that most existing certifying agents currently retain records for at least 10 years and use both electronic and paper storage. We believe that this requirement will not pose an additional burden on existing certifying agents.

8. Public access to certification records, such as a list of certified farmers and handlers, their dates of certification, products produced, and the results of pesticide residue tests. This requirement will have minimal impact given the requirements for retaining records.

9. Providing program information to certification applicants. To comply with this requirement, certifying agents may need to modify existing standards and practices. The criteria for qualified personnel in the proposed rule may likely result in an increase in labor costs for some existing certifying agents and, initially, an increase in training costs. The amount of additional costs to these certifying agents would depend on the level of expertise among current certification agency staff, the extent to which certifying agents currently rely on volunteers, and the current costs of training certification staff.

Producers and Handlers. The regulation will impose administrative costs on producers and handlers for reporting and recordkeeping. The actual amount of the additional administrative costs that would be imposed by the final rule is expected to be different for those entities that would begin their activities only after the national program is implemented. Producers and handlers who currently are active in the organic industry already perform most of these administrative functions; therefore, the additional costs to them would depend upon the extent to which their current practices are different from the requirements of the final regulation. An estimate of the cost of compliance is the annual reporting and recordkeeping burden documented in the Paperwork Reduction Act of 1995 analysis.

The following list describes several proposed administrative requirements or optional submissions and the probable resources required for compliance.

1. Establish, implement, and update annually an organic production or handling plan. Organic plans are a standard feature in the organic industry and are required by certifying agents. Thus, producers and handlers who are already involved in organics, can rely on their current plan with revisions as needed to meet elements of the national program which are new to them or differ from their current practice. Although producers and handlers are generally aware of the goals of organic plans, current practice may fall short of the rigor that will be required by the national program. New producers and handlers will have higher costs because they will have to prepare a plan from scratch.

2. Maintain records pertaining to their organic operation for at least 5 years and allow authorized representatives of the Secretary, the applicable State program's governing State official, and the certifying agent access to records. Existing organic producers and handlers maintain records. New producers and handlers will have to develop records systems. Access is expected to be infrequent, will require little time of the certified entity, and will not require buildings or equipment other than what is required for storing records.

3. Notify the certifying agent as required, *e.g.*, when drift of a prohibited substance may have occurred, and complete a statement of compliance with the provisions of the NOP. Notifications are expected to be infrequent.

The total reporting burden includes creation and submission of documents. It covers the greatest amount of reporting burden that might occur for any single creation or submission of a document during any one of the first 3 years following program implementation, *i.e.,* 2000, 2001, and 2002. The total estimated reporting burden reflects the average burden for each reporting activity that might occur in 1 year of this 3-year period.

The total recordkeeping burden is the amount of time needed to store and maintain records. For the purpose of measuring the recordkeeping burden, the year 2002 is used

as the reporting year for which the largest number of records might be stored and maintained. The annual reporting and recordkeeping burdens on producers, handlers, and certifying agents is summarized in Table 4.

Certified operations. The annual burden on certified producers is estimated at 10 hours and $229. Certified handlers have an estimated burden of 50 hours valued at $1,189. Certifying agencies have an estimated burden of 700 hours valued at roughly $18,900.

Exempt operations. The burden on small producers and handlers, who choose to operate as exempt entities, is minimal, 0.5 hour of recordkeeping valued at $12. Exempt operations are exempt from reporting and recordkeeping burdens. However, small producers and handlers will have to invest some time and review documents to determine whether they qualify for exemption or exclusion. Exempt operations that produce multiingredient products containing less than 50 percent organic ingredient will be required to maintain records documenting the organic ingredients purchased. Since records of purchases would be part of the normal recordkeeping for handlers, we do not consider this a recordkeeping burden.

Based on the projected number of producers (17,150) and handlers (2,150), the total reporting and recordkeeping cost, which captures much of the compliance costs of the rule for this group, is $5,200,721. We request comment and/or data on the costs that may be imposed by the recordkeeping requirements of the proposed regulation. In addition, we request comment and/or data on the similarities and differences between the current practices of private and state programs and the proposed requirements.

Barriers to Entry—Importers of Organic Products

Currently, there are no federal restrictions on importing organic products to the United States in addition to those regulations applying to conventional products. However, some States require organic products sold within the State to be produced according the State's standards. Thus, some State programs are barriers to importers. The proposed regulation imposes a national standard that these importers must meet, and may incur some cost. We request comment and/or data on the extent of the organic food imports and the costs that may be imposed on these importers to meet the proposed standards.

Small Business Ramifications

USDA has proposed an 18-month period during which applicants for accreditation would not be billed for hourly services. The rationale for this transition period is to reduce the costs to certifying agents and, thus, increase the prospect that certifying agents, producers, and handlers will be able to afford to participate in the national program. The choice of 18 months is intended to provide sufficient time for parties desiring accreditation to submit their application and prepare for a site evaluation.

USDA has proposed to operate the program partially with appropriated funds, in effect sharing the cost of the program between taxpayers and the organic industry, to respond to public concerns regarding the effects of the proposed regulation on small businesses. Thousands of comments were received opposing the first proposal's fee provisions with most focusing on the substantial impact on small certifying agents.

Congress has expressed public policy concern with the impacts of regulations on small entities generally and with the impacts on the NOP regulations on small entities particularly. The Small Business Regulatory Enforcement Fairness Act of 1996 and the Regulatory Flexibility Act express Congressional concern regarding regulatory burden on small businesses. The Report from the Committee on Appropriations regarding the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Bill, 2000, includes the following language (U.S. Senate 1999):

''The Committee continues to recognize the importance of organic markets for small farmers and fishermen. The Committee expects the Secretary to construct a national organic program that takes into consideration the needs of small farmers and fishermen. * * * Furthermore, the Committee expects that of the funding available for the National Organic Program, necessary funds should be used to offset the initial costs of accreditation services, a subsidy necessary due to the lack of expertise in the Department of Agriculture in the areas of organic accreditation and insufficient data on the industry.''

Certifying agents applying for accreditation during the first 18 months following the final regulation will face lower direct costs than subsequent applicants. The cost for later applicants for accreditation will be higher because they will have to pay a $500 application fee and hourly charges for completing their site evaluation. The requirement for accreditation was established in the OFPA in 1990 and the proposed accreditation program was part of the 1997 proposal. Because in this proposal USDA is using appropriated funds to cover some of the costs of initial accreditation during the first 18 months of the program, certifying agents may set lower fees initially benefitting the producers and handlers who are certified during this period.

It is important to note that many small organic operations may not be certified currently. In California, for example, many small farms are registered, but not certified. Even if certifying agents pass on the cost savings of the 18 month period provision to applicants for certification, the cost of certification may be higher than the cost of registration. Hence, becoming a certified operation for small organic producers and handlers may be more costly than the current practices.

The costs imposed on small operations may be mitigated by a $5000 certification exemption to aid the smallest organic operations. However, these operations are still subject to other requirements of the proposed regulation. To the extent that these requirements differ from their current practices, complying with the national standards may be costly for exempt operations.

In addition, the certification exemption allowed under the proposed regulation includes limits on what an exempt operation may do. Without the certification, small organic operations may not display the USDA seal and may not use a certifying agent's seal. However, we are asking for public comment on whether exempt operations should have the marketing option of selling their products to handlers who can claim the products as organic in multi-ingredient products. If the consumers of organic food view the seals as important information tools on organic food, that is, if consumers of organic products insist on only certified organic products, the inability of small operations to display these seals may prevent them from realizing the price premiums associated with certified organic products.

Industry Composition

The imposition of the national standards may change the composition of the organic industry. Even with the small business exemptions, some small organic operations may choose to exit the industry and small organic operations may also be discouraged from entering the industry, resulting in a higher concentration of larger firms. On the other hand, it may be easier for small operations to comply with certain NOP standards, such as the livestock standards which prohibit confinement production systems and require 100 percent organic feed.

Conclusion

Ideally, the net benefits of the proposed rule would be estimated by employing a welfare analysis. In a welfare model, the quantitative assessment of benefits would be represented by net changes in consumer and producer surplus, *i.e.,* the difference between the willingness to pay (or firm cost structure in the case of producers) and the market price of organic food. These net changes would be estimated using information about the cost structure of the industry, the demand for organic food, and projected shifts in supply and demand resulting from the various factors discussed in the assessment. Although researchers have conducted numerous small-scale studies to determine consumers' willingness to pay for certain organic products (primarily fresh produce) and to identify reasons why conventional food buyers do not choose organic food products (Hammitt, 1990 and 1993; Jolly; Misra *et al.*; Park and Lohr; Weaver *et al.*), the available data are insufficient to support a quantitative assessment of this type. A 1998 review of studies of consumer demand for organic foods concluded, ''Attitudes, motives, and willingness to pay for organic products have been measured, but apparently no retail data have been available to estimate own-price, cross-price, and income elasticities.'' (Thompson 1998).

USDA has identified the entities that may be affected by the proposed rule and has analyzed the anticipated business-associated impacts on them of the rule based on our knowledge of the industry and limited data. We have drawn on industry studies, including studies completed since the 1997 proposed rule was published, and

information provided in comments on the 1997 proposed rule.

The primary benefits from implementation of the proposed rule are improved protection of buyers from a reduction in market confusion including protection from false and misleading claims, and improved access to markets from the reciprocity inherent in national standards. These benefits have not been quantified.

The costs of the proposed regulation are the direct costs for accreditation and the costs of complying with the specific standards in the proposal including the reporting and recordkeeping requirements. Other than accreditation fees, recordkeeping and reporting costs, we did not quantify the magnitude of the compliance costs or the costs of adhering to other provisions of this regulation. We have also not quantified the impact of all these provisions on small business but we believe there impact to be significant.

The direct costs of accreditation if all currently operating certifying agents become certified during the first 18 months following the final rule is approximately $75,000 to $100,000. After the first 18 months, the direct cost for accrediting would be approximately $150,000 to $238,000. During the 18-month period during which the NOP is not recovering the full costs of accreditation services, the organic industry is being subsidized with appropriated funded derived from the taxpayers. For existing certifying agents compliance costs include costs to become familiar with and adopt NOP standards. The aggregate cost of complying with reporting and recordkeeping requirements of the rule are approximately $6.8 million. Appropriated NOP funds used to operate the National Organic Program are transfers from the taxpayers to the participants in the organic sector.

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TABLE 1.—ORGANIC FOOD SALES

[$ billions]

Year	Sales	Sales (1998 dollars)
1990	1.000	1.25
1991	1.250	1.50
1992	1.540	1.79
1993	1.890	2.13
1994	2.310	2.54
1995	2.800	2.99
1996	3.500	3.64

Source: Mergentime and Emerich in *Natural Foods Merchandiser.*

TABLE 2A.—FIRST YEAR CERTIFICATION COSTS, FROM GRAF AND LOHR ANALYSIS

[In dollars]

Certifying agent	Small farm	Medium farm	Large farm	Super farm
CCOF	750	1,650	4,750	51,150
FVO	585	1,624	5,101	51,437
FOG	325	845	2,525	25,525
NOFA-VT	335	535	585	585
OTCO-In	608	1,766	2,517	11,518
OTCO-Out	568	1,498	2.352	11,353
OCIA-WI	315	1,590	6,090	75,090
OCIA-VA	258	320	495	1,745
TDA	90	155	200	515
WSDA	330	1,375	2,800	12,000
NC/SCS	n/a	n/a	n/a	n/a
Average cost	416	1,136	2,742	24,092

Notes:
CCOF—California Certified Organic Farmers
FVO—Farm Verified Organic
FOG—Florida Certified Organic Growers & Consumers
NOFA–VT—Northeast Organic Farming Association-Vermont
OTCO–In—Oregon Tilth Certified Organic, inside Oregon
OTCO–Out—Oregon Tilth Certified Organic, outside Oregon
OCIA–WI—Organic Crop Improvement Association, Wisconsin chapter
OCIA–VA—Organic Crop Improvement Association, Virginia chapter
TDA—Texas Department of Agriculture
WSDA—Washington State Department of Agriculture
NC/SCS—NutriClean/Scientific Certification Systems

Small farm—25 acres with annual sales of $30,000.
Medium farm—150 acres with annual sales of $200,000.
Large farm—500 acres with annual sales of $800,000.
Super farm—3,000 acres with annual sales of $10,000,000.

TABLE 2B.—SUBSEQUENT YEAR CERTIFICATION COSTS, FROM GRAF AND LOHR ANALYSIS

[In dollars]

Certifying agent	Small farm	Medium farm	Large farm	Super farm
CCOF	425	1,300	4,350	50,550
FVO	510	1,499	4,851	51,187
FOG	325	845	2,525	25,525
NOFA-VT	300	500	550	550
OTCO-In	454	1,611	2,362	11,363
OTCO-Out	424	1,353	2,207	11,208
OCIA-WI	290	1,565	6,065	75,065
OCIA-VA	233	295	470	1,720
TDA	90	155	200	515
WSDA	330	1,375	2,800	12,000
NC/SCS	700	900	1,000	2,000
Average cost	371	1,036	2,489	21,971

Notes:
CCOF—California Certified Organic Farmers
FVO—Farm Verified Organic
FOG—Florida Certified Organic Growers & Consumers
NOFA–VT—Northeast Organic Farming Association—Vermont
OTCO-In—Oregon Tilth Certified Organic, inside Oregon
OTCO-Out—Oregon Tilth Certified Organic, outside Oregon
OCIA–WI—Organic Crop Improvement Association, Wisconsin chapter
OCIA–VA—Organic Crop Improvement Association, Virginia chapter
TDA—Texas Department of Agriculture
WSDA—Washington State Department of Agriculture
NC/SCS—NutriClean/Scientific Certification Systems

Small farm—25 acres with annual sales of $30,000.
Medium farm—150 acres with annual sales of $200,000.
Large farm—500 acres with annual sales of $800,000.
Super farm—3,000 acres with annual sales of $10,000,000.

TABLE 3.—COSTS OF ACCREDITATION AND CERTIFICATION

Estimated costs to certifying agents during first 18 months	
Application fee [1]	$0
Site evaluation costs (two person team):.	
Per diem (3 to 5 days).	$480 to $800
Travel (domestic)	$1,000 to $1,200
Hourly charges (not billed).	$0
Miscellaneous charges (copying, phone, and similar costs).	$50
Total	$1,530 to $2,050
Estimated costs to certifying agents for initial accreditation after first 18 months	
Application fee [1]	$500
Site evaluation costs (one person):	
Per diem (3 to 5 days).	$240 to $400
Travel (domestic)	$500 to $600
Hourly charges (24 to 40 hours at $95/hour)).	$2,280 to $3,800
Miscellaneous charges (copying, phone, and similar costs).	$50
Total	$3,070 to $4,850
Annual review fees for certifying agents (2 to 8 hours at $95/hour) [2].	$190 to $760
Estimated costs to producers for certification [3]	
Certification fee (initial certification).	$800
Certification fee (renewals).	$730
Estimated costs to handlers for certification [4]	
Certification fee (initial certification).	$1,825
Certification fee (renewals).	$1,665

[1] Nonrefundable fee that will be applied to the applicant's fee for service account.

[2] Certifying agents are required to submit annual reports to USDA. Review of these reports is expected to range from 2 to 8 hours at an approximate rate of $95 per hour.

[3] Estimated certification fees are calculated from Graf and Lohr 1999 which, for a selection of certification agents, provides certification costs for four hypothetical farm sizes: (1) Small Farm (''Family Farm''): 25 acres, $30,000 annual sales, 5 hours to certify; (2) Medium Farm (''Cottage Industry''): 150 acres, $200,000 annual sales, 6 hours to certify; (3) Large Farm (''Commercial Farm''): 500 acres, $800,000 annual sales, 8 hours to certify; and (4) Super Farm: 3,000 acres, $10,000,000 annual sales, 16 hours to certify. Our estimated certification fees only include those charged for small and medium farms, because most organic producers fall into these categories as defined by Graf and Lohr. In the 1997 OFRF survey, 90 percent of respondents had gross organic farming income less than $250,000, with 82 percent less than $100,000.

The average current certification cost for most organic producers is about $775 for the first year of certification ($416 for small and $1,136 for medium farms) and about $705 for subsequent years ($371 for small and $1,036 for medium farms). Approximately $25 is added to cover the costs associated with the National Organic Program for an estimated first year certification fee of $800 and subsequent year certification fee of $730 for producers. Larger producers could expect higher fees.

[4] Because Graf and Lohr do not estimate certification fees for handlers, we estimate these fees by applying a ratio of handler-to-producer certification fees from the regulatory impact assessment from 1997. The ratio is 2.28 results in estimated fees of $1,825 and $1,665, respectively.

TABLE 4.—ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN

Type of respondent	Annual hours per respondent	Hourly rate	Annual cost
Certified producer	10	$24	$229
Exempt producer	0.5	24	12
Certified handler	50	24	1,189
Exempt handler	0.5	24	12
State certifying agency	696	27	18,778
Private or foreign certifying agency	700	27	18,893

Note: Estimates derived from Paperwork Reduction Act of 1995 analysis.

Appendix B.—Unfunded Mandates Reform Act

This proposed rule has been reviewed under the Unfunded Mandates Reform Act (P.L.104–4). The Act requires that agencies prepare a qualitative and quantitative assessment of the anticipated costs and benefits before proposing any rule that may result in annual expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million (adjusted annually for inflation) in any one year. According to the Act, the term *Federal mandate* means any provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, except a duty arising from participation in a voluntary Federal program.

The National Organic Foods Production Act (OFPA) of 1990 mandates that the Secretary develop a National Organic Program (NOP) to accredit eligible governing State officials or private persons as certifying agents who would certify producers or handlers of agricultural products that have been produced using organic methods as provided for in the OFPA. The OFPA also permits a governing State official to voluntarily establish a State organic certification program if the program is approved by the Secretary and meets the requirements of the OFPA. The OFPA does not require that States establish their own organic certification programs or that State, local or tribal governments, or the private sector, become accredited; therefore, the OFPA is not subject to the Unfunded Mandates Reform Act because it is a voluntary program.

Although USDA has determined that this proposed rule is not subject to the Unfunded Mandates Reform Act, USDA has sought to consider the rule's impact on various entities. USDA prepared a Regulatory Impact Assessment (RIA) that is discussed in the section titled ''Executive Order 12866'' (also attached as an appendix to this proposed regulation). The RIA consists of a statement of the need for the proposed action, an examination of alternative approaches, and an analysis of the benefits and costs. Much of the analysis is necessarily descriptive of the anticipated impacts of the proposed rule. Because basic market data on the prices and quantities of organic goods and services and the costs of organic production is limited, it is not possible to provide quantitative estimates of all benefits and costs of the proposed rule. The cost of fees and recordkeeping proposed by the USDA are quantified, but the anticipated benefits are not. Consequently, the analysis does not contain an estimate of net benefits.

The analysis employed in reaching a determination that this proposed rule is the least costly and least burdensome to the regulated parties is discussed in the sections titled ''The Regulatory Flexibility Act and the Effects on Small Businesses'' and ''Paperwork Reduction Act of 1995.'' The

proposed rule has been designed to be as consistent as possible with existing industry practices, while satisfying the specific requirements of the OFPA.

We have had numerous occasions to communicate with various entities during the development of the proposed rule; States, for example. Currently there are 27 States with some standards governing the production or handling of organic food and 13 States with organic certifying programs. Representatives of State governments have participated in public meetings with the NOSB, while the NOP staff has made presentations, received comments, and consulted with States and local and regional organic conferences, workshops, and trade shows. States have been actively involved in training sessions for organic inspectors; public hearings concerning standards for livestock products during 1994; a national Organic Certifiers meeting on July 21, 1995; a USDA-hosted meeting on February 26, 1996; a State certifiers meeting in February 1999; and an ISO 65 assessment training session for certifiers in April-May 1999. It is unknown at this time how many States, if any, might voluntarily establish their own organic certification programs pursuant to the OFPA and the regulations.

Appendix C.—The Regulatory Flexibility Act and the Effects on Small Businesses

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (Act) requires agencies to consider the economic impact of each proposed rule on small entities and evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities or erecting barriers that would restrict their ability to compete in the market. The purpose is to fit regulatory actions to the scale of businesses subject to the action.

In the first proposal published in December 1997, the initial Regulatory Flexibility Analysis (RFA), describing the impact of the National Organic Program and evaluating the alternatives, was written with guidance from the U.S. Small Business Administration (SBA). The RFA of this proposal was written following consideration of comments received in response to the first proposal, other information that has become available since the first proposal, the Regulatory Impact Assessment (RIA) that is discussed in the section entitled ''Executive Order 12866'' (also attached as an appendix to this proposal), and the information collection burden discussed in the section entitled ''Paperwork Reduction Act of 1995'' (PRA).

Reasons for Proposal

Currently, organic certification is voluntary and self-imposed. Members of organic industries across the U.S. have experienced numerous problems marketing their organically produced and handled agricultural products. Inconsistent and conflicting organic production standards may have been an obstacle to the effective marketing of organic products. There are currently 36 private and 13 State organic certification agencies (certifying agents) in the United States, each with its own standards and identifying marks.

Some existing private certifying agents are concerned that States might impose registration or licensing fees which would limit or prevent private certification activities in those States. Labeling problems have confronted manufacturers of multi ingredient organic food products containing ingredients certified by different certifying agents because reciprocity agreements have to be negotiated between certifying agents. Consumer confusion may exist because of the variety of seals, labels, and logos used by certifying agents and State programs. Also, there is no industry wide agreement on an accepted list of substances that should be permitted or prohibited for use in organic production and handling. Finally, a lack of national organic standards may inhibit organic producers and handlers in taking full advantage of international organic markets and may reduce consumer choices in the variety of organic products available in the marketplace.

To address these problems in the late 1980's, the organic industry attempted to establish a national voluntary organic certification program. At that time, the industry could not develop consensus on the standards that should be adopted, so Congress was petitioned by the Organic Trade Association to establish national standards for organic food and fiber products.

Recently, the Organic Trade Association published American Organic Standards, Guidelines for the Organic Industry (AOS). However, not all participants in the organic industry elected to participate in developing the AOS. Many certifying agents preferred to wait for implementation of the National standards, and some certifying agents disagree with portions of the AOS. For these reasons, the USDA is proposing a regulation for the National Organic Program.

Legal Basis for and Objectives of Proposal

In 1990, Congress enacted the Organic Foods Production Act of 1990, as amended (7 U.S.C. 6501 *et seq.*) (OFPA). The OFPA requires all agricultural products labeled as ''organically produced'' to originate from farms or handling operations certified by a State or private agency that has been accredited by USDA.

The purposes of the OFPA, set forth in section 2102 (7 U.S.C. 6501), are to: (1) Establish national standards governing the marketing of certain agricultural products as organically produced products; (2) assure consumers that organically produced products meet a consistent standard; and (3) facilitate commerce in fresh and processed food that is organically produced. The National Organic Program, which this rule proposes, is the result of the OFPA.

Applicability of Proposal

This proposal will directly affect three sectors of the organic industry: certifying agents, producers, and handlers. The OFPA provides for the collection of reasonable fees by USDA from producers, handlers, and certifying agents who participate in the national program. This proposal will impose direct costs on certifying agents in the form of a fee paid to the Federal Government for USDA accreditation. This proposal does not impose direct costs in the form of fees on producers and handlers. Certifying agents will establish a fee schedule for their certification services for producers and handlers. All three sectors are subject to indirect costs of compliance.

The term, ''certifying agent,'' means the chief executive officer of a State or, in the case of a State that provides for the statewide election of an official to be responsible solely for the administration of the agricultural operations of a State, such official and any person (including private entities) who is accredited by the Secretary as a certifying agent for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation. The term, ''producer,'' means a person who engages in the business of growing or producing food or feed. The term, ''handler,'' means any person engaged in the business of handling agricultural products, excluding final retailers of agricultural products that do not process agricultural products. Subpart B, section 205.101 in the proposed regulation provides information about exemptions and exclusions from certification.

According to the most complete data available to USDA's Agricultural Marketing Service (AMS), there are 49 certifying agents (36 private and 13 State) in the U.S. Over half of the private and State certifying agents certify both producers and handlers, while the others certify only producers. Over three-fourths of private and State certifying agents each certify fewer than 150 producers and 20 handlers. The number of certifying agents has remained fairly stable between 40 and 50 for some years, with entries and exits tending to offset each other. The National Organic Program staff anticipates that, in addition to the 49 domestic certifying agents, 10 foreign certifying agents may seek accreditation during the initial phase of the program.

It is more difficult to establish the number of organic producers. Organic farming was not distinguished from conventional agriculture in the 1997 Census of Agriculture. There are sources which give insight into the number of producers. The Organic Farming Research Foundation (OFRF), a California-based nonprofit organization, has conducted three nationwide surveys of certified organic producers from lists provided by cooperating certifying agents. The most recent survey applies to the 1997 production year.[1] OFRF sent its 1997 survey to 4,638 names and received 1,192 responses. Because OFRF did not obtain lists from all certifying organizations or their chapters (55 out of a total of 64 identified entities provided lists), their list count is likely an understatement of the number of certified organic producers. Note that the estimated number of organic producers includes only certified organic farms. Comments filed in response to the first proposal and studies indicate that the total number of organic farms is higher.

[1] Organic Farming Research Foundation. 1999. Final Results of the Third Biennial National Organic Farmers' Survey. Santa Cruz, CA.

Dunn has estimated the number of certified organic producers in the U.S.[2] [3] Dunn's 1995 work, a USDA study, estimated the number of certified producers at 4,060 in 1994; this estimate was used in the first proposal. Dunn's 1997 work reported 4,060 certified organic farms in 1994 and 4,856 in 1995.

Data collected by AMS indicate that the number of organic farmers increased about 12 percent per year and the number of organic handlers increased at about 11 percent per year during the period 1990 to 1994. OFRF survey efforts indicate that growth has continued, although it is not clear whether the growth rate has changed. Similarly, growth in retail sales, the addition of meat and poultry to organic production, and the possibility of increased exports suggest that the number of operations has continued to increase. Lacking an alternative estimate of the growth rate for the number of certified organic producers, we use the average growth rate of about 14 percent from Dunn's 1997 study. The true rate of growth could be higher or lower. Applying the 14-percent growth rate to Dunn's estimate of certified producers in 1995 gives an estimate of 8,200 organic producers for 1999.

An adjustment is needed to account for the number of producers who are practicing organic agriculture but who are not certified and who would be affected by this proposal. We assume that the number of organic but not certified producers in 1999 is about 4,000. This assumption is based on very limited information about the number of registered but not certified organic producers in California in 1995. Thus, the total number of organic producers used in assessing the impact of the rule is 12,176 in 1999.

Little information exists on the numbers of handlers and processors. USDA has estimated that there were 600 entities in this category in 1994. In California, there were 208 registered organic processed food firms in 1995 and 376 in 1999, a growth rate of 20 percent.[4] We assume that this growth rate is applicable to the U.S. and project 1,250 handlers in 1999. Again, the rate of growth could be higher or lower.

SBA Definitions of Small Entities

Small business size standards, Standard Industrial Code (SIC) (13 CFR part 121), are developed by an inter-agency group, published by the Office of Management and Budget, and used by SBA to identify small businesses. These standards represent the number of employees or annual receipts constituting the largest size that a for-profit enterprise (together with its affiliates) may be and remain eligible as a small business for various SBA and other Federal Government programs.

Small businesses in the agricultural services sector, such as certifying agents, include firms with average annual revenues of less than $5 million (SIC Division A Major Group 7). Producers with crop production (SIC Division A Major Group 1) and annual average revenues under $500,000 are small businesses. Producers with livestock or animal specialities are also considered small if annual average revenues are under $500,000 (SIC Division A Major Group 2), with the exception of custom beef cattle feedlots and chicken eggs, which are considered small if annual average revenues are under $1,500,000. In handling operations, a small business has fewer than 500 employees (SIC Division D Major Group 20).

Based on SBA's small business size standards for the agricultural services sector, it is not likely that many, if any, of the 49 domestic certifying agents have annual revenue greater than $5 million. Based on anecdotal information, only a few private, for-profit, certifying agents might be categorized as a large business. All private, non profit, and State certifying agents would be considered small by SBA's standards. Even if State certifying agents do not exceed the revenue threshold, they would not be considered to be small entities under the Act if the agents are an arm of state government. Only government jurisdictions with populations under 50,000 are considered to be small entities under section 601(5) of the Act.

Based on SBA's small business size standards for producers, it is likely that almost all organic producers would be considered small. The OFRF survey asked for the producer's total gross organic farming income during 1997. Only 35 (less than 3 percent) of the survey respondents reported gross income greater than $500,000, the SBA's cutoff between small and large businesses. Over 70 percent reported gross income of less than $50,000. The OFRF survey does caution readers about potential survey ''errors.'' It is particularly important to emphasize potential ''non-response error,'' that is, it is unknown if those who responded to the survey accurately represent the entire population of certified organic growers. Also, some producers combine organic and conventional production on the same operation, some with total sales that may exceed $500,000. However, it is likely that a majority of organic producers would be considered small.

It is also likely that the vast majority of handlers would be considered small, based on SBA's small business size standards for handlers. Based on informal conversations with organic certifying agents, about 25 (about 2 percent) of the estimated 1,250 organic handlers have more than 500 employees. This includes firms that handle or process both organic and conventional foods.

Costs of This Proposal

Several requirements to complete this RFA overlap with the RIA and the PRA. In order to avoid duplication, we combine some analyses as allowed in section 605(b) of the Act. This RFA provides information specific to small entities, while the RIA or PRA should be referred to for more detail. For example, the RFA requires an analysis of the proposed rule's costs to small entities. The RIA provides an analysis of the benefits and costs of this proposal. This RFA uses the RIA information to estimate the impact on small entities. Likewise, the RFA requires a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule. The PRA section estimates the reporting and recordkeeping (information collection) requirements that would be required by this proposal from individuals, businesses, other private institutions, and State and local governments. The burden of these requirements is measured in terms of the amount of time required of program participants and its cost. This RFA uses the PRA information to estimate the burden on small entities.

The estimated direct costs of accreditation for certifying agents and certification for producers and handlers under the first proposal issued in December 1997 and this proposal are shown in table 1 and discussed in the following sections. More specific details regarding these costs are found in the RIA.

TABLE 1.—ESTIMATED DIRECT COSTS OF ACCREDITATION AND CERTIFICATION

	First proposal		This proposal	
	1st year cost	2nd year cost	1st year cost	2nd year cost
Certifying Agents:				
Accreditation application fee	$640	$640	$0	$0
USDA administrative fee	2,000	2,000	0	0
Estimated site evaluation fee	3,500	[1]	1,530 to [3] 2,050	[1]
Annual review fee		[2]		[2] 190 to 760

[2] Dunn, Julie Anton. 1995. Organic Food and Fiber: An Analysis of 1994 Certified Production in the United States. U.S. Department of Agriculture, Agricultural Marketing Service.

[3] Dunn, Julie Anton. 1997. AgriSystems International Reports Certified Organic Production in the United States: Half a Decade of Growth. AgriSystems International: Wind Gap, PA.

[4] California Department of Health Services (DHS). 1995. Report on the Registration of California Organic Processed Food Firms. Sacramento: State of California. September 1999 figures obtained via personal communication with California DHS.

TABLE 1.—ESTIMATED DIRECT COSTS OF ACCREDITATION AND CERTIFICATION—Continued

	First proposal		This proposal	
	1st year cost	2nd year cost	1st year cost	2nd year cost
Total Fees	6,140	min. 2,640	min. 1,530	min. 190
Producers:				
Estimated certification fee [4]	413	413	800	730
USDA fee	50	50	0	0
Total Fees	463	463	800	730
Handlers:				
Estimated certification fee [4]	943	943	1,825	1,665
USDA fee	500	500	0	0
Total Fees	1,443	1,443	1,825	1,665

[1] Should certifying agents wish to become accredited in additional areas for which they have not been accredited previously, site evaluation fees will be charged.

[2] First proposal: Included in application and administrative fees. This proposal: Certifying agents are required to submit annual reports to USDA. Review of these reports is expected to range from 2 to 8 hours at an approximate rate of $95 per hour.

[3] During the first 18 months, site evaluation for initial accreditation will involve two reviewers. One reviewer would come from the Quality Systems Certification Program audit staff and would be familiar with ISO Guide 65 verification; the other reviewer would come from the National Organic Program staff and would be familiar with requirements of the organic program. The two would conduct the site evaluation jointly. We anticipate only one reviewer would be required after the 18-month transition period. The estimated site evaluation fee shown here includes per diem and travel costs for two reviewers plus miscellaneous charges related to accreditation. Site evaluations for smaller certifying agents are estimated to take 3 days, with 5 days for larger certifying agents.

For the first 18 months after implementation of the NOP, hourly rates will not be charged to certifying agents for accreditation. The estimated fee shown here includes only travel and per diem expenses. At an approximate rate of $95 per hour, hourly charges would add an estimated $4,560 to $7,600 for 2 reviewers during the first 18 months, and $2,280 to $3,800 for 1 reviewer after the first 18 months or for renewal of accreditation.

[4] First proposal: Estimated certification fees at that time were based on the average of fees charged by a representative group of certifying agents (private non-profit, private for-profit and a State agency).

This proposal: Estimated certification fees are calculated from a 1999 study by Graf and Lohr [5] which, for a selection of certification agents, provides certification costs for four hypothetical farm sizes: (1) Small Farm (''Family Farm''): 25 acres, $30,000 annual sales, 5 hours to certify; (2) Medium Farm (''Cottage Industry''): 150 acres, $200,000 annual sales, 6 hours to certify; (3) Large Farm (''Commercial Farm''): 500 acres, $800,000 annual sales, 8 hours to certify; and (4) Super Farm: 3,000 acres, $10,000,000 annual sales, 16 hours to certify. Our estimated certification fees only include those charged for small and medium farms, because most organic producers fall into these categories as defined by Graf and Lohr. In the 1997 OFRF survey, 90 percent of respondents had gross organic farming income less than $250,000, with 82 percent less than $100,000.

The average current certification cost for most organic producers is about $775 for the first year of certification ($416 for small and $1,136 for medium farms) and about $705 for subsequent years ($371 for small and $1,036 for medium farms). An estimated $25 is added to cover the costs associated with the National Organic Program for an estimated first year certification fee of $800 and subsequent year certification fee of $730 for producers. Larger producers could expect higher fees.

Because Graf and Lohr do not estimate certification fees for handlers, we estimate these fees by applying the December 1997 ratio of handler-to-producer certification fees, 2.28, to the estimated first and subsequent year certification fees for producers, resulting in fees of $1,825 and $1,665, respectively.

Direct Costs to Certifying Agents

We have identified 36 private certifying agents and 13 State programs providing certification. These 49 domestic entities are considered likely applicants during the first 12 months, as are an estimated 10 foreign certifying agents. An unknown number of new entrants to the certifying business may also apply. However, over the last 10 years, the number of certifying agents does not appear to have grown significantly, with the net effect of entries and exits maintaining a population of U.S.-based certifying agents at about 40 to 50. Of the 49 domestic certifying agents, based on information discussed previously, we estimate that the 36 private certifying agents are small.

In order to identify the certifying agents that might be expected to face more significant impacts as a result of this proposal, we analyzed the amount of revenues from certification fees received by certifying agents. Total certification fees collected by the certifying agents in 1994 ranged from about $2,500 to about $400,000, with most certifying agents clustered around the low or high end of this range. This amount is based on information collected by AMS from a sample of 16 private and State certifying agents for certification fees collected in 1994. To determine a cutoff point for small certifying agents, the State certifying agents were eliminated from the sample because these agents are an arm of State government and are not considered small entities. Of the remaining 11 private certifying agents, 6 (or 55 percent) collected less than $25,000 each in total certification fees, and the other 5 (45 percent) each collected more than $200,000. Based on this information and knowledge of the organic industry, for purposes of analyzing the cost of accreditation, we estimate that about 55 percent of private certifying agents are small with total annual revenue from certification of less than $25,000.

Certification fees probably do not constitute total income for most private certifying agents and, thus, are not a complete measure of economic size. Some certifying agents also earn revenue from a number of other sources, such as sale of publications, membership dues, training workshop and conference fees, farmers markets, grants, or donations.

Certifying agents will be assessed for the actual time and travel expenses necessary for the National Organic Program to perform accreditation services. The National Organic Program will charge the same hourly fees as are charged for the voluntary, fee-for-service program provided by AMS to certification bodies requesting conformity assessment to the International Organization for Standardization (ISO) Guide 65, ''General Requirements for Bodies Operating Product Certification Systems.'' We expect that at the time the National Organic Program's final rule is implemented, the fees will be approximately $95 per hour, with higher overtime and holiday rates. Certifying agents will be charged for travel, per diem, and other related costs associated with accreditation. Applicants for accreditation will be required to pay at the time of application a nonrefundable fee of $500, which is applied to the applicant's fee for services account. This fee is credited against

[5] Graf, Anita and Luanne Lohr. 1999. Analysis of certification program costs. Working Paper, Fund for Rural America project, Market Development for Organic Agriculture Projects, Grant No. 97–36200–5.

any subsequent costs of accreditation arising from the site evaluation.

During the first 18 months after the National Organic Program has been implemented, USDA will not impose hourly charges on certifying agents. The direct costs for certifying agents to obtain accreditation will be limited to per diem and transportation costs for the site evaluation, which is required every 5 years. We estimate these costs to be $1,530 for a small certifying agent and $2,050 for a larger certifying agent. These estimates are based on, for small and larger certifying agents, two reviewers with 3 and 5 days of per diem, $500 to $600 in transportation costs, and $50 in miscellaneous charges related to accreditation.[6] In subsequent years, certifying agents will be required to submit an annual report. Review of this report is anticipated to range from 2 to 8 hours at the ISO Guide 65 hourly rate. If certifying agents wish to become accredited in additional areas for which they were not accredited previously, site evaluation fees will be charged.

After the first 18 months of the National Organic Program, USDA estimates that the costs of a site evaluation visit, required every 5 years, could be $3,070 for small certifying agents and $4,850 for larger certifying agents. These estimates are based on, for small and larger certifying agents, one reviewer with 3 and 5 days of per diem, $500 to $600 in transportation costs, $50 in miscellaneous charges related to accreditation, and 24 to 40 hours (3 to 5 work days) at an anticipated maximum hourly rate under ISO Guide 65 of $95. Higher hourly rates will be charged for overtime and for work on holidays.

The cost of a site evaluation will vary with the cost of travel from the auditor's work station to the applicant's place of business. Auditors live in different parts of the country, and travel costs might be reduced when the distance traveled is reduced. The lowest cost airfare would be used whenever possible. In some cases, site evaluations might be grouped geographically in order to reduce travel expenses. The per diem rate will also vary depending on the rate set for the certifying agent's location as established by the General Services Administration.

Several factors will influence the amount of time needed to complete an accreditation audit. An operation in which documents are well organized and that has few nonconformities within the quality system will require less time for an audit than an organization in which documents are scattered and there are many nonconformities.[7] Similarly, in a follow up audit, operations that lack organization in their documents and that had a large number of nonconformities during previous audits will require a greater amount of time. The scope of a follow up audit is to verify the correction of nonconformities and to evaluate the effectiveness of the corrections. Certifying agents are able to control these cost factors by making certain that documents are well organized and by educating themselves about quality systems.

The complexity of an certification agency's organization also will affect the time needed to complete an audit. An agency with a central office in which all certification activities take place will require less time for document review and site evaluation than a chapter organization or a business structured so that responsibility for making certification decisions is delegated outside of the central office. In the latter cases, the auditors' document review would require additional time and site evaluation that would extend from the central office to one or more of the chapters or to the site to which the certification decision making is delegated.

Other factors determine the amount of time needed to complete an accreditation audit. For an agency with numerous clients, auditors may need to spend more time reviewing client files or examining business operations than they would have to spend for a smaller agency. Audit of an agency with a large number of processor clients may require an extended amount of time to follow audit trails, confirm that organic ingredients remain segregated from nonorganic ingredients, and establish that foreign-produced ingredients originate from approved entities. Finally, the complexity of the agricultural practices certified could influence the amount of time necessary to complete an accreditation audit. An agency whose certification covers only producers who grow and harvest one crop per field per year, such as wheat or sugar beets, could quickly be audited. An agency whose producers grow several different crops per field per year or an agency that certifies producers of crops and livestock as well as handlers would require a greater amount of time.

All of these factors will impact both small and large certifying agents. A small certifying agent could be assumed to have a less complex organization or have fewer clients, and, thus, potentially less time would be necessary for review. However, other factors, such as the degree of paperwork organization or the complexity of the agricultural practices certified, may influence the time needed for review for any size of business.

Comments from the first proposal indicate that the average accreditation cost for a certifying agent may range from $3,000 to $5,000 per year for small to medium-size certifying agents to less than $10,000 per year for the largest certifying agents.

Currently, relatively few certifying agents have third party accreditation because accreditation of certifying agents is voluntary. Fetter reports that in a sample of 18 certification programs, selected to include six large, private programs, six smaller private programs, and six State programs, four programs were accredited and one had accreditation pending.[8] All of these were large private certifying agents. Three of the certifying agents identified by Fetter as accredited requested ISO Guide 65 assessments by USDA and have been approved for selling organic products into the international market. Those certifying agents currently accredited by third parties will likely pay less for USDA accreditation because their documents are organized and they have fewer nonconformities.

Those certifying agents who have been operating without third party accreditation will face new costs—the costs of accreditation—under this proposal. Compared to the direct costs of $3,000 to $5,000 per year indicated by the commenters, the direct costs of USDA accreditation will be smaller, with estimated site evaluation fees (covering 5 years) ranging from $3,070 to $4,850 for the first year and an annual review fee ranging from $190 to $760 for subsequent years. Furthermore, the direct costs would be substantially less for those certifying agents obtaining accreditation during the first 18 months while USDA does not impose an application fee or hourly charges and limits direct costs to travel and per diem costs.

It is expected that all certifying agents will set their fee schedule to recover costs for their certification services, including the costs of accreditation. The larger the number of clients per certifying agent, the more fixed costs can be spread out. It is possible, however, that small certifying agents could be significantly impacted by this proposal and may not be able to continue in business from a financial standpoint.

Projected Reporting, Recordkeeping, and Other Compliance Requirements of Certifying Agents

In addition to the direct costs, the regulation will impose administrative costs on certifying agents for reporting, recordkeeping, residue testing, and other compliance requirements. The actual amount of the additional administrative costs that would be imposed by the final rule is expected to be different for those entities that would begin their activities only after the national program is implemented. Certifying agents that currently are active in the organic industry already perform most of these administrative functions; therefore, the additional costs to them would depend upon the extent to which their current practices are different from the requirements of the final regulation. Projected reporting, recordkeeping, and other compliance requirements of certifying agents are discussed in greater detail in the PRA and the RIA.

[6] During the first 18 months, site evaluation for initial accreditation will be conducted jointly by two reviewers. Two reviewers offers: (1) anticipated faster turn-around; (2) different areas of expertise—one reviewer would come from the Quality Systems Certification Program audit staff and would be familiar with ISO Guide 65 verification, while the other reviewer would come from the National Organic Program staff and would be familiar with the requirements of the program; and (3) consistency with the organic industry's desire to have reviewers from both areas of expertise during ISO Guide 65 assessments. AMS would consider sending one reviewer, rather than two, for the site evaluation of small certification agents if an individual possessing both reviewing skill and knowledged of the NOP is available. We anticipate only one reviewer would be required after the 18-month transition period.

[7] Adequate advance notice will be given to certifying agents to allow them the opportunity to organize their records prior to the audit and minimize the costs of accreditation.

[8] Fetter, Robert T. 1999. Economic Impacts of Alternative Scenarios of Organic Products Regulation. Senior Honors Thesis. University of Massachusetts, Amhearst, MA.

Costs to Producers and Handlers

Under this proposal, USDA will not impose any direct fees on producers and handlers. Certifying agents will establish a fee schedule for their certification services that will be filed with the Secretary and posted in a place accessible to the public. Certifying agents will provide all persons inquiring about the application process with a copy of their fees. The certifying agent may only charge those fees that it has filed with the Secretary. Furthermore, the certifying agent will provide each applicant with an estimate of the total cost of certification and an estimate of the annual costs of updating the certification. However, the certifying agent may require applicants to pay at the time of application a nonrefundable fee of no more than $250 which must be applied to the applicant's fee for services account.

Currently, supply and demand for certification services determine the fees charged in most areas. Some States charge minimal fees for certification and instead subsidize operating costs from general revenues. According to separate studies by Fetter, and Graf and Lohr, the majority of certifying agents structure their fee schedules on a sliding scale based on a measure of size, usually represented by the client's gross sales of organic products but sometimes based on the acres operated. Some certifying agents charge an hourly rate for inspection and audit services.

Graf and Lohr have applied fee schedules provided by nine certifying agents to four hypothetical farms—small, medium, large, and a super farm. They define ''small'' as a 25-acre farm with annual sales of $30,000 that would take 5 hours to certify. Note that our alternative definition of small (under $5,000) is different. Table 2 shows the total first-year cost and subsequent-year cost for certification for small farms; the RIA shows detail on other size farms.

TABLE 2.—CERTIFICATION COSTS AMONG A SELECTION OF CERTIFYING AGENTS

[For a small farm: 25 acres, $30,000 annual sales, 5 hours to certify]

Certifying agent	Total cost to certify in first year	Total cost to certify in subsequent years
California Certified Organic Farmers	$750	$425
Farm Verified Organic	585	510
Florida Certified Organic Growers and Consumers	325	325
Northeast Organic Farming Association—Vermont	335	300
Oregon Tilth Certified Organic:		
—Inside Oregon	608	454
—Outside Oregon	568	424
Organic Crop Improvement Association:		
—Wisconsin chapter	315	290
—Virginia chapter	258	233
Texas Department of Agriculture	90	90
Washington State Department of Agriculture	330	330
NutriClean/Scientific Certification Systems	n/a	700
Average cost	416	371

The Texas Department of Agriculture program is the low-cost certifying agent. The high-cost certifying agent differs from first-year to subsequent-year certification. Graf and Lohr's study indicates that even small farms require significant time for the certification process and this time does not increase proportionately as farm size increases. None of these certification programs mentions costs for residue testing which the National Organic Program will require in the form of preharvest testing when there is reason to believe that agricultural products have come in contact with prohibited substances. Preharvest testing is expected to be infrequent. Certifiers will recover the costs of preharvest testing through explicit charges to the producer whose crop is tested, or through a generally higher fee structure that spreads the expected costs of tests over all clients.

Certifying agents will continue to set their own fee schedules under the organic program. Certifying agents will have to set fees to cover any net additional costs of doing business under the National Organic Program. Accreditation and administrative costs are incremental costs to existing certifying agents' businesses. Some certifying agents might drop their third party accreditation saving perhaps $3,000 to $5,000 per year, but most certifying agents are not currently paying for accreditation.

This proposal imposes no requirements that would cause certifying agents that are presently using a sliding scale type fee schedule to abandon their current fee system. Certifying agents could recover their net additional costs by increasing their flat fee component, their incremental charges, or both. Because accreditations are renewed only every 5 years, certifying agents will have 5 years to recover their net new costs. Certifying agents who become accredited during the first year of the program would have fewer direct costs to recover, because they will not be charged the application fee and hourly charges for accreditation services.

The OFPA established a small farmer exemption from certification and submission of organic plans for small producers with a maximum of $5,000 in gross sales of organic products. For purposes of the exemption, the OFPA defines a ''small farmer'' as those who sell no more than $5,000 annually in value of agricultural products. In this proposal, we have clarified that the exemption applies to those who sell no more than $5,000 annually in value of organic products.[9] According to the OFRF survey, 27 percent of currently certified farms that responded to the survey would fall under this exemption. This percentage does not take into account those organic farms that are not currently certified by a private or State certifying agent. A study of California organic farms found that, of all organic farms[10] in 1994–95, about 66 percent have revenues less than $10,000.[11] If California is representative and the distribution within the sub-$10,000 category is uniform, then a third of the farms would be classified as small for purposes of the statutory exemption with annual sales less than $5,000. Based on the California study and the OFRF survey results, we estimate that between 25 and 33 percent of organic producers are small and would qualify for exemption from the certification requirements.

We have estimated that there are between 3,000 and 4,000 small organic producers that will be exempt from certification. These producers would be required to comply with

[9] We asked for comments on the first proposal as to whether the current statutory limitation of $5,000 for exemption from certification should be raised to $10,000 or to another amount and why such an increased monetary limitation for exemption from certification would be appropriate. Few commenters offered recommendations as to a maximum sales volume to exempt producers. Amounts ranged from $2,000 to $50,000, with a few suggesting $10,000 and $20,000 exemptions. These proposed exemption levels and justifications in comments received are not sufficiently consistent enough for us to recommend changing the statute requirement of the $5,000 maximum sales volume exemption.

[10] California State law requires organic farmers to register with the State. Certification is voluntary at the current time.

[11] Klonsky, Karen, and Laura Tourte. 1998. Statistical Review of California's Organic Agriculture, 1992–95. Report prepared for the California Department of Food and Agriculture Organic Program. Cooperative Extension, Department of Agricultural Economics, University of California, Davis.

the production and handling standards and labeling requirements set forth under the National Organic Program. We anticipate that this exemption will be used primarily by small market gardeners and hobbyists who sell produce and other agricultural products at farmers markets and roadside stands to consumers within their communities. By being exempt from certification, the current certification costs (table 2) estimated at an average $416 for the first year and an average $370 for subsequent years have been eliminated.

Exempt producers will be allowed to market their products as organically produced without being certified by a certifying agent. Products marketed by exempt producers cannot be represented as certified organic or display the USDA organic seal. Products produced or handled on an exempt operation may be identified as organic ingredients in a multiingredient product produced by the exempt operation, but they may not be identified as organic in a product processed by others. These limitations may discourage some small producers from seeking exemption, who instead may choose to become certified. In this case, the costs of certification would apply. The value associated with having organic certification may outweigh the costs of certification.

Those currently receiving voluntary certification will likely see a modest increase as the certifying agent passes on its cost incurred under the National Organic Program. Those not currently receiving certification and producing over $5,000 annually in organic products will be required to become certified, and they will incur the actual costs of certification.

We have estimated that there about 98 percent of the 1,250 organic handlers are small. A handling operation or a portion of a handling operation is exempt from certification requirements if it has annual gross sales of less than $5,000; is a retail food establishment that handles organically produced agricultural products but does not process them; handles agricultural products that contain less than 50 percent organic ingredients by weight of finished product; or does not use the word, ''organic,'' on any package panel other than the information panel if the agricultural product contains at least 50 percent organic ingredients by weight of finished product. A handling operation or specific portion of a handling operation is excluded from certification if it handles packaged certified organic products that were enclosed in their packages or containers prior to being acquired and remain in the same package and are not otherwise processed by the handler, or it is a retail food establishment that processes or prepares on its own premises raw and ready-to-eat food from certified organic products. Otherwise, to be certified organic, handlers must pay for certification fees estimated at $1,800 per year and fulfill recordkeeping requirements.

In order to identify handlers that might be expected to face more significant impacts as a result of this proposal, we attempted to analyze handlers' revenue from organic sales. Sales data indicate that gross sales of organic production total less than $500,000 per firm for most certified handlers. Information from the California DHS, where State law requires organic processors to register, gives some indication of the size distribution. Of the 208 processors registered with the State in 1995, 80 firms (38 percent) reported gross sales of $50,000 or less, and 50 firms (24 percent) had gross sales exceeding $500,000. In mid-September 1999, 376 processors were registered with the State, with 107 firms (28 percent) reporting gross sales of $50,000 or less and 112 firms (30 percent) reporting gross sales exceeding $500,000. We use this California information to estimate that 25 to 30 percent of handlers have gross sales of $50,000 or less and could be significantly impacted by this proposal. Information needed to estimate the number of exempt or excluded handlers is not available.

Some States, such as Texas and Washington, charge producers and handlers nominal fees for certification, and it is possible that more States might provide certification services as the National Organic Program is implemented. Other States, such as Minnesota, have cost-share programs to help offset costs for organic producers.

Projected Reporting, Recordkeeping, and Other Compliance Requirements for Producers and Handlers

In addition to the fees for certification, the regulation will impose administrative costs on producers and handlers for reporting, recordkeeping, residue testing, and other compliance requirements. The actual amount of the additional administrative costs that would be imposed by the final rule is expected to be different for those entities that would begin their activities only after the national program is implemented. Producers and handlers who currently are active in the organic industry already perform most of these administrative functions; therefore, the additional costs to them would depend upon the extent to which their current practices are different from the requirements of the final regulation. Projected reporting, recordkeeping, and other compliance requirements of certifying agents are discussed in greater detail in the PRA and the RIA.

Federal Rules

No other burdens are expected to fall upon the organic industry as a result of overlapping Federal rules. This proposed regulation would not duplicate, overlap or conflict with any existing Federal rules. In preparing this proposed regulation, AMS consulted other Federal agencies such as the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA), the Bureau of Alcohol, Tobacco and Firearms (ATF), and the USDA's Food Safety and Inspection Service (FSIS) to ensure that this proposed regulation would complement existing regulations.

Alternatives to This Proposal

We believe that our proposed regulation could have a significant impact on a substantial number of small businesses. However, we have considered several options with the intention of mitigating negative economic impacts of the fees. We did not consider alternatives, beyond the previously discussed exemptions, that would mitigate the indirect costs of this rule on small entities. The following options were considered by AMS prior to and during the development of this proposal:

Option 1: First Proposal Issued December 1997

The first proposal suggested a fee for direct services model which combined a fixed fee for all farmers, handlers, and certifying agents, with a variable fee for certain direct services provided by AMS in the accreditation of certifying agents.

Table 1 includes estimated direct costs of accreditation and certification for the first proposal and this proposal; the fees in this proposal are discussed in prior sections of this RFA. The fee provisions in this proposal have been changed significantly, due in large part to comments received regarding the first proposal.

In overall design, the first proposal is similar to this proposal. USDA would accredit certifying agents who would in turn certify producers and handlers. USDA proposed to charge certifying agents a $640 application fee, costs for a site evaluation fee that were estimated at $3,500, and a $2,000 administrative fee. Producers would be charged a $50 USDA fee in addition to the fees imposed by the certifying agent. Handlers would be charged a $500 USDA fee on top of the certifying agent's fees. The fee structure was intended to recover the full costs of operating the National Organic Program, which was estimated at $1 million annually. Producers with $5,000 or less in annual gross sales of agricultural products and handlers with annual gross sales of less than $5,000 were exempt from certification as provided for in the OFPA.

The OFPA permitted but did not obligate USDA to charge fees. The first proposal sought to set fees to recover the full costs of the National Organic Program. Public comment generally stressed that the fees were too high. Most certifying agents have operated without third party accreditation. Thus, USDA fees were a substantial increase in the costs of doing business for most certifiers. For producers the direct fee of $50 was a 12 percent increase over the estimated average fee paid for certification. For certifying agents the $500 fee would have been a 53 percent increase over estimated average certification fees. To the extent the program raised certifying agent costs, these costs would have been passed through to producers and handlers. Commenters stated that many certifying agents had few clients and to pass through the estimated direct costs of accreditation ($6,140) would make the costs of certification higher than producers could afford.

Comments were received opposing fee provisions in the first proposal. Most of these commenters expressed the belief that the proposed fees would price small farmers, handlers, and certifying agents out of the organic industry. Many commenters stated that the proposed fees favored large farming operations and suggested a sliding scale fee system, rather than the flat fee system discussed in the first proposal, to

accommodate the economic needs of small farmers, handlers, and certifying agents. Most suggested that small farmers and processors be exempt from the payment of fees. A more comprehensive review of the comments appears in subpart G entitled ''Administrative'' of this proposal.

Additional comments were received that specifically referred to the section entitled ''Regulatory Flexibility Act and Effects on Small Businesses'' in the first proposal. Most of these commenters expressed the belief that costs were understated and benefits were overstated. Commenters thought the proposed fees were excessive, unacceptable, and burdensome and would price many small farmers, handlers, and certifying agents out of the organic industry. Some thought that this appeared to be the actual intent of the first proposal. They also supported a sliding scale fee system, rather than the flat fee system originally proposed. Some stated that the $5,000 exemption level was much too low. Producers objected to having to pay the certification and inspection fees prior to knowing whether they would actually set a crop, if the crop would grow, or what percentage of the crop might be harvested.

Compared to this proposal, the first proposal would have been more costly to the organic industry in terms of direct costs for accreditation, and to producers and handlers in terms direct fees and the costs which certifying agents would have attempted to pass through. However, the current proposal has not set fees at levels to recover all program costs and during an 18 month transition period will not require application fees or charge for hourly services. Costs that are not recovered through fees will be covered by appropriated funds, meaning that taxpayers at large will bear some of the costs of the proposed organic program. Thus, in terms of fees and other direct costs, the first proposal was more burdensome on the organic industry.

The first proposal also contained new information collection requirements, a description of those requirements, and an estimate of the annual economic burden on the organic industry. We received responses specifically referring to the information collection requirements of the first proposal. Among the comments made were that the requirements would be unaffordable by small businesses and that paperwork requirements should be kept small, simple, and to a bare minimum, especially for small producers.

Recordkeeping requirements for certifying agents in the first proposal that required certifying agents to maintain all records concerning their activities for 10 years have been changed to reduce the burden. Commenters expressed concern that this requirement was excessive and unnecessary. We agree and are instead proposing that there be three categories of records with retention periods: (1) Records created by certifying agents regarding applicants for certification and certified operations to be maintained 10 years, consistent with OFPA requirement for maintaining all records concerning activities of certifying agents; (2) records obtained from applicants for certification and certified operations to be maintained 5 years, the same as OFPA requirement for the retention of records by certified operations; and (3) other records created or received by certifying agents to be maintained for five years.

Option 2: Fee per Certification Model

A fee per certification model was considered but not used. This model would have based accreditation fees on the numbers of farmers and handlers certified. Specifically, certifying agents would pay a fee to USDA for each certification performed. The smallest one-half of certifying agents, who certify about 10 percent of organic operations, would pay about 10 percent of the estimated costs associated with accreditation. The largest 10 percent of certifying agents, who certify about 45 percent of organic operations, would pay about 45 percent of accreditation costs. The remaining 40 percent of certifying agents in the middle would pay 45 percent of the costs. The fee per certification would be fixed, regardless of the size of the operation being certified. This feature has the potential to create a barrier to market access for the smaller operations. Certifying agents who charge farmers and handlers for certification based on size and scope of the operation would maximize their profits by certifying only the larger farmers and handlers from whom they would realize a higher return. If certifying agents were to discriminate in this manner in favor of larger operations, smaller farmers and handlers would find the certification services available to them to be relatively limited and possibly more expensive than under the fee for direct services model that includes a variable fee for site visits. A fixed fee per certification also would not take into account, in the distribution of costs, the large difference in size between processors and primary producers. Processors are generally much larger than primary producers in terms of both total output and total revenue.

Option 3: Exemption of Small Certifying Agents From Accreditation

Small certifying agents (those with annual revenues of $25,000 or less) may not have the resources to meet all of the requirements of the rule, such as accreditation fees, administrative and personnel requirements, and conflict of interest restrictions, based on their current structure and revenues. Therefore, exempting the smallest certifying agents from the accreditation requirement, similar to small producers being exempt from certification requirements, could mitigate any potential adverse impact of the rule on this group. This option, however, would require a legislative amendment to the OFPA.

The exemption of the smaller certifying agents from accreditation would carry with it many of the limitations resulting from the absence of Federal oversight. International trade would likely be limited to products certified by accredited certifying agents. Protecting domestic consumers from inappropriate organic claims on the labels of products certified by exempt certifying agents would likely lead to greater confusion over labels in the marketplace. Federal enforcement agencies such as the FDA, the ATF, and FSIS might wish to distinguish accredited certifying agents from those certifying agents who are exempt, perhaps by requiring accredited certifying agents' clients to include the USDA seal on their product labels.

One of the purposes of the OFPA described in the statute is to assure consumers that organically produced products meet a consistent standard. Without Federal oversight of certifying agents, it would be difficult to ensure that one national standard of production and handling for agricultural products would be employed. The result could be the continuation of reciprocity agreements between small, exempt certifying agents and large accredited ones. This could result in a cost for small entities, while providing less benefit to certified producers and handlers than would be provided them by accreditation of all certifying agents.

We request comments from all interested parties, particularly small businesses, as to whether a small certifier exemption would be beneficial or practical given the constraints explained in this option.

Option 4: This Proposal

The new proposal includes provisions that will mitigate the impact of the National Organic Program, especially for small businesses. Fixed administration fees for producers, handlers and certification agents have been eliminated. The fixed application fee for accreditation also has been eliminated. This will positively affect small producers and handlers because fixed fees expend a larger percentage of a smaller operation's total revenue.

As indicated earlier in this discussion, certifying agent evaluation fees would reflect actual costs for the time and travel required to do the evaluation. It is anticipated that smaller certification agents would benefit because they are small and less complex than larger certification agents. The proposed accreditation costs would be proportional to the actual time required to perform the service. Several small operations could be grouped by area to reduce travel expenses of the evaluators.

The new labeling requirements that allow the use of a certification agent's seal on the principal display panel and on the information panel of processed product labels also may benefit small operations. Certification agents that have an established consumer base may benefit by displaying their identifying seal. Small certification agents, whose clients more likely produce ingredients for processed products, could also be identified and thus share in this benefit. Certification agents also may wish to expand their operation by offering verification of truthful labeling claims which will be allowed under this proposal.

This proposal has three elements of flexibility that are advantageous to small entities: performance-based production and handling standards and certifying agent requirements; production and handling standards that contain a range of allowable practices; and temporary variances.

The standards in this proposal are performance standards based on the results of a management system, rather than prescriptive or design standards that prescribe specific technology or a precise

procedure for compliance. Performance standards allow for flexibility in compliance, which is especially important to organic farmers, handlers and certifying agents with limited resources. Performance standards promote innovation and the development of new technologies which would help the industry as a whole be more efficient. Finally, they provide a less costly means of compliance than design standards. Small entities, in particular, benefit because compliance with performance standards allows for the adaptation of existing systems without costly capital investment.

This proposal allows for flexibility by providing a range of production and handling practices that can be used to maintain the organic integrity of the operation. The use of an allowed practice or substance must be described in the organic plan as a record for consideration by the certifying agent during a certification review. The proposal provides temporary variances in the case of natural disasters, damage from wind, floods and the like, and for research trials. The benefit of variances is that a producer or handler would not lose its investment in an organic operation because of certain conditions that are beyond the producer or handler's control. Variances also enhance performance standards by allowing additional innovation and experimentation. This is especially important to producers and handlers who depend on the organic price premium.

Conclusion

USDA has identified the entities that may be affected by this proposal and has analyzed the anticipated impacts of the proposal on them based on our knowledge of the industry and limited data. We have drawn on industry studies, including studies completed since the first proposal was published in 1997, as well as information provided in comments on the first proposal. However, we lack data to thoroughly and quantitatively describe the existing organic industry and quantitatively analyze the effects of this proposal.

Whether using SBA's small business size standards by SIC or the alternative definitions created for this analysis, we believe that this proposal could have a significant impact on a substantial number of small businesses. Even with the flexibility proposed in the regulation and the expanded market opportunities brought about by implementation of the National Organic Program, some small certifying agents may choose not to become accredited to provide certifying services, and some small producers and handlers may choose not to continue being certified organic because the proposed fees would be passed down to them as certification fees. We invite comments about the expected benefits and costs to small entities as presented in this analysis. Specifically, we invite comments regarding the impact of the proposed National Organic Program on small certifying agents, producers, and handlers so that we might uncover potential unintended negative impacts on small entities.

The proposed structure of user fees outlined in this proposal attempts to minimize the burden of administrative costs which will be assumed by small-scale organic certifying agents and the producers and handlers who use these certification services. Certifying agents already performing organic certification services in a State or private capacity on the date that the proposed national accreditation program for organic certification is implemented will not be required to pay the administrative costs of applying for initial national accreditation status; the administrative costs involved in evaluating the accreditation status of these agents will be absorbed by a portion of the National Organic Program operating budget appropriated by Congress. They will be required to pay travel expenses for the reviewers. New applicants seeking national accreditation for organic certification services will be charged a fee to cover the administrative costs of evaluating their suitability for accreditation, their application fees will be structured to reflect the actual hourly costs of having an AMS evaluator conduct a site visit (including travel time to and from the evaluator's duty station and per diem travel expenses). The departures from the first proposal—which would have imposed a uniform flat fee on all applicants for national accreditation—along with the adoption of an application fee structure which attempts to relate the imposition of fees to the actual costs involved in administering the national accreditation program, should contribute to a less burdensome and more equitable distribution of administrative costs across all segments of the organic industry.

Appendix D—Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506 and 3507) is designed to minimize the burden of reporting and recordkeeping (information collection requirements) required by Federal regulations on individuals, businesses, other private institutions, and State and local governments. The burden is an estimate of the amount of time and the cost required of program participants to fulfill the information collection requirements.

Information collection requirements must have Office of Management and Budget (OMB) review and approval before they can become effective. They must also be made available for public comment, and the comments become part of the public record. This notice requests comments on the proposed information collection requirements of this proposal.

Title: National Organic Program.

OMB Number: New collection.

Expiration Date of Approval: Three years from date of approval.

Type of Request: New.

Abstract: The Organic Foods Production Act (OFPA) of 1990 mandates that the Secretary develop a National Organic Program (NOP) to accredit eligible State program's governing State officials or private persons as certifying agents who would certify producers or handlers of agricultural products that have been produced using organic methods as provided for in the OFPA. This regulation is proposed: (1) To establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organically produced products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced.

The OFPA was requested by the organic community because of problems encountered in the marketing of organic products. First, there was fraudulent use of the term, ''organic,'' resulting in the mislabeling of products, caused in part because many consumers are willing to pay premium prices for organic foods. Second, there was a lack of uniformity in standards defining organic production, causing trade disruption and confusion among buyers, sellers, and users of organic products. Third, there was constraint on market growth due to the prohibition on labeling meat and poultry products as organic. After implementation of the NOP, any agricultural product labeled ''organic'' will have to be from a production or handling operation that is certified by a certifying agent who is accredited by the U.S. Department of Agriculture (USDA).

A proposed rule to implement the OFPA was published in December 1997. It contained information collection requirements, an estimate of the annual economic burden on the organic industry, and a request for comments about the burden. A few general comments were received about the burden and they were considered when this proposal was prepared. Also taken into account was other information about existing industry practices and documents, the Initial Regulatory Flexibility Analysis that is discussed in the section entitled ''Regulatory Flexibility Act and the Effects on Small Businesses,'' and the Regulatory Impact Assessment (RIA) that is discussed in the section entitled ''Executive Order 12866.'' The numbers of entities affected by this proposal are estimated in the RIA. The RIA is attached as an appendix to this proposal.

Reporting and recordkeeping are essential to the integrity of the organic certification system. They create a paper trail that is a critical element in carrying out the mandate of the OFPA. They serve the Agency mission, program objectives, and management needs by providing information on the efficiency and effectiveness of the program. The information affects decisions because it is the basis for evaluating compliance with the OFPA and the regulations, for administering the program, for management decisions and planning, and for establishing the cost of the program. It supports administrative and regulatory actions in response to noncompliance with the OFPA and the regulations.

In general, the information collected will be used by USDA, State program's governing State officials, and certifying agents. It will be created and submitted by State and foreign program officials, peer review panel members, accredited certifying agents, organic inspectors, certified organic producers and handlers, those seeking accreditation or certification, and parties interested in changing the National List. Additionally, it will necessitate that all of these entities have procedures and space for recordkeeping.

The burden on each entity is discussed below. One major estimate made about each entity is the number of entities likely to participate in the NOP. The information collection burden attempts to incorporate the burden that will be in addition to the burden that current organic marketers have with the burden required of new entrants into the field.

USDA. USDA will be the accrediting authority. USDA will accredit domestic and foreign certifying agents who will certify domestic and foreign organic producers and handlers, using information from the agents documenting their business operations and program expertise. USDA will also permit State program's governing State officials to establish their own organic certification programs after the programs are approved by the Secretary, using information from the States documenting their ability to operate such programs and showing that such programs meet the requirements of the OFPA and the regulations.

States. State program's governing State officials may operate their own organic certification programs. State officials will obtain the Secretary's approval of their programs by submitting information to USDA documenting their ability to operate such programs and showing that such programs meet the requirements of the OFPA and the regulations. More than half of the States currently have some standards governing the production, handling, or labeling of organic food and 13 States have organic certifying programs. These programs require reporting and recordkeeping burdens similar to those required by the NOP. It is unknown at this time how many States, if any, will establish their own organic certification programs pursuant to the OFPA and the regulations. *Estimates:* 13 States will operate their own certification programs. The annual burden for each State will be an average of 52.308 hours or if calculated at a rate of $27 per hour, (rounded up to the next dollar), it would be $1,413.

Peer review panels. Panels will assist the Agricultural Marketing Service (AMS) Administrator in evaluating applicants for accreditation as certifying agents. Individuals will apply to USDA for membership in a pool from which the panels are selected, submitting to USDA information documenting their qualifications to conduct such reviews. This will be a new burden for those serving on the panels. *Estimates*: 40 people will participate in peer review panels. The annual burden for each panel member will be an average of 10 hours or if calculated at and $27 per hour, it would be $270.

Certifying agents. Certifying agents may be State program's governing State officials, private entities, or foreign entities who are accredited by USDA to certify domestic and foreign producers and handlers as organic in accordance with the OFPA and the regulations. Each entity wanting to be an agent will seek accreditation from USDA, submitting information documenting its business operations and program expertise. Accredited agents will determine if a producer or handler meets organic requirements, using detailed information from the operation documenting its specific practices and on-site inspection reports from organic inspectors. *Estimates:* 59 entities are expected to apply for certification (13 State programs, 36 private entities, 10 foreign entities). The annual burden for each State program will be an average of 695.428 hours or if calculated at $18,778. The annual burden for each private or foreign entity will be 699.678 hours or $27 per hour (rounded up to the next dollar) it would be $18,893.

Administrative costs for reporting, disclosure of information, and recordkeeping are expected to vary among certifying agents. Entities which begin their activities only after the national program is implemented would be expected to incur the greatest cost as they set up an operation that conforms to the OFPA and the regulations. For agents who are currently active in the organic industry, follow ISO guidelines, and already perform many of these administrative functions, costs will vary depending upon the extent to which their current practices are different from requirements in the OFPA and the regulations. Agents will be expected to provide the public with information concerning their clients. Efforts were made to incorporate existing industry practices and documents into this proposal. A list of several proposed administrative requirements and the probable resources required for compliance is included in the Regulatory Impact Assessment.

When an entity applies for accreditation as a certifying agent, it must provide a copy of its procedures for complying with recordkeeping requirements (§ 205.504(b)(3)). Once certified, agents will have to make their records available for inspection and copying by authorized representatives of the Secretary (§ 205.501(a)(9)). USDA will charge certifying agents for the time required to do these document reviews. Audits will require less time if the documents are well organized and centrally located, than if they are in disarray and in several locations. Certifying agents will have control over these conditions, but making documents accessible to the public may bring about a substantial change in the way some agents currently operate.

Recordkeeping requirements for certifying agents in the first proposal were changed to reduce the burden. They required certifying agents to maintain all records concerning their activities for 10 years. Commenters expressed concern that this requirement was excessive and unnecessary. We agree and are instead proposing three categories of records with varying retention periods: (1) records created by certifying agents regarding applicants for certification and certified operations, maintain 10 years, consistent with OFPA's requirement for maintaining all records concerning activities of certifying agents; (2) records obtained from applicants for certification and certified operations, maintain 5 years, the same as OFPA's requirement for the retention of records by certified operations; and (3) records created or received by certifying agents regarding accreditation, maintain 5 years, consistent with OFPA's requirement for renewal of agent's accreditation (§ 205.510(b)).

Residue testing requirements in the first proposal were changed to reduce the burden. They required certifying agents to undertake residue testing every 5 years to determine if products from certified operations contained a detectable residue level of a prohibited substance and to report such findings to appropriate authorities. Commenters expressed concern that the requirement was too costly. We agree and are instead proposing that the State program's governing State officials or certifying agents may conduct testing at their own expense only if they suspect a crop has come into contact with a prohibited substance. Test results must be submitted to the Administrator (§ 205.672(b)).

Organic inspectors. Inspectors will conduct on-site inspections for the certifying agents of each applicant for certification and annually of each certified operation. They will determine whether or not certification should continue and will report this finding to the certifying agent. Inspectors will be the agents themselves, employees of the agents, or individual contractors. We estimate that about half will be certifying agents and their employees and half will be individual contractors. Individuals who apply for positions as inspectors will submit to the agents information documenting their qualifications to conduct such inspections. *Estimates:* 293 inspectors (147 certifying agents and their employees, 146 individual contractors) will be used. The annual burden for each inspector will be an average of 48.304 hours or if calculated at $27 per hour (rounded up to the next dollar), it would be $1,305.

Producers and handlers. Producers and handlers, domestic and foreign, will apply to certifying agents for organic certification, to renew their certification, or to report changes in their practices, submitting to the agents detailed information documenting their specific practices. Producers include farmers, livestock and poultry producers, and wild crop harvesters. Handlers include those who transport or transform food and may include millers, bulk distributors, food manufacturers, processors, repackagers, or packers. Some handlers may be part of a retail operation that processes organic products in a location other than the premises of the retail outlet.

The OFPA requires certified operators to maintain their records for 5 years. *Estimates:* 19,300 total operators (14,153 certified and 5,147 exempt), including 17,150 producers (12,176 certified and 4,974 exempt) and 2,150 handlers (1,977 certified and 173 exempt). We do not have an estimate of the number of foreign producers and handlers that will apply for organic certification. The annual burden for each domestic operator will be: certified producer—average of 9.521 hours or if calculated at $24 per hour, it would be $229; certified handler—average of 49.521 hours or if calculated at $24 per hour, it would be $1,189; exempt/excluded operator—average of 0.5 hour or if calculated at $24. per hour, it would be $12.

The proposed regulation exempts certain operations from certification: (1) Producers and handlers whose gross agricultural income from organic sales totals $5,000 or less annually; (2) handlers selling only agricultural products that contain less than 50 percent organic ingredients by total

weight of the finished product; (3) handlers that handle agricultural products that contain at least 50 percent organic ingredients and choose to use the word ''organic'' only on the information panel of a packaged product; and (4) handlers that are retail food establishments that handler organic food but do not process it. The proposed regulation also excludes certain operations from certification: (1) Handlers selling only agricultural products labeled as organic or made with organic ingredients that are enclosed in a container prior to being received, remain in the same container, and are not otherwise processed while in the control of the operation; and (2) handlers that are retail food establishments that process or prepare, on the premises, raw and ready-to-eat food from organic agricultural products.

Administrative costs for reporting and recordkeeping are expected to vary among certified operators. Entities which begin their activities only after the national program is implemented would be expected to incur the greatest cost as they set up an operation that conforms to the OFPA and the regulations. For operators who are currently active in the organic industry and already perform many of these administrative functions, costs would vary depending upon the extent to which their current practices are different from requirements in the OFPA and the regulations. Efforts were made to incorporate existing industry practices and documents into this proposal. A list of several proposed administrative requirements and the probable resources required for compliance is included in the Regulatory Impact Assessment.

Research studies have indicated that operations using product labels containing the term ''organic'' handle an average of 19.5 labels annually, that there are about 16,000 products with the term organic on the label, and that the number of such products increased by 250 annually from 1994 through 1996. We estimate that by the year 2001, 17,000 products will be marketed with the term ''organic'' on the label. This proposal includes an estimate of the time needed to develop labels for products sold, labeled, or represented as ''100 percent organic,'' ''organic,'' ''made with organic (specified ingredients),'' or which use the term organic to modify an ingredient in the ingredients statement. Also included is the time spent deciding about use of the USDA seal, a State emblem, or the seal, logo, or other identifying marks of a private certifying agent (§ 205.300–§ 205.310). Because the labeling requirements in this proposal are in addition to FDA and FSIS requirements, the burden measurement does not include the hours necessary to develop the entire label. For purposes of calculating the burden, it was estimated that each handler will develop 20 labels annually.

Interested parties. Any interested party may petition the NOSB for the purpose of having a substance evaluated for recommendation to the Secretary for inclusion on or deletion from the National List. *Estimates:* 25 interested parties may petition the NOSB. The annual burden for each interested party will be an average of 104 hours and $2,496 ($24 per hour).

Cost. The following table shows the salary rates used to calculate the cost of the burden. We believe the increased rates for this proposal over the first proposal are more realistic in terms of the responsibilities and requirements of each entity.

Estimated hourly rates	First proposal	This proposal
Certified and exempt operators, interested parties	$10	$24
State program's governing State officials, peer review panel members, certifying agents, organic inspectors	20	27

Annual Reporting and Recordkeeping Burden:

Estimated Number of Respondents: 19,730.

Total Annual Hours: 269,622.

Total Cost: $6,780,348.

Comments. Comments are requested on these proposed information collection requirements. Comments are specifically invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of USDA, including whether the information would have practical utility; (2) the accuracy of USDA'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 of information technology.

Comments should be submitted by the date stated in the section entitled **DATES** at the beginning of this proposal. However, they should be sent to (1) Office of Management and Budget, New Executive Office Building, 725 17th Street, NW, Room 725, Washington, D. C. 20503, Attention: Desk Officer, and to (2) Clearance Officer, USDA–OCIO, Room 404W, Jamie Whitten Building, STOP 7602, 1400 Independence Avenue, SW, Washington, D.C. 20250–7602. Additionally, comments may be sent by fax to (202) 690–4632 or submitted via the Internet through the National Organic Program's homepage at http://www.ams.usda.gov/nop.

Appendix E.—Executive Order 12988, Civil Justice Reform

Executive Order 12988, Civil Justice Reform, instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system. The first proposal was reviewed under this Executive Order. No comments were received on that review and no additional related information has been obtained since then. This rule is not intended to have retroactive effect.

States and local jurisdictions are preempted under section 2115 of the OFPA (7 U.S.C. 6514) from creating programs of accreditation for private persons or State officials who want to become certifying agents of organic farms or handling operations. A governing State official would have to apply to the USDA to be accredited as a certifying agent, as described in section 2115(b) of the OFPA (7 U.S.C. 6514(b)). States also are preempted under sections 2104 through 2108 of the OFPA (7 U.S.C. 6503 through 6507) from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA.

Pursuant to section 2108(b)(2) of the OFPA (7 U.S.C. 6507(b)(2)), a State organic certification program may contain additional requirements for the production and handling of organically produced agricultural products that are produced in the State, and for the certification of organic farm and handling operations located within the State, under certain circumstances. Such additional requirements must: (a) Further the purposes of the OFPA; (b) not be inconsistent with the OFPA; (c) not be discriminatory towards agricultural commodities organically produced in other States; and (d) not be effective until approved by the Secretary.

Pursuant to section 2120(f) of the OFPA (7 U.S.C. 6519(f)), this proposal would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspections Act (21 U.S.C. 451 *et seq.*) or the Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 *et seq.*), nor the authority of the Administrator of the Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 *et seq.*).

Section 2121 of the OFPA (7 U.S.C. 6520) provides for the Secretary to establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that adversely affects such person or is inconsistent with the organic certification program established under this title. The Act also provides that the U.S. District Court for the district in which a person is located has jurisdiction to review the Secretary's decision.

Appendix—Executive Order 13132, Federalism

This proposal has been reviewed under Executive Order 13132, Federalism. This

Order requires that regulations that have federalism implications provide a federalism impact statement that: (1) Demonstrates the Agency consulted with the State and local officials before developing the proposed regulation, (2) summarizes State concerns, (3) provides the Agency's position supporting the need for the regulation, and, (4) describes how the concerns of State officials have been met. The Order indicates that where National standards are required by Federal statutes, Agencies shall consult with appropriate State and local officials in developing those standards. Further, Agencies are required to interpret Federal statutes to preempt State law only where the statute contains an express preemption provision. In such a case, any regulatory preemption of State law shall be restricted to the minimum necessary to meet the objectives of the statute.

The Organic Foods Production Act (OFPA) of 1990 (7 U.S.C. 6514) establishes national standards regarding the marketing of agricultural products as organically produced, assures consumers that organically produced products meet a consistent standard, and facilitates interstate commerce in fresh and processed food that is organically produced. In carrying out these purposes, the Act contemplates a significant role for the States and, in fact, envisions a partnership between the States and the Federal Government in meeting the requirements of the Statute. The Act specifies the State role and gives States recognition for their activities in organic agriculture in several ways. First, 7 CFR 6507 provides that States may establish a State organic certification program consistent with the national program. Second, these programs may contain more restrictive requirements than the National Organic Program established by the Secretary of Agriculture. To be more restrictive, State Organic programs are required to: further the purposes of the Act, be consistent with the Act, not discriminate against organic products of another State, and be approved by the Secretary. Third, States can choose to be accredited as certifying agents under the Act and carry out a State organic program. Fourth, the Act allows the States to determine the manner in which they choose to be involved in the organic program. States may choose to carry out the requirements of the Act by establishing a State program and becoming accredited as certifying agents, they may establish a State program and utilize private certifying agents to implement the program, or they may choose to utilize the national organic program as implemented by the Secretary.

In recognition of their role in carrying out the provisions of OFPA, the Department has reached out to States and actively sought their input throughout the entire process of developing the proposed organic rule. The Department drew extensively on the organic expertise of States and the organic industry by working closely with the National Organic Standards Board. The National Organic Standards Board, established under Section 2119 of the OFPA (7 CFR 6518), has provided a broad and inclusive forum for public participation in developing the recommendations and concepts that underpin the proposed organic rule. Section 2104(c) of the OFPA (7 CFR 6503(c)) requires the Secretary to consult with the National Organic Standards Board in developing the organic program and the National List set forth in Section 2118 of the OFPA (7 CFR 6517).

The Secretary has received extensive input from the Board, interested persons, and the States regarding the establishment of the National Organic Program and this reproposal. The Board met 12 times before publication of the proposed rule on December 16, 1997, and has met five times during 1998 and 1999. States were invited to attend each of these meetings, and official State certifier representatives participated in Board deliberations in meetings held in July 1998 and July 1999. Public input sessions were held at each meeting to gather information from all interested persons, including State and local jurisdictions.

Section 2110(g) of the OFPA (7 U.S.C. 6509(g)) requires the Secretary to hold public hearings to gather information to guide development of standards for livestock products. Four hearings were held during 1994 in Washington, D.C.; Rosemont, IL; Denver, CO; and, Sacramento, CA. States were invited to participate in each of these hearings.

National Organic Program staff also received comments and consulted with States at public events. They made presentations, received comments, and consulted with States at local and regional organic conferences and workshops and at national and international organic and natural food shows.

Further, States were provided the opportunity to comment specifically on State issues at a National Organic Certifiers meeting held on July 21, 1995, to discuss accreditation issues; a meeting held on February 26, 1996, to discuss the role of States in the National Organic Program; and a February 1999 State Certifiers meeting to discuss State issues. Further, States were consulted in training sessions held for organic inspectors, as well as numerous question and answer sessions at speaking engagements of the Agricultural Marketing Service Administrator, the National Organic Program Program Manager, and the staff.

On publication of the first proposal on December 16, 1997, an announcement and information packet summarizing the first proposal were sent to over 1,000 interested parties, including State governors and State department of agriculture secretaries, commissioners, or directors. Subsequent to publication of the first proposal, State and local jurisdictions had the opportunity to provide input at four listening sessions held in February–March 1998 on the first proposal in Austin, TX; Ames, IA; Seattle, WA; and New Brunswick, NJ.

Finally, States had the opportunity to comment on the first proposal. More than 275,000 comments were received on the first proposal, including State commenters.

Through this extensive outreach and consultation process, States identified a number of issues with the first proposal. States expressed several specific concerns regarding accreditation requirements as they affect State programs. These issues are described below, along with the Department's response in the reproposal.

(1) Under OPFA 2108 (7 CFR 6507), States may establish additional standards, approved by the Secretary. First, State commenters objected to the provision in the first proposal that would have prohibited States from requiring compliance with these additional standards as a condition for use of the organically produced State logo on products within the borders of such State. We agree with the commenters, as we did not intend to prohibit States from requiring that these more restrictive standards be met as a requirement to the State's logo on organically produced products. Accordingly, this proposal will permit States with more restrictive requirements approved by the Secretary and private certifiers certifying production and handling operations within these States to require that the State's more restrictive standards be met in order to use the State logo.

(2) The first proposal required annual organic inspector performance appraisal and annual program evaluations for certifying agents. State commenters objected that these requirements would duplicate State requirements. We do not intend for States to develop dual performance appraisal and program evaluation systems because we believe that programs already conducted by the States will meet the requirements of this proposal. These programs would be expected to conform with good management practices appropriate to an organization's size and structure. The questioned provisions have not been changed, but this proposal has been revised to clarify that the annual program evaluation can be conducted by the certifying agency staff, an auditing entity, or a consultant with appropriate expertise.

(3) The first proposal set forth confidentiality requirements for certifying agents. Commenters stated that these confidentiality requirements might conflict with State requirements for ''open records.'' While we recognize this potential for conflicting requirements, records collected under the National Organic Program would be subject to the requirements of the Act. Where the Act and State requirements conflict, the Act would take precedence. There is no change to the confidentiality provision.

To clarify that authorized representatives of the Secretary or the applicable Stae program's governing State official may act on their behalf and must be given access to the records, this proposal adds the phrase ''and their authorized representatives.''

(4) This proposal will require that accredited certifying agents accept certification decisions made by another USDA-accredited certifying agent as equivalent. State commenters said that States should be able to control which certifying agents operate within their State.

The first proposal provided that accredited certifying agents accept the certification decisions made by another USDA-accredited certifying agent as equivalent to their own. Commenters representing State programs said that States should be able to control which certifying agents operate within their

State. Several commenters asked whether States with more restrictive standards could challenge certification decisions made by other accredited certifying agents. Under the Act, no organic product may be produced or handled to organic standards lower than the standards of the National Organic Program. A State Government may not prevent the marketing or sale within a given State of organic product produced in another State according to this proposal. While States may, with the approval of the Secretary, set more restrictive standards than the national organic standards for product produced or handled within their State, these requirements do not apply to products produced or handled in another State.

State programs approved by the Secretary will be required to treat all accredited certifying agents equally, and accredited certifying agents in one State cannot refuse to recognize another State's product certified to national standards. Accordingly, the requirement remains unchanged that a certifying agent accept certification decisions by another USDA-accredited certifying agent as equivalent.

(5) The first proposal required all certifying agents to submit documents and information on personnel, administrative, and financial policies and procedures to demonstrate organic expertise and ability to implement the National Organic Program. States commented that State certifying agents should not be required to submit such information, stating that these requirements should not apply to States with established personnel, administrative, and financial procedures. They also indicated that the review should be limited to organic program administration only, not to agencywide policies and procedures. We recognize that States have established personnel, administrative, and financial procedures and that these procedures would apply to State certifying agents. However, a stated purpose of the Act is establishment of national standards. Such standards should extend to uniform requirements for State and private certifying agents unless otherwise provided in the Act. Further, such information is necessary for the Administrator to make a determination on approval of an application for accreditation. Accordingly, the requirements for demonstrating organic expertise and ability to implement the National Organic Program remain the same for private and State certifying agents.

(6) The first proposal required a certifying agents to provide a description of procedures to prevent conflicts of interest and the identification of any food or agriculture-related business interests of all personnel intended to be used in the certifying operation. Commenters stated that existing State policies should be sufficient to prevent conflicts of interest for a State certifying agent and that lists of the business interests of all inspectors, program staff, and their families are not necessary.

We agree that existing State policies should be sufficient to prevent conflicts of interest but disagree that lists of the business interests of all inspectors, program staff, and their families are unnecessary. The Act (CFR 6515(h)) places responsibility for the prevention of conflicts of interest with the certifying agent. However, the Department is responsible for ensuring that the certifying agent complies with that responsibility. The requirement to provide such a listing provides the Administrator information essential to identifying conflicts of interest. In addition, a stated purpose of the Act is to establish uniform national standards. These uniform standards should extend to uniform conflict of interest requirements for State and private certifying agents. The commenters have said that most States already have established conflict of interest policies and procedures so that the required information should be easily available for submission to the Administrator. Accordingly, no change has been made in this proposal.

Certification, the process of qualifying a producer or handler to sell agricultural products labeled as organic, raised several issues for States.

(1) The first proposal required an applicant for certification to supply required documentation to provide information necessary to allow a certifying agent to evaluate the application. State commenters suggested a provision be added to allow a certifying agent to require documentation from applicants in addition to that required by the first proposal.

A certifying agent can, if necessary, follow up on an initial application with requests for additional information, provided that information is needed to evaluate the application and determine compliance with the Act and regulations. We did not make the suggested change, as the existing language already allows the certifying agent to request additional information necessary to determine compliance with the Act and regulations.

(2) The first proposal laid out a certification program that provided for updates to a continuous organic certification. To meet continuation of certification requirements, the first proposal required an on-site inspection after receipt of the update to the application. A State certifying agent objected, saying that an on-site inspection after receipt of a renewal application is not consistent with current practice. Currently, on-site inspections conducted during the prior year are used to determine compliance with certification requirements at the time of renewal, along with a review of information submitted by the certified operation. The State certifying agent stated that an additional inspection at renewal time would not be useful if it was not an appropriate time to observe the certified unit in operation.

We disagree with the commenters, since certifiers are required to schedule on-site inspections when the certified operation can be observed for its compliance or ability to comply with the provisions of the National Organic Program. The initial certification, therefore, should have been granted when the on-site inspection verified compliance with certification requirements. The certified operation should be fulfilling its annual continuation of certification at a time when it can demonstrate its compliance with the Act.

States commented on several compliance issues included in the first proposal.

(1) The Administrator had sole authority to suspend or revoke the accreditation of certifying agents in the first proposal. Commenters indicated that State program's governing State officials should have the authority to suspend or revoke the accreditation of private certifying agents.

We agree that in a State with a program approved by the Secretary, the State program's governing State official should be authorized to suspend or revoke an accreditation granted by the Secretary to certifying agents operating within the State. We concur because of the Department's role in providing oversight to the State program, including its enforcement procedures, and have made that change in this proposal.

(2) Many commenters stated that the first proposal lacked adequate enforcement provisions, including enforcement by States with an approved State program.

We agree with the commenters that additional enforcement provisions are necessary for the National Organic Program. The following changes have been made in this proposal.

(a) As noted above, the State program's governing State official will now be authorized to suspend or revoke accreditation granted by the Secretary to certifying agents operating in the State.

(b) An enforcement proceeding brought by a State program's governing State official against a certified operation or certifying agent shall be appealable pursuant to the appeal procedures of the State program with no subsequent appeal rights to the Secretary.

States commented on several fees provisions in the first proposal.

(1) The first proposal required that payment of fees and charges to the Department be by certified check or money order. State commenters objected, saying it was insulting for USDA to require a State government agency to pay for its accreditation with a certified check.

Accordingly, we have removed this requirement, simply requiring that payments for fees and other charges for accreditation must be made payable to the Agricultural Marketing Service.

(2) Several State agencies objected to the fee provisions in the first proposal, expressing the belief that the proposed fees would price small producers and handlers out of the organic industry. Some State agencies commented that those small organic producers conducting their own on-farm handling would be forced out of the organic industry by the excessive handler fee and reporting burdens.

After review of the comments, we acknowledge that the fees charged in the first proposal may have discouraged industry growth and may not have facilitated interstate commerce of organic product. We have thus, modified the fee structure to reduce costs to all organic sectors and have removed the requirement that provided for payment of fees to the Department by certified production and handling operations. Instead, the Department will charge certifying agents only for fees and charges related to accreditation, with the balance of the costs of the program to be funded through appropriations.

(3) Some State certifying agents commented that State certifying agents should not be assessed accreditation fees. They stated that most State certifying agents could face large accreditation costs because they have many county or regional offices which would be considered subsidiaries, adding that these costs would be passed on to producers and handlers or paid with supplemental State funds. A few State certifying agents asserted that USDA should pay the States because of the State's contribution to the national program. One State representative said that accreditation fees for State certifying agents should be less than for private certifying agents, as State certifying agents should involve less AMS review and oversight.

We disagree with those commenters who say that State certifying agents should not be assessed accreditation charges, be charged less, or be paid to certify production and handling operations. These actions would constitute unacceptable preferential treatment of State certifying agents to the detriment of private certifying agents. This proposal will assess State certifying agents the same fees for accreditation under the same fee structure as private certifying agents.

We invite States and local jurisdictions to comment on the issues raised in this Federalism impact statement. We also encourage States and local jurisdictions to review and comment on this proposal as it relates to the operation of State organic programs.

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Eurocopter France; comments due by 3-20-00; published 1-20-00

Fokker; comments due by 3-20-00; published 2-17-00

Kaman Aerospace Corp.; comments due by 3-24-00; published 1-24-00

Class E airspace; comments due by 3-20-00; published 2-7-00

TRANSPORTATION DEPARTMENT

Federal Highway Administration

Engineering and traffic operations:

Uniform Traffic Control Devices Manual—

Tourist oriented directional signs, recreation and cultural interest signs, and traffic controls for bicycle facilities; comments due by 3-24-00; published 6-24-99

TRANSPORTATION DEPARTMENT

Research and Special Programs Administration

Hazardous materials:

Rulemaking and program procedures, etc.; Regulatory Flexibility Act and plain language reviews; comments due by 3-22-00; published 12-20-99

TREASURY DEPARTMENT

Internal Revenue Service

Income taxes:

Construction aid contribution; definition; comments due by 3-22-00; published 12-20-99

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''PLUS'' (Public Laws Update Service) on 202–523–6641. This list is also available online at http://www.nara.gov/fedreg.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at http://www.access.gpo.gov/nara/index.html. Some laws may not yet be available.

H.R. 1451/P.L. 106–173
Abraham Lincoln Bicentennial Commission Act (Feb. 25, 2000; 114 Stat. 14)

S. 632/P.L. 106–174
Poison Control Center Enhancement and Awareness Act (Feb. 25, 2000; 114 Stat. 18)

Last List February 23, 2000

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CFR CHECKLIST

This checklist, prepared by the Office of the Federal Register, is published weekly. It is arranged in the order of CFR titles, stock numbers, prices, and revision dates.

An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

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Title	Stock Number	Price	Revision Date
1, 2 (2 Reserved)	(869–038–00001–6)	5.00	[5] Jan. 1, 1999
3 (1997 Compilation and Parts 100 and 101)	(869–038–00002–4)	20.00	[1] Jan. 1, 1999
4	(869–038–00003–2)	7.00	[5] Jan. 1, 1999
5 Parts:			
1–699	(869–038–00004–1)	37.00	Jan. 1, 1999
*700–1199	(869–042–00005–6)	31.00	Jan. 1, 2000
*1200–End, 6 (6 Reserved)	(869–042–00006–4)	48.00	Jan. 1, 2000
7 Parts:			
*1–26	(869–042–00007–2)	28.00	Jan. 1, 2000
*27–52	(869–042–00008–1)	35.00	Jan. 1, 2000
*53–209	(869–042–00009–9)	22.00	Jan. 1, 2000
210–299	(869–038–00010–5)	47.00	Jan. 1, 1999
*300–399	(869–042–00011–1)	29.00	Jan. 1, 2000
400–699	(869–038–00012–1)	37.00	Jan. 1, 1999
700–899	(869–038–00013–0)	32.00	Jan. 1, 1999
*900–999	(869–042–00014–5)	46.00	Jan. 1, 2000
1000–1199	(869–038–00015–6)	46.00	Jan. 1, 1999
1200–1599	(869–038–00016–4)	34.00	Jan. 1, 1999
1600–1899	(869–038–00017–2)	55.00	Jan. 1, 1999
1900–1939	(869–038–00018–1)	19.00	Jan. 1, 1999
1940–1949	(869–038–00019–9)	34.00	Jan. 1, 1999
*1950–1999	(869–042–00020–0)	38.00	Jan. 1, 2000
2000–End	(869–042–00021–8)	31.00	Jan. 1, 2000
8	(869–038–00022–9)	36.00	Jan. 1, 1999
9 Parts:			
1–199	(869–038–00023–7)	42.00	Jan. 1, 1999
200–End	(869–038–00024–5)	37.00	Jan. 1, 1999
10 Parts:			
1–50	(869–038–00025–3)	42.00	Jan. 1, 1999
51–199	(869–038–00026–1)	34.00	Jan. 1, 1999
200–499	(869–038–00027–0)	33.00	Jan. 1, 1999
500–End	(869–038–00028–8)	43.00	Jan. 1, 1999
11	(869–038–00029–6)	20.00	Jan. 1, 1999
12 Parts:			
1–199	(869–038–00030–0)	17.00	Jan. 1, 1999
*200–219	(869–042–00031–5)	22.00	Jan. 1, 2000
220–299	(869–038–00032–6)	40.00	Jan. 1, 1999
300–499	(869–038–00033–4)	25.00	Jan. 1, 1999
500–599	(869–038–00034–2)	24.00	Jan. 1, 1999
600–End	(869–038–00035–1)	45.00	Jan. 1, 1999
13	(869–038–00036–9)	25.00	Jan. 1, 1999
14 Parts:			
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60–139	(869–038–00038–5)	42.00	Jan. 1, 1999
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200–1199	(869–038–00040–7)	28.00	Jan. 1, 1999
*1200–End	(869–042–00041–2)	25.00	Jan. 1, 2000
15 Parts:			
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1000–End	(869–038–00046–6)	37.00	Jan. 1, 1999
17 Parts:			
1–199	(869–038–00048–2)	29.00	Apr. 1, 1999
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240–End	(869–038–00050–4)	44.00	Apr. 1, 1999
18 Parts:			
1–399	(869–038–00051–2)	48.00	Apr. 1, 1999
400–End	(869–038–00052–1)	14.00	Apr. 1, 1999
19 Parts:			
1–140	(869–038–00053–9)	37.00	Apr. 1, 1999
141–199	(869–038–00054–7)	36.00	Apr. 1, 1999
200–End	(869–038–00055–5)	18.00	Apr. 1, 1999
20 Parts:			
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400–499	(869–038–00057–1)	51.00	Apr. 1, 1999
500–End	(869–038–00058–0)	44.00	[7] Apr. 1, 1999
21 Parts:			
1–99	(869–038–00059–8)	24.00	Apr. 1, 1999
100–169	(869–038–00060–1)	28.00	Apr. 1, 1999
170–199	(869–038–00061–0)	29.00	Apr. 1, 1999
200–299	(869–038–00062–8)	11.00	Apr. 1, 1999
300–499	(869–038–00063–6)	50.00	Apr. 1, 1999
500–599	(869–038–00064–4)	28.00	Apr. 1, 1999
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800–1299	(869–038–00066–1)	35.00	Apr. 1, 1999
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22 Parts:			
1–299	(869–038–00068–7)	44.00	Apr. 1, 1999
300–End	(869–038–00069–5)	32.00	Apr. 1, 1999
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200–499	(869–038–00072–5)	32.00	Apr. 1, 1999
500–699	(869–038–00073–3)	18.00	Apr. 1, 1999
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1700–End	(869–038–00075–0)	18.00	Apr. 1, 1999
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26 Parts:			
§§ 1.0-1–1.60	(869–038–00077–6)	27.00	Apr. 1, 1999
§§ 1.61–1.169	(869–038–00078–4)	50.00	Apr. 1, 1999
§§ 1.170–1.300	(869–038–00079–2)	34.00	Apr. 1, 1999
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§§ 1.401–1.440	(869–038–00081–4)	43.00	Apr. 1, 1999
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§§ 1.501–1.640	(869–038–00083–1)	27.00	[7] Apr. 1, 1999
§§ 1.641–1.850	(869–038–00084–9)	35.00	Apr. 1, 1999
§§ 1.851–1.907	(869–038–00085–7)	40.00	Apr. 1, 1999
§§ 1.908–1.1000	(869–038–00086–5)	38.00	Apr. 1, 1999
§§ 1.1001–1.1400	(869–038–00087–3)	40.00	Apr. 1, 1999
§§ 1.1401–End	(869–038–00088–1)	55.00	Apr. 1, 1999
2–29	(869–038–00089–0)	39.00	Apr. 1, 1999
30–39	(869–038–00090–3)	28.00	Apr. 1, 1999
40–49	(869–038–00091–1)	17.00	Apr. 1, 1999
50–299	(869–038–00092–0)	21.00	Apr. 1, 1999
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500–599	(869–038–00094–6)	11.00	Apr. 1, 1999
600–End	(869–038–00095–4)	11.00	Apr. 1, 1999
27 Parts:			
1–199	(869–038–00096–2)	53.00	Apr. 1, 1999

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200–End	(869–038–00097–1)	17.00	Apr. 1, 1999
28 Parts:			
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43-end	(869-038-00099-7)	32.00	July 1, 1999
29 Parts:			
0–99	(869–038–00100–4)	28.00	July 1, 1999
100–499	(869–038–00101–2)	13.00	July 1, 1999
500–899	(869–038–00102–1)	40.00	[8] July 1, 1999
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1900–1910 (§§ 1900 to 1910.999)	(869–038–00104–7)	46.00	July 1, 1999
1910 (§§ 1910.1000 to end)	(869–038–00105–5)	28.00	July 1, 1999
1911–1925	(869–038–00106–3)	18.00	July 1, 1999
1926	(869–038–00107–1)	30.00	July 1, 1999
1927–End	(869–038–00108–0)	43.00	July 1, 1999
30 Parts:			
1–199	(869–038–00109–8)	35.00	July 1, 1999
200–699	(869–038–00110–1)	30.00	July 1, 1999
700–End	(869–038–00111–0)	35.00	July 1, 1999
31 Parts:			
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200–End	(869–038–00113–6)	48.00	July 1, 1999
32 Parts:			
1–39, Vol. I		15.00	[2] July 1, 1984
1–39, Vol. II		19.00	[2] July 1, 1984
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630–699	(869–038–00117–9)	23.00	July 1, 1999
700–799	(869–038–00118–7)	27.00	July 1, 1999
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125–199	(869–038–00121–7)	41.00	July 1, 1999
200–End	(869–038–00122–5)	33.00	July 1, 1999
34 Parts:			
1–299	(869–038–00123–3)	28.00	July 1, 1999
300–399	(869–038–00124–1)	25.00	July 1, 1999
400–End	(869–038–00125–0)	46.00	July 1, 1999
35	(869–038–00126–8)	14.00	[8] July 1, 1999
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0–17	(869–038–00131–4)	37.00	July 1, 1999
18–End	(869–038–00132–2)	41.00	July 1, 1999
39	(869–038–00133–1)	24.00	July 1, 1999
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1–49	(869–038–00134–9)	33.00	July 1, 1999
50–51	(869–038–00135–7)	25.00	July 1, 1999
52 (52.01–52.1018)	(869–038–00136–5)	33.00	July 1, 1999
52 (52.1019–End)	(869–038–00137–3)	37.00	July 1, 1999
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60	(869–038–00139–0)	59.00	July 1, 1999
61–62	(869–038–00140–3)	19.00	July 1, 1999
63 (63.1–63.1119)	(869–038–00141–1)	58.00	July 1, 1999
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400–424	(869–038–00154–3)	34.00	July 1, 1999
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1–199	(869–038–00168–3)	33.00	Oct. 1, 1999
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1200–End	(869–038–00171–3)	40.00	Oct. 1, 1999
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1–40	(869–038–00172–1)	27.00	Oct. 1, 1999
41–69	(869–038–00173–0)	23.00	Oct. 1, 1999
70–89	(869–034–00173–4)	8.00	Oct. 1, 1998
90–139	(869–038–00175–6)	26.00	Oct. 1, 1999
140–155	(869–038–00176–4)	15.00	Oct. 1, 1999
156–165	(869–038–00177–2)	21.00	Oct. 1, 1999
166–199	(869–038–00178–1)	27.00	Oct. 1, 1999
200–499	(869–038–00179–9)	23.00	Oct. 1, 1999
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20–39	(869–038–00182–9)	26.00	Oct. 1, 1999
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1–199	(869–038–00200–1)	43.00	Oct. 1, 1999
200–599	(869–038–00201–9)	22.00	Oct. 1, 1999

Title	Stock Number	Price	Revision Date
600–End	(869–038–00202–7)	37.00	Oct. 1, 1999
CFR Index and Findings Aids	(869–038–00047–4)	48.00	Jan. 1, 1999
Complete 1998 CFR set		951.00	1998
Microfiche CFR Edition:			
Subscription (mailed as issued)		247.00	1998
Individual copies		1.00	1998
Complete set (one-time mailing)		247.00	1997
Complete set (one-time mailing)		264.00	1996

[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[5] No amendments to this volume were promulgated during the period January 1, 1998 through December 31, 1998. The CFR volume issued as of January 1, 1997 should be retained.

[7] No amendments to this volume were promulgated during the period April 1, 1998, through April 1, 1999. The CFR volume issued as of April 1, 1998, should be retained.

[8] No amendments to this volume were promulgated during the period July 1, 1998, through July 1, 1999. The CFR volume issued as of July 1, 1998, should be retained.