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FEDERAL COMMUNICATIONS COMMISSION**47 CFR Part 73**

[DA 00-2238; MM Docket No. 99-278; RM-9424]

Radio Broadcasting Services; Susquehanna, PA and Conklin, NY**AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

SUMMARY: The Commission, at the joint request of Majac of Michigan, Inc., and Equinox Broadcasting Corporation, reallocates Channel 223A from Susquehanna, Pennsylvania, to Conklin, New York, and modifies Station WKGB-FM's license accordingly. We also reallocate Channel 263A from Conklin, New York, to Susquehanna, Pennsylvania, and modify Station WCDW(FM)'s license accordingly. See 64 FR 51284, September 22, 1999. Channel 223A can be reallocated to Conklin in compliance with the Commission's minimum distance separation requirements at Station WKGB-FM's requested site. The coordinates for Channel 223A at Conklin are 42-06-53 North Latitude and 75-51-16 West Longitude. Additionally, Channel 263A can be reallocated to Susquehanna in compliance with the Commission's minimum distance separation requirements at Station WCDW(FM)'s requested site. The coordinates for Channel 263A at Susquehanna are 42-02-30 North Latitude and 75-41-30 West Longitude.

DATES: Effective November 13, 2000.**FOR FURTHER INFORMATION CONTACT:** Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 99-278, adopted September 20, 2000, and released September 29, 2000. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY-A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857-3800, 1231 20th Street, NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

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

Part 73 [AMENDED]

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

Authority: 47 U.S.C. 54, 303, 334, 336.**§ 73.202 [Amended]**

2. Section 73.202(b), the Table of FM Allotments under New York, is amended by adding Channel 223A and removing Channel 263A at Conklin.

3. Section 73.202(b), the Table of FM Allotments under Pennsylvania, is amended by adding Channel 263A and removing Channel 223A at Susquehanna.

Federal Communications Commission.

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

[FR Doc. 00-26714 Filed 10-17-00; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF ENERGY**48 CFR Parts 931 and 970****RIN 1991-AB36****Acquisition Regulations; Costs Associated With Whistleblower Actions****AGENCY:** Department of Energy.**ACTION:** Final rule.

SUMMARY: The Department of Energy (Department) is amending its acquisition regulations to address contractor defense, settlement and award costs associated with contractor employee whistleblower actions. This action implements a cost principle approach in the Department of Energy Acquisition Regulation (DEAR) which will apply to the Department's cost reimbursement contractors and subcontractors with a contract amount exceeding \$5,000,000.

EFFECTIVE DATE: This final rule is effective November 17, 2000.**FOR FURTHER INFORMATION CONTACT:** Terrence D. Sheppard, (202) 586-8193; e-mail terry.sheppard@hq.doe.gov.**SUPPLEMENTARY INFORMATION:**

I. Background.

II. Disposition of Comments

III. 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 13132.

G. Review Under the Unfunded Mandates Reform Act of 1995.

H. Congressional Notification.

I. Background

The purpose of this final rule is to establish the Department's policy on the reimbursement of contractor settlement, award and defense costs associated with contractor employee whistleblower actions. This policy will cover the Department's cost reimbursement contractors and subcontractors with a contract amount in excess of \$5,000,000. Costs associated with whistleblower actions filed by an employee in Federal and state courts, and with Federal agencies under 29 CFR Part 24, 48 CFR Subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239 will be subject to the reimbursement provisions of the new regulation.

This action grows out of rulemaking notices published on January 5, 1998 (63 FR 386) and March 24, 1999 (64 FR 14206). The first notice published for comment a proposed rule to create a whistleblower costs clause. The second notice reopened the comment period for an alternate proposal using a cost principle approach.

The alternate proposal was the result of a number of factors, including: (1) The Department's experience in a few high profile whistleblower actions; (2) further review of the practices of the rest of the Federal Government with this cost category; (3) a Department effort to reduce the number of cost clauses in DEAR Part 970 in favor of a cost principle approach (notice of proposed rule published June 14, 2000 (65 FR 37335)); and (4) the comments received in response to the initial proposed rule.

For the reasons stated below, the Department has now concluded that the cost principle approach, which provides contracting officers with greater flexibility in making determinations on a case-by-case basis, is the best approach for the circumstances facing the Department and its facility management contractors. However, the Department has modified its initial cost principle proposal in response to some of the comments received concerning that proposal.

II. Disposition of Comments

Two sets of comments were received in response to the January 5, 1998, notice of proposed rulemaking and five sets of comments were received in response to the March 24, 1999, notice to reopen the comment period. Except

for one set of comments from another Federal agency, all comments were from the Department's contractors.

Contract Cost Clause Approach

Both sets of comments on the proposed cost clause pointed out that the result of the proposal to reimburse settlement costs, while excluding costs where an adverse determination is made, would provide a financial incentive for the Department's contractors to settle any employee claim of retaliation, no matter how lacking in merit, rather than risk an adverse determination and the disallowance of costs. The comments also asserted that such a liberal policy for settlement of questionable claims would encourage frivolous claims.

It was, in part, as a result of these comments that the Department proposed the alternate cost principle approach providing contracting officers with greater flexibility in making case-by-case determinations based on the facts of each case. In a case-by-case approach, costs resulting from unlawful or egregious contractor conduct would be disallowed, while costs resulting from the exercise of prudent business judgment by the contractor would be allowable.

Cost Principle Approach

Three of the contractors commented that the alternate proposal would create an administrative burden and unnecessary and unallowable expense, and they urged that the final regulation not be expanded to labor cases beyond whistleblower retaliation claims. All of the contractor comments argued that the existing contract clauses and cost principle regulations provided sufficient coverage for labor settlements and litigation costs.

The Department agrees that the regulation should not be expanded to cover all labor cases and the final regulation covers only employee whistleblower actions alleging a retaliatory act.

Final Rule

The final rule creates a cost principle regulation to be added to 48 CFR (DEAR) Part 931 and incorporated by reference in 48 CFR (DEAR) Subpart 970.31. Contractors and subcontractors covered by this regulation are those with contracts for an amount in excess of \$5,000,000. The regulation requires contracting officers to determine allowability of defense, settlement and award costs on a case-by-case basis after considering the terms of the contract, relevant cost regulations, and relevant facts and circumstances, including

federal law and policy prohibiting reprisal against whistleblowers, at the conclusion of the employee whistleblower claim. The cost principle addresses only the costs associated with whistleblower retaliation claims filed in Federal and state courts and with Federal agencies under 29 CFR Part 24, 48 CFR subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239.

The Department recognizes that a potential disadvantage of a case-by-case approach is unwarranted variation in cost allowability determinations in cases involving similar circumstances. Therefore, in order to promote an evenhanded approach and to avoid unwarranted variation, the Department will name a member of the Office of General Counsel who will consult with representatives from the Office of Procurement and Assistance Management, the Office of Environment, Safety and Health, and other Headquarters program offices on whistleblower costs. The Department's contracting officers will be required to report their final allowability determinations, and the analysis or basis for their determinations, to the Office of Procurement and Assistance Management, which will collect that information to determine whether additional guidance to the field is necessary. The collected information will also be a resource for providing advice to contracting officers. Internal guidance is being issued to establish procedures and points of contact for consulting and reporting purposes.

This cost principle will be effective in contracts awarded or executed by the Department after the effective date of this regulation. Whistleblower costs clauses already contained in current contracts will continue to be effective unless a contract modification is executed deleting the clause in favor of cost principle coverage.

Since the Department published the January 5, 1998, notice and the March 24, 1999, notice, the National Defense Authorization Act for FY 2000 (Pub.L. 106-65) reorganized the Department. Consistent with that Act, the Department has amended the authority citation for 48 CFR (DEAR) Parts 931 and 970 to include the citation for that Act.

III. 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 final rule 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; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this regulation meets the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment unless the agency certifies that the rule will not have a "significant economic impact on a substantial number of small entities." DOE is not required by the Administrative Procedure Act (5 U.S.C. 553) or any other law to propose this procurement rule for public comment. Accordingly, the Regulatory Flexibility Act requirements do not apply to this rulemaking, and no regulatory flexibility analysis has been prepared.

D. Review Under the Paperwork Reduction Act

No new information or record keeping 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 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 (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule is categorically excluded from NEPA review because the amendments to the DEAR would be strictly procedural (categorical exclusion A6). Therefore, this rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

F. Review Under Executive Order 13132

Executive Order 13132 (64 FR 43255, August 10, 1999) requires agencies 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 are 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. DOE has examined this rule and has determined that it 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. No further action is required by Executive Order 13132.

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, which provides guidance on the reimbursement of certain contractor legal defense costs, does not

impact any state, local or tribal government.

H. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress promulgation of this final rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 48 CFR Parts 931 and 970.

Government procurement.

Issued in Washington, D.C. on October 2, 2000.

T.J. Glauthier,
Deputy Secretary.

For the reasons set out in the preamble, chapter 9 of Title 48 of the Code of Federal Regulations is amended as set forth below.

PART 931—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for Part 931 continues to read as follows:

Authority: 42 U.S.C. 7101, *et seq.*; 40 U.S.C. 486(c); 50 U.S.C. 2401, *et seq.*; 42 U.S.C. 2201.

2. Section 931.205-47 is added to read as follows:

931.205-47 Costs related to legal and other proceedings. (DOE coverage-paragraph (h)).

(h) Costs Associated with Whistleblower Actions.

(1) Definitions for purposes of this paragraph (h):

Covered contractors and subcontractors means those contractors and subcontractors with contracts exceeding \$5,000,000.

Employee whistleblower action means any action filed by an employee in Federal or state court for redress of a retaliatory act by a contractor and any administrative procedure initiated by an employee under 29 CFR Part 24, 48 CFR subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239.

Retaliatory act means a discharge, demotion, reduction in pay, coercion, restraint, threat, intimidation or other similar negative action taken against an employee by a contractor as a result of an employee's activity protected as a whistleblower activity by a Federal or state statute or regulation.

Settlement and award costs means defense costs and costs arising from judicial orders, negotiated agreements, arbitration, or an order from a Federal agency or board and includes compensatory damages, underpayment for work performed, and reimbursement

for a complainant employee's legal counsel.

(2) For costs associated with employee whistleblower actions where a retaliatory act is alleged against a covered contractor or subcontractor, the contracting officer:

(i) May authorize reimbursement of costs on a provisional basis, in appropriate cases;

(ii) Must consult with the Office of General Counsel whistleblower costs point of contact, who will consult with other Headquarters points of contact as appropriate, before making a final allowability determination; and

(iii) Must determine allowability of defense, settlement and award costs on a case-by-case basis after considering the terms of the contract, relevant cost regulations, and the relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, available at the conclusion of the employee whistleblower action.

(3) Covered contractors and subcontractors must segregate legal costs, including costs of in-house counsel, incurred in the defense of an employee whistleblower action so that the costs are separately identifiable.

(4) If a contracting officer provisionally disallows costs associated with an employee whistleblower action for a covered contractor or subcontractor, funds advanced by the Department may not be used to finance costs connected with the defense, settlement and award of an employee whistleblower action.

(5) Contractor defense, settlement and award costs incurred in connection with the defense of suits brought by employees under section 2 of the Major Fraud Act of 1988 are excluded from coverage of this section.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

3. The authority citation for Part 970 continues to read as follows:

Authority: Atomic Energy Act of 1954 (42 U.S.C. 2201); Department of Energy Organization Act (42 U.S.C. 7101, *et seq.*); and National Nuclear Security Administration Act (50 U.S.C. 2401, *et seq.*)

4. Section 970.3102-20, Cost prohibitions related to legal and other proceedings, is amended by adding paragraph (c), Costs Associated with Whistleblower Actions, to read as follows:

970.3102-20 Costs related to legal and other proceedings.

* * * * *

(c) Costs Associated with Whistleblower Actions. Section

931.205–47(h) of this chapter is applicable to management and operating contracts under this part and must be included in the contract's cost reimbursement subcontracts.

[FR Doc. 00–26333 Filed 10–17–00; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AE87

Endangered and Threatened Wildlife and Plants: Threatened Status for the Colorado Butterfly Plant (*Gaura neomexicana* ssp. *coloradensis*) From Southeastern Wyoming, Northcentral Colorado, and Extreme Western Nebraska

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the Fish and Wildlife Service (Service), have determined threatened status under the Endangered Species Act of 1973, as amended, for *Gaura neomexicana* ssp. *coloradensis* (Colorado butterfly plant). A short-lived, perennial herb, *G. n.* ssp. *coloradensis* is endemic to moist soils in mesic or wet meadows of floodplain areas in north central Colorado, extreme western Nebraska, and southeastern Wyoming. This subspecies occurs primarily in habitats created and maintained by streams active within their floodplains, with vegetation that is relatively open and not overly dense or overgrown. The primary threats to *G. n.* ssp. *coloradensis* is the indiscriminate spraying of broadleaf herbicides and the disturbance of riparian areas that contain native grasses due to agricultural conversion, water diversions, channelization, and urban development.

EFFECTIVE DATE: November 17, 2000.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, 4000 Airport Parkway, Cheyenne, Wyoming 82001.

FOR FURTHER INFORMATION CONTACT: Mike Long, Field Supervisor, Wyoming Field Office (see **ADDRESSES** section), telephone 307/772/2374; facimile 307/772–2358.

SUPPLEMENTARY INFORMATION

Background

Gaura neomexicana ssp. *coloradensis* was initially described as *G. coloradensis* by Rydberg (1904) based on material collected near Fort Collins, Colorado, in 1895. Munz (1938) transferred *G. coloradensis* to *G. neomexicana* and reduced it to variety *coloradensis*. This taxon is now recognized as *G. n.* ssp. *coloradensis* (Raven and Gregory 1972).

Gaura neomexicana ssp. *coloradensis* is a perennial herb that lives vegetatively for several years before bearing fruit once and then dying. It has one or a few reddish, hairy stems that are 50–80 centimeters (cm) (2–3 feet (ft)) tall. The lower leaves are lance-shaped with smooth or wavy-toothed margins and average 5–15 cm (2–6 inches (in.)) long, while those on the stem are smaller and reduced in number. Flowers are arranged in a branched, elongate pattern above the leaves. Only a few flowers are open at any one time and these are located below the rounded buds and above the mature fruits. Individual flowers are 5–14 millimeters (1/4–1/2 in.) long with four reddish sepals (modified leaves surrounding the flower) and four white petals that turn pink or red with age. The hard, nutlike fruits are 4-angled and have no stalk. Nonflowering plants consist of a stemless, basal rosette of oblong, hairless leaves 3–18 cm (1–7 in.) long (Marriott 1987; Fertig 1994; Fertig *et al.* 1994).

Gaura neomexicana ssp. *coloradensis* occurs on subirrigated, alluvial (stream deposited) soils on level or slightly sloping floodplains and drainage bottoms at elevations of 1,524–1,951 meters (5,000–6,400 ft). Colonies are often found in low depressions or along bends in wide, active, meandering stream channels a short distance upslope of the actual channel. The plant requires early-to mid-succession riparian (river bank) habitat. It commonly occurs in communities dominated by *Agrostis stolonifera* (redtop) and *Poa pratensis* (Kentucky bluegrass) on wetter sites, and *Glycyrrhiza lepidota* (wild licorice), *Cirsium flodmanii* (Flodman's thistle), *Grindelia squarrosa* (curlytop gumweed), and *Equisetum laevigatum* (smooth scouring rush) on drier sites. Both these habitat types are usually intermediate in moisture between wet, streamside communities dominated by sedges (*Carex* spp.), rushes (*Juncus* spp.), and cattails (*Typha* spp.), and dry, upland shortgrass prairie. Typical *G. n.* ssp. *coloradensis* habitat is open, without dense or overgrown vegetation. *Salix exigua* (coyote willow) and

Cirsium arvense (Canada thistle) may become dominant in *G. n.* ssp. *coloradensis* habitat that are not periodically flooded or otherwise disturbed. The plant occurs on soils derived from conglomerates, sandstones, and tuffaceous mudstones and siltstones of the Tertiary White River, Arikaree, and Oglalla Formations (Love and Christiansen 1985). These soils are common in eastern Colorado and Wyoming.

Gaura neomexicana ssp. *coloradensis* is an early successional plant (although probably not a pioneer) adapted to use stream channel sites that are periodically disturbed. Historically, flooding was probably the main cause of disturbances in the plant's habitat, although wildfire and grazing by native herbivores also may have been important. Although flowering and fruiting stems may undergo increased mortality because of these events, vegetative rosettes appear to be little affected (Mountain West Environmental Services 1985). However, the survival rate of the vegetative rosettes appears to be very dependent on available soil moisture. In wet years, such as the past few years, a large number of rosettes have survived; however, in dry years or during extended droughts, fewer rosettes appear to survive to reach the size necessary for flowering and fruiting. Because the long-term viability of this taxa relies on successful flowering and fruiting, as well as the difficulty in identifying small rosettes, only the flowering plants are counted to estimate population size and trends. The establishment and survival of seedlings appears to be enhanced at sites where tall and dense vegetation has been removed by some form of disturbance. In the absence of occasional disturbance, the plant's habitat can become choked out by dense growth of willows (*Salix* spp.), grasses (including red top (*Agrostis stolonifera*)), baltic rush (*Juncus balticus*), and exotic plants (such as Canada thistle (*Cirsium arvense*) and leafy spurge (*Euphorbia esula*)), which prevents new seedlings from becoming established and replacing plants that have died (Floyd 1995a; Fertig 1996).

Little is known about the historical distribution of *Gaura neomexicana* ssp. *coloradensis*. Prior to 1984, no extensive documentation of the plant's range had been conducted. The plant was known from several historical (and presumably extirpated (Fertig 1994)) locations in southeastern Wyoming, and at least four historical (and presumably extirpated (Fertig 1994)) locations in northern Colorado; and from three extant populations in Laramie County,