AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

12-30-88
Vol. 53 No. 251
Pages 52971-53376

federal register

Friday
December 30, 1988

Briefings on How To Use the Federal Register—
For information on briefings in Washington, DC, and Los Angeles, CA, see announcement on the inside cover of this issue.

FEDERAL REGISTER Published daily, Monday through Friday, (not published on Saturdays, Sundays, or on official holidays), by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (49 Stat. 500, as amended; 44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). Distribution is made only by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

The **Federal Register** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders and Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress and other Federal agency documents of public interest. Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless earlier filing is requested by the issuing agency.

The **Federal Register** will be furnished by mail to subscribers for $340 per year in paper form; $195 per year in microfiche form; or $37,500 per year for the magnetic tape. Six-month subscriptions are also available at one-half the annual rate. The charge for individual copies in paper or microfiche form is $1.50 for each issue, or $1.50 for each group of pages as actually bound, or $175.00 per magnetic tape. Remit check or money order, made payable to the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or charge to your GPO Deposit Account or VISA or Mastercard.

There are no restrictions on the republication of material appearing in the **Federal Register**.

How To Cite This Publication: Use the volume number and the page number. Example: 53 FR 12345.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	202–783–3238
Magnetic tapes	275–3328
Problems with public subscriptions	275–3054

Single copies/back copies:

Paper or fiche	783–3238
Magnetic tapes	275–3328
Problems with public single copies	275–3050

FEDERAL AGENCIES

Subscriptions:

Paper or fiche	523–5240
Magnetic tapes	275–3328
Problems with Federal agency subscriptions	523–5240

For other telephone numbers, see the Reader Aids section at the end of this issue.

THE FEDERAL REGISTER
WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WASHINGTON, DC

WHEN: January 26, at 9:00 a.m.
WHERE: Office of the Federal Register,
First Floor Conference Room,
1100 L Street NW., Washington, DC
RESERVATIONS: 202–523–5240

LOS ANGELES, CA

WHEN: January 12, at 9:00 a.m.
WHERE: Room 8544,
Federal Building,
300 N. Los Angeles St.,
Los Angeles, CA
RESERVATIONS: Call the Federal Information Center,
Los Angeles 213–894–3800

Contents

Federal Register

Vol. 53, No. 251

Friday, December 30, 1988

Agricultural Marketing Service
RULES
Milk marketing orders:
Oregon-Washington et al., 52975
PROPOSED RULES
Milk marketing orders:
Memphis, TN, 53002
Olives grown in California, 53000
Spearmint oil produced in Far West, 53001

Agriculture Department
See Agricultural Marketing Service; Animal and Plant Health Inspection Service; Food Safety and Inspection Service; Forest Service; Soil Conservation Service

Alcohol, Drug Abuse, and Mental Health Administration
NOTICES
Grants and cooperative agreements; availability, etc.:
Depressive disorders, diagnosis and treatment; short-term clinical training grants, 53064
Small instrumentation program, 53064

Animal and Plant Health Inspection Service
RULES
Federal Seed Act regulations:
Alfalfa and red clover seed importation from Canada, 52973
Overtime services relating to imports and exports:
Work at border ports, sea ports, and airports, 52974
Work at laboratories, border ports, ocean ports, and airports, 52991

Antitrust Division
NOTICES
National cooperative research notifications:
Petroleum Environmental Research Forum, 53079

Civil Rights Commission
NOTICES
Meetings; State advisory committees:
North Carolina, 53039

Coast Guard
RULES
Marine pollution financial responsibility and compensation:
Offshore oil production; barrel fee levy suspension, 52995

Commerce Department
See also Foreign-Trade Zones Board; International Trade Administration; Minority Business Development Agency; National Institute of Standards and Technology; National Oceanic and Atmospheric Administration; National Telecommunications and Information Administration
NOTICES
Meetings:
Export Now Advisory Committee, 53039

Consumer Product Safety Commission
NOTICES
Agency information collection activities under OMB review, 53050
Meetings; Sunshine Act, 53119

Defense Department
RULES
Federal Acquisition Regulation (FAR):
U.S.-Canada free-trade agreement, procurement provisions; implementation, 53340
PROPOSED RULES
Federal Acquisition Regulation (FAR):
Bid guarantee requirements, 53279
Individual sureties, 53361
Prompt payment, 53364

Education Department
NOTICES
Grants and cooperative agreements; availability, etc.:
Bilingual education—
Family English literacy program, 53051
Meetings:
Education Intergovernmental Advisory Council, 53051
Indian Education National Advisory Council, 53051

Employment and Training Administration
NOTICES
Adjustment assistance:
Alamco, Inc., et al., 53080
APV Chemical Machinery, Inc., 53082
BethEnergy Mines, Inc., 53083
B.J. Titan Service, 53083

Employment Standards Administration
See also Wage and Hour Division
NOTICES
Minimum wages for Federal and federally-assisted construction; general wage determination decisions, 53080

Energy Department
See also Energy Information Administration
NOTICES
Atomic energy agreements; subsequent arrangements, 53059 (2 documents)
Environmental statements; availability, etc.:
West Valley Demonstration Project, NY, 53052
Nuclear waste repositories; site characterization plans:
Yucca Mountain, NV, 53057

Energy Information Administration
NOTICES
Reporting and recordkeeping requirements, 53059

Environmental Protection Agency
PROPOSED RULES
Air pollutants, hazardous; national emission standards:
Coke oven emissions from wet-coal charged by-product coke oven batteries, 53014
Hazardous waste:
Identification and listing—
Wood preserving operations and surface protection processes, 53282
Wood preserving wastewaters (K001 formation), 53330

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
Fluazifop-butyl, 53017
Myclobutanil, 53019
Thiophanate-methyl, 53018
NOTICES
Environmental statements; availability, etc.:
Agency statements—
Weekly receipts, 53060
Meetings:
Science Advisory Board, 53060
Water pollution; discharge of pollutants (NPDES):
Virginia, 53060

Executive Office of the President
See Presidential Documents; Science and Technology Policy Office; Trade Representative, Office of United States

Federal Aviation Administration
PROPOSED RULES
Airport radar service areas, 53272

Federal Emergency Management Agency
PROPOSED RULES
Flood insurance program:
Proposed projects review; reimbursement procedures; rate increase and payee change, 53028

Federal Highway Administration
PROPOSED RULES
Engineering and traffic operations:
Truck size and weight—
Reasonable access, 53006
NOTICES
Environmental statements; notice of intent:
Ellis County, TX, 53116
San Diego County, CA, 53117

Federal Maritime Commission
NOTICES
Agreements filed, etc., 53061
(3 documents)

Federal Reserve System
NOTICES
Federal Open Market Committee:
Domestic policy directives, 53062
Applications, hearings, determinations, etc.:
Andelson, Arlen H., 53063
Antrim Financial Corp. et al., 53063

Financial Management Service
See Fiscal Service

Fiscal Service
NOTICES
Interest rates:
Renegotiation Board and prompt payment rates, 53117

Fish and Wildlife Service
PROPOSED RULES
Endangered and threatened species:
Findings on petitions, etc., 53030

Food and Drug Administration
RULES
Animal drugs, feeds, and related products:
Diethylcarbamazine/oxibendazole chewable tablets Correction, 53120
Food additives:
Irradiated foods; production processing and handling—
Gamma radiation for pork treatment, 53176

Food Safety and Inspection Service
NOTICES
Committees; establishment, renewal, termination, etc.:
Microbiological Criteria for Foods National Advisory Committee; membership nominations, 53037

Foreign-Trade Zones Board
NOTICES
Applications, hearings, determinations, etc.:
Alabama—
Chrysler Corp., 53039
Hawaii—
Chevron U.S.A., Inc., 53040
Texas, 53042
(3 documents)
Texas—
Valero Refining Co., 53041

Forest Service
NOTICES
Environmental statements; availability, etc.:
Apalachicola National Forest, FL, 53037

General Services Administration
RULES
Federal Acquisition Regulation (FAR):
U.S.-Canada free-trade agreement, procurement provisions; implementation, 53340
PROPOSED RULES
Federal Acquisition Regulation (FAR):
Bid guarantee requirements, 53279
Individual sureties, 53361
Prompt payment, 53364
Federal property management:
Advisory committee management, 53022

Health and Human Services Department
See also Alcohol, Drug Abuse, and Mental Health Administration; Food and Drug Administration; Health Care Financing Administration; Human Development Services Office; National Institutes of Health; Public Health Service
NOTICES
Agency information collection activities under OMB review, 53063

Health Care Financing Administration
PROPOSED RULES
Medicare:
Non-assigned claims; physician liability, 53025

Health Resources and Services Administration
See Public Health Service

Human Development Services Office
NOTICES
Grants; availability, etc.:
Child abuse and neglect—
Prevention and treatment; proposed research demonstration priorities, 53065
Child welfare services State grant program; allotment percentages, 53071

Interior Department
See also Fish and Wildlife Service; Land Management Bureau
RULES
Watch duty-exemption program:
Duty-exemption entitlement allocations in Virgin Islands, Guam, American Samoa, and Northern Mariana Islands, 52994

Internal Revenue Service
RULES
Income taxes:
Partnership liabilities treatment; allocations attributable to nonrecourse liabilities, 53140
PROPOSED RULES
Income taxes:
Partnership liabilities treatment; allocations attributable to nonrecourse liabilities; cross reference, 53174

International Trade Administration
RULES
United States-Canada free-trade agreement; panel review procedures, 53232
Watch duty-exemption program:
Duty-exemption entitlement allocations in Virgin Islands, Guam, American Samoa, and Northern Mariana Islands, 52994
NOTICES
Antidumping:
Television receivers, monochrome and color, from Japan, 53043
Countervailing duties:
Unprocessed float glass from Mexico, 53045
Machine tools produced in Japan or the territory represented by CCNAA; enforcement of export limits, 53047
United States-Canada free-trade agreements; binational panel reviews and extraordinary challenge committees; procedure rules, 53212

International Trade Commission
RULES
United States-Canada free-trade agreement; panel review procedures, 53248
NOTICES
Probable economic effect on U.S. industries and consumers of tariff modifications; investigation and hearings, 53077

Interstate Commerce Commission
PROPOSED RULES
Practice and procedure:
Practitioners; licensing, 53029
NOTICES
Motor carriers; control, purchase, and tariff filing exemptions, etc.:
Leisure Time Tours et al., 53079

Justice Department
See Antitrust Division

Labor Department
See Employment and Training Administration; Employment Standards Administration; Mine Safety and Health Administration; Wage and Hour Division

Land Management Bureau
RULES
Public land orders:
Arizona, 52997
NOTICES
Classification of public lands:
Arizona, 53073
Environmental statements; availability, etc.:
Catron and Cibola Counties Fence Lake Area, NM, 53073
Oil and gas leases:
Alaska, 53074
Wyoming, 53074
Realty actions; sales, leases, etc.:
Colorado, 53074
Colorado; correction, 53075
Nevada, 53075
Utah, 53075
Wyoming, 53076
Survey plat filings:
Idaho, 53076

Legal Services Corporation
PROPOSED RULES
Fee-generating cases; attorneys' fees, etc.
Correction, 53120

Mine Safety and Health Administration
NOTICES
Safety standard petitions:
Mettiki Coal Corp., 53084
Old Ben Coal Co., 53084
Pyro Mining Co., 53084
Rough Diamond, Inc., 53085

Minority Business Development Agency
NOTICES
Business development center program applications:
American Indian Business Consultants, U.S., 53047
Puerto Rico, 53048

National Aeronautics and Space Administration
RULES
Federal Acquisition Regulation (FAR):
U.S.-Canada free-trade agreement, procurement provisions; implementation, 53340
PROPOSED RULES
Federal Acquisition Regulation (FAR):
Bid guarantee requirements, 53279
Individual sureties, 53361
Prompt payment, 53364

National Institute of Standards and Technology
NOTICES
Laboratory Accreditation Program, National Voluntary:
Airborne asbestos analysis; workshop, 53048

National Institutes of Health
NOTICES
Meetings:
Recombinant DNA Advisory Committee, 53262
Recombinant DNA molecules research:
Actions under guidelines
Proposed, 53262

National Oceanic and Atmospheric Administration
RULES
Fishery conservation and management:
Western Pacific crustacean, 52998
PROPOSED RULES
Fishery conservation and management plans; guidelines, 53031

NOTICES
Marine sanctuaries:
Cordell Bank, CA, 53049
Permits:
Marine mammals, 53050

National Telecommunications and Information Administration
NOTICES
Consent decree prohibitions on Bell companies; impact on telecommunications marketplace, 53050

National Transportation Safety Board
NOTICES
Meetings; Sunshine Act, 53119

Nuclear Regulatory Commission
RULES
Organization, functions, and authority delegations:
Administration and Resources Management Office, 52993
NOTICES
Environmental statements; availability, etc.:
Georgia Power Co. et al., 53085
Operating licenses, amendments; no significant hazards considerations; biweekly notices, 53086

Office of United States Trade Representative
See Trade Representative, Office of United States

Pension Benefit Guaranty Corporation
RULES
Multiemployer plans:
Withdrawal liability; notice and collection; interest rates, 52995
NOTICES
Agency information collection activities under OMB review, 53110

Presidential Documents
ADMINISTRATIVE ORDERS
Libyan emergency; continuation (Notice of Dec. 28, 1988), 52971

Public Health Service
See also Alcohol, Drug Abuse, and Mental Health Administration; Food and Drug Administration; National Institutes of Health
NOTICES
Organization, functions, and authority delegations:
Food and Drug Administration, 53072

Railroad Retirement Board
NOTICES
Agency information collection activities under OMB review, 53111, 53112
(4 documents)

Saint Lawrence Seaway Development Corporation
PROPOSED RULES
Tariff of tolls, 53012

Science and Technology Policy Office
NOTICES
Meetings:
White House Science Council, 53112

Securities and Exchange Commission
NOTICES
Agency information collection activities under OMB review, 53113
Meetings; Sunshine Act, 53119
Self-regulatory organizations; proposed rule changes:
New York Stock Exchange, Inc., 53113

Small Business Administration
NOTICES
Agency information collection activities under OMB review, 53114

Soil Conservation Service
NOTICES
Environmental statements; availability, etc.:
Soap Creek Watershed, IA, 53037

State Department
RULES
Visas; nonimmigrant documentation:
United States-Canada Free Trade Agreement Implementation Act of 1988; waiver of passport and visa requirements
PROPOSED RULES
Visas; immigrant documentation:
"Under-represented countries" natives; 10,000 visas issuance, 53003

Tennessee Valley Authority
NOTICES
Agency information collection activities under OMB review, 53114, 53115
(2 documents)

Trade Representative, Office of United States
NOTICES
European Community; increased duties on certain products, 53115

Transportation Department
See Coast Guard; Federal Aviation Administration; Federal Highway Administration; Saint Lawrence Seaway Development Corporation; Urban Mass Transportation Administration

Treasury Department
See Fiscal Service; Internal Revenue Service

Urban Mass Transportation Administration
RULES
Charter services, 53348

Veterans Administration
NOTICES
Agency information collection activities under OMB review, 53117, 53118
(2 documents)

Wage and Hour Division
PROPOSED RULES
Homeworkers; employment in industries
Women's apparel industry, 53344

Separate Parts In This Issue

Part II
Department of the Treasury, Internal Revenue Service, 53140

Part III
Department of Health and Human Services, Food and Drug Administration, 53176

Part IV
Department of Commerce, International Trade Administration, 53212

Part V
Department of Commerce, International Trade Administration, 53232

Part VI
International Trade Commission, 53248

Part VII
Department of Health and Human Services, National Institutes of Health, 53262

Part VIII
Department of Transportation, Federal Aviation Administration, 53272

Part IX
Department of Defense; General Services Administration; National Aeronautics and Space Administration, 53279

Part X
Environmental Protection Agency, 53282

Part XI
Department of Defense; General Services Administration; National Aeronautics and Space Administration, 53340

Part XII
Department of Labor, Employment Standards Administration, Wage and Hour Division, 53344

Part XIII
Department of Transportation, Urban Mass Transportation Administration, 53348

Part XIV
Department of Defense; General Services Administration; National Aeronautics and Space Administration, 53361

Part XV
Department of Defense; General Services Administration; National Aeronautics and Space Administration, 53364

Part XVI
Department of State, 53375

Reader Aids
Additional information, including a list of public laws, telephone numbers, and finding aids, appears in the Reader Aids section at the end of this issue.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR
Executive Orders:
12543 (*See* Notice of Dec. 28, 1988)..... 52971
Administrative Orders:
Notices:
December 28, 1988..... 52971

7 CFR
201..... 52973
354..... 52974
1124..... 52975
1125..... 52975
Proposed Rules:
932..... 53000
985..... 53001
1097..... 53002

9 CFR
97..... 52991

10 CFR
1..... 52993
2..... 52993
9..... 52993
73..... 52993

14 CFR
Proposed Rules:
71..... 53272

15 CFR
303..... 52994

19 CFR
207..... 53248
356..... 53232

21 CFR
179..... 53176
520..... 53120

22 CFR
41..... 53375
Proposed Rules:
44..... 53003

23 CFR
Proposed Rules:
658..... 53006

26 CFR
1..... 53140
602..... 53140
Proposed Rules:
1..... 53174
602..... 53174

29 CFR
2644..... 52995
Proposed Rules:
530..... 53344

33 CFR
135..... 52995
Proposed Rules:
402..... 53012

40 CFR
Proposed Rules:
61..... 53014
180 (3 documents)..... 53017-53019
185..... 53019
186..... 53019
260..... 53282
261 (2 documents)..... 53282, 53330
262..... 53282
264..... 53282
265..... 53282
270..... 53282
271..... 53282
302..... 53282

41 CFR
Proposed Rules:
101-6..... 53022

42 CFR
Proposed Rules:
405..... 53025

43 CFR
Public Land Orders:
6697..... 52997

44 CFR
Proposed Rules:
72..... 53028

45 CFR
Proposed Rules:
1609..... 53120

48 CFR
25..... 53340
52..... 53340
Proposed Rules:
28 (2 documents)..... 53279, 53361
32..... 53364
52 (2 documents)..... 53361, 53364
53..... 53361

49 CFR
604..... 53348
Proposed Rules:
1103..... 53029

50 CFR
681..... 52998
Proposed Rules:
17..... 53030
602..... 53031

Federal Register
Vol. 53, No. 251
Friday, December 30, 1988

Presidential Documents

Title 3—

The President

Notice of December 28, 1988

Continuation of Libyan Emergency

On January 7, 1986, by Executive Order No. 12543, I declared a national emergency to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions and policies of the Government of Libya. On January 8, 1986, by Executive Order No. 12544, I took additional measures to block Libyan assets in the United States. I transmitted a notice continuing this emergency to the Congress and the **Federal Register** on December 23, 1986. Because the Government of Libya has continued its actions and policies in support of international terrorism, the national emergency declared on January 7, 1986, and the measures adopted on January 7 and January 8, 1986, to deal with that emergency, must continue in effect beyond January 7, 1989. Therefore, in accordance with Section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to Libya. This notice shall be published in the **Federal Register** and transmitted to the Congress.

Ronald Reagan

THE WHITE HOUSE,
December 28, 1988.

[FR Doc. 88-30203
Filed 12-28-88; 2:54 pm]
Billing code 3195-01-M

Editorial note: For the text of the President's letters to the Speaker of the House of Representatives and the President of the Senate, dated Dec. 28, on the extension of the national emergency, see the *Weekly Compilation of Presidential Documents* (vol. 24, no. 52).

Rules and Regulations

Federal Register
Vol. 53, No. 251
Friday, December 30, 1988

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 201

[Docket No. 88-208]

Federal Seed Act Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.[1].
ACTION: Interim rule and request for comments.

SUMMARY: This rule removes the origin staining requirements for seed of alfalfa or red clover grown in Canada and imported into the United States. The removal of the requirements is necessary to make the regulations conform to the amendment of the Federal Seed Act by the United States-Canada Free-Trade Implementation Act of 1988. This action relieves a restriction on importation of alfalfa and red clover seed from Canada.

DATE: This rule takes effect on the date that the United States-Canada Free-Trade Agreeemnt enters into force. (*See* Supplementary Information below.) The Animal and Plant Health Inspection Service will publish a document in the Federal Register announcing the effective date. Written comments must be postmarked or received on or before February 28, 1989.

ADDRESSES: Send an original and two copies of written comments to Helene R. Wright, Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, Room 866, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket No. 88-208. Comments received may be inspected at USDA, Room 1141, South Building, 14th and Independence Avenue, SW, Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Frank E. Cooper, Senior Operations Officer, Port Operations, PPQ, APHIS, USDA, Room 632, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8393.

SUPPLEMENTARY INFORMATION:

Background

We are amending the Federal Seed Act Regulations (the regulations) by removing the requirement that one percent of each container of seed of alfalfa or red clover grown in the Dominion of Canada and imported into the United States be stained violet.

On January 2, 1988, President Reagan signed the United States-Canada Free-Trade Agreement (FTA), to become effective January 1, 1989, subject to both countries taking certain actions necessary to implement the FTA. Congress satisfied one of the prerequisites by passing the United States-Canada Free-Trade Implementation Act of 1988 (the Act). The statutory amendments included in the Act become effective coincident with the FTA.

This amendment is mandated by section 301(e) of the Act, which amended section 302(e) of the Federal Seed Act (7 U.S.C. 1582(e)) by providing that the provisions requiring certain seeds to be stained shall not apply to alfalfa or clover seed originating in Canada. (*See* Pub. L. 100-449, 102 Stat 1868.) The Act provides implementing legislation for the FTA.

This regulation is being promulgated in anticipation of the entry into force of the FTA. Article 2105 of the FTA provides that the FTA enters into force "on January 1, 1989 upon an exchange of diplomatic notes certifying the completion of necessary legal procedures by each Party." It is anticipated the the FTA will enter into force on January 1, 1989. The Office of the United States Trade Representative will confirm in a Federal Register notice the precise date of the FTA's entry into force.

This action is taken to conform the regulations with the Act.

Emergency Action

The Administrator of the Animal and Plant Health Inspection Service has determined that good cause exists to publish this interim rule without prior notice and opportunity for public comment.

Certain regulatory actions must be taken as a result of the statutory amendments discussed in the "Background", and must become effective with the FTA to avoid inconsistency between the regulations and their statutory authority. Removal of the origin staining requirement for alfalfa and clover seed imported from Canada is one of the regulatory changes that must become effective at the same time as the Agreement and the Act to avoid this conflict.

This action relieves a restriction on importation of certain seed from Canada. Since prior notice and other public procedures with respect to this interim rull and impracticable and since this regulatory change is mandated by Congress, there is good cause under 5 U.S.C. 553 for making this interim rule effective upon the entry into force of the FTA.

We will consider comments postmarked or received on or before February 28, 1989.

Executive Order 12291 and Regulatory Flexibility Act

Since this rule merely deletes a regulatory requirement which is no longer authorized by the Federal Seed Act because of its amendment, it has been determined that it is not a "major rule" within the meaning of Executive Order 12291 and Departmental regulation 1512-1. For the same reason, it is not subject to regulatory analysis pursuant to the requirement of the Regulatory Flexibility Act.

Paperwork Reduction Act

The regulations in this rule contain no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 201

Advertising, Agricultural commodities, Imports, Labelling, Reporting and recordkeeping requirements, Seeds, Vegetables.

[1] Delegation of authority published September 22, 1982 (page 41725) and Functional Responsibility published October 25, 1982 (page 47229).

Accordingly, 7 CFR Part 201 is amended as follows:

PART 201—FEDERAL SEED ACT REGULATIONS

1. The authority citation for Part 201 is revised to read as follows:

Authority: 7 U.S.C. 1592.

§ 201.104 [Amended]

2. In § 201.104, paragraph (c) is removed and paragraph (d) is dedesignated as paragraph (c).

Done in Washington, DC this 28th day of December, 1988.

James Glosser,

Administrator, Animal and Plant Health Inspection Service

December 28, 1988.

[FR Doc 88-30219 Filed 12-29-88; 9:14 a.m.]

BILLING CODE 3410-34-M

---

7 CFR Part 354

[Docket No. 88-189]

Overtime Work at Border Ports, Sea Ports, and Airports

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations that establish charges for overtime work performed by Plant Protection and Quarantine inspectors of the U.S. Department of Agriculture at border ports, sea ports, and airports. The regulations are amended by: (1) Increasing the hourly rates charged an owner or operator of an aircraft requesting inspection or quarantine services at an airport outside of the regularly established hours of service; and (2) increasing the hourly rates charged a person, firm, or corporation having ownership, custody, or control of plants, plant products, animals, animal byproducts, or other commodities or articles subject to certain inspection, laboratory testing, certification, or quarantine and who requires the services of an employee of Plant Protection and Quarantine on a Sunday or holiday or at any other time outside the employee's regular tour of duty. These increases reflect salary increases for federal employees in accordance with the Federal Pay Comparability Act of 1970 (Pub. L. 91-656), and Pub. L. 100-440, 102 Stat. 1756, dated September 22, 1988, and reflect allowable costs associated with the implementation of the Debt Collection Act of 1982.

EFFECTIVE DATE: January 1, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Paul R. Eggert, Director, Resource Management Support, Plant Protection and Quarantine, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 622, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-7764.

SUPPLEMENTARY INFORMATION: .

Executive Order 12291 and Regulatory Flexibility Act and Effective Date

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and will not have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

We are amending the regulations by increasing the hourly rates charged an owner or operator of an aircraft requesting inspection or quarantine services at any airport outside of the regularly established hours of service. The rates are increased by $2.52 per hour for services performed outside of the regularly established hours on a Sunday and by $2.20 per hour for services performed outside of the regularly established hours on a holiday or any other period.

We are also amending the regulations by increasing the hourly rates charged a person, firm, or corporation having ownership, custody, or control of plants, plant products, animals, animal byproducts, or other commodities or articles subject to certain inspection, laboratory testing, certification, or quarantine and who requires the services of an employee of Plant Protection and Quarantine on a Sunday or holiday or at any other time outside the regular tour of duty of the employee. The rates are increased by $4.64 per hour for services performed outside the regular tour of duty on a Sunday and by $4.32 per hour for services performed outside the regular tour of duty on a holiday or any other period.

Services of an employee of Plant Protection and Quarantine at an airport during a regular tour of duty and during regularly established hours of service on Sundays and holidays are still provided free of charge to those requesting the service. Based on information compiled by the Department, we have estimated that Plant Protection and Quarantine provided an average of 10,957 hours per week of services for which charges were assessed during 1988, and these services were requested by thousands of entities. We do not expect that the number of hours of service for which charges will be imposed will increase significantly in 1989.

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

The hourly rate for services of an employee of Plant Protection and Quarantine depend entirely upon facts within the knowledge of the Department of Agriculture. The Department has no alternatives to raising the rates. By law, importers and exporters are required to reimburse the Department for its costs associated with services rendered. A cost analysis was performed to determine if fees for overtime are adequate to recover the cost of providing the services. Unless the rates are raised, the Department will not be able to recover the costs for providing services outside regularly established hours or outside regular tours of duty hours.

Accordingly, pursuant to the administrative procedure provisions in 5 U.S.C. 553, we find for good cause that prior notice and other public procedure with respect to this rule are impracticable, unnecessary, and contrary to the public interest; we also find good cause that this rule be made effective less than 30 days after publication of this document in the **Federal Register.**

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

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

List of Subjects in 7 CFR Part 354

Agricultural commodities, Exports, Government employees, Imports, Plants

(Agriculture) Quarantine, Transportation.

PART 354—OVERTIME SERVICES RELATING TO IMPORTS AND EXPORTS

1. The authority citation for Part 354 continues to read as follows:

Authority: 7 U.S.C. 2260; 49 U.S.C. 1741; 7 CFR 2.17, 2.51, and 371.2(c).

2. Section 354.1(a)(1) is revised to read as follows:

§ 354.1 Overtime work at border ports, sea ports, and airports.

(a)(1) Any person, firm, or corporation having ownership, custody, or control of plants, plant products, animals, animal byproducts, or other commodities or articles subject to inspection, laboratory testing, certification, or quarantine under this chapter and Subchapter D of Chapter I, Title 9 CFR, who requires the services of an employee of Plant Protection and Quarantine on a Sunday or holiday, or at any other time outside the regular tour of duty of the employee, shall sufficiently in advance of the period of Sunday or holiday or overtime service request the Plant Protection and Quarantine inspector in charge to furnish the service during the overtime or Sunday or holiday period, and shall pay the Government at a rate of $37.92 per work-hour per employee on a Sunday and at the rate of $29.28 per work-hour per employee for holiday or any other period, except as provided in paragraphs (a)(1)(i), (a)(1)(ii), and (a)(1)(iii) of this section:

(i) For any services performed on a Sunday or holiday, or at any time after 5 p.m. or before 8 a.m. on a weekday, in connection with the arrivals in or departure from the United States of a private aircraft or vessel, the total amount payable shall not exceed $25 for all inspection services performed by the Customs Service, Immigration and Naturalization Service, Public Health Service, and the Department of Agriculture;

(ii) Owners and operators of aircraft will be provided service without reimbursement during regularly established hours of service on a Sunday or holiday; and

(iii) The overtime rate to be charged owners or operators of aircraft at airports of entry or other places of inspection as a consequence of the operation of the aircraft, for work performed outside of the regularly established hours of service on a Sunday will be $31.16 and for work performed outside of the regularly established hours of service for a holiday or any other period will be $23.68 per hour (these charges exclude administrative overhead costs).

* * * * *

Done at Washington, DC, this 27th day of December, 1988.

James Glosser,

Administrator, Animal and Plant Health Inspection Service.

December 27, 1988.

[FR Doc. 88-30129 Filed 12-29-88; 8:45 am]

BILLING CODE 3410-34-M

Agricultural Marketing Service

7 CFR Parts 1124 and 1125

[Docket Nos. AO-368-A16 and AO-226-A32; DA-88-108]

Milk in the Oregon-Washington and Puget Sound-Inland Marketing Areas; Order Amending and Merging Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This action merges the Oregon-Washington and Puget Sound-Inland Federal orders on the basis of industry proposals considered at a public hearing held November 17–18, 1987, in Portland, Oregon. The merged "Pacific Northwest" marketing area includes, in addition to all of the presently regulated area of the two individual orders, five additional Washington counties, the unregulated portion of another Washington county, and three central Oregon counties. The Class I differentials at Portland, Oregon, and Spokane, Washington, are reduced from $1.95 to $1.90; and the Class I differential at Seattle, Washington, is increased from $1.85 to $1.90.

The provisions of the merged order are patterned largely after those of the present Puget Sound-Inland order, with some modifications to accommodate specific marketing conditions of the Oregon-Washington order area. Provisions of the merged order that represent significant changes in regulation for handlers and producers currently pooled under the Oregon-Washington order include a single butterfat differential for adjusting order prices for variations in butterfat content, payment to producers on the basis of a uniform price for all production rather than a base-excess plan, and determination of handler obligations to the marketwide pool on an equalization basis (the difference between the use value of producer receipts and the value of those receipts at the uniform price).

The merger is necessary to reflect changes in market structure in that the two separately regulated areas have become, in effect, one common market. Cooperative associations representing more than the required two-thirds of the producers supplying milk for the market during the respresentative period of September 1988 have approved issuance of the amended order.

EFFECTIVE DATE: February 1, 1989.

FOR FURTHER INFORMATION CONTACT: Constance M. Brenner, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 447-7183.

Prior documents in this proceeding:

Notice of Hearing: Issued October 26, 1987; published October 29, 1987 (52 FR 41566).

Recommended Decision: Issued September 7, 1988; published September 19, 1988 (53 FR 36291).

Final Decision: Issued November 29, 1988; published December 6, 1988 (53 FR 49154).

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the Oregon-Washington and Puget Sound-Inland orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) Findings upon the basis of the hearing record. Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the Oregon-Washington and Puget Sound-Inland marketing areas.

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The Pacific Northwest order, which amends and merges the Oregon-Washington and Puget Sound-Inland orders, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the Pacific Northwest marketing area; and the minimum prices

specified in the Pacific Northwest order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(3) The Pacific Northwest order regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, marketing agreements upon which hearings have been held;

(4) All milk and milk products handled by handlers, as defined in the Pacific Northwest order are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products; and

(5) It is hereby found that the necessary expense of the market administrator for the maintenance and functioning of such agency will require the payment by each handler, as his pro rata share of such expense, 4 cents per hundredweight or such lesser amount as the Secretary may prescribe, with respect to milk specified in § 1124.85.

(b) Determinations. It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in Sec. 8c(9) of the Act) of more than 50 percent of the milk, which is marketed within the marketing area, to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the act;

(2) The issuance of this order amending and merging the orders is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the order; and

(3) The issuance of the order amending and merging the orders is approved or favored by at least two-thirds of the producers who during the determined representative period were engaged in the production of milk for sale in the Pacific Northwest marketing area.

List of Subjects in 7 CFR Parts 1124 and 1125

Milk marketing orders, Milk, Dairy products.

Order Relative to Handling

It is therefore ordered, That on and after the effective date hereof, the handling of milk in the Oregon-Washington and Puget Sound-Inland marketing areas (Parts 1124 and 1125, respectively) shall be amended and merged into one order. Part 1125 is superseded thereby, and such vacated Part designation shall be reserved for future assignment. The handling of milk in the merged marketing area, to be designated as the "Pacific Northwest Marketing Area" (Part 1124), shall be in conformity to and in compliance with the terms and conditions of the following attached order.

For the reasons set forth in the preamble, Chapter X of Title 7 of the Code of Federal Regulations is amended as follows:

PART 1125—[REMOVED AND RESERVED]

1. Part 1125 is removed and reserved.

2. Part 1124 is revised to read as follows:

PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA

Subpart—Order Regulating Handling

General Provisions

Sec.
1124.1 General provisions.

Definitions

1124.2 Pacific Northwest marketing area.
1124.3 Route disposition.
1124.4 Plant.
1124.5 Distributing plant.
1124.6 Supply plant.
1124.7 Pool plant.
1124.8 Nonpool plant.
1124.9 Handler.
1124.10 Producer-handler.
1124.11 Cooperative reserve supply unit.
1124.12 Producer.
1124.13 Producer milk.
1124.14 Other source milk.
1124.15 Fluid milk product.
1124.16 Fluid cream product.
1124.17 Filled milk.
1124.18 Cooperative association.
1124.19 Product prices.

Handler Reports

1124.30 Reports of receipt and utilization.
1124.31 Payroll reports.
1124.32 Other reports.

Classification of Milk

1124.40 Classes of utilization.
1124.41 Shrinkage.
1124.42 Classification of transfers and diversions.
1124.43 General classification rules.
1124.44 Classification of producer milk.
1124.45 Market administrator's reports and announcements concerning classification.

Class Prices

1124.50 Class prices.
1124.51 Basic formula price.
1124.51a Basic Class II formula price.
1124.52 Plant location adjustments for handlers.
1124.53 Announcement of class prices.
1124.54 Equivalent price.

Uniform Price

Sec.
1124.60 Handler's value of milk for computing uniform price.
1124.61 Computation of uniform price.
1124.62 Announcement of uniform price and butterfat differential.

Payments for Milk

1124.70 Producer-settlement fund.
1124.71 Payments to the producer-settlement fund.
1124.72 Payments from the producer-settlement fund.
1124.73 Payments to producers and to cooperative associations.
1124.74 Butterfat differential.
1124.75 Plant location adjustments for producers and on nonpool milk.
1124.76 Payments by a handler operating a partially regulated distributing plant.
1124.77 Adjustment of accounts.
1124.78 Charges on overdue accounts.

Administrative Assessment and Marketing Service Deduction

1124.85 Assessment for order administration.
1124.86 Deduction for marketing services.

Authority: Secs. 1–19, 48 Stat. 31, as amended (7 U.S.C. 601–674).

Subpart—Order Regulating Handling

General Provisions

§ 1124.1 General provisions.

The terms, definitions, and provisions in Part 1000 of this chapter are hereby referenced and made a part of this order.

Definitions

§ 1124.2 Pacific Northwest marketing area.

"Pacific Northwest Marketing Area" (hereinafter called the "Marketing Area") means all territory geographically within the places listed below, including all territory fully or partly therein occupied by government (municipal, state or federal) reservations, facilities, installations, or institutions:

Idaho Counties:

Benewah, Bonner, Boundary, Kootenai, Latah, and Shoshone.

Washington Counties:

Adams, Asotin, Benton, Chelan, Clark, Columbia, Cowlitz, Douglas, Ferry, Franklin, Garfield, Grant, Grays Harbor, Island, King, Kitsap, Kittitas, Klickitat, Lewis, Lincoln, Mason, Okanogan, Pacific, Pend Oreille, Pierce, San Juan, Skagit, Skamania, Snohomish, Spokane, Stevens, Thurston, Wahkiakum, Walla Walla, Whitman and Yakima.

Oregon Counties:

Benton, Clackamas, Clatsop, Columbia, Coos, Crook, Deschutes, Douglas, Gilliam, Hood River, Jackson, Jefferson, Josephine, Klamath, Lake, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Polk, Sherman, Tillamook, Umatilla, Wasco, Washington, Wheeler, and Yamhill.

§ 1124.3 Route disposition.

"Route disposition" means any delivery of a fluid milk product classified as Class I milk from a plant to a retail or wholesale outlet (including any delivery through a distribution point as provided by this section, by a vendor, from a plant store or through a vending machine). The term "route disposition" does not include:

(a) A delivery to a plant. However, packaged fluid milk products that are transferred to a pool distributing plant from another pool distributing plant, and classified as Class I under § 1124.42(a), shall be considered route disposition from the transferor-plant for the sole purpose of qualifying it as a pool distributing plant under § 1124.7(a), and the transferor-plant shall be assigned in-area dispositions but not in excess of the in-area dispositions of the transferee plant;

(b) A delivery in bulk to a commercial food processing establishment pursuant to § 1124.40(b)(3); or

(c) A delivery to a military or other ocean transport vessel leaving the marketing area, of fluid milk products which originated at a plant located outside the marketing area and were not received or processed at any pool plant.

§ 1124.4 Plant.

"Plant" means the buildings, facilities and equipment, whether owned or operated by one or more persons, constituting a single operating unit or establishment, which is maintained and operated primarily for the receiving, handling and/or processing of milk or milk products (including filled milk). Separate facilities used only as a distribution point for storing packaged fluid milk products in transit for route disposition or separate facilities used only as a reload point for transferring bulk milk from one tank truck to another shall not be a "plant" under this definition.

§ 1124.5 Distributing plant.

"Distributing plant" means a plant in which a fluid milk product approved by a duly constituted regulatory agency for fluid consumption, or filled milk, is processed or packaged and that has route disposition in the marketing area during the month.

§ 1124.6 Supply plant.

"Supply plant" means a plant from which a fluid milk product approved by a duly constituted regulatory agency for fluid consumption or filled milk, is transferred during the month to a pool distributing plant.

§ 1124.7 Pool plant.

Except as provided in paragraph (d) of this section, "pool plant" means:

(a) A distributing plant from which there is route disposition (except filled milk) in the marketing area during the month equal to not less than 10 percent of receipts of Grade A milk at such plant (exclusive of transfers of packaged fluid milk products from plants qualifying as pool plants pursuant to this paragraph, filled milk, and milk received at such plant as diverted milk from another plant, which milk is classified in Class III under this order and is subject to the pricing and pooling provisions of this or another order issued pursuant to the Act) or diverted therefrom pursuant to § 1124.13;

(b) A supply plant from which during any month not less than 30 percent of the total quantity of milk that is physically received at such plant from dairy farmers eligible to be producers pursuant to § 1124.12 (excluding milk received at such plant as diverted milk from another plant, which milk is classified in Class III under this order and is subject to the pricing and pooling provisions of this or another order issued pursuant to the Act) or diverted as producer milk to another plant pursuant to § 1124.13, is shipped in the form of a fluid milk product (except as filled milk) to a pool distributing plant or is a route disposition in the marketing area of fluid milk products (except filled milk) processed and packaged at such plant; *Provided*, That:

(1) With respect to a supply plant operated by a cooperative association, the producer milk of its members which is caused to be delivered directly from their farms to pool distributing plants, shall for the purpose of this paragraph, be considered as a receipt at the cooperative's supply plant and a shipment from the supply plant to pool distributing plants;

(2) A plant which qualified as a pool plant pursuant to this paragraph in each month of September through February shall be a pool plant in each of the following months of March through August unless a written application is filed with the Market Administrator prior to the first day of any such month requesting that the plant be designated a nonpool plant for such month and each subsequent month through August during which it would not otherwise qualify as a pool plant; and

(3) For the purpose of this paragraph, the operations of two or more supply plants may be combined and considered as the operation of one plant if so requested in writing to the Market Administrator by the handler(s) operating such plants prior to the first day of the month for which such consideration is requested.

(c) The Director of the Dairy Division may reduce or increase up to 10 percentage points from the levels set forth therein the pool plant performance standards in paragraphs (a) or (b) of this section, if the Director finds such revision is necessary to obtain needed shipments or to prevent uneconomic shipments. Before making such a finding, the Director shall investigate the need for revision either at the Director's own initiative or at the request of interested persons. If the investigation shows that a revision might be appropriate, the Director shall issue a notice stating that the revision is being considered and invite data, views, and arguments.

(d) The term "pool plant" shall not apply to the following plants:

(1) A producer-handler plant;

(2) A plant qualified pursuant to paragraph (a) of this section which also meets the pooling requirements of another Federal Order and from which, the Secretary determines, there is a greater quantity of route disposition during the month in such other Federal Order marketing area than in this marketing area, except that if such plant was subject to all the provisions of this part in the immediately preceding month it shall continue to be subject to all the provisions of this part until the fourth consecutive month in which a greater proportion of its route disposition is made in such other marketing area unless, notwithstanding the provisions of this paragraph, it is regulated under such other order;

(3) A plant qualified pursuant to paragraph (a) of this section which also meets the pooling requirements of another Federal Order on the basis of route disposition in such other marketing area and from which, the Secretary determines, there is a greater quantity of route disposition in this marketing area than in such other marketing area but which plant maintains pooling status for the month under such other Federal Order;

(4) A plant qualified pursuant to paragraph (b) of this section which also meets the pool plant requirements of another Federal Order and from which greater shipments are made during the

month to plants regulated under such other order than are made to plants regulated under this order;

(5) A distributing plant from which total route disposition (except filled milk) in the marketing area during the month averages 300 pounds or less per day; or

(6) That portion of a plant that is physically separated from the Grade A portion of such plant, is operated separately, and is not approved by any regulatory agency for the receiving, processing, or packaging of any fluid milk products for Grade A disposition.

§ 1124.8 Nonpool plant.

"Nonpool plant" means any plant other than a pool plant. The following categories of nonpool plants are further defined as follows:

(a) "Other order plant" means a plant that is fully subject to the pricing and pooling provisions of another order issued pursuant to the Act.

(b) "Producer-handler plant" means a plant operated by a producer-handler as defined in any order (including this part) issued pursuant to the Act.

(c) "Partially regulated distributing plant" means a nonpool plant that is neither an other order plant nor a producer-handler plant, from which during the month an average of more than 300 pounds daily of fluid milk products is disposed of as route disposition in the marketing area.

(d) "Unregulated supply plant" means a nonpool plant that is neither an other order plant nor a producer-handler plant, from which fluid milk products are moved to a pool plant during the month.

(e) "Exempt distributing plant" means a plant, other than a pool supply plant or a regulated plant under another Federal Order that meets all the requirements for status as a pool distributing plant except that its route disposition (exclusive of filled milk) in the marketing area in the month does not exceed an average of 300 pounds daily. For purposes of this paragraph, route disposition shall not include receipts from a transferor-plant pursuant to the proviso of § 1124.3(a).

§ 1124.9 Handler.

"Handler" means:

(a) The operator of one or more pool plants;

(b) Any cooperative association with respect to producer milk which it caused to be diverted for the account of such cooperative association to another plant or pursuant to § 1124.40(b)(3);

(c) Any cooperative association with respect to milk that it receives for its account from the farm of a producer for delivery to a pool plant of another handler in a tank truck owned and operated by, or under the control of, such cooperative association, unless both the cooperative association and the operator of the pool plant notify the market administrator prior to the time that such milk is delivered to the pool plant that the plant operator will be the handler for such milk and will purchase such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples. Milk for which the cooperative association is the handler pursuant to this paragraph shall be deemed to have been received by the cooperative association at the location of the pool plant to which such milk is delivered;

(d) Any person who operates a plant defined in § 1124.8 (a) through (e).

§ 1124.10 Producer-handler.

"Producer-handler" means a person who is engaged in the production of milk and also operates a plant from which during the month an average of more than 300 pounds daily of fluid milk products, except filled milk, is disposed of as route disposition within the marketing area and who has been so designated by the market administrator upon determination that all of the requirements of this section have been met, and that none of the conditions therein for cancellation of such designation exists. All designations shall remain in effect until canceled pursuant to paragraph (c) of this section. Any state institution shall be a producer-handler exempt from the provisions of this section and §§ 1124.30 and 1124.32 with respect to milk of its own production and receipts from pool plants processed or received for consumption in State institutions and with respect to movements of milk to or from a pool plant.

(a) *Requirements for designation.* (1) The producer-handler has and exercises (in its capacity as a handler) complete and exclusive control over the operation and management of a plant at which it handles and processes milk received from its milk production resources and facilities (designated as such pursuant to paragraph (b)(1) of this section), the operation and management of which are under the complete and exclusive control of the producer-handler (in its capacity as a dairy farmer).

(2) The producer-handler neither receives at its designated milk production resources and facilities nor receives, handles, processes or distributes at or through any of its milk handling, processing or distributing resources and facilities (designated as such pursuant to paragraph (b)(2) of this section) milk products for reconstitution into fluid milk products, or fluid milk products derived from any source other than (i) its designated milk production resources and facilities, (ii) pool plants within the limitation specified in paragraph (c)(2) of this section, or (iii) nonfat milk solids which are used to fortify fluid milk products.

(3) The producer-handler is neither directly nor indirectly associated with the business control or management of, nor has a financial interest in, another handler's operation; nor is any other handler so associated with the producer-handler's operation.

(4) Designation of any person as a producer-handler following a cancellation of its prior designation shall be preceded by performance in accordance with paragraph (a) (1), (2), and (3) of this section for a period of 1 month.

(b) *Resources and facilities.* Designation of a person as a producer-handler shall include the determination and designation of the milk production, handling, processing and distributing resources and facilities, all of which shall be deemed to constitute an integrated operation, as follows:

(1) As milk production resources and facilities: All resources and facilities (milking herd(s), buildings housing such herd(s), and the land on which such buildings are located) used for the production of milk:

(i) Which are directly, indirectly or partially owned, operated or controlled by the producer-handler;

(ii) In which the producer-handler in any way has an interest including any contractual arrangement; and

(iii) Which are directly, indirectly or partially owned, operated or controlled by any partner or stockholder of the producer-handler. However, for purposes of this paragraph any such milk production resources and facilities which the producer-handler proves to the satisfaction of the market administrator do not constitute an actual or potential source of milk supply for the producer-handler's operation as such shall not be considered a part of the producer-handler's milk production resources and facilities; and

(2) As milk handling, processing and distributing resources and facilities: All resources and facilities (including store outlets) used for handling, processing and distributing any fluid milk product:

(i) Which are directly, indirectly or partially owned, operated or controlled by the producer-handler; or

(ii) In which the producer-handler in any way has an interest, including any

contractual arrangement, or with respect to which the producer-handler directly or indirectly exercises any degree of management or control.

(c) *Cancellation.* The designation as a producer-handler shall be canceled under any of the conditions set forth in paragraph (c) (1) and (2) of this section or upon determination by the market administrator that any of the requirements of paragraph (a) (1), (2), and (3) of this section are not continuing to be met, such cancellation to be effective on the first day of the month following the month in which the requirements were not met, or the conditions for cancellation occurred.

(1) Milk from the designated milk production resources and facilities of the producer-handler is delivered in the name of another person as producer milk to another handler.

(2) The producer-handler handles fluid milk products derived from sources other than the designated milk production facilities and resources, with the exception of purchases from pool plants in the form of fluid milk products which do not exceed in the aggregate a daily average during the month of 100 pounds.

(d) *Public announcement.* The market administrator shall publicly announce the name, plant location and farm location(s) of persons designated as producer-handlers, of those whose designations have been canceled and the effective dates of producer-handler status or loss of producer-handler status for each. Such announcements shall be controlling with respect to the accounting at plants of other handlers for fluid milk products received from any producer-handler.

(e) *Burden of establishing and maintaining producer-handler status.* The burden rests upon the handler who is designated as a producer-handler to establish through records required pursuant to § 1000.5 of this chapter that the requirements set forth in paragraph (a) of this section have been and are continuing to be met, and that the conditions set forth in paragraph (c) of this section for cancellation of designation do not exist.

§ 1124.11 Cooperative reserve supply unit.

"Cooperative reserve supply unit" means any cooperative association or its agent that is a handler pursuant to § 1124.9 (b) or (c) that does not own or operate a plant, if such cooperative has been qualified to receive payments pursuant to § 1124.73 and has been a handler of producer milk under this or its predecessor order(s) during each of the 12 previous months, and if a majority of the cooperative's member producers are located within 125 miles of a pool distributing plant. A cooperative reserve supply unit shall be subject to the following conditions:

(a) The cooperative shall file a request with the market administrator for cooperative reserve supply unit status at least 15 days prior to the first day of the month in which such status is desired to be effective. Once qualified as a cooperative reserve supply unit pursuant to this paragraph, such status shall continue to be effective unless the cooperative requests termination prior to the first day of the month that change of status is requested, or the cooperative fails to meet all of the conditions of this section;

(b) The cooperative reserve supply unit supplies fluid milk products to pool distributing plants located within 125 miles of a majority of the cooperative's member producers in compliance with any announcement by the market administrator requesting a minimum level of shipments as further provided below:

(1) The market administrator may require such supplies of bulk fluid milk from cooperative reserve supply units whenever the market administrator finds that milk supplies for Class I use at pool distributing plants are needed for plants defined in § 1124.7(a). Before making such a finding, the market administrator shall investigate the need for such shipments either on the market administrator's own initiative or at the request of interested persons. If the market administrator's investigation shows that such shipments might be appropriate, the market administrator shall issue a notice stating that a shipping announcement is being considered and inviting data, views and arguments with respect to the proposed shipping announcement.

(2) Failure of a cooperative reserve supply unit to comply with any announced shipping requirements, including making any significant change in the unit's marketing operation that the market administrator determines has the impact of evading or forcing such an announcement, shall result in immediate loss of cooperative reserve supply unit status until such time as the unit has been a handler pursuant to § 1124.9 (b) and (c) for at least 12 consecutive months.

§ 1124.12 Producer.

(a) Except as provided in paragraph (b) of this section, "producer" means any person who produces milk approved by a duly constituted regulatory agency for disposition as Grade A milk and whose milk is:

(1) Received at a pool plant directly from such person;

(2) Received by a handler described in § 1124.9(c); or

(3) Diverted in accordance with § 1124.13;

(b) "Producer" shall not include:

(1) A producer-handler as defined in any order (including this part) issued pursuant to the Act;

(2) Any person with respect to milk produced by such person that is diverted to a pool plant from an other order plant if the other order designates such person as a producer under that order and such milk is allocated to Class II or Class III utilization pursuant to § 1124.44(a)(9)(iii) and the corresponding step of § 1124.44(b);

(3) Any person with respect to milk produced by such person that is reported as diverted to an other order plant if any portion of such person's milk so moved is assigned to Class I under the provisions of such order;

(4) Any person who during the month has disposed of as route disposition or to consumers at the farm an average of more than 110 pounds daily of fluid milk or fluid cream products; and

(5) Any person (known as a dairy farmer for other markets) whose milk was received at a nonpool plant or a commercial food processing establishment during the month as other than producer milk under this or any other Federal milk order.

§ 1124.13 Producer milk.

"Producer milk" means the skim milk and butterfat in milk of a producer that is:

(a) Received or diverted by a handler defined in § 1124.9(a) under one of the following conditions:

(1) Received at such handler's pool plant directly from the farm of such producer;

(2) Received at such handler's plant from a handler defined in § 1124.9(c) for all purposes other than those specified in paragraph (b)(2)(i) of this section; and

(3) Diverted for the account of the operator of the pool plant, subject to the conditions set forth in paragraph (c) of this section.

(b) Received or diverted by a cooperative defined in § 1124.9 (b) or (c) under one of the following conditions:

(1) Milk diverted for the account of the cooperative association. Except for milk moved by a cooperative reserve supply unit defined in § 1124.11, such diversions shall be subject to the conditions set forth in paragraph (c) of this section;

(2) Milk for which the cooperative association is a handler pursuant to § 1124.9(c) to the following extent:

(i) For purposes of reporting pursuant to §§ 1124.30(c) and 1124.31(a) and making payments to producers pursuant to § 1124.73(a); and

(ii) For all purposes, with respect to any such milk which is not delivered to the pool plant of another handler.

(c) The following conditions shall apply to diverted producer milk:

(1) A cooperative association or its agent may divert for its account the milk of any producer. The total quantity of milk diverted may not exceed 80 percent during the months of September through April of the total quantity of producer milk which the association or its agent causes to be delivered to pool distributing plants or diverted. No percentage limit shall apply during the months of May through August. The percentage limits on diversions specified in this paragraph shall not apply to a cooperative reserve supply unit defined in § 1124.11;

(2) A handler other than a cooperative association that operates a pool plant may divert milk for its account to other plants or pursuant to § 1124.40(b)(3). The total quantity of milk so diverted may not exceed 80 percent during the months of September through April of the milk received at such handler's pool plant or diverted by such handler from any producer other than a member of a cooperative association which markets milk under paragraph (c)(1) of this section and for which the operator of such plant is the handler during the month. No percentage limit shall apply during the months of May through August;

(3) Milk diverted in excess of the limits specified shall not be considered producer milk, except for milk diverted by a cooperative reserve supply unit. The diverting handler shall specify the producers whose milk is ineligible as producer milk. If a handler fails to designate such producers, producer milk status shall be forfeited with respect to all milk diverted by the handler during the month;

(4) Two or more cooperative associations may have their allowable diversions computed on the basis of their combined deliveries of producer milk which the associations cause to be delivered to pool plants or diverted during the month if each association has filed a request in writing with the market administrator on or before the first day of the month the agreement is to be effective. This request shall specify the basis for assigning overdiverted milk to the producer deliveries of each cooperative according to a method approved by the market administrator;

(5) Diverted milk shall be priced at the location of the plant or commercial food processing establishment to which diverted; and

(d) In the case of any bulk tank load of milk originating at farms and subsequently divided among plants, the proportion of the load received at each plant shall be prorated among the individual producers involved on the basis of their respective percentage of the total load.

§ 1124.14 Other source milk.

"Other source milk" means all skim milk and butterfat contained in or represented by:

(a) Receipts of fluid milk products and bulk products specified in § 1124.40(b)(1) from any source other than producers, handlers described in § 1124.9(c), or pool plants;

(b) Receipts in packaged form from other plants of products specified in § 1124.40(b)(1);

(c) Products (other than fluid milk products, products specified in § 1124.40(b)(1), and products produced at the plant during the same month) from any source which are reprocessed, converted into, or combined with another product in the plant during the month; and

(d) Receipts of any milk product (other than a fluid milk product or a product specified in § 1124.40(b)(1)) for which the handler fails to establish a disposition.

§ 1124.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section, "fluid milk product" means any of the following products in fluid or frozen form: milk, skim milk, lowfat milk, milk drinks, buttermilk, mixtures of cream and milk or skim milk containing less than 15 percent butterfat (including those which are sterilized or aseptically packaged), filled milk, and milkshake and ice milk mixes containing less than 20 percent total solids, incuding any such products that are flavored, cultured, modified with added nonfat milk solids, concentrated (if in a consumer-type package), or reconstituted.

(b) The term "fluid milk product" shall not include:

(1) Evaporated or condensed milk (plain or sweetened), evaporated or condensed skim milk (plain or sweetened), formulas especially prepared for infant feeding or dietary use and milk or milk products (including filled milk) that are sterilized and packaged in hermetically sealed glass or all-metal containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

§ 1124.16 Fluid cream product.

"Fluid cream product" means cream (other than plastic cream or frozen cream), sour cream, or a mixture (including a cultured mixture) of cream and milk or skim milk containing 15 percent or more butterfat, with or without the addition of other ingredients.

§ 1124.17 Filled milk.

"Filled milk" means any combination of nonmilk fat (or oil) with skim milk (whether fresh, cultured, reconstituted or modified by the addition of nonfat milk solids), with or without milkfat, so that the product (including stabilizers, emulsifiers, or flavoring) resembles milk or any other fluid milk product; and contains less than 6 percent nonmilk fat (or oil).

§ 1124.18 Cooperative association.

"Cooperative association" means any cooperative marketing association of producers, which the Secretary determines, after application by the cooperative association:

(a) To be qualified under the provisions of the Act of Congress of February 18, 1922, known as the "Capper-Volstead Act", and any amendments thereto;

(b) To have full authority in the sale of milk of its members and to be engaged in making collective sales of or marketing milk for its members; and

(c) To have its entire activities under the control of its members.

§ 1124.19 Product prices.

The following product prices shall be used in calculating the basic Class II formula price pursuant to § 1124.51a:

(a) *Butter price.* "Butter price" means the simple average, for the first 15 days of the month, of the daily prices per pound of Grade A (92–score) butter. The prices used shall be those of the Chicago Mercantile Exchange as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division, using the price reported each week as the daily price for that day and for each following work-day until the next price is reported. A work-day is each Monday through Friday, except national holidays. For any week that the Exchange does not meet to establish a price, the price for the following week

shall be the last price that was established.

(b) *Cheddar cheese price.* "Cheddar cheese price" means the simple average, for the first 15 days of the month, of the daily prices per pound of cheddar cheese in 40-pound blocks. The prices used shall be those of the National Cheese Exchange (Green Bay, WI), as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division, using the price reported each week as the daily price for that day and for each following work-day until the next price is reported. A work-day is each Monday through Friday, except national holidays. For any week that the Exchange does not meet to establish a price, the price for the following week shall be the last price that was established.

(c) *Nonfat dry milk price.* "Nonfat dry milk price" means the simple average, for the first 15 days of the month, of the daily prices per pound of nonfat dry milk, which average shall be computed by the Director of the Dairy Division as follows:

(1) The prices used shall be the prices (using the midpoint of any price range as one price) of high heat, low heat and Grade A nonfat dry milk, respectively, for the Central States production area, as reported and published weekly by the Dairy Division, Agricultural Marketing Service.

(2) For each week, determine the simple average of the prices reported for the three types of nonfat dry milk. Such average shall be the daily price for the day that such prices are reported and for each preceding work-day until the day such prices were previously reported. A work-day is each Monday through Friday except national holidays.

(3) Add the prices determined in paragraph (c)(2) of this section for the first 15 days of the month and divide by the number of days for which there is a daily price.

(d) *Edible whey price.* "Edible whey price" means the simple average, for the first 15 days of the month, of the daily prices per pound of edible whey powder (nonhygroscopic). The prices used shall be the prices (using the midpoint of any price range as one price) of edible whey powder for the Central States production area, as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division, using the price reported each week as the daily price for that day and for each preceding work-day until the day such price was previously reported. A work-day is each Monday through Friday, except national holidays.

Handler Reports

§ 1124.30 Reports of receipts and utilization.

On or before the 9th day of each month each handler shall report to the market administrator, in the detail and on forms prescribed by the market administrator, the following information for the preceding month:

(a) Each handler operating a pool plant(s) shall report separately for each pool plant:

(1) The quantities of skim milk and butterfat contained in:

(i) Milk received directly from producers, showing separately any milk of own-farm production;

(ii) Milk received from a cooperative association pursuant to § 1124.9(c);

(iii) Fluid milk products and bulk fluid cream products received from other pool plants showing filled milk separately;

(iv) Other source milk showing filled milk separately; and

(v) Inventories at the beginning and end of the month of fluid milk products and products specified in § 1124.40(b)(1).

(2) The utilization of all skim milk and butterfat required to be reported, including separate statements of quantities in route disposition inside and outside the marketing area.

(b) Each producer-handler shall report:

(1) The quantities of skim milk and butterfat contained in:

(i) Milk of own-farm production;

(ii) Receipts of fluid milk products and fluid cream products from pool plants, showing separately receipts in packaged form and in bulk; and

(iii) Other source milk, showing separately any receipts from another dairy farmer.

(2) As specified in paragraph (a)(2) of this section.

(c) Each cooperative association shall report with respect to milk for which it is the handler pursuant to either § 1124.9(b) or (c):

(1) The quantities of skim milk and butterfat received from producers;

(2) The utilization of skim milk and butterfat for which it is the handler pursuant to § 1124.9(b); and

(3) The quantities of skim milk and butterfat delivered to each pool plant pursuant to § 1124.9(c).

(d) Each handler who operates a partially regulated distributing plant shall report as specified in paragraph (a)(1) and (2) of this section except that receipts from dairy farmers in Grade A milk shall be reported in lieu of those in producer milk. Such report shall include separate statements, respectively, showing the respective amounts of skim milk and butterfat disposed of as route disposition in the marketing area as Class I milk and the quantity of reconstituted skim milk in fluid milk products disposed of as route disposition in the marketing area.

(e) Each handler who operates an other order plant with route disposition of fluid milk products in the marketing area shall report the quantities of skim milk and butterfat in such disposition.

(f) Each handler who operates an exempt plant or an unregulated supply plant shall report as specified in paragraph (a)(1) and (2) of this section except that receipts from dairy farmers in Grade A milk shall be reported in lieu of those in producer milk.

§ 1124.31 Payroll reports.

On or before the 22nd day of each month handlers shall report to the market administrator as follows:

(a) Each handler with respect to each of its pool plants and each cooperative association which is a handler pursuant to § 1124.9(b) or (c) shall submit its producer payroll for deliveries (other than own-farm production) in the preceding month which shall show:

(1) The total pounds of milk received from each producer, the pounds of butterfat contained in such milk, and the number of days on which milk was delivered by such producer in such month;

(2) The amount of payment to each producer and cooperative association; and

(3) The nature and amount of any deductions or charges involved in such payments; and

(b) Each handler operating a partially regulated distributing plant who wishes computations pursuant to § 1124.76(a) to be considered in the computation of its obligation pursuant to § 1124.76 shall submit its payroll for deliveries of Grade A milk by dairy farmers which shall show:

(1) The total pounds of milk and the butterfat content thereof received from each dairy farmer;

(2) The amount of payment to each dairy farmer (or to a cooperative association on behalf of such dairy farmer); and

(3) The nature and amount of any deductions or charges involved in such payments.

§ 1124.32 Other reports.

At such time and in such manner as the market administrator may prescribe, each handler shall report to the market administrator such information in

addition to that required under §§ 1124.30 and 1124.31 as may be requested by the market administrator with respect to milk and milk products (including filled milk) handled by the handler.

Classification of Milk

§ 1124.40 Classes of utilization.

Except as provided in § 1124.42 all skim milk and butterfat required to be reported by a handler pursuant to § 1124.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged inventory of fluid milk products at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product, eggnog, yogurt, and any product containing 6 percent or more non-milk fat (or oil) that resembles a fluid cream product, eggnog, or yogurt, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In all bulk fluid milk products and bulk fluid cream products disposed of or diverted to any commercial food processing establishment, subject to the conditions of § 1124.42(e), at which food products (other than milk products and filled milk) are processed and from which there is no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages; and

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, and dry curd cottage cheese;

(ii) Milkshake and ice milk mixes (or bases) containing 20 percent or more total solids, frozen desserts, and frozen dessert mixes;

(iii) Any concentrated milk product in bulk fluid form other than that specified in paragraph (c)(1)(iv) of this section.

(iv) Plastic cream, frozen cream and anhydrous milkfat.

(v) Custards, puddings, and pancake mixes;

(vi) Formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed glass or all-metal containers; and

(vii) Any milk or milk products sterilized and packaged in hermetically sealed metal or glass containers.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cheese (other than cottage cheese, lowfat cottage cheese, and dry curd cottage cheese);

(ii) Butter;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(vi) Any product not otherwise specified in this section;

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and products specified in paragraph (b)(1) of this section that are dumped by a handler if the market administrator is notified of such dumping in advance and is given the opportunity to verify such disposition;

(5) In skim milk in any modified fluid milk product that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1124.15; and

(6) In shrinkage assigned pursuant to § 1125.41(a) to the receipts specified in § 1124.41(a)(2) and in shrinkage specified in § 1124.41 (b) and (c).

§ 1124.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1124.30, the market administrator shall determine the following:

(a) The pro rata assignment of shrinkage of skim milk and butterfat, respectively, at each pool plant to the respective quantities of skim milk and butterfat:

(1) In the receipts specified in paragraph (b) (1) through (6) of this section on which shrinkage is allowed pursuant to such paragraph; and

(2) In other source milk not specified in paragraph (b) (1) through (6) of this section which was received in the form of a bulk fluid milk product or a bulk fluid cream product.

(b) The shrinkage of skim milk and butterfat, respectively, assigned pursuant to paragraph (a) of this section to the receipts specified in paragraph (a)(1) of this section that is not in excess of:

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant or pursuant to § 1124.40(b)(3) and milk received from a handler described in § 1124.9(c));

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in milk received from a handler described in § 1124.9(c) and in milk diverted to such plant by the operator of another pool plant, except that if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph shall be 2 percent;

(3) Plus 0.5 percent of the skim milk and butterfat, respectively, in producer milk diverted by the plant operator to another plant or pursuant to § 1124.40(b)(3), except that if the operator of the plant or establishment to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph shall be zero;

(4) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other pool plants;

(5) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other order plants, excluding the quantity for which Class II or Class III classification is requested by the operator of both plants;

(6) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received from unregulated supply plants, excluding the quantity for which Class II or Class III classification is requested by the handler; and

(7) Less 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products transferred to other plants that is not in excess of the respective amounts of skim milk and butterfat to which percentages are applied in paragraph (b) (1), (2), (4), (5), and (6) of this section.

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1124.9 (b) or (c), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of a plant or a commercial food processing establishment pursuant to § 1124.40(b)(3) to which the milk is

delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

§ 1124.42 Classification of transfers and diversions.

(a) *Transfers and diversions to pool plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I milk unless the operators of both plants request the same classification in another class. The classification of such transfers and diversions shall be subject to the following conditions:

(1) The skim milk or butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the receiving handler's plant after the computation pursuant to § 1124.44(a)(13) and the corresponding step of § 1124.44(b);

(2) If the transferor-plant or divertor-plant received during the month other source milk to be allocated pursuant to § 1124.44(a)(8) or the corresponding step of § 1124.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler or divertor-handler received during the month other source milk to be allocated pursuant to § 1124.44(a) (12) or (13) or the corresponding steps of § 1124.44(b), the skim milk or butterfat so transferred or diverted up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant or divertee-plant.

(b) *Transfers and diversions to other order plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to an other order plant shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the pool plant from the other order plant of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraph (b) (1), (2), or (3) of this section:

(1) If transferred as packaged fluid milk products, classification shall be in the classes to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order (including allocation under the conditions set forth in paragraph (b)(3) of this section);

(3) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers or diversions in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers or diversions were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be as Class I, subject to adjustments when such information is available;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1124.40.

(c) *Transferor and diversions to producer-handlers.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a producer-handler under this or any other Federal order shall be classified:

(1) As Class I milk if transferred or diverted in the form of a fluid milk product; and

(2) In accordance with the utilization assigned to it by the market administrator, if transferred in the form of a bulk fluid cream product. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to the transferee's receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers and diversions to other nonpool plants.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a nonpool plant that is not an other order plant or a producer-handler plant shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraph (d)(2)(i) (*a*) and (*b*) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonpool plant's utilization to its receipts as set forth in paragraph (d)(2) (ii) through (viii) of this section:

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1124.30 for the month within which such transaction occurred; and

(B) The nonpool plant operator maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal milk order from the nonpool plant and transfers of packaged fluid milk products from such nonpool plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of packaged fluid milk products at such nonpool plant from pool plants;

(B) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from other order plants;

(C) Pro rata to receipts of bulk fluid milk products at such nonpool plant from pool plants; and

(D) Pro rata to any remaining unassigned receipts of bulk fluid milk products at such nonpool plant from other order plants;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonpool plant shall be assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from pool plants and other order plants;

(iv) Transfers of bulk fluid milk products from the nonpool plant to a plant fully regulated under any Federal milk order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the transferee-plant, shall be assigned to the

extent possible in the following sequence:

(A) Pro rata to receipts of fluid milk products at such nonpool plant from pool plants; and

(B) Pro rata to any remaining unassigned receipts of fluid milk products at such nonpool plant from other order plants;

(v) Any remaining unassigned Class I disposition from the nonpool plant shall be assigned to the extent possible in the following sequence:

(A) To such nonpool plant's receipts from dairy farmers who the market administrator determines constitute regular sources of Grade A milk for such nonpool plant; and

(B) To such nonpool plant's receipts of Grade A milk from plants not fully regulated under any Federal milk order which the market administrator determines constitute regular sources of Grade A milk for such nonpool plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class III utilization, and then to Class II utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class III utilization, then to any remaining Class II utilization, and then to Class I utilization at such nonpool plant; and

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in this paragraph.

(e) *Transfers and diversions to a commercial food processing establishment.* Skim milk and butterfat transferred or diverted to a commercial food processing establishment shall be classified:

(1) Subject to the provisions of § 1124.13(c) and, except as provided in paragraph (e)(2) of this section, as Class II milk; or

(2) Transfers or diversions shall be classified as Class I milk unless the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification.

§ 1124.43 General classification rules.

In determining the classification of producer milk pursuant to § 1124.44, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1124.30 and shall compute separately for each pool plant and for each cooperative association with respect to milk for which it is the handler pursuant to § 1124.9 (b) or (c) the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1124.40, 1124.41, and 1124.42;

(b) If any of the water contained in the milk which a product is made is removed before the product is utilized or disposed of by a handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water originally associated with such solids;

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1124.9 (b) or (c) shall be determined separately from the operations of any pool plant operated by such cooperative association; and

(d) For classification purposes, pursuant to §§ 1124.40 through 1124.45, butterfat in skim milk, either disposed of to others or used in the manufacture of milk products shall be accounted for at a butterfat content of 0.060 percent unless the handler has adequate records of the actual butterfat content of such skim milk.

§ 1124.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1124.9(a) for each of the handler's pool plants separately and of each handler described in § 1124.9 (b) or (c) by allocating the handler's receipts of skim milk and butterfat to its utilization as follows:

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1124.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(3) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in fluid milk products received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(8)(vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

(ii) From Class I milk, the remainder of such receipts;

(4) Subtract from the remaining pounds of skim milk in Class I the pounds of skim milk in packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(5) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1124.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1124.40(b)(1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(7) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1124.40(b) but not in excess of the pounds of skim milk remaining in Class II;

(8) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a)(6) of this section applies, packaged inventory at the beginning of the month of products specified in § 1124.40(b)(1) that was not subtracted pursuant to paragraph (a) (5), (6), and (7) of this section;

(ii) Receipts of fluid milk products (except filled milk) for which Grade A certification is not established;

(iii) Receipts of fluid milk products from unidentified sources;

(iv) Receipts of fluid milk products received or acquired for distribution from a producer-handler as defined under this or any other Federal Order;

(v) Receipts of reconstituted skim milk in filled milk from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2) of this section;

(vi) Receipts of reconstituted skim milk in filled milk from an other order plant that is regulated under any Federal milk order providing for individual-handler pooling, to the extent that reconstituted skim milk is allocated to Class I at the transferor-plant; and

(vii) Receipts of fluid milk products from a person described in § 1124.12(b)(5);

(9) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2) and (8)(v) of this section for which the handler requests a classification other than Class I, but not in excess of pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2), (8)(v), and (9)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraph (a)(9)(ii) (*a*) through (*c*) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

(A) Multiply by 1.25 the sum of the pounds of skim milk remaining in Class I at this allocation step at all pool plants of the handler (excluding any duplication of Class I utilization resulting from reported Class I transfers between pool plants of the handler);

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(8)(vi) of this section; and

(C) Multiply any plus quantity resulting above by the percentages that the receipts of skim milk in fluid milk products from unregulated supply plants that remain at this pool plant are of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) The pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(8)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(10) Subtract from the pounds of skim milk remaining in each class, in series, beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1124.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraph (a) (4), (6), and (8)(i) of this section;

(11) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(12) Subject to the provisions of paragraph (a)(12) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity pro rated, to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2), (8)(v), (9) (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received;

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to this paragraph exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to this paragraph exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(13) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(8)(vi) and (9)(iii) of this section:

(i) Subject to the provisions of paragrpahs (a)(13) (ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportions of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1124.45(a); or

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of

utilization in each class resulting from transfers between pool plants of the hander);

(ii) Should the proration pursuant to paragraph (a)(13)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(13)(ii) of this section, should the computations pursuant to paragraph (a)(13) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plant(s) shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(13)(ii) of this section, should the computations pursuant to paragraph (a)(13) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(14) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1124.42(a); and

(15) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk, subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as "overage";

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(15) of this section and the corresponding step of paragraph (b) of this section.

§ 1124.45 Market administrator's reports and announcements concerning classification.

The market administrator shall make the following reports and announcements concerning classification:

(a) Whenever required for the purpose of allocating receipts from other order plants pursuant to § 1124.44(a)(13) and the corresponding step of § 1124.44(b), estimate and publicly announce the utilization (to the nearest whole percentage) in each class during the month of skim milk and butterfat, respectively, in producer milk of all handlers. Such estimate shall be based upon the most current available data and shall be final for such purpose.

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1124.44 on the basis of such report, and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

(c) Furnish to each handler operating a pool plant who has shipped fluid milk products or bulk fluid cream products to an other order plant the class to which such shipments were allocated by the market administrator of the other order on the basis of the report by the receiving handler, and, as necessary, any changes in such allocation arising from the verification of such report.

(d) On or before the 14th day after the end of each month, report to each cooperative association which so requests the amount and class utilization of producer milk delivered by members of such cooperative association to each handler receiving such milk. For the purpose of this report the milk so received shall be prorated to each class in accordance with the total utilization of producer milk by such handler.

Class Prices

§ 1124.50 Class prices.

Subject to the provisions of § 1124.52, the class prices for the month, per hundredweight of milk, shall be as follows:

(a) *Class I price.* The Class I price shall be the basic formula price for the second preceding month plus $1.90.

(b) *Class II price.* A tentative Class II price shall be computed by the Director of the Dairy Division and transmitted to the market administrator on or before the 15th day of the preceding month. The tentative Class II price shall be the basic Class II formula price for the month plus the amount that the value computed pursuant to paragraph (b)(1) of this section exceeds the value computed pursuant to paragraph (b)(2) of this section, except that in no event shall the final Class II price be less than the Class III price. If the Class III price for the month is computed pursuant to paragraph (c) (1) through (3) of this section, the final Class II price shall be reduced by the amount that the Class III price is less than the basic formula price to the extent such reduction does not cause the Class II price to be less than the Class III price.

(1) Determine for the most recent 12-month period the simple average (rounded to the nearest cent) of the basic formula prices computed pursuant to § 1124.51 and add 25 cents; and

(2) Determine for the same 12-month period as specified in paragraph (b)(1) of this section the simple average (rounded to the nearest cent) of the basic Class II formula prices computed pursuant to § 1124.51a.

(c) *Class III price.* The Class III price shall be the basic formula price for the month but not to exceed the price computed as follows:

(1) Multiply the Chicago butter price pursuant to § 1124.51 by 4.2;

(2) Multiply by 8.2 the weighted average of carlot prices per pound for nonfat dry milk solids, spray process, for human consumption, f.o.b. manufacturing plants in the Chicago area, as published for the period from the 26th day of the immediately preceding month through the 25th day of the current month by the Department; and

(3) From the sum of the results arrived at under paragraph (c) (1) and (2) of this

section subtract 48 cents and round to the nearest cent.

§ 1124.51 Basic formula price.

The "basic formula price" shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, adjusted to 3.5 percent butterfat basis and rounded to the nearest cent. For such adjustment, the butterfat differential (rounded to the nearest one-tenth cent) per one-tenth percent butterfat shall be 0.12 times the simple average of the wholesale selling prices (using the midpoint of any price range as one price) of Grade A (92-score) bulk butter per pound at Chicago, as reported by the Department for the month.

§ 1124.51a Basic Class II formula price.

The "basic Class II formula price" for the month shall be the basic formula price determined pursuant to § 1124.51 for the second preceding month plus or minus the amount computed pursuant to paragraphs (a) through (d) of this section:

(a) The gross values per hundredweight of milk used to manufacture cheddar cheese and butter-nonfat dry milk shall be computed, using price data determined purusant to § 1124.19 and yield factors in effect under the Dairy Price Support Program authorized by the Agricultural Act of 1949, as amended, for the first 15 days of the preceding month and, separately, for the first 15 days of the second preceding month as follows:

(1) The gross value of milk used to manufacture cheddar cheese shall be the sum of the following computations:

(i) Multiply the cheddar cheese price by the yield factor used under the Price Support Program for cheddar cheese;

(ii) Multiply the butter price by the yield factor used under the Price Support Program for determining the butterfat component of the whey value in the cheese price computation; and

(iii) Subtract from the edible whey price the processing cost used under the Price Support Program for edible whey and multiply any positive difference by the yield factor used under the Price Support Program for edible whey.

(2) The gross value of milk used to manufacture butter-nonfat dry milk shall be the sum of the following computations:

(i) Multiply the butter price by the yield factor used under the Price Support Program for butter; and

(ii) Multiply the nonfat dry milk price by the yield factor used under the Price Support Program for nonfat dry milk.

(b) Determine the amounts by which the gross value per hundredweight of milk used to manufacture cheddar cheese and the gross value per hundredweight of milk used to manufacture butter-nonfat dry milk for the first 15 days of the preceding month exceed or are less than the respective gross values for the first 15 days of the second preceding month.

(c) Compute weighting factors to be applied to the changes in gross values determined pursuant to paragraph (b) of this section by determining the relative proportion that the data included in each of the following paragraphs is of the total of the data represented in paragraphs (c) (1) and (2) of this section:

(1) Combine the total American cheese production for the States of Minnesota and Wisconsin, as reported by the Statistical Reporting Service of the Department for the most recent preceding period, and divide by the yield factor used under the Price Support Program for cheddar cheese to determine the quantity of milk used in the production of American cheddar cheese; and

(2) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the Statistical Reporting Service of the Department for the most recent preceding period, and divide by the yield factor used under the Price Support Program for nonfat dry milk to determine the quantity of milk used in the production of butter-nonfat dry milk.

(d) Compute a weighted average of the changes in gross values per hundreweight of milk determined pursuant to paragraph (b) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (c) of this section.

§ 1124.52 Plant location adjustments for handlers.

(a) The following zones are defined for the purpose of determining location adjustments:

(1) Zone 1 shall include:

(i) The Idaho counties of Benewah, Bonner, Boundary, Kootenai, Latah, and Shoshone;

(ii) The Oregon counties of Benton, Clackamas, Clatsop, Columbia, Douglas, Hood River, Lane, Lincoln, Linn, Marion, Multnomah, Polk, Tillamook, Washington, and Yamhill;

(iii) The Washington counties of Clark, Cowlitz, Ferry, Grays Harbor, Island, King, Kitsap, Lewis, Lincoln, Mason, Pacific, Pend Oreille, Pierce, Skagit, Snohomish, Skamania, Spokane, Stevens, Thurston, Wahkiakum, and Whitman.

(2) Zone 2 shall include: the Washington county of Whatcom;

(3) Zone 3 shall include: the Oregon counties of Coos, Jackson, and Josephine;

(4) Zone 4 shall include:

(i) The Idaho counties of Lewis and Nez Perce;

(ii) The Oregon counties of Crook, Deschutes, Gilliam, Jefferson, Klamath, Lake, Morrow, Sherman, Umatilla, Wallowa, Wasco and Wheeler;

(iii) The Washington counties of Adams, Asotin, Benton, Chelan, Clallam, Columbia, Douglas, Franklin, Garfield, Grant, Jefferson, Kittitas, Klickitat, Okanogan, San Juan, Walla Walla and Yakima.

(b) For milk received at a plant from producers and which is classified as Class I milk, the price specified in § 1124.50(a) shall be adjused by the amount stated in paragraphs (b) (1) and (2) of this section for the location of such plant:

(1) For a plant located within one of the zones described in paragraphs (a) (1) through (4) of this section, the adjustment shall be as follows:

	Adjustment per Hundredweight
Zone 1	No adjustment.
Zone 2	Minus 6 cents.
Zone 3	Minus 8 cents.
Zone 4	Minus 15 cents.

(2) For a plant located outside of one of the zones described in paragraphs (a) (1) through (4) of this section, the adjustment shall be minus 1.5 cents per hundredweight for each 10 miles or fraction thereof by shortest hard-surfaced highway distance that the plant is located from the nearer of the county courthouse in Spokane, Washington, the Multnomah County Courthouse in Portland, Oregon, or the city hall in Eugene, Oregon;

(c) The Class I price applicable to other source milk shall be adjusted at the rates set forth in paragraph (b) of this section, except that the price when adjusted for location shall not be less than the Class II price.

(d) For fluid milk products transferred in bulk from a pool plant at another pool plant at which a higher Class I price applies and which is classified as Class I, the price shal be the Class I price applicable at the location of the transferee-plant subject to a location adjustment credit for the transferor-plant determined by the market administrator as follows:

(1) Subtract from the pounds of Class I remaining at the transferee-plant after

the computations pursuant to § 1124.44 (a)(13) and (b) the pounds of packaged fluid milk products from other pool plants;

(2) Subtract the pounds of bulk fluid milk products received at the transferee-plant from the following sources:

(i) Producers;

(ii) Handlers described in § 1124.9(c); and

(iii) Pool plants at which the same or a higher Class I price applies.

(3) Assign any pounds remaining to transferor-plants in sequence beginning with the plant at which the least adjustment would apply; and

(4) Multiply the pounds so computed for each transferor-plant by the difference in the Class I prices applicable at the transferee-plant and transferor-plant.

§ 1124.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price for the following month, the Class III price for the preceding month and the final Class II price for the preceding month; and on or before the 15th day of each month the tentative Class II price for the following month.

§ 1124.54 Equivalent price.

If for any reason a price or pricing constituent required by this part for computing class prices or for other purposes is not available as prescribed in this part, the market administrator shall use a price or pricing constituent determined by the Secretary to be equivalent to the pricing constituent that is required.

Uniform Price

§ 1124.60 Handler's value of milk for computing uniform price.

For the purpose of computing the uniform price, the market administrator shall determine for each month the value of milk of each handler with respect to each of its pool plants and of each handler described in § 1124.9 (b) and (c) with respect to milk that was not received at a pool plant as follows:

(a) Multiply the quantity of producer milk in each class, as computed pursuant to § 1124.44(c), by the applicable class prices (adjusted pursuant to § 1124.52) and add together the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage deducted from each class pursuant to § 1124.44(a)(15) and the corresponding step of § 1124.44(b) by the class prices applicable at the location of the pool plant, as adjusted by the butterfat differential specified in § 1124.74. In case overage occurs in a nonpool plant located on the same premises as a pool plant, such overage shall be prorated between the quantity transferred from the pool plant and other source milk in such nonpool plant. In such case, add an amount equal to the value of overage prorated to the quantity transferred to the nonpool plant at the class price applicable at the pool plant;

(c) Add an amount equal to the difference between the value at the Class I price applicable at the pool plant and the value at the Class III price, with respect to skim milk and butterfat in other source milk subtracted from Class I pursuant to § 1124.44(a)(8) (i) through (iv) and (vii) and the corresponding step of § 1124.44(b) excluding receipts of bulk fluid cream products from an other order plant;

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1124.44(a)(8) (v) and (vi) and the corresponding step of § 1124.44(b);

(e) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price adjusted pursuant to § 1124.52, or the Class II price as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1124.44(a)(10) and the corresponding step of § 1124.44(b);

(f) Add an amount equal to the value at the Class I price, adjusted for location of the nearest nonpool plant(s) from which an equivalent volume was received, with respect to skim milk and butterfat subtracted from Class I pursuant to § 1124.44(a)(12) and the corresponding step of § 1124.44(b), excluding such skim milk or butterfat in bulk receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by a handler fully regulated under this or any other order issued pursuant to the Act is classified and priced as Class I milk and is not used as an offset on any payment obligation under this or any other order; and

(g) Add or subtract as the case may be, the amount necessary to correct errors as disclosed by the verification of reports of such handler of the handler's receipts and utilization of skim milk and butterfat in previous months for which payment has not been made.

§ 1124.61 Computation of uniform price.

For each month the market administrator shall compute the "uniform price" per hundredweight for milk of 3.5 percent butterfat content received from producers as follows:

(a) Combine into one total the values computed pursuant to § 1124.60 for all handlers who filed the reports prescribed by § 1124.30 for the month and who made the payments pursuant to § 1124.71 for the preceding month;

(b) Add the aggregate of all minus location adjustments computed pursuant to § 1124.75;

(c) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(d) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1124.60(f); and

(e) Subtract not less than 4 cents nor more than 5 cents per hundredweight. The result shall be the "uniform price" for milk received from producers.

§ 1124.62 Announcement of uniform price and butterfat differential.

The market administrator shall announce publicly on or before:

(a) The fifth day after the end of each month the butterfat differential for such month; and

(b) The 14th day after the end of each month the uniform price for such month.

Payments for Milk

§ 1124.70 Producer-settlement fund.

The market administrator shall establish and maintain a separate fund known as the "producer-settlement fund," into which shall be deposited all payments made by handlers pursuant to §§ 1124.71 and 1124.76 and out of which shall be made all payments to handlers pursuant to § 1124.72. However, the market administrator shall offset the payment due to a handler from such fund against payments due from such handler.

§ 1124.71 Payments to the producer-settlement fund.

(a) On or before the 16th day after the end of the month during which the skim milk and butterfat were received each handler shall pay to the market administrator the amount, if any, by which the total amount specified in paragraph (a)(1) of this section exceeds the total amount specified in paragraph (a)(2) of this section:

(1) The sum of:

(i) The total value of milk of the handler for such month as determined pursuant to § 1124.60; and

(ii) For a cooperative association handler, the amount due from other handlers pursuant to § 1124.73(d) but without adjustment for butterfat;

(2) The sum of:

(i) The value of milk received by such handler from producers at the applicable uniform price pursuant to § 1124.73(a)(2) but without adjustments for butterfat;

(ii) The amount to be paid to cooperative associations pursuant to § 1124.73(d) but without adjustment for butterfat; and

(iii) The value at the uniform price for all skim milk and butterfat applicable at the location of the plant(s) from which received (not to be less than the value at the Class III price) with respect to other source milk for which a value is computed pursuant to § 1124.60(f); and

(b) On or before the 25th day after the end of the month, each handler operating a plant specified in § 1124.7(d) (2) and (3), if such plant is subject to the classification and pricing provisions of another order which provides for individual handler pooling, shall pay to the market administrator for the producer-settlement fund an amount computed as follows:

(1) Determine the quantity of reconstituted skim milk in filled milk disposed of as route disposition in the marketing area which was allocated to Class I at such other order plant. If reconstituted skim milk in filled milk is disposed of from such plant as route disposition in the marketing areas regulated by two or more market pool orders, the reconstituted skim milk assigned to Class I shall be prorated according to such disposition in each area.

(2) Compute the value of the quantity assigned in paragraph (b)(1) of this section to Class I disposition in this area, at the Class I price under this part applicable at the location of the other order plant (but not to be less than the Class III price) and subtract its value at the Class III price.

§ 1124.72 Payments from the producer-settlement fund.

On or before the 18th day after the end of the month during which the skim milk and butterfat were received, the market administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1124.71(a)(2) exceeds the amount computed pursuant to § 1124.71(a)(1), and less any unpaid obligations of such handler to the market administrator pursuant to §§ 1124.71(a), 1124.77, 1124.85, and 1124.86. However, if the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the necessary funds are available.

§ 1124.73 Payments to producers and to cooperative associations.

(a) Each handler shall make payments to each producer for milk received from such producer during the month:

(1) On or before the last day of the month to each producer who had not discontinued shipping milk to such handler before the 18th day of the month, at not less than the Class III price for the preceding month per hundredweight of milk received during the first 15 days of the month, less proper deductions authorized in writing by such producer; and

(2) On or before the 19th day after the end of each month for milk received from such producers during such month:

(i) At not less than the uniform price for the quantity of milk received, adjusted by the butterfat differential pursuant to § 1124.74 and by any location adjustments applicable under § 1124.75;

(ii) Minus payments made pursuant to paragraph (a)(1) of this section. However, if by such date such handler has not received full payment for such month pursuant to § 1124.72, the handler shall not be deemed to be in violation of this paragraph if the handler reduced uniformly for all producers the payments per hundredweight pursuant to this paragraph by a total amount not in excess of the reduction in payment from the Market Administrator; however, the handler shall make such balance of payment uniformly to those producers to whom it is due on or before the date for making payments pursuant to this paragraph next following that on which such balance of payments is received from the market administrator.

(b) The payments required in paragraph (a) of this section shall be made, upon request, to a cooperative association qualified under § 1124.18, or its duly authorized agent, with respect to milk received from each producer who has given such association authorization by contract or by other written instrument to collect the proceeds from the sale of the producer's milk, and any payment made pursuant to this paragraph shall be made on or before 2 days prior to the dates specified in paragraph (a) of this section.

(c) Each handler shall pay to each cooperative association or its duly authorized agent which operates a pool plant for skim milk and butterfat received from such plant:

(1) On or before the 2nd day prior to the date specified in paragraph (a)(1) of this section for skim milk and butterfat received during the first 15 days of that month at not less than the Class III price for the preceding month; and

(2) On or before the 15th day after the end of such month, an amount of money computed by multiplying the total pounds of such skim milk and butterfat in each class pursuant to § 1124.42(a) by the class price adjusted by the butterfat differential and taking into account any location adjustments as provided by § 1124.52 applicable at the pool plant of the cooperative association or its agent, minus payment made pursuant to paragraph (c)(1) of this section.

(d) Each handler who received milk for which a cooperative association is the handler pursuant to § 1124.9(c) shall pay such cooperative association for such milk received:

(1) On or before the 2nd day prior to the date specified in paragraph (a)(1) of this section for such milk received during the first 15 days of that month at not less than the Class III price for the preceding month; and

(2) On or before the 17th day after the end of each month, for the milk received at not less than the uniform price for all milk adjusted pursuant to §§ 1124.74 and 1124.75(b), minus payments made pursuant to paragraph (d)(1) of this section.

(e) None of the provisions of this section shall be construed to restrict any cooperative association qualified under section 8c(5)(F) of the Act from making payment for milk to its producers in accordance with such provision of the Act.

(f) In making payments to producers pursuant to this section, each handler, on or before the 19th day of each month shall furnish each producer with a supporting statement in such form that it may be retained by the producer, which shall show for the preceding month:

(1) The identity of the handler and the producer;

(2) The total pounds of milk delivered by the producer and the average butterfat test thereof and the pounds per shipment if such information is not furnished to the producer each day of delivery;

(3) The minimum rate at which payment to the producer is required under the provisions of this section;

(4) The rate per hundredweight and amount of any premiums or payments above the minimum price provided by the order;

(5) The amount or rate per hundredweight of each deduction claimed by the handler, together with a description of the respective deductions; and

(6) The net amount of payment to the producer.

(g) In making payments to a cooperative association in aggregate pursuant to this section, each handler upon request shall furnish to the cooperative association, with respect to each producer for whom such payment is made, any or all of the above information specified in paragraph (f) of this section.

§ 1124.74 Butterfat differential.

For milk containing more or less than 3.5 percent butterfat, the uniform price shall be increased or decreased, respectively, for each one-tenth percent butterfat variation from 3.5 percent by a butterfat differential, rounded to the nearest one-tenth cent, which shall be 0.115 times the simple average of the wholesale selling prices (using the midpoint of any price range as one price) of Grade A (92-score) bulk butter per pound at Chicago as reported by the Department for the month.

§ 1124.75 Plant location adjustments for producers and on nonpool milk.

(a) In making payment to producers pursuant to § 1124.73(a) subject to the application of § 1124.13(c)(5) appropriate adjustments shall be made per hundredweight of milk received from producers at respective plant locations at the same rate as specified for Class I milk set forth in § 1124.52.

(b) In making payments to a cooperative association pursuant to § 1124.73(d) appropriate adjustments shall be made at the rates specified for Class I milk in § 1124.52 for the location of the plant at which the milk was received from the cooperative association.

(c) For purposes of computations pursuant to §§ 1124.71(a) and 1124.72 the uniform price for all milk shall be adjusted at the rates set forth in § 1124.52 for Class I milk applicable at the location of the nonpool plant from which the milk or filled milk was received, except that the adjusted uniform price shall not be less than the Class III price.

§ 1124.76 Payments by a handler operating a partially regulated distributing plant.

Each handler who operates a partially regulated distributing plant shall pay to the market administrator for the producer-settlement fund on or before the 25th day after the end of the month either of the amounts (at the handler's election) calculated pursuant to paragraph (a) or (b) of this section. If the handler fails to report pursuant to §§ 1124.30(d) and 1124.31(b) the information necessary to compute the amount specified in paragraph (a) of this section, the handler shall pay the amount computed pursuant to paragraph (b) of this section:

(a) An amount computed as follows:

(1)(i) The obligation that would have been computed pursuant to § 1124.60 at such plant shall be determined as though such plant were a pool plant. For purposes of such computation, receipts at such nonpool plant from a pool plant or an other order plant shall be assigned to the utilization at which classified at the pool plant or other order plant and transfers from such nonpool plant to a pool plant or an other order plant shall be classified as Class II or Class III milk if allocated to such class at the pool plant or other order plant and be valued at the uniform price of the respective order if so allocated to Class I milk, except that reconstituted skim milk in filled milk shall be valued at the Class III price. No obligation shall apply to Class I milk transferred to a pool plant or another order plant if such Class I utilization is assigned to receipts at the partially regulated distributing plant from pool plants and other order plants at which an equivalent amount of milk was classified and priced as Class I milk. There shall be included in the obligation so computed a charge in the amount specified in § 1124.60(f) and a credit in the amount specified in § 1124.71(a)(2)(iii) with respect to receipts from an unregulated supply plant, except that the credit for receipts of reconstituted skim milk in filled milk shall be at the Class III price, unless an obligation with respect to such plant is computed as specified in paragraph (a)(1)(ii) of this section; and

(ii) If the operator of the partially regulated distributing plant so requests, and provides with reports filed pursuant to §§ 1124.30(d) and 1124.31(b) similar reports with respect to the operations of any other nonpool plant which serves as a supply plant for such partially regulated distributing plant by shipments to such plant during the month equivalent to the requirements of § 1124.7(b), with agreement of the operator of such plant that the market administrator may examine the books and records of such plant for purposes of verification of such reports, there will be added the amount of the obligation computed at such nonpool supply plant in the same manner and subject to the same conditions as for the partially regulated distributing plant.

(2) From this obligation there will be deducted the sum of:

(i) The gross payments made by such handler for Grade A milk received during the month from dairy farmers at such plant adjusted to a 3.5 percent butterfat basis by the butterfat differential pursuant to § 1124.74, and like payments made by the operator of a supply plant(s) included in the computations pursuant to paragraph (a)(1) of this section; and

(ii) Any payments to the producer-settlement fund of an other order under which such plant is also a partially regulated distributing plant.

(b) An amount computed as follows:

(1) Determine the respective amounts of skim milk and butterfat disposed of as route disposition of Class I milk within the marketing area;

(2) Deduct the respective amount of skim milk and butterfat received at the plant:

(i) As Class I milk from pool plants and other order plants, except that deducted under a similar provision of another order issued pursuant to the Act; and

(ii) From a nonpool plant that is not an other order plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such nonpool plant by handlers fully regulated under this or any other order issued pursuant to the Act is classified and priced as Class I milk and is not used as an offset on any payment obligation under this or any other order;

(3) Deduct the quantity of reconstituted skim milk in fluid milk products disposed of as route disposition in the marketing area;

(4) From the value of such milk at the Class I price applicable at the location of the nonpool plant, subtract its value at the uniform price applicable at such location (not to be less than the Class III price), and add for the quantity of reconstituted skim milk specified in paragraph (b)(3) of this section its value computed at the Class I price applicable at the location of the nonpool plant (but not to be less than the Class III price) less the value of such skim milk at the Class III price.

§ 1124.77 Adjustment of accounts.

Whenever verification by the market administrator of reports or payments of any handler discloses errors resulting in money due:

(a) The market administrator from such handler;

(b) Such handler from the market administrator; or

(c) Any producer or cooperative association from such handler, the

market administrator shall promptly notify such handler of any amount so due and payment thereof shall be made on or before the next date for making payments set forth in the provisions under which such error occurred following the 5th day after such notice.

§ 1124.78 Charges on Overdue Accounts.

(a) Any unpaid obligation of a handler pursuant to §§ 1124.71, 1124.76, 1124.77, 1124.85 or 1124.86 shall be increased 1 percent beginning on the first day after the due date, and on each date of subsequent months following the day on which such type of obligation is normally due, subject to the following conditions:

(1) The amounts payable pursuant to this section shall be computed monthly on each unpaid obligation, which shall include any unpaid overdue charges previously computed pursuant to this section; and

(2) For the purpose of this section, any obligation that was determined at a date later than that prescribed by the order because of a handler's failure to submit a report to the market administrator when due shall be considered to have been payable by the date it would have been due if the report had been filed when due.

(b) All charges on overdue accounts shall be paid to the fund to which the account was due immediately after the charge has been collected.

Administrative Assessment and Marketing Service Deduction

§ 1124.85 Assessment for order administration.

A pro rata share of the expense of administration of the order shall be paid to the market administrator by each handler on or before the 16th day after the end of the month 4 cents per hundredweight, or such lesser amount as the Secretary may prescribe, with respect to:

(a) Producer milk (including such handler's own production);

(b) Other source milk allocated to Class I pursuant to § 1124.44(a) (8) and (12) and the corresponding steps of § 1124.44(b), except such other source milk on which no handler obligation applies pursuant to § 1124.60(f); and

(c) Route disposition in the marketing area from a partially regulated distributing plant that exceeds the Class I milk:

(1) Received during the month at such plant from pool plants and other order plants that is not used as an offset under a similar provision of another order issued pursuant to the Act; and

(2) Specified in § 1124.76(b)(2)(ii).

§ 1124.86 Deduction for marketing services.

(a) Except as set forth in paragraph (b) of this section, each handler, in making payments to producers (other than with respect to milk of such handler's own production) pursuant to § 1124.73(a)(2), shall make a deduction of 5 cents per hundredweight of milk or such amount not exceeding 5 cents per hundredweight as the Secretary may prescribe, with respect to the following:

(1) All milk received from producers at a plant not operated by a cooperative association.

(2) All milk received at a plant operated by a cooperative association from producers for whom the marketing services set forth below in this paragraph are not being performed by the cooperative association as determined by the market administrator. Such deduction shall be paid by the handler to the market administrator on or before the 16th day after the end of the month. Such moneys shall be expended by the market administrator for the verification of weights, sampling and testing of milk received from producers, and in providing for market information to producers. Such services are to be performed in whole or in part by the market administrator or by an agent engaged by and responsible to him.

(b) In the case of each producer;

(1) Who is a member of, or who has given written authorization for the rendering of marketing services and the taking of deductions therefore to, a cooperative association;

(2) Whose milk is received at a plant not operated by such association; and

(3) For whom the market administrator determines that such association is performing the services described in paragraph (a) of this section, each handler shall deduct, in lieu of the deduction specified under paragraph (a) of this section, from the payments made pursuant to § 1124.73(a)(2) the amount per hundredweight on milk authorized by such producer and shall pay, on or before the 18th day after the end of the month, such deduction to the association entitled to receive it under this paragraph.

Signed at Washington, DC, on December 23, 1988.

Kenneth A. Gilles,

Assistant Secretary for Marketing and Inspection Services.

[FR Doc. 88-30074 Filed 12-29-88; 8:45 am]

BILLING CODE 3410-02-M

Animal and Plant Health Inspection Service

9 CFR Part 97

[Docket No. 88-190]

Overtime Work at Laboratories, Border Ports, Ocean Ports, and Airports

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations that establish charges for overtime work performed by Veterinary Services inspectors of the U.S. Department of Agriculture at laboratories, border ports, ocean ports, and airports. The regulations are amended by: (1) Increasing the hourly rates charged an owner or operator of an aircraft requesting inspection or quarantine services at an airport outside of the regularly established hours of service; and (2) increasing the hourly rates charged a person, firm, or corporation having ownership, custody, or control of animals, animal byproducts, or other commodities subject to certain inspection, laboratory testing, certification, or quarantine and who requires the services of an employee of Veterinary Services on a Sunday or holiday or at any other time outside the employee's regular tour of duty. These increases reflect salary increases for federal employees in accordance with the Federal Pay Comparability Act of 1970 (Pub. L. 91-656), and Pub. L. 100-440, 102 Stat. 1756, dated September 22, 1988, and reflect allowable costs associated with the implementation of the Debt Collection Act of 1982.

EFFECTIVE DATE: January 1, 1989.

FOR FURTHER INFORMATION CONTACT: Louise Rakestraw Lothery, Acting Director, Resources Management Staff, VS, APHIS, USDA, Room 740, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-7517.

SUPPLEMENTARY INFORMATION:

Executive Order 12291 and Regulatory Flexibility Act and Effective Date

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase

in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and will not have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

We are amending the regulations by increasing the hourly rates charged an owner or operator of an aircraft requesting inspection or quarantine services at an airport outside of the regularly established hours of service. The rates are increased by $2.52 per hour for services performed outside of the regularly established hours of service on a Sunday and by $2.20 per hour for services performed outside of the regularly established hours of service on a holiday or any other period.

We are also amending the regulations by increasing the hourly rates charged a person, firm, or corporation having ownership, custody, or control of animals, animal byproducts, or other commodities subject to certain inspection, laboratory testing, certification, or quarantine and who requires the services of the employee of Veterinary Services on a Sunday or holiday or at any other time outside the regular tour of duty of the employee. The rates are increased by $4.64 per hour for services performed outside the regular tour of duty on a Sunday and by $4.32 per hour for services performed outside the regular tour of duty on a holiday or any other period.

Services of an employee of Veterinary Services at an airport during a regular tour of duty and during regularly established hours on Sundays and holidays are still provided free of charge to those requesting the service. Based on information compiled by the Department, we have estimated that Veterinary Services provided an average of 1,015 hours per week of services for which charges were assessed during 1988, and these services were requested by thousands of entities. We do not expect that the number of hours of service for which charges will be imposed will increase significantly in 1989.

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

The hourly rate for services of an employee of Veterinary Services depends entirely upon facts within the knowledge of the Department of Agriculture. The Department has no alternatives to raising the rates. By law, importers and exporters are required to reimburse the Department for its costs associated with services rendered. A cost analysis was performed to determine if fees for overtime are adequate to recover the cost of providing the services. Unless the rates are raised, the Department will not be able to recover the costs for providing services outside regularly established hours or outside regular tours of duty hours.

Accordingly, pursuant to the administrative procedure provisions in 5 U.S.C. 553, we find for good cause that prior notice and other public procedure with respect to this rule are impracticable, unnecessary, and contrary to the public interest; we also find good cause that this rule be made effective less than 30 days after publication of this document in the **Federal Register.**

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

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

List of Subjects in 9 CFR Part 97

Exports, Government employees, Imports, Livestock and livestock products, Poultry and poultry products, Transportation.

PART 97—OVERTIME SERVICES RELATING TO IMPORTS AND EXPORTS

1. The authority citation for Part 97 continues to read as follows:

Authority: 7 U.S.C. 2260; 49 U.S.C. 1741; 7 CFR 2.17, 2.51, and 371.2(d).

2. In § 97.1, current paragraph (b) is removed; the first sentence of paragraph (a) is revised as set forth below and the remaining text of current paragraph (a) is redesignated as paragraph (b):

§ 97.1 Overtime work at laboratories, border ports, ocean ports, and airports.

(a) Any person, firm, or corporation having ownership, custody, or control of animals, animal byproducts, or other commodities subject to inspection, laboratory testing, certification, or quarantine under this subchapter and Subchapter G of this Chapter, and who requires the services of an employee of Veterinary Services on a Sunday or holiday, or at any other time outside the regular tour of duty of the employee, shall sufficiently in advance of the period of Sunday or holiday or overtime service request the Veterinary Services inspector in charge to furnish the service and shall pay the Government at a rate of $37.92 per work-hour per employee on a Sunday and at the rate of $29.28 per work-hour per employee for holiday or any other period; except as provided in paragraphs (a)(1), (a)(2), and (a)(3) of this section:

(1) For any services performed on a Sunday or holiday, or at any time after 5 p.m. or before 8 a.m. on a weekday, in connection with the arrival in or departure from the United States of a private aircraft or private vessel, the total amount payable shall not exceed $25 for all inspection services performed by the Customs Service, Immigration and Naturalization Service, Public Health Service, and the Department of Agriculture;

(2) Owners and operators of aircraft will be provided service without reimbursement during regularly established hours of service on a Sunday or holiday; and

(3) The overtime rate to be charged owners or operators of aircraft at airports of entry or other places of inspection as a consequence of the operation of the aircraft, for work performed outside of the regularly established hours of service on a Sunday will be $31.16 and for work performed outside of the regularly established hours of service for a holiday or any other period will be $23.68 per hour (these charges exclude administrative overhead costs).

* * * * *

Done in Washington, DC, this 27th day of December, 1988.

James Glosser,

Administrator, Animal and Plant Health Inspection Service.

December 27, 1988.

[FR Doc. 88-30130 Filed 12-29-88; 8:45 am]

BILLING CODE 3410-34-M

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 1, 2, 9 and 73

Reorganization of Functions Within the Office of Administration and Resources Management and Minor Corrective Amendments

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations to codify nomenclature changes required by a reorganization of NRC staff activities within the Office of Administration and Resources Management. The amendments are necessary to reflect the reorganization of functions reporting to the Deputy Director for Administration. The final rule is intended to inform the public of the administrative changes to NRC regulations.

EFFECTIVE DATE: December 30, 1989.

FOR FURTHER INFORMATION CONTACT: Donnie H. Grimsley, Director, Division of Freedom of Information and Publication Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301 492–7211.

SUPPLEMENTARY INFORMATION: On May 19, 1988, the Nuclear Regulatory Commission issued a notice to all its employees announcing the reorganization of certain functions in the Office of Administration and Resources Management. The reorganization combines the Division of Contracts and the Division of Facilities and Operations Support into a new Division of Contracts and Property Management, and combines the Division of Publications Services and the Division of Rules and Records into a new Division of Freedom of Information and Publications Services. The Nuclear Regulatory Commission is amending portions of its regulations to substitute references to the Division of Rules and Records with the new Division of Freedom of Information and Publications Services.

Because these are amendments dealing with agency practice and procedures, the notice and comment provisions of the Administrative Procedure Act do not apply pursuant to 5 U.S.C. 553(b)(A). The amendments are effective upon publication in the **Federal Register**. Good cause exists to dispense with the usual 30-day delay in the effective date, because these amendments are of a minor and administrative nature, dealing with the agency's reorganization.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

List of Subjects

10 CFR Part 1

Organization and functions (Government Agencies).

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear Materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 9

Freedom of information, Penalty, Privacy, Reporting and recordkeeping requirements.

10 CFR Part 73

Hazardous materials-transportation, Incorporation by reference, Nuclear materials, Nuclear power plants and reactors, Penalty, Reporting and recordkeeping requirements, Security measures.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is adopting the following amendments to 10 CFR Parts, 1, 2, 9, 55, and 73.

PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

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

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 1.3 [Amended]

2. In § 1.3, in paragraph (c), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services".

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

3. The authority citation for Part 2 continues to read in part as follows:

Authority: Sec. 161, 68 Stat. 948 as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 2.802 [Amended]

4. In § 2.802, in paragraphs (b), (e), and (g), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services".

PART 9—PUBLIC RECORDS

5. The authority citation for Part 9 continues to read in part as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 9.23 [Amended]

6. In § 9.23, in paragraphs (b) introductory text, (b)(1), (b)(2), and (e), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services."

§ 9.25 [Amended]

7. In § 9.25, in paragraphs (a), (b), (c), and (f), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services."

§ 9.27 [Amended]

8. In § 9.27, in paragraphs (a), (b), and (c), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services."

§ 9.29 [Amended]

9. In § 9.29, in paragraphs (d), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services."

§ 9.41 [Amended]

10. In § 9.41, in paragraph (a)(2), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services."

§ 9.85 [Amended]

11. In § 9.85, remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services."

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

12. The authority citation for Part 73 continues to read in part as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

§ 73.57 [Amended]

13. In § 73.57, in paragraph (d)(1) remove the words "Information and Records Management Branch (PMSS)," and add in their place the words "Records and Reports Management Branch, Division of Information Support Services."

Dated at Rockville, Maryland, 16th day of December 1988.

For the Nuclear Regulatory Commission.

Victor Stello, Jr.,

Executive Director for Operations.

[FR Doc. 88-29763 Filed 12-29-88; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF COMMERCE

International Trade Administration

DEPARTMENT OF THE INTERIOR

Office of Territorial and International Affairs

15 CFR Part 303

[Docket No. 80994-8243]

Watch Duty-Exemption Program

AGENCIES: Import Administration, International Trade Administration, Department of Commerce; Office of Territorial and International Affairs, Department of the Interior.

ACTION: Final rule.

SUMMARY: This action amends 15 CFR Part 303, which governs the allocation of duty-exemption entitlements among watch producers in the United States' insular possessions (the Virgin Islands, Guam, and American Samoa) and in the territory of the Northern Mariana Islands. The amendments convert tariff schedule references in the regulations to the new Harmonized Tariff Schedule of the United States; change the formula for allocating territorial shares to a fifty percent weight for creditable wages and fifty percent for units shipped; raise the maximum value of components used in the assembly of duty-free watches and watch movements to $150 and $35, respectively; eliminate specific dates for publication of notices on the quantity of watch and watch movement units, and territorial shares thereof, which may enter duty-free into the customs territory of the United States each year; and raise to $32,000 the limit on individual creditable wages.

EFFECTIVE DATE: Regulation effective December 30, 1988. The changes incorporated in these amendments are effective with respect to entries made and taxes and wages paid on or after January 1, 1989.

FOR FURTHER INFORMATION CONTACT: Faye Robinson, (202) 377-1660.

SUPPLEMENTARY INFORMATION: We published these revisions in proposed form on October 7, 1988 (53 FR 39486) and invited comments. We received one comment. The comment supported all proposed changes.

Under 5 U.S.C. 553(d)(1) the effective date of this rule need not be delayed for 30 days because this rule relieves a restriction. The restriction is relieved by raising the maximum value of components used in the assembly of duty-free watches from $80 to $150 and watch movements from $30 to $35.

Classification: Executive Order 12291

In accordance with Executive Order 12291 (46 FR 13193, February 19, 1981), the Departments of Commerce and the Interior have determined that this rule does not constitute a "major rule" as defined by Section 1(b) of the Order. It is not likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Therefore, preparation of a Regulatory Impact Analysis is not required.

This regulation was submitted to the Office of Management and Budget for review, as required by Executive Order 12291.

This final rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the General Counsel of the Department of Commerce has certified that this action will not have a significant economic impact on a substantial number of small entities. Fewer than ten entities are directly affected by this action. The commercial benefits of the program governed by these regulations, for entities both directly and indirectly affected, are less than $10 million per year.

Paperwork Reduction Act

This rule does not contain information collection requirements subject to the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

List of Subjects in 15 CFR Part 303

Imports, Customs duties and inspection, Watches and jewelry, Marketing quotas, Administrative practice and procedure, Reporting and recordkeeping requirements, American Samoa, Guam, Virgin Islands, Northern Mariana Islands.

PART 303—[AMENDED]

For reasons set forth above, we are amending Part 303 as follows:

1. The authority citation for Part 303 continues to read as follows:

Authority: Pub. L. 97-446, 96 Stat. 2329, 2331 (19 U.S.C. 1202 note); Pub. L. 94-241, 90 Stat. 263 (48 U.S.C. 1681, note)

§ 303.1 [Amended]

2. Section 303.1(a) is amended by changing the words "Headnote 6 of Schedule 7, Part 2, Subpart E of the Tariff Schedules of the U.S. ("Headnote 6")" to "U.S. Legal Note 5 to Chapter 91 of the Harmonized Tariff Schedule of the United States ("91/5")".

§§ 303.1, 303.2, 303.5, and 303.14 [Amended]

3. The terms "Headnote 6" and/or "headnote 3(a)" are changed to read "91/5" each time they appear in 303.1 (a) and (b), 303.2(a) (10), (13), and (14), 303.5(b)(7) and 303.14(a)(1)(i).

§ 303.3 [Amended]

4. Section 303.3(a) is revised to read as follows:

§ 303.3 Determination of the total annual duty-exemption.

(a) Procedure for determination. If, after considering the productive capacity of the territorial watch industry and the economic interests of the territories, the Secretaries determine that the amount of the total annual duty-exemption, or the territorial shares of the total amount, should be changed, they shall publish in the **Federal Register** a proposed limit on the quantity of watch units which may enter duty-free into the customs territory of the United States and proposed territorial shares thereof and, after considering comments, establish the limit and shares by **Federal Register** notice. If the

Secretaries take no action under this section, they shall make the allocations in accordance with the limit and shares last established by this procedure.

* * * * *

§ 303.14 [Amended]

5. Section 303.14(a)(1)(i) is amended by changing "Eighty percent" to "Fifty percent" and "$28,000" to "$32,000".

6. Section 303.14(a)(1)(ii) is amended by changing "Twenty percent" to "Fifty percent".

7. Section 303.14(b)(3) is amended by changing "$30" to "$35" and "$80" to "$150".

Timothy N. Bergan,

Deputy Assistant Secretary for Import Administration.

David Heggestad,

Acting Assistant Secretary for Territorial and International Affairs.

[FR Doc. 88-29910 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M, 4310-93-M

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 2644

Collection of Withdrawal Liability; Adoption of New Interest Rate

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This is an amendment to the Pension Benefit Guaranty Corporation's regulation on Notice and Collection of Withdrawal Liability. That regulation incorporates certain interest rates published by another Federal agency. The effect of this amendment is to add to the appendix of that regulation a new interest rate to be effective from January 1, 1989, to March 31, 1989.

EFFECTIVE DATE: January 1, 1989.

FOR FURTHER INFORMATION CONTACT: John Foster, Attorney, Office of the General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006; telephone 202-778-8850 (202-778-8859 or TTY and TDD). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: Under section 4219(c) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the Pension Benefit Guaranty Corporation ("the PBGC") promulgated a final regulation on Notice and Collection of Withdrawal Liability. That regulation, codified at 29 CFR Part 2644, deals with the rate of interest to be charged by multiemployer pension plans on withdrawal liability payments that are overdue or in default, or to be credited by plans on overpayments of withdrawal liability. The regulation allows plans to set rates, subject to certain restrictions. Where a plan does not set the interest rate, § 2644.3(b) of the regulation provides that the rate to be charged or credited for any calendar quarter is the average quoted prime rate on short-term commercial loans for the fifteenth day (or the next business day if the fifteenth day is not a business day) of the month preceding the beginning of the quarter, as reported by the Board of Governors of the Federal Reserve System in Statistical Release H.15 ("Selected Interest Rates").

Because the regulation incorporates interest rates published in Statistical Release H.15, that release is the authoritative source for the rates that are to be applied under the regulation. As a convenience to persons using the regulation, however, the PBGC collects the applicable rates and republishes them in an appendix to Part 2644. This amendment adds to this appendix the interest rate of 10½ percent, which will be effective from January 1, 1989, through March 31, 1989. This rate represents an increase of ½ percent from the rate in effect for the fourth quarter of 1988. See 53 FR 38288 (September 30, 1988). This rate is based on the prime rate in effect on December 15, 1988.

The appendix to 29 CFR Part 2644 does not prescribe interest rates under the regulation; the rates prescribed in the regulation are those published in Statistical Release H.15. The appendix merely collects and republishes the rates in a convenient place. Thus, the interest rates in the appendix are informational only. Accordingly, the PBGC finds that notice of and public comment on this amendment would be unnecessary and contrary to the public interest. For the above reasons, the PBGC also believes that good cause exists for making this amendment effective immediately.

The PBGC has determined that this amendment is not a "major rule" within the meaning of Executive Order 12291, because it will not have an annual effect on the economy of $100 million or more; nor create a major increase in costs or prices for consumers, individual industries, or geographic regions, nor have significant adverse effects on competition, employment, investment, innovation or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects in 29 CFR Part 2644

Employee benefit plans, Pensions.

In consideration of the foregoing, Part 2644 of Subchapter F of Chapter XXVI of Title 29, Code of Federal Regulations, is amended as follows:

PART 2644—NOTICE AND COLLECTION OF WITHDRAWAL LIABILITY

1. The authority citation for Part 2644 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3) and 1399(c)(6).

Appendix A—[Amended]

2. Appendix A is amended by adding to the end of the table therein a new entry as follows:

From	To	Date of quotation	Rate (percent)
*	*	*	*
01/01/89	03/31/89	12/15/88	10.50

Issued at Washington, DC, on this 27th day of December 1988.

Kathleen P. Utgoff,

Executive Director.

[FR Doc. 88-30105 Filed 12-29-88; 8:45 am]

BILLING CODE 7708-01-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 135

[CGD 88-050]

RIN 2115—AD01

Offshore Oil Pollution Compensation Fund Barrel Fee Suspension

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: This final rule suspends until further notice the $.03 barrel fee levied on all oil produced on the Outer Continental Shelf (OCS). The Offshore Oil Pollution Compensation Fund (Fund) balance, to which the barrel fee revenues have been credited, is now within the statutorily prescribed maintenance level and is sufficient to meet obligations for oil pollution removal and damage claims settlements arising from OCS activities, and administrative expenses of the Fund program. This action relieves the owners of OCS oil from the economic burden of

paying barrel fees while the Fund balance is sufficient to meet reasonably anticipated obligations.

EFFECTIVE DATE: This final rule is effective April 1, 1989.

FOR FURTHER INFORMATION CONTACT: Frank A. Martin, Jr., Offshore Oil Pollution Compensation Fund Manager, telephone (202) 267–0535, between 7:30 a.m. and 3:00 p.m., Monday through Friday.

SUPPLEMENTARY INFORMATION: By notice published in the **Federal Register** on September 28, 1988 (53 FR 37794–5) the Coast Guard invited public comment on its proposal to suspend the per barrel fee, levied under 33 CFR 135.103(a), on all oil produced on the OCS.

Under section 302 of Title III, Outer Continental Shelf Lands Act Amendments of 1973 (43 U.S.C. 1812) the Fund is maintained at a level of not less than $100 million and not more than $200 million. The Fund's principal revenue source since its establishment in 1979 has been the $.03 barrel fee levied on each barrel of oil produced on the OCS. In addition to barrel fees, the Fund also earns substantial interest revenue on its investment in U.S. Securities (Treasury Bonds, Notes, Bills) of monies in the Fund which are not immediately needed for oil pollution removal costs, damage claims settlement activities, and administrative costs of the Fund program.

The Treasury Department, Internal Revenue Services (IRS), collects and deposits the barrel fees into the Fund account at the U.S. Treasury. The Coast Guard is coordinating this suspension with the IRS, which will make any changes to its procedures necessary to stop collections.

The Coast Guard has not had to use the Fund for OCS pollution cleanup costs nor damage claims settlements, for any of the approximately 10,000 reported offshore spills which have occurred since its establishment. Cleanup of these spills, where necessary, was accomplished by the appropriate responsible party, and none of the spills were of sufficient size to result in damage claims. The only obligations against the Fund over the years have been for administration, and those expenses have been minimal. Present interest income more than covers Fund administration costs, and this income will continue to increase the Fund balance without the barrel fee revenues, absent major OCS pollution incidents which substantially draw down the Fund balance.

In addition to suspending the barrel fee collections, we are also updating the agency and regulatory references cited in § 135.103(b), concerning measurement of OCS oil production. Since original publication of this rule the U.S. Geological Survey name has been changed to Minerals Management Service (MMS), and the regulatory material on OCS production measurement, formerly at 30 CFR 250.60, has been revised and moved to another section. OCS Order #13 was incorporated into that revision.

A total of twenty entities submitted written comments in response to the proposed rule. Represented among the respondents were the offshore oil industry and its trade associates and committees, including the National Ocean Industries Association, Offshore Operators Committee and the American Petroleum Institute. The Sea Grant Association and the Bering Sea Fishermen's Association also commented.

Discussion of Comments

In general, the majority of the comments were received from the interest who pay the fee, i.e., the owners of OCS oil at the time of production. These comments supported a rapid suspension of the barrel fees. Two respondents, the Sea Grant and Bering Sea Fisherman's Associations, objected to the proposed suspension, primarily taking the position that even a $200 million Fund balance may not be sufficient for oil pollution response to future OCS development activities.

Proponents of the barrel fee suspension proposal generally favored the proposal for the following reasons:

(a) The present balance exceeds the $100 million statutory minimum (actual balance as of December 1, 1988 was $132,753,000);

(b) Interest income from Fund investments will continue to increase the Fund balance; and

(c) The offshore industry spill history since Fund establishment in 1978 has not resulted in any claims against the Fund for removal costs and damages.

Opponents of the proposal generally felt that even the $200 million level authorized under the law could be insufficient for handling economic losses resulting from a major spill. The Coast Guard agrees that a major spill, or simultaneous spills, could rapidly deplete a $200 million balance for cleanup and damages. However, there are other means to handle claims which exceed the immediately available balance.

In the event of an actual major OCS spill likely to result in cleanup and removal costs and third party damages, the Coast Guard, in accordance with 33 CFR Part 136, Offshore Oil Pollution Compensation Fund Claims Procedures, would first look to the spiller, or its financial guarantor, to meet the primary statutory pollution liability. Liable party responsibility under law is $35 million for damages, plus the total of all cleanup and removal costs. The Fund becomes obligated only when the spiller does not promptly pay, or when spiller liability is exceeded.

Current law contains provisions for borrowing from the U.S. Treasury to meet obligations of the Fund at any time the balance of the Fund is insufficient to meet obligations. Therefore, should a major spill, or series of spills, deplete the Fund balance, the Coast Guard could borrow from the Treasury amounts sufficient to meet Fund obligations. The Coast Guard would then reimpose the barrel fee levy to pay back the Treasury and to replenish the Fund balance.

Therefore, the present Fund balance, continuing interest income, up front spiller liability and Coast Guard borrowing authority provides a full range of flexibility to deal with OCS pollution after suspension of barrel fee revenues to the Fund.

Other Issues

Several comments received addressed matters beyond the scope of this rulemaking.

After the barrel fee is suspended, interest income to the Fund is expected to cause the Fund balance to exceed $200 million before the end of 1993. Marathon Oil Company suggested that monies in excess of $200 million be returned to those companies who have been paying the barrel fees over the years in proportion to the amount contributed. There is no basis under current law to rebate monies in the Fund which exceed $200 million.

Conoco Inc. raised an issue concerning whether the Federal Government *owns* royalty oil at the time of production or whether the oil company producing the oil when it reaches the wellhead is subject to payment of the barrel fee on that royalty oil. The Coast Guard and Treasury Department addressed this issue at the time the Fund implementing rules and barrel fee collection regulations were established in 1979, and determined that the Federal Government entitlement to royalty oil does not constitute ownership of oil at the time of production (44 FR 16860; March 19, 1979).

Several oil companies expressed views opposing use of monies in the Fund for any purposes other than the purposes for which originally

established, i.e., removal costs, the processing and settlement of damage claims, and administrative costs of the Federal Government incident to administration of the Fund law. A related concern was allowing the fee to continue so as to generate revenues which could be made available for other purposes. Any use of the Fund, other than permitted by current law, would require legislative action.

Regulatory Evaluation

The final rule is considered non-major under Executive Order 12291 and non-significant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). This regulatory action relieves an economic impact on the offshore oil industry for an indeterminate period of time. For fiscal year 1988, Fund barrel fees collected were $10 million, interest income was $14.7 million, and administrative expenses were $126,000. As long as the Fund balance is being maintained by interest income, the Coast Guard has determined that barrel fees need not be levied. The barrel fee levy, at a rate not to exceed $.03 per barrel on oil obtained from the OCS, will be reimposed in future rulemaking, as necessary, to maintain the Fund balance at an appropriate level within the statutory limits. Based upon current OCS crude oil production, the impact of this final rule is expected to be minimal; therefore a full regulatory evaluation is unnecessary.

There are no direct information collection requirements associated with this regulation action. Indirectly, there will be a small reduction of information reporting burdens on companies which pay the barrel fee collected by the IRS. the reduction will result from the companies not having to file with IRS the Fee Deposit and Quarterly Fees Due reports while the fee levy is at $.00 per barrel.

Regulatory Flexibility Act

In accordance with paragraph 605(d) of the Regulatory Flexibility Act (94 Stat. 1164), the Coast Guard certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Federalism

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Effective Date

This final rule is effective April 1, 1989. In selecting this effective date the Coast Guard is guided by several factors. First, the governing statute and regulations state that modification or suspension of the barrel fee requires 90 days notice in the **Federal Register**. Additionally, as stated in the proposed rule, IRS actually collects the barrel fees. In coordination with that agency, and its published fee collection procedures at 26 CFR Part 301, it is considered appropriate to have the fee collections stop at the end of a month (March 31, 1989) so as to have adequate reporting on production and fees due. Finally, an April 1, 1989 effective date will end barrel fee revenues to the Fund at the end of the first half of the government fiscal year.

List of Subjects in 33 CFR Part 135

Administrative practice and procedure, Advertising, Claims, Continental shelf, Insurance, Oil pollution, Reporting and record keeping requirements.

In consideration of the foregoing, Chapter I of Title 33, Code of Federal Regulations, is amended by revising Part 135 to read as follows:

PART 135—OFFSHORE OIL POLLUTION COMPENSATION FUND

1. The authority for Part 135 continues to read as follows:

Authority: 43 U.S.C. 1811–24; E.O. 12123, 44 FR 11199; 49 CFR 1.46.

2. Section 135.103 is revised to read as follows:

§ 135.103 Levy and payment of barrel fee on OCS oil.

(a) A fee not to exceed $.03 per barrel is levied on all oil produced on the OCS and is imposed on the owner of the oil when such oil is produced. Effective April 1, 1989, the fee per barrel is $.00.

(b) The owner of oil obtained from the OCS shall, for the purpose of computing the barel fee levied in paragraph (a) of this section, measure OCS oil production by employing the methods and criteria of the Minerals Management Service contained in 30 CFR 250.180.

3. Section 135.105(b) is revised to read as follows:

§ 135.105 Adjustment of levy.

(a) * * *

(b) Modification or suspension of the barrel fee levied in this subpart is made effective not less than 90 days after publication in the **Federal Register**.

* * * * *

Dated: December 19, 1988.

J. D. Sipes,

Rear Admiral, U.S. Coast Guard, Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 88–30153 Filed 12–29–88; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Public Land Order 6697

[AZ–920–09–4214–10; A–12865]

Modification of Secretarial Order dated October 16, 1931; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order modifies the Secretarial order insofar as it affects 640 acres of public land withdrawn for the Bureau of Reclamation's Boulder Canyon Project. This 640 acres has been identified for disposal by exchange, pursuant to section 206 of the Federal Land Policy and Management Act. The land described below will be opened to disposal by exchange but will remain closed to all other forms of surface entry and to mining. The land has been and will remain open to mineral leasing.

EFFECTIVE DATE: December 30, 1988.

FOR FURTHER INFORMATION CONTACT: Marsha Luke, BLM Arizona State Office, P.O. Box 16563, Phoenix, Arizona 85011, 602–241–5534.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. The Secretarial Order dated October 16, 1931, which withdrew public land for the Bureau of Reclamation's Boulder Canyon Project is hereby modified to allow for the disposal, by exchange pursuant to section 206 of the Federal Land Policy and Management Act, 90 Stat. 2756; 43 U.S.C. 1716. The affected described land is identified as follows:

Gila and Salt River Meridian

T. 21 N., R. 21 W.,
sec. 16, all.

The area described contains 640 acres in Mohave County.

2. At 9:00 a.m. on December 30, 1988, the land described in paragraph 1 will be opened to disposal by exchange pursuant to section 206 of the Federal Land Policy and Management Act. The land will remain closed to mining and

all forms of surface entry except disposal by exchange. The land has been and will remain open to mineral leasing.

Earl E. Gjelde,

Acting Secretary of the Interior.

[FR Doc. 88-30132 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-84-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 681

[Docket No. 80476-8229]

Western Pacific Crustacean Fisheries

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule.

SUMMARY: NOAA issues a final rule to revise the regulations implementing the Fishery Management Plan for the Crustacean Fisheries of the Western Pacific Region (FMP). This rule amends the regulations to better reflect the intent of Amendment 5 to the FMP with respect to escape vent panels and reporting requirements.

EFFECTIVE DATE: January 30, 1989.

ADDRESS: A copy of Amendment 5 may be obtained from the Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1406, Honolulu, Hawaii 96813, 808-523-1368.

FOR FURTHER INFORMATION CONTACT: James J. Morgan, Southwest Region, Terminal Island, CA, 213-514-6667; or Peter Milone, Southwest Region, Honolulu, HI, 808-955-8831.

SUPPLEMENTARY INFORMATION:

Background

Amendment 5 to the FMP was submitted by the Western Pacific Fishery Management Council (Council) and approved by the Secretary of Commerce. The final rule implementing Amendment 5 went into effect on January 14, 1988 (52 FR 47572, December 15, 1987). Several provisions contained in Amendment 5 relating to escape vent panels and reporting requirements were omitted from the proposed rule (52 FR 28028, July 27, 1987) and final rule. A proposed rule for this action was published on August 18, 1988 (53 FR 31381) to correct the discrepancies, and comments were invited through September 16, 1988. No comments have been received.

The regulations implementing Amendment 5 require that all lobster traps used in the Northwestern Hawaiian Islands (NWHI) have a minimum of two escape vent panels that meet certain specifications. The Amendment also specified that the two panels be placed opposite each other in each trap. This latter provision was omitted from the proposed and final rules. To comply with the intent of the FMP regarding the configuration of escape vent panels, this rule amends the regulations to require that the panels be placed on opposite sides of each trap.

Amendment 5 also provided for a number of changes in FMP reporting requirements. The permit application form and daily catch log report were amended to add information requests needed for management of the lobster fishery. The requirement for an annual processor's report was eliminated and the Trip Processing and Sales Report was replaced by a new form, the Lobster Report for Transshipment and Sales. All the proposed changes in reporting requirements, as approved by the Office of Management and Budget under the Paperwork Reduction Act, were incorporated in the final rule, except for implementing the proposed Lobster Report for Transshipment and Sales form. The new reporting form is less confusing than the original form and better reflects the current structure of the fishery. Accordingly, this rule amends the regulatory text to require use of the new Lobster Report for Transshipment and Sales in place of the former Trip Processing and Sales Report.

An additional technical change to the regulations replaces the words "Center Director" with the words "Regional Director" in §§ 681.4(b)(2)(xxi) and 681.5(b)(2)(ix) to accurately reflect management responsibility.

The word "unobstructed" is added to the description of circular holes in escape vent panels in § 681.24(c)(1) to clarify the Council's original intent in Amendment 5 to the FMP.

The measures proposed in Amendment 5 were presented at a public information meeting in Honolulu, Hawaii on April 29, 1986 and at a public hearing in Honolulu on May 18, 1987. All lobster fishery permit holders have been kept apprised of the issues contained in Amendment 5 and were requested to offer comments.

Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this measure is necessary for the conservation and management of the crustacean fisheries of the western Pacific region and that it is consistent with the Magnuson Act and other applicable law.

The Council prepared an environmental impact statement (EIS) for the original FMP. An environmental assessment (EA) was also incorporated into Amendment 5. The measures to be implemented by this rule were included in Amendment 5, so the Assistant Administrator has concluded that this action falls within the categorical exclusion identified in the environmental review procedures in NOAA Directives Manual 02-10 at 5 (b)(3)(a). Consequently, no additional environmental document has been prepared. A copy of the amendment, incorporating the EA, and the FMP's EIS can be obtained from the Council at the above address.

The Under Secretary of Oceans and Atmosphere, NOAA, determined that this rule is not a "major rule" requiring a regulatory impact analysis under Executive Order 12291. The present action will not have a cumulative effect on the economy of $100 million or more, nor will it result in a major increase in costs to consumers, industries, government agencies, or geographical regions. No significant adverse effects on competition, employment, investment, productivity, innovation, or competitiveness of U.S.-based enterprises are anticipated.

The General Counsel of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities. This is because the industry has already anticipated the proposed action to incorporate measures in the regulations for the correct placement of escape vents and the new reporting form, which were approved under Amendment 5, but inadvertently omitted from the proposed and final rules. A majority of the industry, if not all, have already complied with the vent requirements. This rule contains a collection of information requirement at section 681.5 subject to the Paperwork Reduction Act. This requirement has been approved by the Office of Management and Budget (OMB) under Control Number 0648-0214.

The burden associated with the revised reporting requirement will be the same as that reported in the final rule implementing Amendment 5 to the FMP. The replacement of the Trip Processing and Sales Report with the new Lobster Report for Transshipment and Sales form will not change the burden hours, and it will provide data essential for the management of the fishery. The burden had been calculated and approved by OMB as 48 hours, or 4

hours per fishermen (each of the 12 vessels fishing will incur a burden of 10 minutes per report for each of their 24 trips per year).

The Council has determined, and the appropriate State and territorial government offices have found, that the measures established in Amendment 5, including the measures implemented by this rule, are consistent to the maximum extent practicable with the approved coastal zone management programs of Hawaii and the territories of American Samoa and Guam.

This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

List of Subjects in 50 CFR Part 681

Fisheries, Reporting and recordkeeping requirements.

James W. Brennan,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR Part 681 is amended as follows:

PART 681—[AMENDED]

1. The authority citation for 50 CFR Part 681 continues to read as follows:

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

2. In Section 681.4, paragraph (b)(2)(xxi) is revised to read as follows:

§ 681.4 Permits.

* * * * *

(b) * * *

(2) * * *

(xxi) Any other fishery management data requested by the Regional Director.

* * * * *

3. In § 681.5, in paragraphs (a)(3), (4), and (5), the words "Trip Processing and Sales Report" are revised to read "Lobster Report for Transshipment and Sales"; paragraphs (b)(2)(x), (b)(4), (b)(5), (c)(4)(iii) and (iv) are removed; and paragraphs (b)(2)(viii) and (ix), (c) introductory text, (c)(3), (c)(4) introductory text, (c)(4)(i) and (ii) are revised to read as follows:

§ 681.5 Recordkeeping and reporting.

* * * * *

(b) * * *

(2) * * *

(viii) Number of octopus and other species per trap deployment;

(ix) Any other fishery management data requested by the Regional Director.

* * * * *

(c) *Lobster Report for Transshipment and Sales.* The Lobster Report for Transshipment and Sales must contain the following information for all lobsters taken under this part:

(1) * * *

(2) * * *

(3) Sales Information—

(i) Weight and revenue from sale of spiny lobsters by product type;

(ii) Weight and revenue from sale of slipper lobsters by product type;

(iii) Weight and revenue from sale of octopus by product type; and

(iv) Weight and revenue from sale of other fishery products by product type.

(4) Transshipment Information (for lobster products that have not been sold but have been placed in storage or transshipped elsewhere for future sale)—

(i) Weight of spiny lobsters by product type; and

(ii) Weight of slipper lobsters by product type.

* * * * *

(4) In § 681.24, paragraph (c) introductory text and (c)(1) are revised and a new paragraph (c)(3) is added to read as follows:

§ 681.24 Gear restrictions.

* * * * *

(c) Each lobster trap must have a minimum of two escape vent panels that meet the following requirements:

(1) Panels must have at least four unobstructed circular holes no smaller than 67 millimeters (mm) in diameter with centers at least 82 mm apart.

* * * * *

(3) Panels must be placed opposite one another in each trap.

* * * * *

[FR Doc. 88-30025 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 53, No. 251
Friday, December 30, 1988

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 932

Expenses and Assessment Rate for Marketing Order Covering Olives Grown in California

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would authorize expenditures and establish an assessment rate under Marketing Order 932 for the 1989 fiscal year (January through December) established for that order. The proposal is needed for the California Olive Committee established under the order to incur operating expenses during the 1989 fiscal year and to collect funds during that year to pay those expenses. This would facilitate program operations. Funds to administer this program are derived from assessments on handlers.

DATE: Comments must be received by January 9, 1989.

ADDRESS: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2085–S, Washington, DC 20090–6456. Comments should reference the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Patrick Packnett, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2530–S, Washington, DC 20090–6456, telephone 202–475–3862.

SUPPLEMENTARY INFORMATION: .

This rule is proposed under Marketing Order No. 932 (7 CFR Part 932) regulating the handling of olives grown in California. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

This proposed rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512–1 and has been determined to be a "non-major" rule under criteria contained therein.

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately seven handlers of California olives regulated under this marketing order each season, and approximately 1,390 olive producers in California. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual gross revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. Most, but not all, of the olive producers and none of the olive handlers may be classified as small-entities.

Each marketing order administered by the Department of Agriculture requires that the assessment rate for a particular fiscal year shall apply to all assessable commodities handled from the beginning of such year. An annual budget of expenses is prepared by each administrative committee and submitted to the Department for approval. The members of administrative committees are handlers and producers of the regulated commodities. They are familiar with the committee's needs and with the costs for goods, services and personnel in their local areas and are thus in a position to formulate appropriate budgets. The budgets are formulated and discussed in public meetings. Thus, all directly affected persons have an opportunity to participate and provide input.

The assessment rate recommended by each committee is derived by dividing anticipated expenses by expected shipments of the commodity (e.g., pounds, tons, boxes, cartons, etc.). Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committee's expected expenses. Recommended budgets and rates of assessment are usually acted upon by the committees shortly before a season starts, and expenses are incurred on a continuous basis. Therefore, budget and assessment rate approvals must be expedited so that the committees will have funds to pay their expenses.

The California Olive Committee unanimously recommended 1989 fiscal year expenditures of $1,883,290 and an assessment rate of $25.39 per ton of assessable olives shipped under M.O. 932. In comparison, 1988 fiscal year budgeted expenditures were $1,627,482 and the assessment rate was $23.92. Major expenditure items budgeted for the 1989 fiscal year compared with those budgeted in 1988 (in parentheses) are $469,540 ($435,434) for program administration, $60,000 ($51,948) for production research, $760,000 ($540,000) for consumer advertising, $398,500 ($494,000) for food service advertising, and $195,250 ($106,100) for public relations. The $255,808 increase in budgeted expenditures from 1988 is mainly for advertising and promotion activities needed to market this year's larger crop.

An estimated assessment income of $1,883,938 for the 1989 fiscal period based on shipments of 74,200 tons of olives will be utilized to cover the proposed expenses. Last year's shipments totalled 57,300 assessable tons. The committee also unanimously recommended that excess 1988 assessments (about $245,473) be placed in its reserve, resulting in a reserve well within the maximum authorized under the order.

While this proposed action would impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed onto producers. However, these costs would be significantly offset by the benefits derived from the operation of the marketing order. Therefore, the

Administrator of AMS has determined that this action would not have a significant economic impact on a substantial number of small entities.

Based on the foregoing, it is found and determined that a comment period of less than 30 days is appropriate because the budget and assessment rate approvals for the olive program need to be expedited. The committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis.

List of Subjects in 7 CFR Part 932

Marketing agreements and orders, olives, California.

For the reasons set forth in the preamble, it is proposed that § 932.223 be added as follows:

PART 932—OLIVES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR Part 932 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. New § 932.223, is added to read as follows:

§ 932.223 Expenses and assessment rate.

Expenses of $1,883,290 by the California Olive Committee are authorized, and an assessment rate of $25.39 per ton of assessable olives is established, for the fiscal year ending December 31, 1989. Unexpended funds from the 1988 fiscal year may be carried over as a reserve.

Dated: December 27, 1988.

William J. Doyle,

Associate Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 88–30131 Filed 12–29–88; 8:45 am]

BILLING CODE 3410–02–M

---

7 CFR Part 985

[FV–89–001PR]

Spearmint Oil Produced in the Far West; Salable Quantities and Allotment Percentages for the 1989–90 Marketing Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would establish the quantity of spearmint oil produced in the Far West, by class, that may be purchased from or handled for producers by handlers during the 1989–90 marketing year, which begins June 1, 1989. This proposed action is taken under the marketing order for spearmint oil produced in the Far West in order to avoid extreme fluctuations in supplies and prices and thus stabilize the market for spearmint oil. This action was recommended by the Spearmint Oil Administrative Committee (Committee), the agency which is responsible for local administration of the order.

DATE: Comments due January 30, 1989.

ADDRESS: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, Room 2085–S, P.O. Box 96456, Washington, DC 20090–6456. Comments should reference the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular working hours.

FOR FURTHER INFORMATION CONTACT: Jacquelyn R. Schlatter, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, Room 2525–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 447–5120.

SUPPLEMENTARY INFORMATION: This proposed rule is issued under Marketing Agreement and Order No. 985, as amended (7 CFR Part 985), regulating the handling of spearmint oil produced in the Far West. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

This rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512–1 and has been determined to be a "non-major" rule under criteria contained therein.

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

The Far West spearmint oil industry is characterized by primarily small producers whose farming operations generally involve more than one commodity and whose income from farming operations is not exclusively dependent on the production of spearmint oil. The production of spearmint oil is concentrated in the Far West, primarily Washington, Idaho, and Oregon (part of the area covered under the marketing order). Spearmint oil is also produced in the Midwest and Great Plains. The production area covered by the marketing order normally accounts for more than 75 percent of U.S. production of spearmint oil.

The Committee reports that there are approximately 9 handlers and 253 producers of spearmint oil under the marketing order for spearmint oil produced in the Far West. Of the 253 producers, 160 producers hold "Class 1" (Scotch) oil allotment base and 136 producers hold "Class 3" (Native) oil allotment base. As of June 1, 1988, the producers' allotment base ranged from 667 to 181,902 pounds for Scotch oil and from 290 to 124,346 pounds for Native oil. The average total allotment base held is 10,413 pounds and 13,539 pounds for Scotch and Native oils, respectively.

Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.1) as those having average gross annual revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of Far West spearmint oil producers and handlers may be classified as small entities.

This proposed rule would establish salable quantities of 706,742 pounds and 781,092 pounds, respectively, for Scotch and Native spearmint oils produced in the Far West, and allotment percentages of 42 percent for both oils. This proposed action would limit the amount of spearmint oil that may be purchased from or handled for producers, by handlers, during the 1989–90 marketing year, which begins June 1, 1989. Such salable quantities and allotment percentages have been placed into effect each season since the order's inception in 1980. The establishment of salable quantities and allotment percentages would be likely to result in the production of less than half of the total allotment base available for production of spearmint oil. However, the amounts recommended for sale are based on average sales levels over the past seven years, and are not expected to cause a shortage of spearmint oil supplies. Any unanticipated or additional market needs which may develop can be more than satisfied by current reserve stocks. In addition, those producers who produce more than their annual percentage of allotment may transfer such excess spearmint oil to a producer with a deficiency in spearmint oil

production, or such excess spearmint oil may be placed into reserve stocks.

This proposed regulation, if adopted, would be similar to those which have been issued in prior seasons. Costs to producers and handlers resulting from this proposed action are expected to be offset by the benefits derived from improved returns.

The salable quantities and allotment percentages were recommended by the Committee at its September 21, 1988, meeting.

The proposed salable quantity and allotment percentage for each class of spearmint oil for the 1989–90 marketing year, which begins June 1, 1989, is based upon recommendations of the Committee and the following data and estimates:

(1) "Class 1" (Scotch) Spearmint Oil.

(A) Estimated carryin on June 1, 1989—16,892 pounds.

(B) Estimated trade demand (domestic and export) for the 1989–90 marketing year, based on an average of producer sales for the past seven marketing years, beginning with the 1980–81 marketing year through the 1986–87 marketing year (minus 23,419 pounds) [1]—718,000 pounds.

(C) Recommended desirable carryout on May 31, 1990—0 pounds.

(D) Salable quantity required from 1989 regulated production [2]—701,108 pounds.

(E) Total allotment bases for Scotch oil—1,682,719 pounds.

(F) Computed allotment percentage—41.6 percent.

(G) The Committee's recommended salable quantity—706,742 pounds.

(H) Recommended allotment percentage—42 percent.

(2) "Class 3" (Native) Spearmint Oil.

(A) Estimated carryin on June 1, 1989—40,000 pounds.

(B) Estimated trade demand (domestic and export) for the 1989–90 marketing year, based on an average of producer sales for the past seven marketing years, beginning with the 1980–81 marketing year through the 1986–87 marketing year (minus 50,000 pounds) [3]—818,266 pounds.

(C) Recommended desirable carryout on May 31, 1990—0 pounds.

(D) Salable quantity required from 1989 production—778,226 pounds.

(E) Total allotment bases for Native oil—1,859,743 pounds.

(F) Computed allotment percentage—41.8 percent.

(G) The Committee's recommended salable quantity—781,902 pounds.

(H) Recommended allotment percentage—42 percent.

The salable quantity is the total quantity of each class of oil which handlers may purchase from or handle on behalf of producers during a marketing year. Each producer is allotted a share of the salable quantity by applying the allotment percentage to the producer's allotment base for the applicable class of spearmint oil. Pursuant to the order, the Committee may issue additional allotment base to both new and existing producers for each marketing year (7 CFR 985.51(b)).

The establishment of these salable quantities and allotment percentages would allow for anticipated market needs based on historical sales and provides spearmint oil producers with information on the amount of oil which should be produced for next season. Spearmint oil has an extremely ineleastic demand and excess production normally is placed into the industry's reserves. Current reserves are equal to about 35 percent of the volume of Scotch spearmint oil and 110 percent of the volume of Native spearmint oil utilized by the market on a yearly basis. These reserve stocks are sufficient to meet any unanticipated marketing opportunities in the coming season.

Based on available information, the Administrator of the AMS has determined that the issuance of this proposed rule would not have a significant economic impact on a substantial number of small entities.

List of Subjects in 7 CFR Part 985

Far West, Marketing agreements and orders, Spearmint oil.

For the reasons set forth in the preamble, 7 CFR Part 985 is proposed to be amended as follows:

[1] The seven year average of sales was 741,419 pounds. The high years average approximately 50,000 pounds above the seven year average and the low years average approximately 50,000 pounds below the seven year average. Taking into consideration the cyclical demand for Scotch spearmint oil over the past years, the committee determined that it was appropriate to reduce the estimated trade demand for the 1989–90 marketing year by 23,419 pounds.

[2] In past years, the Committee has considered production of 100,000 pounds from South Dakota in its computation of the Scotch salable quantity. However, this year, the Committee has determined that the South Dakota production does not directly affect the marketing of Far West Scotch spearmint oil. Therefore, South Dakota production was not included in the computation of trade demand and salable quantity this year.

[3] The seven year average sales was 868,266 pounds. The 1987–88 level of 745,777 pounds was below the seven year average and could be followed by another low year. Actual movement to date has not been at more than average levels. Based on this, the Committee used a seven year average but reduced this average by 50,000 pounds.

PART 985—SPEARMINT OIL PRODUCED IN THE FAR WEST

1. The authority citation for 7 CFR Part 985 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. Add a new § 985.209 under Subpart—Salable Quantities and Allotment Percentages to read as follows:

Subpart—Salable Quantities and Allotment Percentages

§ 985.209 Salable quantities and allotment percentages—1989–90 marketing year.

The salable quantity and allotment percentage for each class of spearmint oil during the marketing year which begins June 1, 1989, shall be as follows:

(a) "Class 1" (Scotch) oil—a salable quantity of 706,742 pounds and an allotment percentage of 42 percent.

(b) "Class 3" (Native) oil—a salable quantity of 781,092 pounds and an allotment percentage of 42 percent.

Dated: December 27, 1988.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 88–30070 Filed 12–29–88; 8:45 am]

BILLING CODE 3410–02–M

7 CFR Part 1097

[DA–89–009]

Milk in the Memphis, TN, Marketing Area; Notice of Proposed Termination of Certain Provision of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed termination of rule.

SUMMARY: This notice invites public comments on a proposal to terminate the portion of the fluid milk plant definition of the Memphis order relating to pool supply plants. The termination was requested by Mid-America Dairymen, Inc. (Mid-Am), a cooperative association that is continuing to make supplemental shipments of milk to meet the increased fluid milk needs of Memphis distributing plants. The supply that Mid-Am has available to meet the greater need for milk in fluid uses by such Memphis handlers is milk received at the cooperative's plants which handle reserve milk supplies associated with distributing plants that are regulated under other Federal order markets. Mid-Am contends that the level of shipments needed by such handlers could result in Mid-America's plants and the

associated milk supplies becoming regulated under the individual-handler pool Memphis order. Mid-Am contends that such a regulatory change would result in a reduction of returns to its member-producers and disrupt their normal association with other Federal orders. Mid-Am also claims that the termination would allow the reserve milk supplies and supplemental shipments for fluid milk needs to continue to be regulated under the orders with which the milk is currently associated and facilitate making sufficient supplies of milk available to Memphis distributing plants for fluid use.

DATE: Comments are due on or before January 6, 1989.

ADDRESS: Comments (two copies) should be filed with USDA/AMS, Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456.

FOR FURTHER INFORMATION CONTACT: John F. Borovies, Marketing Specialist, USDA/AMS, Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456 (202) 447–2089.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act (5 U.S.C. 601–612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this proposed action would not have a significant economic impact on a substantial number of small entities. Such action would tend to ensure that dairy farmers would continue to have their milk priced under the order for the market which is the primary outlet for their milk and thereby receive the benefits that accrue from such pricing. This proposed rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512–1 and has been determined to be a "non-major" rule under the criteria contained therein.

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), the termination of the following provision of the order regulating the handling of milk in the Memphis, Tennessee, marketing area is being considered:

In § 1097.7, paragraph (b) in its entirety.

All persons who want to send written data, views or arguments about the proposed termination should send two copies of them to USDA/AMS, Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456, by the 7th day after publication of this notice in the **Federal Register**. The period for filing comments is limited to 7 days because a longer period would not provide the time needed to complete the required procedures and include January 1989 in the termination period.

The comments that are sent will be made a available for public inspection in the Dairy Division during normal business hours (7 CFR 1.279(b)).

Statement of Consideration

The proposal would terminate on January 1, 1989, that portion of the fluid milk plant definition that relates to a pool supply plant. The provision has been suspended on three prior occasions: October-December 1986, March-December 1987, and January-December 1988. The Memphis order regulates any plant that ships in excess of 70,000 pounds of milk to fully regulated distributing plants during the month.

The termination was requested by Mid-America Dairymen, Inc. (Mid-Am), a cooperative association that is making supplemental shipments of milk to meet increased fluid milk needs of plants regulated under the Memphis order. Mid-Am indicates that the shipments to such handlers continue to be made and are expected to be necessary throughout 1989.

Mid-Am indicates that the most feasible supply that it has available to meet the continuing fluid milk needs of Memphis handlers is located in the heavy milk production area of southwest Missouri. However, milk in such area is associated with Mid-Am's plants that are regulated under the Southern Illinois-Eastern Missouri, Southwest Plains, or Texas Federal order. These plants are qualified for pool status under the respective orders either on the basis of shipments from the plant to distributing plants or on the basis of Mid-Am's marketwide performance in supplying milk to distributing plants. Mid-Am contends that shipments from such plants could result in the regulation of one or more of its plants under the Memphis order.

Mid-Am claims that since the Memphis order provides for individual-handler pooling, regulation of any such plant under that order would result in a reduction of returns to Mid-Am's producers since the reserve milk supplies of the other markets would also shift regulation. Thus, Mid-Am contends that termination action is needed to permit the continued pooling after 1988 of the reserve milk supplies under the orders with which such milk is currently associated and to facilitate making sufficient supplies of milk available to Memphis handlers for fluid use.

Mid-Am has been relying on the southwest Missouri production area to supply Memphis handlers since September 1986. A shift in the regulation of such plants has been avoided by a suspension of the Memphis provision relating to pool supply plants during October-December 1986, March-December 1987 and January-December 1988 and by alternating the plants from which milk is shipped to Memphis distributing plants in the months the provision was not suspended. Proponent anticipates that a greater and continuing reliance on such milk supplies will be necessary for an extended period of time after the expiration of the current suspension. For this reason, the cooperative association has requested that the provision be terminated effective January 1, 1989.

List of Subjects in 7 CFR Part 1097

Milk marketing orders, Milk, Dairy products.

PART 1097—[AMENDED]

The authority citation for 7 CFR Part 1097 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

Signed at Washington, DC, on December 23, 1988.

Kenneth A. Gilles,

Assistant Secretary for Marketing and Inspection Services.

[FR Doc. 88–30073 Filed 12–29–88; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF STATE

Bureau of Consular Affairs

22 CFR Part 44

[SD–223]

Visas: Documentation of Immigrants Under Section 3 of Pub. L. 100–658

AGENCY: Bureau of Consular Affairs DOS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would add a new Part 44 in order to implement section 3 of Pub. L. 100–658. Section 3(a) provides for the issuance of 10,000 immigrant visas per year during Fiscal Years 1990 and 1991 to aliens selected at random from among those natives of "under-represented countries" as defined in section 3(e), under a procedure established by section 3(b). This rule would favorably affect a

specific class of intending immigrants who would benefit from a separate annual numerical limitation of 10,000 during fiscal years 1990 and 1991.

DATE: Written comments must be received in duplicate on or before January 27, 1989.

ADDRESS: Cornelius D. Scully, III, Director, Office of Legislation, Regulations and Advisory Assistance, Visa Office, Department of State, Washington, DC, 20520.

FOR FURTHER INFORMATION CONTACT: Cornelius D. Scully, III (202) 663–1184.

SUPPLEMENTARY INFORMATION: Section 3 of Pub. L. 100–658 establishes a separate annual numerical limitation of 10,000 per year for Fiscal Years 1990 and 1991. Usage of the immigrant visa numbers authorized by section 3 is not subject to the world-wide annual limitation of 270,000 set forth in section 201(a) of the Immigration and Nationality Act (INA), but is subject to the foreign state limitation set forth in INA 202(a).

Aliens entitled to compete for immigrant visa numbers under section 3 are aliens who are natives of "under-represented countries", as defined in section 3(e). An "under-represented country" is a foreign state natives of which used "less than 25 percent of the maximum number of immigrant visas otherwise available to it in * * *" fiscal year 1988. NP–5 visa numbers are not counted in determining which countries were "under-represented." Under INA 202(a) no more than 20,000 immigrant visa numbers may be made available to natives of any single foreign state in any fiscal year. There are at this time 175 independent countries and other areas which meet the definition of "foreign state" set forth in INA 101(a)(14). A list of foreign states, as so defined, is contained in Exhibit I to 22 CFR 42.12, Volume 9, Visas, Part III, Immigrant, Foreign Affairs Manual. Visa Office records of immigrant visa number usage during Fiscal Year 1988 reflect that 5,000 or more immigrant visa numbers were used by natives of only thirteen foreign states—China-mainland born; China-Taiwan born; Colombia; the Dominican Republic; El Salvador; the United Kingdom; Guyana; Haiti; India; Jamaica; Korea; Mexico; and the Philippines. Thus, natives of 162 foreign states will be eligible to compete for visa numbers under section 3 of Pub. L. 100–658.

As was the case with respect to section 314 of Pub. L. 99–603, the so-called "NP–5" program, section 3 of Pub. L. 100–658 provides that visas shall be made available to qualified immigrants, but then goes on to exempt aliens applying under section 3 from the requirements of INA 212(a)(14), the labor certification requirements. The exemption of these aliens from INA 212(a)(14) nullifies the currently applicable regulations concerning qualifying for nonpreference immigrant status.

Section 3 contains no provision for establishing qualifications, as was the case with respect to section 314. Thus, the Department is left with no alternative but to provide that an alien may qualify for consideration by the submission of a writing in which the alien indicates a desire to compete for immigration and lists his or her name, date and place of birth, current mailing address, the location of the consular office nearest to the alien's place of residence or, if currently in the United States, last place of foreign residence prior to entry, and the name, date and place of birth of the alien's spouse and children, if any.

Section 3 appears to provide for making the authorized visas available in a previously untried manner—at random. Section 3 specifies that visas shall be made available "in the same manner as visa numbers are made available to qualified immigrants under INA 203(a)(7), except that such visas shall be made available strictly in a random order * * *." INA 202(a)(7) specifies that visas shall be made available to qualified aliens "strictly in the chronological order in which they qualify." Considering that it is not possible to make visas available both "strictly in chronological order" and "strictly in a random order," the Department believes that the Congress intended that the visas provided for in section 3 of Pub. L. 100–658 be made available strictly in a random order.

Accordingly, the Department is proposing a procedure, set forth in proposed Part 44, § 44.4, for that purpose.

Section 3 also provides that an alien may submit only one "petition" for consideration under the program and submission of more than one "petition" will void all "petitions" submitted by the alien. This provision requires several comments. First, the Department does not envision creating and distributing a "petition" form for registration under this program. Since there are no substantive requirements for qualification, as explained above, the basic information described above will be sufficient for that purpose. Because of difficulties experienced under the "NP–5" program in deciphering applicants' handwriting and because of the world-wide scope of section 3, the Department proposes to require that all applications be typewritten and in the Roman alphabet. The Department therefore proposes, in § 44.1, to define the word "petition" for the purposes of this Part as any typewritten document using the Roman alphabet and containing the information previously described. For purposes of identificaiton, the Department also proposes to require that each applicant affix a photograph of himself or herself, and of the spouse and each child, if any, to the typewritten document. The photograph must be of the type normally submitted by nonimmigrant visa applicants—1 and ½" square, recent full-face likeness against a light background.

Second, in order to facilitate enforcement of the one petition per alien requirements, the Department proposed to require that each alien submitting a petition write on the outside of the envelope, in the manner of a return address, his or her exact name and current mailing address, as given in the document contained in the envelope.

In processing mail received during the application period (discussed below), the Department proposes not to open any envelopes until after the random selection has been made. Each envelope will be examined to ensure that the name and return address appear on the outside thereof. Envelopes not so marked will be discarded without further consideration. Envelopes bearing the name and return address will be numbered to assign a number to each and will be stored in order of the assigned numbers to facilitate retrieval. Once all envelopes have been numbered, numbers will be selected at random, manually, mechanically, or electronically, the envelopes bearing those numbers will be retrieved and opened, and the selected applicants appropriated notified. As a further measure against multiple applications, should the selection process reveal two or more applications by any alien, all will be discarded and additional numbers will be selected at random in replacement.

The Department does not contemplate returning applications to applicants at any point. Rather, the Department contemplates that unselected applications would be retained, unopened, for an appropriate period (not less than six months) and thereafter destroyed.

The Department contemplates an application period lasting for approximately one month, with "petitions" mailed to a single processing facility through a post office box mailing address, as was done with the NP–5 registrations. Because of the nature of the proposed random selection system, in which unopened envelopes will be

selected at random, it is also necessary to require that only one application be included in any single envelope. Section 44.4 of this Part describes this procedure, but, it will be noted, contains neither the exact dates of the application period nor the exact post office box mailing address to which "petitions" should be mailed.

For planning purposes, the Department envisions that the application period should be no later than the month of April 1989. An application period later in the Fiscal Year (FY) than April would not allow sufficient time to ensure that there would be applicants ready for final action on their applications (visa issuance or refusal) at the beginning of FY 1990. The Department believes it to be important that implementation of section 3 be timed so as to create the least possible disruption in other consular processes. Timing implementation as described above would ensure an even monthly processing of selected applicants throughout the fiscal year.

The requirement that visas be made available "strictly in a random order" effectively eliminates the use of chronological order at any stage in the processing of the selected applications. Under the immigrant visa procedures which implement the Immigration and Nationality Act, there are two separate steps in the process which are governed by the statutory requirement for consideration of applications in chronological order. The first step is the sending of notifications (referred to as Packet 3) to individual applicants to initiate the administrative steps leading to final action (visa issuance or refusal). Such notifications are sent to the applicants in chronological order. When an applicant completes the required administrative steps, the applicant is said to be "documentarily qualified." Each month every immigrant-visa-issuing office submits to the Visa Office a report of the number of documentarily qualified applicants by foreign state, preference class and priority date. Each month, immigrant visa numbers are then allocated, within the applicable numerical limitations, to those applicants in strict chronological order of their priority dates.

The requirement of section 3(b) that visas be made available to applicants under section 3 "strictly in a random order" eliminates the possibility that either the sending of the initial notifications of the actual allocation of immigrant visa numbers can be accomplished on a chronological basis. The identity of the applicants to whom the initial notifications are to be sent will be determined by the random selection process proposed in § 44.4(b) of this Part.

There remains the question of what basis to use for the allocation of immigrant visa numbers for a given month when, as will certainly be the case from time to time, the number of documentarily qualified applicants exceeds the amount of immigrant visa numbers available for allocation for that month. After consideration of this question, the Department has concluded that the order in which the applicants are selected initially will fix the order of consideration for immigrant visa number allocation when that step in the processing occurs. Thus, the first applicant selected in the initial selection will receive the rank order number one, the second rank order number two, etc. throughout the selection process. When consular offices periodically report documentarily qualified applicants ready for final action, they will report the applicants by rank order number. Immigrant visa numbers will be allocated for use by the reported applicants in rank order as far as the numerical limitations, annual and monthly, permit.

It will thus be seen that the rank order number system described above will serve the same purpose in the administration of section 3 of Pub. L. 100–658, as the chronological priority date system serves in the administration of the numerical limitations under the INA. The Department contemplates that, during the life of section 3, the monthly Visa Office Bulletin on immigrant visa availability would include the rank order number reached under section 3.

This rule is not considered to be a major rule for purposes of E.O. 12291 nor is it expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 22 CFR Part 44

Aliens, Immigration, Nonpreference immigrants, Visas.

In view of the foregoing, Title 22, Code of Federal Regulations, would be amended by adding Part 44 to Chapter I, Subchapter E—Visas, to read:

PART 44—VISAS: DOCUMENTATION OF IMMIGRANTS UNDER SECTION 3 OF PUB. L. 100–658.

Sec.

44.1 General.
44.2 Definitions.
44.3 Registration of applicants.
44.4 Selection and processing of registrants.
44.5 Control of numerical limitation.
44.6 Eligibility to receive a visa.

Authority: Sec. 104, 66 Stat. 174, 8 U.S.C. 1104; Sec. 109(b)(1), 91 Stat. 847; Sec. 314, 100 Stat. 3359, 8 U.S.C. 1153 Note; Sec. 3, 102 Stat. 3908, 8 U.S.C. 1101 Note.

§ 44.1 General.

Except as specifically provided in this Part, the provisions of the INA, as amended, and of Parts 40 and 42 of this chapter shall apply to application for, consideration of, and issuance or refusal of, immigrant visas under section 3 of Pub. L. 100–658.

§ 44. 2 Definitions.

The following definitions shall be applicable to this Part:

(a) "Petition" shall mean any typewritten document using the Roman alphabet and containing the name of the alien, the alien's date and place of birth, the alien's current mailing address, the location of the consular office nearest to the alien's residence abroad or, if the alien is in the United States, to the alien's last residence abroad prior to entry into the United States, and the name, date and place of birth of the alien's spouse and child or children (if any), to which shall be affixed a photograph of the alien (and of the alien's spouse and each child, if any) 1 and ½" square showing a recent full-face likeness against a light background.

(b) "Under-represented country" shall mean any foreign state, as defined in section 101(a)(14) of the Immigration and Nationality Act, as amended, natives of which used less than 5,000 immigrant visa numbers under INA 203(a) during Fiscal Year 1988. Immigrant visa numbers used by aliens under section 314 of Pub. L. 99–603 during Fiscal Year 1988 shall not be counted for this purpose. Usage of immigrant visa numbers by foreign states shall be determined from the records of the Visa Office of the Department of State. For the purposes of this Part, a dependent area, as defined in 22 CFR 40.1(f), shall be considered to be a part of its governing foreign state.

§ 44. 3 Registration of applicants.

(a) *Limitations on registration.* An alien shall not be eligible to register under this section unless the alien is a native of an under-represented country as defined in § 44.2(b) of this Part. Petitions from aliens seeking to register will be accepted only from (to be determined), 1989 until (to be determined), 1989. Applications received

before or after those dates will not be considered. If the Department thereafter determines that it is necessary to establish a further period for registration in order to ensure that the number of qualified applicants is sufficient to permit allocation of all immigrant visa numbers authorized by section 3 of Pub. L. 100–658, the Department will so provide by Public Notice in the **Federal Register.**

(b) *Place of registration.* An alien who is a native of an under-represented country who desires to register as an applicant for a visa under section 3 of Pub. L. 100–658 shall submit a petition in a separate envelope by mail to: (to be determined). Petitions shall not be accepted for this purpose by any means other than by mail nor at any address other than the one specified in the preceding sentence. All applications shall be submitted by regular domestic or international surface or airmail. Applications submitted by any means requiring any form of written acknowledgement or confirmation of receipt will not be given consideration. All envelopes submitted for this purpose shall bear on the outside thereof, clearly typewritten and in the Roman alphabet, the name and current mailing address of the applicant as they are typed on the petition contained therein.

(c) *Derivative registration.* A petition submitted in accordance with § 44.3 (a) and (b) shall be considered to include automatically the spouse or child of the applicant, whether or not such spouse or child is named in the petition, if, in the case of a spouse, the marriage to the applicant took place prior to the applicant's admission to the United States for permanent residence, or, in the case of a child, the child is the issue of a marriage which took place prior to the applicant's admission to the United States for permanent residence.

§ 44. 4 Selection and processing of registrants.

(a) *Selection.* All envelopes received at the mailing address specified in §44.3(b) during the period specified in § 44.3(a) and bearing the name and address of the petitioner as specified in § 44.3(b) shall be assigned a number in order of receipt. Envelopes received prior or subsequent to the specified period and those not bearing the name and mailing address of the petitioner shall be discarded. Upon completion of the numbering of all envelopes, a quantity of numbers sufficient to permit the processing and issuance of all immigrant visas authorized under section 3 of Pub. L. 100–658 shall be selected at random, manually, mechanically or electronically, as the Department shall determine. Any alien who submits more than one petition for this purpose shall be disqualified from consideration for registration or selection under this section.

(b) *Processing.* Upon selection of the envelopes pursuant to the provisions of § 44.4(a), the envelopes shall be opened and the applicant assigned a rank order number based upon the order in which his or her envelope was selected at random. The information concerning the applicants selected, including the applicant's rank order number, shall be transmitted to the consular office named in the petition. Thereafter, the consular officer shall process the application in accordance with the applicable provisions of Part 42 of this chapter and § 44.5 and § 44.6 of this Part.

§ 44. 5 Control of numerical limitation.

(a) *Centralized control.* Centralized control of the numerical limitation specified in section 3 of Pub. L. 100–658 is established in the Department of State. In order to effect this control, the Department shall limit the number of immigrant visas and the number of adjustments of status that may be granted, to aliens applying under section 3 of Pub. L. 100–658 to a number not to exceed 10,000 each in Fiscal Years 1990 and 1991 and not to exceed, in any month of either such fiscal year, 1,000 plus any balance remaining from authorizations for preceding months in the same fiscal year.

(b) *Notification of applicants.* Consular offices shall notify applicants to take the steps necessary to meet the requirements of INA 222(b) in order to apply formally for a visa upon notification from the department that the applicants have been selected as provided in § 44.4.

(c) *Reports of applicants ready to apply formally for a visa.* Consular officers shall report to the Department monthly, or at such other intervals as the Department may direct, the rank order numbers of applicants notified pursuant to § 44.5(b) who have informed the consular office that they have obtained the documents required under INA 222(b), and for whom the necessary clearance procedures have been completed.

(d) *Allocation of immigrant visa numbers.* Within the numerical limitations specified in § 44.5(a), the Department shall allocate immigrant visa numbers for use in connection with the issuance of immigrant visas and the granting of adjustment of status based on the rank order numbers of visa applicants reported by consular officers pursuant to §44.5(c) and of applicants for adjustment of status reported by officers of INS.

§ 44. 6 Eligibility to receive a visa.

The elibibility of an applicant for a visa under section 3 of Pub. L. 100–658 shall be determined as provided in the INA, as amended, and in Parts 40 and 42 of this chapter except that the provisions of INA 212(a)(14) shall not apply in determining an alien's eligibility for such visa.

Date: December 22, 1988.

Joan M. Clark,

Assistant Secretary for Consular Affairs.

[FR Doc. 88–29902 Filed 12–29–88; 8:45 am]

BILLING CODE 4710–06–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 658

[FHWA Docket No. 87–1, Notice No. 2]

RIN 2125–AB70

Truck Size and Weight; Reasonable Access

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: FHWA proposes to amend § 658.19 of 23 CFR Part 658 which governs reasonable access by commercial vehicles with lengths and widths authorized by the Surface Transportation Assistance Act of 1982 (STAA), as amended. The proposed changes would define "terminals" and establish national minimum access requirements for STAA-defined vehicles off the National Network in all States in a safe and efficient manner. The proposed amendments have been developed in response to an industry petition and comments received on the ANPRM issued in the **Federal Register** at 52 FR 298 on January 5, 1987.

DATE: Comments on this docket must be received on or before May 1, 1989.

ADDRESS: Submit written, signed comments to FHWA Docket No. 87–1, Notice No. 2, Federal Highway Administration, Room 4232, HCC–10, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address between 8:30 a.m. and 3:30 p.m. EST, Monday through Friday, except legal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin E. Heanue, Office of Planning (202) 366–2951 or Mr. John F. Grimm, Office of Motor Carrier Information Management and Analysis (202) 366–4039, or Mr. David C. Oliver, Office of Chief Counsel (202) 366–1356, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m. EST, Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION: On June 5, 1984, the FHWA issued a final rule in the **Federal Register** (23 CFR 658; 49 FR 23302) implementing the major size and weight provisions of the Surface Transportation Assistance Act of 1982, Pub. L. 97–424, 96 Stat. 2097. Section 658.19 of the June 5 rule (23 CFR 658.19) implemented the reasonable access provisions of the STAA of 1982. These provisions require the States to allow vehicles with the dimensions and weight limits authorized by the STAA reasonable access between the National Network and terminals and facilities for food, fuel, repairs and rest.

Reasonable access must also be provided from the network to points of loading and unloading for household goods carriers and for truck tractor-semitrailer combinations with a single semitrailer up to 28-feet long (28½ feet long if grandfathered) and up to 102-inches wide (see section 106 of Pub. L. 98–554, 98 Stat. 2832).

The National Network consists of the Interstate System and those Federal-aid primary routes designated by the Secretary of Transportation identified under each State in 23 CFR Part 658, Appendix A.

Docket comments on reasonable access received prior to the June 5, 1984, rule generally concerned two issues. The first was whether the States or the FHWA should define "reasonable access." The second was whether FHWA should define "terminal." The FHWA concluded that the wide variation in local conditions would make any single Federal definition of either "reasonable access" or "terminal" inappropriate under specific local conditions. Instead of defining "reasonable access" and "terminal," a background table in the June 5, 1984, **Federal Register** listed State requirements. The FHWA indicated its intention to monitor State laws and regulations and to intervene in specific cases where there was a clear denial of access.

Petition

On August 28, 1986, the National Industrial Transportation League (NITLeague), an organization of shippers and shipper groups, petitioned the FHWA to adopt an interim rule that would amend the current Federal requirements for reasonable access (23 CFR 658.19) and institute a rulemaking proceeding.

The interim rule proposed by the NITLeague petition would have FHWA do two things. First, it would have FHWA prohibit States from denying access except on posted routes where:

(a) Large commercial vehicles were generally excluded and, for 102-inch wide vehicles, where lane widths were generally or substantially under 10 feet, and

(b) Safer alternative routes exist, considering any extra distance.

Second, it would have FHWA define the word "terminal" as any industrial, commercial, or job site location used for origination or termination.

The FHWA at that time did not have an adequate factual basis for adopting the interim rule proposed by the NITLeague and denied that part of the petition. The FHWA, however, did recognize that restrictions imposed by States and their political subdivisions on access to the National Network were many and varied and that the petition raised a substantial issue of whether FHWA should modify its position. As a result, FHWA granted that portion of the petition requesting the initiation of rulemaking procedures by issuing an advance notice of proposed rulemaking (ANPRM) in the **Federal Register** on January 5, 1987 (52 FR 298).

The January 5, 1987, ANPRM briefly described the intent of the NITLeague petition and requested comments on several issues related to possible amendment of the existing rule. In addition, the ANPRM requested data on accident experience as well as any geometric or engineering data relating access restrictions to safety.

Comments Discussion—General

In total there were 230 responses to the request for comments contained in the ANPRM. The preponderance of comments (200) were from industry associations and individual shipping and trucking companies with over 90 percent favoring a greater Federal role in defining and ensuring access. The next largest group of commenters were State highway agencies (20) of which 19 opposed further Federal involvement. The remaining commenters (10) were local governments, public interest groups and individuals. The responses from this group were all against any additional Federal involvement.

Comments Discussion—Definition of "Reasonable Access" and "Terminal"

In general, all industry responses advocated a Federal definition of both "reasonable access" and "terminal," while public agencies and public interest groups stated that there was no need for further preemption of State authority.

The State of Vermont commented that if further definition of terms is required it should be left up to each State using its own safety criteria. The State of Virginia noted that if national definitions were used they would have to be very restrictive to protect the public in a variety of terrain conditions. The State of Florida suggested that FHWA do no more than establish minimum elements that States would be required to address.

The State of Texas, in opposing FHWA definitions, responded that "* * * public safety must be maintained and that determination involves many issues that are unique to each specific site. National definitions for determining access could not take into consideration the unique conditions that determine the safety of an access route. For these reasons * * * continue to allow the State and local governments to determine appropriate solutions to access problems."

The State of Illinois noted that it had not experienced problems with access on the State highway system because the State uses the term "points of loading and unloading" in lieu of "terminal." Illinois pointed out that access was not totally resolved in local areas, because local governments are reluctant to allow access on many streets and highways that are not geometrically or structurally adequate.

The Florida Department of Transportation submitted the definition of terminal facilities contained in its State code as follows: "* * * are devoted exclusively to wholesale commercial transportation activities, including the reception, retention, transfer, and forwarding of cargo or freight."

The State of Maine also provided a definition of terminal. Its definition is in terms of carrier types (i.e., linehaul trucks) which load/unload major portions of their loads or full loads as opposed to localized delivery, collection, or distribution.

The American Automobile Association asked FHWA to retain its current approach, but suggested, if a definition must be made, that FHWA use the New York Department of Transportation definition of terminal,

namely, "A 'terminal' * * * is a highly specialized distribution facility where longhaul inter-city freight is delivered from original points of origin, or stored, or distributed to final points of destination, or any combination thereof."

On the other hand, industry commented on the many difficulties faced by shippers and truckers due to the nonuniformity of the various States' access provisions. The Private Carrier Conference (PCC) responded that, "The access problems PCC members are experiencing have taken a number of different forms. PCC members have encountered outright denials of access to their terminals or other facilities or those of their customers. They have also had mileage restrictions imposed upon them of such limit from the National Network that the effect of the restriction has been tantamount to no access at all."

Another problem associated with lack of uniformity is the inability of industry to capitalize on the availability of the new vehicle type to enhance productivity. This problem is reflected in comments from the J.I. Case Company which noted that it had every intention of utilizing 102-inch wide trailers until it discovered that it would be impossible to deliver finished products to its customers due to access restrictions.

In addition, industry comments noted that there are currently as many definitions of these terms as there are States and that national definitions, established by FHWA, were necessary for uniformity across the country. Industry commenters noted that national definitions are needed to fulfill congressional objectives in the STAA of enhanced truck productivity, reduced costs, and fewer vehicles being operated on our public highways. In general, they also commented that safety would not be compromised.

The International Brotherhood of Teamsters (IBT) commented that FHWA should define the terms with assistance from the States.

None of the respondents supported formula-type definitions of a terminal. Those stating a preference recommended operational type definitions. Most industry commenters favored the broad definition of a terminal contained in the NITLeague petition. One commenter who supported the NITLeague definitions pointed out that use of tonnage, operations, and demographics-type definitions would discriminate against small carriers.

The IBT noted, on the other hand, that a customer is not a terminal. It pointed out the STAA's differential treatment of household goods movers as evidence of congressional intent that reasonable access was somewhat less than unrestricted access.

With respect to reasonable access provisions that contain fixed mileage limitations, the State of North Carolina stated that it has defined as reasonable those routes within 3 miles of the National Network and indicated no significant problems. However, it commented that any distance set could be considered arbitrary and that the degree of reasonableness can only be judged by the number of complaints from both the trucking industry and enforcement officials. The State further argued that 3 miles is only appropriate for access for food, fuel, repairs and rest and that arbitrary distances for terminals cannot be set.

The Private Truck Council of America (PTCA) noted that blanket access regulations tied to distance should be viewed with skepticism and only tolerated when each and every route to which the regulation applies meets a concern for a specific safety or operational characteristic. The PTCA suggested that FHWA should develop regulations for States that opt to regulate access. Such regulations should require that any restrictions be based on safety or operating characteristics; any permit process be related to safety or operational characteristics; permit processes be timely; and the availability of facilities for food, fuel, repair and rest along the National Network be considered.

Comments Discussion—Safety

The FHWA in the ANPRM requested data on accident experience and any geometric or engineering data that would indicate safety problems under unrestricted or less restricted access provisions.

There were 18 industry commenters who responded with safety information and 2 States that provided accident data. Neither of the States provided rate-based data that would allow comparison by vehicle type. Only 1 State (California) responded with engineering/geometric data. The information demonstrated that it is possible to evaluate the adequacy of individual routes in terms of the amount of vehicle off-tracking.

The State of California also provided data showing increases in combination truck accidents from 1981 to 1985; however, accident rates were not given, and it was not possible to relate the changes to the larger STAA vehicles.

The accident involvement data provided by industry showed little change in accident rates from pre-STAA-dimensioned vehicles to STAA-dimensioned vehicles. The predominance of change was toward accident rate reduction.

The preamble to the June 5, 1984, final rule on Truck Size and Weight characterized the "widely divergent" views on truck safety. This docket was no different. One major benchmark in the intervening years has been the publication of the congressionally requested study on twin trailer trucks by the National Academy of Science, Transportation Research Board.[1] This study concluded, after a 2-year effort, that "the increased use of twins will have little overall effect on highway safety, because a reduction in miles of truck travel will approximately offset the small possible increase in accident involvement per mile traveled."

Court Interpretations

The courts have been reluctant to enter into the area of State regulation vis-a-vis Federal powers with respect to interstate commerce in the absence of clear preemption or discrimination. However, those few courts which have discussed the subject of access have provided us with guidance in formulating this regulation. For example, in *Consolidated Freightways* v. *Kassel*, 475 F. Supp. 544, at 533 (D.C. Iowa, 1979) regarding twin trailer operations, Judge Stuart issued an order that the State grant access to terminals and facilities for food, fuel, repairs or rest up to 5 miles, unless closer facilities were available.

Likewise, in a recent District Court Opinion in the case of *Consolidated Freightways* v. *Larson*, 647 F. Supp. 1479 (1986), Judge R. Dixon Herman found a limitation of 2/10ths of a mile for food, fuel, rest, and repair to be unduly restrictive, as most such facilities are located beyond this distance. Therefore, availability of such facilities at regular intervals along the network, including abutting properties on non-controlled access highways, is an important factor in access determinations. At the same time, review of an expanded access route to or from a terminal may be reasonable. Delay in such review, however, constitutes a denial of reasonable access. Finally, Judge Herman noted that denial of an access route must be for safety and must be related to a safety or operating characteristic of the STAA vehicle in relation to the proposed route. According to this view, denial based on other factors and denial pending lengthy

[1] National Research Council, "Twin Trailer Trucks," Transportation Research Board Special Report 211, Washington, DC, 1986.

review amount to denials of reasonable access under the STAA.

NPRM Proposal

In developing the proposed amendment, FHWA has attempted to specifically address safety concerns while recognizing the needs of interstate commerce. As the above discussion illustrates, there is no real consensus on how "reasonable access" and "terminal" should be defined. Based on the comments received and FHWA's ongoing monitoring of the situation, FHWA has decided to propose definitions, within some broad criteria, of reasonable access and terminal. The FHWA has concluded that any definitions need to continue to emphasize that safety is paramount and should not be compromised in providing access from the National Network. With this in the forefront, FHWA is proposing to amend the regulation within the following four key provisions:

(a) Definition of "terminals,"

(b) A 5-mile minimum standard of "reasonable access" with a safety-based exception,

(c) The requirement that all States have a program for evaluating requests for access to terminals beyond the minimum 5-mile standard, and

(d) A certification provision which is an alternative means for States to gain compliance with the "reasonable access" provisions.

Terminals Defined

In defining terminals, the FHWA seeks to provide access for STAA vehicles consistent with public safety requirements. The proposed definition would include facilities where freight is transferred or stored, where vehicles are completely loaded or unloaded, or where vehicles are manufactured, stored, or maintained. States at their option may define terminals to include other facilities in addition to those described in the definition. While this definition should significantly expand access for the larger STAA vehicles, it seeks to balance current practices now employed by most of the States and those sought by the NITLeague petition that would have added access for virtually all locations.

The FHWA recognizes that there are other potential definitions of "terminals." The statute does not specifically define the term, but it, for example, could be argued that it should be limited to the traditional definition of "terminal," as it applies to motor carrier operations, which generally includes only areas where freight is consolidated, loaded and unloaded. In support of such limitation, it can be argued that the 1982 STAA may use the work "terminal" as it was commonly understood at the time, prior to efforts to expand the concept to ensure access to additional types of facilities. As indicated in response to the ANPRM, other alternative definitions of "terminals" have been suggested, which are similar to the traditional concept of "terminals." For example, Florida proposed that we use its definition that terminals are facilities "devoted exclusively to wholesale commercial transportation activities, including the reception, retention, transfer, and forwarding of cargo and freight." The definition proposed by Maine focuses on carrier types which load/unload *major* portions of their loads or full loads, in contrast to localized pick-up and delivery. The AAA suggests another definition: "A 'terminal' is a highly specialized distribution facility where longhaul freight is delivered from original points of origin, or stored, or distributed to final points of destination, or any combination thereof."

Comments are specifically requested on these alternative definitions; what impact would they have on interstate trucking; are they enforceable; are they easily understood; should a definition focus on a point where goods are consolidated, which is generally viewed as the "traditional" definition of terminal; and finally, what impact on safety woud these alternative definitions have?

General Preemption—5 Miles

The proposed amendments contain a general preemption in the form of a broad 5-mile reasonable access provision. Under this proposed provision, STAA-type vehicles would be allowed access to terminals and to facilities for food, fuel, repairs, and rest within 5 road miles of the National Network along the shortest feasible route, unless a route is specifically posted as precluding such vehicles for safety reasons. The proposal is not designed to allow access on every road and street, but rather to establish a minimum for access via the shortest feasible rote where there are no safety problems. The provision also allows for positive signing of access routes as an alternative. A preliminary analysis of State access provisions indicates that the 5-mile provision would impact approximately 25 States by virtue of their having either a shorter distance provision or not having any distance-based provision and requiring permits to leave the designated system.

The FHWA generally concurs with those comments that noted the difficulty of establishing completely objective mileage-based limitations, but FHWA recognizes that a majority of States now use a mileage-based formula is providing access for the trucking industry. The FHWA proposal is designed to ensure a measure of uniformity in all States. In light of this, comments are requested on the 5-mile standard or if there should be any mileage-based standard and what impact a standard would have on the States and the industry. The FHWA proposal does not distinguish between urban or rural locations, and FHWA specifically seeks comment on the advisability and feasibility of establishing separate mileage based requirements for rural and urban areas. Further, FHWA seeks comments on the implications of establishing separate mileage-based requirements for service facilities (food, fuel, repairs and rest) and terminals and possibly for separate STAA vehicle classes (i.e., twin trailers, longer semitrailer combinations, etc.) Most service facilities, for example, are much closer than 5 miles from the National Network. Most States that now use a mileage standard do not make these distinctions, but is there justification or a basis to have separate definitions? How would the States and the industry be affected?

Limited Preemption—Beyond 5 Miles

The proposed regulation would require the States to have a process for evaluating access requests for terminals, as defined above, that are not included in the proposed 5-mile provision. This notice proposes two regulatory options for comment by the industry, States, and interested parties.

Under Option 1, States would be required to provide access beyond 5 miles unless safety reasons require denial. A State's process would meet the regulatory requirements if it generally provides access and provides for expeditious processing. A State process would be required and be subject to the following Federal criteria: Routes can be posted on the basis of safety. In those cases where a State chooses to adopt a route approval system, this option would require that requests be automatically granted, if not acted on within 90 days. Finally, it would require that, when a State grants route approval for one vehicle of any type, the approval constitutes approval for all vehicles of that type. Thus, individual trip permits could no longer be required, and the paperwork burden upon both the States and industry will be reduced. This option would not prohibit the use of kingpin-to-rear-axle restrictions or other safety-based State restriction procedures on access routes.

Under Option 2, a State process would be required, but decisions on its detailed provisions and administration would be left to the States. As long as a State adopts a process for evaluating requests, this option would not require the State to meet further Federal requirements for access beyond 5 miles from the National Network. The FHWA would not review the State process or evaluate its actual impacts. For example, a State could decide to restrict access for safety or non-safety reasons such as reducing wear and tear on roads or promoting efficiency by encouraging the relocation of older terminals to within 5 miles of the National Network. However, all States would be required to have a process for evaluating requests for access beyond 5 miles.

Certification Provision

The proposed amendment includes a certification provision whereby States may request FHWA to accept their reasonable access policies as complying with 23 CFR 658.19. This provision could be used by States whose reasonable access policies are different than those specified in this amendment, but do have a process which provides for "a substantially equivalent level of access," such a process would have to provide for a rational accommodation of STAA vehicles and not impose an unreasonable burden on carriers.

For example, some States with 1- or 2-mile reasonable access provisions have very effective programs for considering requests for access from terminal operators located at distances greater than these limits from the National Network. Requests are handled expeditiously, a field review is undertaken and, if no safety problems are identified , the requests are granted. In some states, for example, 80 to 90 percent of all requests are granted because safety problems are not identified. These State processes obviously provide reasonable access and would be certified as "substantially equivalent" to the proposed regulatory provisions. In other cases the facts may not be as clear, and FHWA would use its judgment to determine whether the State process is "substantially equivalent."

As explained below, FHWA intends to be very flexible in implementing the certification provision. Although many States have programs that do not comply with the specific provisions proposed under § 658.19 (d), (e), and (f), FHWA believes that all but a few of these States (fewer than eight) will meet the "substantially equivalent" test without significant modifications to their existing programs. This proposal therefore relies heavily on the certification provision. Alternatively, FHWA could issue a less restrictive version of § 658.19 (d), (e), and (f), so that most State programs would automatically comply with the regulation without requiring specific FHWA approval. Commenters who support less reliance on the certification provision are encouraged to provide suggestions on how FHWA could revise the proposed rule to avoid the need to grant waivers to large numbers of States. Commenters are also invited to suggest ways that the certification process should be simplified so that it does not become onerous on States.

Federalism Impact on States

State practices regarding reasonable access vary considerably. Western States tend to restrict longer semitrailer combinations while eastern States tend to restrict twin trailer combinations. State controls are premised on a combination of length and width limitations with the length limitation varying by vehicle type. For example, a preliminary evaluation of State access provisions indicate 13 States allow STAA vehicles to operate on all roads. Twenty-two States have adopted 102-inches as the legal width limit on all roads. Twenty-nine States have a 65-foot or greater overall length provision for roads not on the National Network which is, to a large extent, equivalent to no restriction. Nineteen States have, essentially, no restriction on STAA twin trailers off the National Network.

The FHWA has historically tried to avoid preemption and has instead sought to reconcile problems through negotiation. In the case of reasonable access, this has been attempted for over 6 years. Our evaluation of the ANPRM docket comments indicated that further rulemaking may be needed in order to achieve the statutory requirements of the STAA.

The proposed amendments have "federalism" implications and have been developed in accordance with the principles and policymaking criteria of Executive Order 12612, *Federalism*, of October 26, 1987. They allow alternative State requirements and are intended to minimize regulatory preemption of State law.

A specific set of criteria for reasonable access has been proposed under § 658.19 (d), (e), and (f) which establish standard requirements. Almost half the States have reasonable access policies that meet or exceed these criteria, and they will not be impacted by the regulatory requirements. Moreover, a regulatory option without specific criteria for § 658.19 (f) (beyond 5 miles) is also proposed for comment, in keeping with the Executive Order.

The alternative approach provided under § 658.19(g) for States that have developed their own policies and do not choose to adopt the proposed standard requirements permits States to apply for Federal certification that their policies meet the objectives of the reasonable access provisions of the STAA.

Approximately 28 States and the District of Columbia appear to have some current vehicle class or access requirements which are different from the standard we propose and which, taken at face value, appear to be more limiting than the proposed standard. However, in practice, many of these States administer their procedures in a way that appears to provide a level of access substantially equivalent to the proposed standard. Thus, the certification alternative should provide an opportunity for them to demonstrate that their procedures provide an equivalent degree of access in practice. For example, one State may, by statute or regulation, limit access to 1 mile, but employ the permitting process liberally. Such a system would be a likely candidate for certification. A review of the number of requests, complaints, approvals of permits, and time to process requests could be used to determine substantially equivalent levels of access. Thus, the proposed rule should only impact State access provisions for specific vehicle classes (i.e., twins or longer semitrailer combinations) or overall length limitations.

The FHWA recognizes that a number of States have worked with the motor carrier industry to reach accommodations and agreements on issues of access, and intends to accommodate those positive efforts to avoid preemptive action. Therefore, the certification process should ultimately reduce the number of States significantly affected by the preemptive Federal standard requirements to less than eight. These (eight or fewer) States may argue that they are complying with the minimum that the 1982 STAA requires. Should FHWA nonetheless preempt their laws or regulation to ensure additional access?

Thus, the proposed amendments would not impact all States, but rather establish minimum national reasonable access requirements for large commercial vehicles. Further, they would not preempt a State's authority to restrict or deny access on specific routes when that State has valid reasons for the limitations.

Congressional Interest and Direction

The broad issue of reasonable access for all STAA vehicles has generated considerable congressional interest.

On April 2, 1987, Congress enacted the Surface Transportation and Uniform Relocation Assistance Act of 1987, section 158, which mandated a 30-month study of motor vehicle issues, including nationwide reasonable access policy, by the Transportation Research Board (TRB). Most recently, the Conference Committee on the Department of Transportation and Related Agencies Appropriations Act of 1988 (Pub. L. 100–202, 101 Stat. 1329) accelerated the time table for completion of the Reasonable Access portion of the study and report. The TRB has been directed to complete its study of the Reasonable Access provisions and report within 18 months (July 1989). The committee report further directed the DOT to "* * * accord substantial weight to the findings and recommendations contained in the Board report * * *." (H.R. Rept. No. 498, 100th Cong., 1st Sess. 1131(1987)).

Based on the comments received on the ANPRM, the FHWA recognizes the urgency in addressing the reasonable access issue. While the committee report directs the Department to refrain from issuing a final rule on this issue until after the TRB has issued its report, it further states that, "The Department may proceed with its current efforts in this area, including soliciting comments from interested parties through a notice of proposed rulemaking." The FHWA has decided to proceed and issue this NPRM containing proposed amendments to 23 CFR 658.

All comments received on the ANPRM and this NPRM will be provided to TRB to assist in this study. These comments, as well as the TRB study report, will be used by FHWA in preparing a final rule on Reasonable Access.

Request for Comments

The FHWA solicits comments from all interested persons on the proposed amendments to 23 CFR 658.19. The FHWA is particularly interested in comments by individual State transportation agencies on how this amendment would impact their current State requirements.

The FHWA welcomes comments and suggestions that could be helpful to the TRB and the FHWA as they explore the issues of reasonable access. The FHWA also seeks comment on whether the proposed approach is necessary in order to solve the problem of reasonable access. Since the problem is currently limited to a few States, will a regulatory approach impose unnecessary burdens or decrease the flexibility of those who are already complying? Will those States already be in full compliance without any extra effort? Would it be more effective to use the current process of negotiation with litigation against non-complying States to ensure fulfillment of the statutory objectives? Would the use of litigation/negotiation provide the necessary clarity with respect to the statute's objectives? Would it be sufficient in providing timely implementation of the statutory objectives? Overall, which approach (regulation or litigation) would provide the States with the most flexibility? Which would most effectively implement the statutory objectives? Why?

Those desiring to comment on this NPRM are asked to submit their views in writing to the docket. The docket comments will be available for public inspection before and after the closing date at the above address. All comments received before the closing date will be considered before further rulemaking action is taken. A copy of the NITLeague petition is available for inspection and copying in the FHWA Docket Room or may be obtained by contacting the Docket Room Clerk at (202) 366–1387.

Regulatory Impact

The FHWA has considered the impacts of this notice and has determined that it is not a major rulemaking action within the meaning of Executive Order 12291. However, this rulemaking has been included in DOT's Regulatory Program for significant rulemakings. These determinations by the FHWA are based on the nature of the rulemaking. The FHWA proposes to amend the June 5 final rule by establishing minimum criteria and procedures for the implementation of the reasonable access provisions required by the STAA. The impacts of the revisions addressed in the proposed rulemaking do not significantly alter the impacts initially projected. A Regulatory Impact Analysis was prepared for the June 5, 1984, rulemaking and is available for inspection in the Headquarters Office of FHWA , 400 Seventh Street, SW., Washington, DC 20590. Copies may be obtained by contacting Mr. Kevin E. Heanue, Mr. John F. Grimm, or Mr. David C. Oliver, at the address provided under the heading **"FOR FURTHER INFORMATION CONTACT."** For the same reason, and under the criteria of the regulatory Flexibility Act, the FHWA certifies that this action will not have a significant economic impact on a substantial number of small entities.

In consideration of the foregoing, the FHWA proposes to amend Chapter 1 of Title 23, Code of Federal regulations, by revising Part 658 as set forth below.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultations on Federal programs and activities apply to this program.)

A regulatory information number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 658

Grant programs—transportation, Highways and roads, Motor Carriers—size and weight.

Issued on December 23, 1988.

Lowell B. Jackson, P.E.,

Deputy Administrator.

PART 658—TRUCK SIZE AND WEIGHT, ROUTE DESIGNATIONS—LENGTH, WIDTH AND WEIGHT LIMITATIONS

1. The authority citation for 23 CFR Part 658 continues to read as follows:

Authority: Secs 133, 411, 412, 413, and 416 of Pub. L. 97–424, 96 Stat. 2097; (23 U.S.C. 127; and 49 U.S.C. 2311, 2312, 2313 and app. 2316), as amended by Pub. L. 98–17, 97 Stat. 59, and Pub. L. 98–554, 98 Stat. 2829; 23 U.S.C. 315; and 49 CFR 1.48.

2. Section 658.19 is amended by adding new paragraphs (d), (e), (f), and (g) as follows:

§ 658.19 Reasonable access.

* * * * *

(d) *Terminals.* The term "terminals" includes, at a minimum, facilities at which one or more of the following criteria apply:

(1) Freight enroute to other destinations is transferred, warehoused, or temporarily stored; or

(2) STAA vehicles are completely loaded or compleltely unloaded; or

(3) STAA vehicles are manufactured, stored, or maintained. States may define terminals to include additional facilities.

(e) *Reasonable access—5 miles.* (1) Except as provided herein, reasonable access for a terminal or a facility for food, fuel, repairs, and rest includes, at a minimum, the use of the shortest feasible route up to 5 road miles from the National Network.

(2) States may prohibit the operation of STAA vehicles on particular roads for specific safety reasons. Such roads shall

be clearly posted as being unavailable to STAA vehicles.

(3) States, at their option in lieu of posting, may elect to erect positive signing to delineate access for STAA vehicles.

(f) Option 1: *Reasonable access—beyond 5 miles.* In addition to reasonable access provided under paragraph (e) of this section (the 5-mile provision) or under general provision of State law, reasonable access includes a process for evaluating access requests for terminals beyond the established mileage limit from the National Network according to the following:

(1) Access routes shall not be prohibited for reasons other than safety.

(2) An access route request shall be deemed granted if not action is taken on the request within 90 days of its submittal.

(3) Access routes granted for any particular vehicle shall be available to all vehicles of the same type.

(f) Option 2: *Reasonable access—beyond 5 miles.* In addition to reasonable access provided under paragraph (e) of this section (the 5-mile provision) or under general provision of State law, reasonable access includes a process for evaluating access requests for terminals beyond the established mileage limit from the National Network.

(g) *Reasonable access—alternative approach—certification.* Any State with reasonable access provisions in conflict with those contained in this section, but which actually provide for a substantially equivalent level of access, may petition FHWA for certification of its procedures as being in compliance with 23 CFR 658.19. The FHWA will approve all such petitions which demonstrate the State has a process that provides for rational accommodation of STAA vehicles and does not impose an unreasonable burden on carriers.

[FR Doc. 88-30107 Filed 12-29-88; 8:45 am]

BILLING CODE 4910-22-M

Saint Lawrence Seaway Development Corporation

33 CFR Part 402

Tariff of Tolls; Proposed Revision

AGENCY: Saint Lawrence Seaway Development Corporation, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Saint Lawrence Seaway Development Corporation and the St. Lawrence Seaway Authority of Canada have jointly established and presently administer the St. Lawrence Seaway Tariff of Tolls. This Tariff sets forth the level of tolls assessed on all commodities and vessels transiting the facilities operated by the Corporation and the Authority. The Authority is proposing to the Corporation that the commodity tolls and vessel charges be increased by approximately 4.5 percent for the 1989 and approximately 4.5 percent for the 1990 navigation seasons at the Welland Canal section and at the Montreal-Lake Ontario section of the St. Lawrence Seaway. All the Welland Canal revenues accrue to the Authority. The Authority is proposing that the Corporation receive 25 percent of the Montreal-Lake Ontario revenues, a change from the 27 percent it currently receives. All of the Corporation's share of these revenues, however, will be returned to the person paying the toll or charge in accordance with section 805 of the Water Resources Development Act of 1986.

The Authority also is proposing to the Seaway that lumber be reclassified from general cargo to bulk, that mill feed be removed from the classification "feed grains", and that the provision concerning the Welland Canal lockage charge for vessels in tandem be changed to specify cargo vessels in tandem. The Authority further proposes a reduction in the passenger charge on the Welland Canal and the Corporation proposes an elimination of the tariff for government aid cargoes and for nonprofit organization or cooperative food cargoes intended for humanitarian or development assistance overseas. Finally, the Authority proposes to delete the language in § 402.4(a) concerning the toll level reached in 1983 as it is superfluous.

DATES: The Corporation invites comments on the proposed revision to the Tariff of Tolls from any interested person(s) or organization(s). Any party wishing to present views or data on the proposed revision may file comments with the Corporation on or before February 13, 1989.

It is requested that, for comments concerning the tariff increases, data provided in written comments include total transportation costs for the movements of cargo via the St. Lawrence Seaway and should detail individually all pertinent components, including all inland freight costs (rail, truck, or water), terminal or elevator charges and handling costs, ocean freight costs and other significant transportation costs. It would be very helpful if each of these analyses also detailed similar transportation costs by alternative routes in order to adequately evaluate the potential for diversion.

FOR FURTHER INFORMATION CONTACT: Marc C. Owen, Chief Counsel, Saint Lawrence Seaway Development Corporation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-0091.

SUPPLEMENTARY INFORMATION: It is proposed to amend the definition of "bulk cargo" (at 33 CFR 402.3(b)(7)) to add lumber. Presently, lumber is included under general cargo, for which rates are higher. The change would result in an approximately $1.47 per ton reduction throughout the system. The reduction would encourage certain lumber shipments to transit the seaway that otherwise would not because of the higher, present rate.

It also is proposed to amend the definition of "feed grains" (at 33 CFR 402.3(g)) to delete mill feeds containing not more than 35 percent of ingredients other than grain or grain products, which are a manufactured product and therefore should not be considered feed grains.

It is proposed further to amend the definition of "Government aid cargo" (at 33 CFR 402.3(j)) to include certain food cargoes that are owned or financed by nonprofit organizations or cooperatives and intended for use in humanitarian or development assistance overseas. These are the type of shipments presently covered in the United States by Title II of the Pub. L. 480 Food for Peace Program. In addition, it is proposed to eliminate the tolls for all "Government aid cargoes" (as set forth in the Tolls Schedule in 33 CFR 402.8) to encourage use of the system for both Canadian and United States Government owned or financed humanitarian relief programs and these nonprofit owned or financed programs in support of greater humanitarian and development assistance efforts.

It is proposed to the language under the "Tolls" provision in 33 CFR 402.4(a) concerning the toll level reached in 1983 as it is superfluous.

In addition to the elimination of tolls for Government aid cargoes, it is proposed to amend the Tolls Schedule (33 CFR 402.8) to eliminate the lockage fee for passenger vessels using the Welland Canal. Passenger vessels in the Montreal-Lake Ontario section only pay a per passenger fee. The amendment would make the treatment of passenger vessels using the Welland Canal equal. Relatedly, the provision in the Tolls Schedule concerning vessels in tandem would be amended to clarify that it pertains only to cargo vessels in tandem.

Finally, it is proposed that present division of tolls revenue between the Authority and the Corporation (33 CFR 402.4(c)) and, in addition to the changes

discussed in the foregoing and except the maintenance of the per passenger per lock charge for passenger vessels at $1.00, the Tolls Schedule for the Welland Canal Section and the Montreal-Lake Ontario Section be revised (33 CFR 402.8). The increase in tolls will be approximately 4.5 percent for 1989 and 4.5 percent for 1990 on both the Welland Canal and Montreal-Lake Ontario Sections. For example, the current toll for bulk cargo for the Welland Section is $0.42 and for the Montreal-Lake Ontario Section is $0.85. Under the proposed changes, the 1989 charges would be $0.44 and $0.89 and the 1990 charges would be $0.46 and $0.93 for the Welland and Montreal-Lake Ontario Sections respectively. In addition, the division of tolls would be changed from the current 73 percent for the Authority and 27 percent for the Corporation to 75 percent for the Authority and 25 percent for the Corporation.

As provided in the 1978 Tolls Agreement between the Authority and the Corporation, the Joint Tolls Review Board has reviewed the estimated expenditures for 1989 and the projected revenues from tolls and other sources to determine the adequacy of the current toll structure and division in meeting the financial requirements of the Authority and the Corporation during fiscal year 1989. In the Montreal-Lake Ontario Section, the cargo forecast used for 1989 was 41.4 million tons. The tonnage projection for Canadian grain, however, is now believed to be less than that projected for 1988. Based upon this 1989 forecast, the present toll structure and division would result in a 4.9 million dollar shortfall to the Authority and a .9 million shortfall to the Corporation, or 18% and 9% respectively. In the Welland Canal Section, the cargo forecast was 44.0 million tons. Based upon this, the Authority is forecasting a $3.2 million dollar shortfall.

To avoid these shortfalls, the Authority needs an additional 18% in tolls revenue and the Corporation needs an additional 9% on the Montreal-Lake Ontario Section and the Authority needs an additional 9% on the Welland Canal Section. Accordingly, The Authority and the Corporation are proposing the new toll increase and division of tolls described in the foregoing and set forth below.

Regulatory Evaluation: This proposed regulation involves a foreign affairs function of the United States, and therefore, Executive Order 12291 does not apply. This regulation has also been evaluated under the Department of Transportation's Regulatory Policies and Procedures and the regulation is not considered significant under those procedures and its economic impact is expected to be so minimal that a full economic evaluation is not warranted.

Regulatory Flexibility Act Determination

The Saint Lawrence Seaway Development Corporation certifies that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. The St. Lawrence Seaway Tariff of Tolls relates to the activities of commercial users of the Seaway, the vast majority of whom are foreign vessel operators. Therefore, any resulting costs will be borne by foreign vessels.

Environmental Impact

This proposed regulation does not require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321, *et seq.*) because it is not a major federal action significantly affecting the quality of human environment.

List of Subjects in 33 CFR Part 402

Vessels, Waterways.

Accordingly, the Saint Lawrence Seaway Development Corporation proposes to amend Part 402—Tariff of Tolls (33 CFR Part 402) as follows:

PART 402—[AMENDED]

1. The authority citation for 33 CFR Part 402 continues to read as follows:

Authority: 68 Stat. 93–96, 33 U.S.C. 981–990, as amended.

§ 402.3 [Amended]

2. Section 402.3(b)(7), (g), and (j) are revised to read as follows:

* * * * *

(b) * * *

(7) Lumber, pulpwood, poles and logs, loose or bundled;

* * * * *

(g) "Feed grains" means barley, corn, oats, flaxseed, rapeseed, soybeans, and other field crop seeds grain screenings;

* * * * *

(j) "Government aid cargo" means processed food products which have been donated by or the purchase of which has been financed on concessional terms by the Federal Government of either the United States or Canada for the purposes of nutrition, economic development, emergency, or disaster relief programs and any food cargo that is owned or financed by a nonprofit organization or cooperative and that is certified by the Customs Service of the United States or Canada as intended for use in humanitarian or development assistance overseas.

* * * * *

§ 402.4 [Amended]

3. Section 402.4(a) and (c) are revised to read as follows:

* * * * *

(c) The tolls for the section between Montreal and Lake Ontario shall be paid 75 percent in Canadian dollars and 25 percent in United States dollars. Payments for transit through locks in Canada only shall be in Canadian dollars, and payments for transit through locks in the United States only shall be in United States dollars.

* * * * *

4. Section 402.8 is revised to read as follows:

§ 402.8 Schedule of tolls.

	Tolls			
	Montreal to or from Lake Ontario		Lake Ontario to or from Lake Erie (Welland Canal)	
	1989	1990	1989	1990
(a) For transit of the Seaway, a composite toll, comprising:				
(1) A charge in dollars per gross registered ton, according to national registry of the vessel, applicable whether the vessel is wholly or partially laden, or is in ballast. (All vessels shall have an option to calculate gross registered tonnage according to prescribed rules for measurement in either Canada or the United States)	0.09	0.09	0.11	0.11
(2) A charge in dollars per metric ton of cargo as certified on ship's manifest or other document, as follows:				
(i) Bulk cargo	0.89	0.93	0.44	0.46
(ii) General cargo	2.15	2.25	0.71	0.74
(iii) Containerized cargo	0.89	0.93	0.44	0.46

	Tolls			
	Montreal to or from Lake Ontario		Lake Ontario to or from Lake Erie (Welland Canal)	
	1989	1990	1989	1990
(iv) Government aid cargo	0.00	0.00	0.00	0.00
(v) Food grains	0.54	0.57	0.44	0.46
(vi) Feed grains	0.54	0.57	0.44	0.46
(3) A charge in dollars per passenger per lock	1.00	1.00	1.00	1.00
(4) A charge in dollars per lock for complete or partial transit of the Welland Canal in either direction by cargo vessels, which may be shared by cargo vessels in tandem:				
(i) Loaded: Per Lock	NA	NA	355.00	370.00
(ii) In ballast: Per Lock	NA	NA	260.00	275.00
(b) For partial transit of the Seaway:				
(1) Between Montreal and Lake Ontario, in either direction 15 percent per lock of the applicable toll.				
(2) Between Lake Ontario and Lake Erie, in either direction, (Welland Canal), 13 percent per lock of the applicable toll.				
(c) Minimum charge in dollars per vessel per lock transited for full or partial transit of the Seaway:				
(1) Pleasure craft	7.00	7.00	7.00	7.00
(2) Other vessels	13.00	13.00	13.00	13.00

Saint Lawrence Seaway Development Corporation.

James L. Emery,

Administrator.

[FR Doc. 88-29697 Filed 12-29-88; 8:45 am]

BILLING CODE 4910-61-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[AD-FRL-3500-1]

National Emission Standards for Hazardous Air Pollutants; Coke Oven Emissions From Wet-Coal Charged By-Product Coke Oven Batteries

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of reopening of public comment period.

SUMMARY: The period for receiving written comments on the proposed National Emission Standards for Hazardous Air Pollutants (NESHAP) for Coke Oven Emissions from Wet-Coal Charged By-Product Coke Oven Batteries is being reopened for the limited purpose of allowing public comment on data gathered by EPA on new technology for the control of emissions from coke oven door leaks. Available data suggest that this technology has the potential to reduce door leaks to 3 percent leaking doors (PLD) for 4-meter batteries and 7 PLD for 6-meter batteries based on three-run averages.

DATE: Comments must be postmarked on or before February 28, 1989.

ADDRESS: Comments on this notice should be submitted (in duplicate if possible) to: Central Docket Section (LE-131), Attention: Docket Number A-79-15, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: For further information concerning this notice, contact Mr. Doug Bell or Ms. Amanda Agnew, Standards Development Branch, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, 27711, telephone numbers (919) 541-5568 and (919) 541-5268, respectively.

SUPPLEMENTARY INFORMATION:

I. Background

On April 23, 1987 (52 FR 13586), the Agency proposed the NESHAP for coke oven emissions from wet-coal charged by-product coke oven batteries under Section 112 of the Clean Air Act (CAA). Following proposal, additional information was obtained by the Agency on recent technological advancements for the control of leaks from coke oven doors (Docket A-79-15, Docket Items IV-B-4, IV-B-5, IV-J-1, and IV-J-2). The evaluation of this technology indicates that door leaks can be controlled to levels of 3 PLD for 4-meter batteries and 7 PLD for 6-meter batteries based on three-run averages as compared to the 10 PLD for all sizes that was proposed. Consequently, the additional emission reduction provided by this technology can result in lower risks to human health from exposure to coke oven emissions.

Because of this new technical information and EPA's desire to ensure that the standards are based on the most complete and accurate information available, EPA is reopening the public comment period until February 28, 1989. The EPA will consider those comments that pertain to the applicability, control effectiveness, and costs associated with the technology for the control of emissions from coke oven door leaks discussed in this notice or on the performance of any other new technologies. The EPA will also consider new performance data for the control of door leaks that were not previously addressed by EPA in the document titled "Coke Oven Emissions from By-Product Coke Oven Batteries—Background Information for Proposed Standards" (EPA 450/3-85-028a). The comment period for all other aspects of the rulemaking ended November 30, 1987.

This notice does not change in any way the standards as proposed on April 23, 1987 (52 FR 13586). In addition, this notice is not intended to address how the recent decision by the DC Circuit Court on the vinyl chloride standards (*Natural Resources Defense Council, Inc.* v. *EPA*, 824 F.2d 1146 [1987]) affects the proposed standards for coke oven emissions. Any change in the proposed standards or response to the vinyl chloride standards decision will be addressed in future notices in the **Federal Register.**

II. Description of Technology

The controls for coke oven door leaks have continued to improve in recent years with the introduction of flexible coke oven doors, improved automatic cleaners for doors and jambs, and the use of sodium silicate as a supplementary sealant that is applied to reduce leakage. The flexible door technology includes a modified door designed by Krupp Wilputte, a new design that is being marketed by Saturn Machine & Welding Company, Inc., and a new door manufactured by Krupp Koppers The new Saturn door incorporates several features that are

different from those of conventional doors and seals:

- Flexibility: The door and doorplug are constructed in two to three sections, which allows the door to flex (either in the concave or convex direction) more than the rigid conventional doors to conform to warped jambs with an outward or inward bow.
- Seal: The door seal is constructed of Inconel® (a durable, heat-resistant alloy that is flexible and easily repaired) mounted on a flexible diaphragm plate.
- Leaf springs: Pressure is maintained on the seal by leaf springs that provide continuous force around the door perimeter instead of the point loading of plungers (spaced at 4- to 8-in. intervals) used on conventional doors.

A major advantage of the Saturn door is in seal maintenance because the seal can be relatively easily repaired at the plant by replacing a damaged seal section or filing in place. Conventional doors generally are sent to outside contractors for seal replacement and repairs, and these repairs are usually more extensive and expensive. Another advantage is that the door can be more easily adjusted to conform to the deflections of warped jambs. The use of leaf springs instead of numerous spring-loaded plungers also improves seal performance by providing a uniform and continuous pressure on the seal against the jamb. This eliminates the need for manual adjustment of numerous spring-loaded plungers, which may result in too much or too little pressure on the seal.

The operation of Krupp Wilputte's flexible door is similar to the Saturn door in that the knife edge holder and knife edge can flex somewhat to mate with the jamb. The newer design does not use asbestos insulation between the plug and metal seal, the gas channel is larger, adjusting bolts are placed at 4-in. intervals (instead of 8-in.), and ¼-in. and ½-in. half-rounds are placed between the doorplug and doorframe to allow the door to flex. The door sealing may be supplemented with the use of sodium silicate prepared in a graphite base. For doors that are identified as leakers, the jamb can be sprayed with sodium silicate prior to door placement. Sodium silicate is also sprayed externally to stop door leaks that occur after door placement and charging.

Another flexible door design is one marketed by Krupp Koppers called the FLEXIT® door. This door has a flexible cast-iron body and flexible, spring-loaded seal elements that are supported by membranes. In addition, the ceramic plugs are designed to provide enlarged pressure relief canals. This door has been installed on an 8-meter battery in the Federal Republic of Germany, and additional installations are planned for two more tall batteries. There are no known U.S. installations with the FLEXIT® door.

The routine cleaning of doors and jambs after every push is also an important component of a successful door leak control program. The use of automatic door and jamb cleaners can improve the quality and consistency of the cleaning effort. For example, the Saturn Company has developed a new jamb cleaner that provides good cleaning coverage, even on warped jambs, and is easier to maintain than some other automatic cleaners. The Saturn jamb cleaner maintains a constant hydraulic pressure of 125 psig, which allows it to follow warped jambs. The jamb cleaner also has a serrated-edge blade that is effective at cleaning the portion of the jamb inside the oven. Another advantage is that the head of the cleaner can be lowered to the bench level to make access for maintenance easier. The door cleaner developed by Saturn uses cut steel cables instead of blades for door cleaning and also has a scraper for the bottom plate. The frayed cable ends provide the proper amount of flexibility for door cleaning, and it will generally work on any door. The design makes cable replacement on the door cleaner straightforward, and it is a relatively minor maintenance item.

Another important part of the door leak control technology is worker performance in cleaning doors and jambs, proper door placement, and repairs for damaged door seals. For example, door seals may be damaged and subsequently leak if the metal seal is damaged when the door is improperly spotted for placement on the oven. Extensive worker training programs are used to minimize leaks that occur from human errors. In addition, door alignment devices are available to aid the workers in properly positioning the door before placement on the oven. Visable emission monitoring, with feedback to supervisory personnel, is also a critical component of a successful door leak control program. The monitoring identifies problem doors and the need for corrective actions. When door leaks are observed, it is important to identify the cause (e.g., seal damage, blocked gas passages, poor cleaning) and to take the necessary action to correct the problem.

III. Door Leak Control Performance

The only complete set of Saturn doors in place is on a 6-meter battery with 60 ovens. (Single experimental doors are currently being evaluated in trials at several other coke plants.) This battery has several structural design problems and also has a leakage problem from warped jambs. The design problems are currently being remedied, and all of the jambs on the battery are being replaced. The design problems and warped jambs are unrelated to the installation or indicated emission performance of the Saturn doors. The door installation was completed in January 1988, and the company has conducted 58 observations of door leaks since then. These observations did not include any leaks due to design problems or the warped jambs. Leaks associated with these situations are expected to be eliminated when the repair work is completed. These data show an overall average of 4.5 PLD and an uppor 95-perceant confidence level of 7 PLD (based on a three-run average). The EPA's previous evaluation of coke oven emissions has shown that there is considerable variability over time and from battery to battery even when the equipment, operation, and maintenance programs are apparently identical. The ratio of the 95-percent confidence level to the overall average noted in this case is typical of this variability. In the past, EPA has chosen the 95-percent confidence level as the basis for the not-to-be exceeded standard. However, annual emission estimates that are used to estimate risks are based on overall average levels. These data were collected from observations from the bench instead of the yard as specified in EPA Method 109. Consequently, these observations may include a few leaks that would not be observed form the yard and may yield results for PLD slightly higher than those obtained by the EPA method.

Data were available for a coke plant that used the flexible Krupp Wilputte doors supplemented with sodium silicate spraying. Chuck doors (level doors) at this plant are routinely sealed by spraying with sodium silicate. Prior experience at this plant had been that sodium silicate was difficult to remove after it had set up; however, no problems have been experienced with the sodium silicate in a graphite base because it releases more easily and removal of the residue is not difficult. A total of nine observations performed during official State inspections at this plant in the period from 1984 to 1988 and four observations performed during official EPA inspections in 1988 revealed a range of 0 to 2.5 PLD with a projected upper 95-percent confidence level of about 3 PLD. These very low levels are apparently achieved by the use of sodium silicate as needed to stop door leaks.

The data for the new Saturn door suggest that door leak control levels of 7 PLD or less are achievable for a high percentage of the time on 6-meter batteries. Door leak control is more difficult on tall batteries; consequently, this same technology applied to short batteries (less than 5-meters in height) may result in even lower PLD levels. The flexible Krupp Wilputte door and sodium silicate appear to offer an alternative means to obtain an additional reduction in leaks. The plant using this technology reported no leaks observed in many cases, and the highest observation was only 2.5 PLD during 13 official inspections. The use of the sodium silicate spray may make door leak control similar to that for topside leaks. On the topside, leaks are controlled by applying a luting mixture to seal the leak when a leak is observed. If sodium silicate can be used routinely on doors, exceptional door leak control may be attained by conscientiously sealing any leaking doors with the sodium silicate regardless of the type of door.

The data from the two coke plants suggest that PLD levels on the order of 3 to 7 PLD are achievable for a high percentage of the time. A level of 3 PLD is apparently achievable based on a 95-percent confidence level and three-run averages for a 4-meter battery with flexible doors supplemented by sodium silicate spraying. The new Saturn door should continually achieve 7 PLD or less on a 6-meter battery, and it may achieve lower levels on shorter batteries that are not as difficult to control. These very low performance levels are not achievable by the control equipment technology alone. The level of control also is affected directly by the ability to identify and correct leak control problems. A vigorously implemented program of monitoring, trouble-shooting, more frequent seal repairs, jamb replacement as necessary, extensive worker training, worker incentives, and regulatory enforcement can improve performance to levels not currently achieved on other batteries.

The data on emission control performance for the two plants with flexible door technology represent somewhat limited data on newly installed equipment. However, EPA has no information that indicates that the control performance should deteriorate over time.

IV. Costs

The use of the Saturn door technology could require the replacement of existing doors with the new flexible doors. No major modifications to existing door machines are expected. However, the installation and routine use of automatic door and jamb cleaners are highly recommended to achieve consistent control performance. The capital cost for a new door for short ovens ranges from about $10,000 to $12,000 per door and about $160,000 each for a door or jamb cleaner. For a typical 60-oven battery, the capital cost for the doors would be about $1.3 million, and the cost of door and jamb cleaners (four at $160,000) would add about $0.64 million for a total of about $2 million per short battery. For a 6-meter battery with 60 ovens, the capital cost of the doors is estimated as $2 million with an additional $1.2 million for the cleaners. For batteries that use manual cleaning, the cost of the automatic cleaners may be offset somewhat by reduced labor requirements for the manual cleaning of doors and jambs.

The cost to modify doors to the flexible Krupp Wilputte design includes $2,500 for material and $1,500 for labor. for a 60-oven battery, the installed capital cost for the modified doors is estimated as roughly $480,000. The major cost component for supplemental sealing with sodium silicate is the additional labor required for preparing the material, spraying the doors, respraying to seal leaks as necessary, and removal of the residue after pushing. Some plants may be able to redirect worker efforts with a minimal increase in labor, and other plants may need to add a worker specifically for this function. Assuming the labor increase is one person per shift for a 60-oven battery, the annual labor costs would be roughly $200,000 per year (including fringe benefits and overhead for a total of four persons). The annual material cost (sodium silicate) is estimated at $10,000 for a total annual cost of $210,000.

V. Request for Comments

It is important that the Agency receive comments from the owners and operators of coke ovens. The Agency is aware that there are many factors that a plant operator must consider in determining control strategies. The information collected on relatively recent door leak control technology suggest that levels of 3 and 7 PLD (based on the average of three observations) can be achieved on short and tall batteries, respectively, with the flexible door design, a vigorously implemented door leak control program, and perhaps supplementary control by spraying sodium silicate. It would be very helpful for the Agency to learn what steps each plant would take to meet the cited performance levels. Therefore, comments on the information presented in this notice are requested from the public and the affected industry. Specific comments are requested on the following areas:

- Is the technology applicable to the industry in general?
- Does it represent improvements over conventional technology used for door leak control?
- Are the cited performance levels achievable and adequately demonstrated? Is better performance possible?
- Is the estimate of cost accurate? (For example, are there cost savings or additional expenses that should be included?)
- What impacts on maintenance and operational procedures would occur as a result of installing the new door technology?
- Describe in detail other technologies or procedures that could be used in lieu of the new door technology to achieve the cited performance levels.
- What specific battery characteristics (e.g., type and age of equipment, existing control technology, etc.) would impact on a plant's ability to achieve the cited performance levels? Describe how and why the impact would occur.

The EPA will consider only those comments that pertain to the technologies for the control of coke oven door leaks discussed in this notice or on the performance of any other technologies for the control of door leaks not previously addressed by EPA in the document titled "Coke Oven Emissions from By-Product Coke Oven Batteries—Background Information for Proposed Standards" (EPA 450/3–85–028a).

List of Subjects in 40 CFR Part 61

Asbestos, Benzene, Beryllium, Blast furnaces and steel mills, Hazardous substances, Incorporation by reference, Inorganic arsenic, Intergovernmental relations, Mercury, Radionuclides, Reporting and recordkeeping requirements, Vinyl chloride.

Date: December 22, 1988.

Don R. Clay,

Assistant Administrator for Air and Radiation.

[FR Doc. 88–30082 Filed 12–29–88; 8:45 am]

BILLING CODE 6560–50–M

40 CFR Part 180

[PP 8E3661/P475; FRL-3501-2]

Pesticide Tolerance For Fluazifop-Butyl

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document proposes that a tolerance be established for residues of the herbicide fluazifop-butyl in or on the raw agricultural commodity coffee. The proposed regulation to establish a maximum permissible level for residues of the herbicide in or on the commodity was requested in a petition submitted by the Interregional Research Project No. 4 (IR-4).

DATE: Comments, identified by the document control number [PP 8E3661/P475], must be received on or before January 30, 1989.

ADDRESS: By mail, submit written comments to: Public Docket and Freedom of Information Section, Field Operations Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 246, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 246 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Hoyt Jamerson, Emergency Response and Minor Use Section (TS-767C), Registration Division, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 716B, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-2310.

SUPPLEMENTARY INFORMATION: The Interregional Research Project No. 4 (IR-4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903, has submitted pesticide petition 8E3661 to EPA on behalf of Dr. Robert H. Kupelian, National Director, IR-4 Project, and the Agricultural Experiment Station of Hawaii.

The petition requested that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, propose the establishment of a tolerance for residues of the herbicide (R)-2-[14-[[5-(trifluoromethyl)-2-pyridinyl]oxy]phenoxy]-propanoic acid (resolved isomer of fluazifop), both free and conjugated, and of butyl [R]-2-[4-[[5-(trifluoromethyl)-2-pyridinyl]-oxy]phenoxy]propanoate (resolved isomer of fluazifop-p-butyl), all expressed as fluazifop, in or on the raw agricultural commodity coffee at 0.10 part per million (ppm).

The petitioner proposed that use of this commodity be limited to Hawaii based on the geographical representation of the residue data submitted. Additional residue data will be required to expand the area of usage. Persons seeking geographically broader registration should contact the Agency's Registration Division at the address provided above.

The data submitted in the petition and other relevant material have been evaluated. The pesticide is considered useful for the purpose for which the tolerance is sought. The toxicological data considered in support of the proposed tolerance include:

1. A 2-year chronic feeding/oncogenicity study in rats which was negative for oncogenic potential under the conditions of the study at all feeding levels of 0.1, 0.3, 1.0, and 3.0 milligrams (mg) per kilogram (kg) of body weight (bw) per day (equivalent to 2, 6, 20, and 60 ppm) and a systemic no-observed-effect level (NOEL) of 1 mg/kg/day.

2. A 90-day rat feeding study with a NOEL of 0.5 mg/kg/day (equivalent to 10 ppm).

3. A 90-day dog feeding study with a NOEL of 25 mg/kg/day (equivalent to 1,000 ppm).

4. A rat oral lethal dose LD_{50} of 3,300 mg/kg.

5. A rat teratology study with a teratogenic and maternal toxicity NOEL of 10 mg/kg/day (equivalent to 200 ppm) and a NOEL for fetotoxicity of 1 mg/kg/day.

6. A rabbit teratology study with a no teratogenic effect level at 90 mg/kg/day (highest dose tested) and a NOEL for fetotoxicity of 10 mg/kg/day (equivalent to 330 ppm).

7. A two-generation rat reproduction study with a NOEL of 4 mg/kg/day (80 ppm).

8. A 1-year dog feeding study with a NOEL of 5 mg/kg/day.

9. An 18-month mouse chronic feeding/oncogenicity study with no observed oncogenic potential under conditions of the study at all feeding levels of 0.1, 0.3, 1.0, and 3.0 mg/kg/day and a NOEL for systemic toxicity of 1.0 mg/kg/day (equivalent to 7 ppm).

10. An Ames test (negative), a rat cytogenetic study (negative), and an in-vitro transformation assay (negative).

11. An acute delayed neurotoxicity study in hens (negative).

The acceptable daily intake (ADI), based on the 2-year rat feeding study (NOEL of 1.0 mg/kg/day) and using a 100-fold safety factor, is calculated to be 0.01 mg/kg of body weight (bw)/day. The theoretical maximum residue contribution (TMRC) from existing tolerances for a 1.5-kg daily diet is calculated to be 0.002095 mg/kg/day; the current action will increase the TMRC by 0.000005 mg/kg/day (0.2 percent). Pubished tolerances utilize 20.85 percent of the ADI; the current action will utilize an additional 0.05 percent.

The nature of the residues is adequately understood and adequate analytical methods, high-pressure liquid chromatography using an ultraviolet detector, are available in the *Pesticide Analytical Manual*, Vol. II (PAM-II), for enforcement purposes.

Based on the above information considered by the Agency, the tolerance established by amending 40 CFR 180.411 would protect the public health. No secondary residues in meat, milk, poultry, or eggs are expected since coffee is not considered a livestock feed commodity.

Any person who has registered or submitted an application for registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this document in the **Federal Register**, that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [PP 8E3661/P475]. All written comments filed in response to this petiton will be available in the Public Docket and Freedom of Information Section, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–354, 94 Stat. 1164, 5 U.S.C. 601–612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

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

Dated: December 20, 1988.

Anne E. Lindsay,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR Part 180 be amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 346a.

2. In § 180.411(d), by adding and alphabetically inserting the raw agricultural commodity coffee, to read as follows:

§ 180.411 Fluazifop-butyl; tolerances for residues.

* * * * *

(d) * * *

Commodity	Parts per million
* * * * *	
Coffee	0.1
* * * * *	

[FR Doc. 88–30080 Filed 12–29–88; 8:45 am]

BILLING CODE 6560–50–M

40 CFR Part 180

[PP 7E3555/P445; FRC–3500–9]

Pesticide Tolerance for Thiophanate-Methyl

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document proposes that a tolerance be established for the combined residues of the fungicide thiophanate-methyl, its oxygen analog, and its benzimidazole-containing metabolites in or on the raw agricultural commodity potatoes. The proposed regulation to establish a maximum permissible level for residues of the fungicide in or on the commodity was requested in a petition submitted by the Interregional Research Project No. 4 (IR–4).

DATE: Comments, identified by the document control number [PP 7E3555/P445], must be received on or before January 30, 1989.

ADDRESS: By mail, submit written comments to: Public Docket and Freedom of Information Section, Field Operations Division (TS–757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 246, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 246 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Hoyt Jamerson, Emergency Response and Minor Use Section (TS–767C), Registration Division, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 716C, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)–557–2310.

SUPPLEMENTARY INFORMATION: The Interregional Research Project No. 4 (IR–4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903, has submitted pesticide petition 7E3555 to EPA on behalf of Dr. Robert H. Kupelian, National Director, IR–4 Project and the Agricultural Experiment Stations of Colorado, Florida, Idaho, Maine, and Washington.

This petition requested that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, propose the establishment of a tolerance for the combined residues of the fungicide thiophanate-methyl (dimethyl-[(1,2-phenylene)bis(iminocarbonothioyl)]bis[carbamate]), its oxygen analog dimethyl-4-4'-o-phenylene bis(allophanate), and its benzimidazole-containing metabolites (calculated as thiophanate-methyl) in or on the raw agricultural commodity potatoes at 0.2 part per million (ppm).

The data submitted in the petition and other relevant material have been evaluated. The pesticide is considered useful for the purpose for which the tolerance is sought. The toxicological data considered in support of the proposed tolerance include:

1. A 6-month rat feeding study with a NOEL of 64 ppm (3.2 mg/kg/day).

2. A 6-month mouse feeding study with a NOEL of 1,600 ppm (240 mg/kg/day).

3. A 2-year rat feeding/oncogenicity study with a no-observed-effect level (NOEL) of 160 ppm (equivalent to 8 milligrams (mg)/kilogram (kg) of body weight per day) for systemic effects and no oncogenic efforts observed at the dosage levels tested (0, 10, 40, 160, and 640 ppm, equivalent t 0.5, 2, 8, and 32 mg/kg/day).

4. A 2-year dog feeding study with a systemic NOEL of 50 mg/kg/day (2,000 ppm).

5. A rat teratology study with no compound-related teratogenic or fetal effects observed at the dosage levels tested (0, 250, 1,200 and 2,500 ppm).

6. A three-generation rat study with a reproductive NOEL of 160 ppm (8 mg/kg/day).

7. Mutagenicity studies including one that was negative for point mutations in *Salmonella typhimurum* with and without liver microsomal activation, and another that was negative for DNA damage as indicated by differential toxicity in repair proficient and deficient strains of *Bacillus subtilis*.

Data considered desirable but lacking are a mouse oncogenicity study, a teratology study in a second species, and mutagenicity assays in mammalia systems to determine thiophanate methyl's potential to cause point mutations, chromosomal change, and DNA damage.

A comprehensive review of the data available for thiophanate-methyl was conducted in connection with a Special Review (formerly called rebuttable presumption against registration (RPAR)) for the chemical, which was published in the **Federal Register** of December 7, 1977 (42 FR 61970). This presumption against thiophanate-methyl was based on information indicating

that its metabolite, methyl 2-benzimidizole carbamate (MBC), had the potential to cause mutagenic effects and to result in local population reduction in nontarget organisms (earthworms). In the Federal Register of October 11, 1979 (44 FR 58798), the Agency published a Preliminary Notice of Determination, which concluded that available evidence did not clearly demonstrate a risk to humans or the environment as a result of registered uses.

Prior to the publication of the final regulatory decision, the Agency received limited evidence that dietary exposure to the MBC metabolite might pose an oncogenic risk. The Agency's position concerning the RPAR issues with thiophanate-methyl was published in the Federal Register of October 20, 1982 (47 FR 46747). In the Notice of Determination Concluding the Rebuttable Presumption Against Registration (PD–4), the Agency determined that the potential oncogenic and mutagenic risks of thiophanate-methyl were exceeded by the benefits associated with its use.

Thiophanate-methyl was subsequently classified as a Group D carcinogen (inadequate information available for classification as a carcinogen), and the metabolite MBC was classified as a Group C carcinogen (limited evidence of carcinogenicity). MBC was classified as a Group C carcinogen based on the following considerations: (1) MBC has been shown to cause liver tumors solely in the mouse; (2) the liver tumors were observed in two closely related strains of mice (CD–1 and Swiss), whereas no liver tumors were produced by MBC in another strain of mice (NMRKf SPF–71); (3) MBC showed no oncogenic response in ChR–CD rates; and (4) MBC produced weak mutagenic effects consistent with spindle poison activity rather than gene mutation of DNA repair activity.

The oncogenic risk from dietary exposure to MBC resulting from existing uses of thiophanate-methyl is expected to be less than that for the fungicide benomyl, which has similar use patterns. The upper limit of oncogenic risk for dietary exposure to tolerance-level residues of MBC is calculated at 10^{-5}. The proposed use on potatoes will contribute a negligible incremental increase of 10^{-7} to the oncogenic risk estimate for the metabolite.

The provisional acceptable daily intake (PADI) for thiophante-methyl, based on the 2-year rat feeding study NOEL of 8 mg/kg/day (160 ppm) and using a 100-fold safety factor, is calculated to be 0.08 mg/kg of body weight (bw)/day. The maximum permitted intake (MPI) for a 60-kg human is calculated to be 4.8 mg/day. The theoretical maximum residue contribution (TMRC) from existing tolerances for a 1.5-kg daily diet is calculated to be 0.24002 mg/day; the current action will increase the TMRC by 0.000170 mg/kg/day (0.71 percent). Published tolerances utilize 30.00 percent of the PADI; the current action will utilize an additional 0.21 percent.

For purposes of the proposed use on potatoes, the nature of the residues is adequately understood and an adequate analytical method, high-pressure liquid chromatography, is available for enforcement purposes in the Pesticide Analytical Manual (PAM), Vol. II. There are currently no actions pending against the continued registration of this chemical.

Based on the above information considered by the Agency and the fact that currently established tolerances for meat and milk are adequate to cover any residues on animal feed resulting from the proposed use, the tolerance established by amending 40 CFR 180.371 would protect the public health. Therefore, it is proposed that the tolerance be established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this notice in the Federal Register that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [pp 7E3555/P445]. All written comments filed in response to this petition will be available in the Public Docket and Freedom of Information Section, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–354, Stat. 1164, 5 U.S.C. 601–612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Recording and recordkeeping requirements.

Dated: December 19, 1988.

Anne E. Lindsay,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR Part 180 be amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 346a.

2. Section 180.371 is amended in the table therein by adding and alphabetically inserting the raw agricultural commodity potatoes to read as follows:

§ 180.371 Thiophanate-methyl; tolerances for residues.

* * * * *

Commodities	Parts per million
* * * * *	
Potatoes	0.2
* * * * *	

[FR Doc. 88–30084 Filed 12–29–88; 8:45 am]

BILLING CODE 6560–50–M

40 CFR Parts 180, 185, and 186

[PP 7F3476 and FAP 7H5524/R997; FRL–3501–1]

Pesticide Tolerances for Myclobutanil

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document propose that tolerances be established for the combined residues of the fungicide myclobutanil and certain of its metabolites in or on certain raw agricultural commodities, food additives, and feed additives. This proposal to establish maximum permissible levels of combined residues of myclobutanil and certain of its metabolites in or on the commodities, food additives, and feed additives, was requested in petitions submitted by Rohm and Haas Co.

DATE: Comments, identified by the document control number [PP 7F3476/R997], must be received on or before January 17, 1989.

ADDRESS: Written objections, identified by the document control number [PP 7F3476 and FAP 7H5524/R997], may be submitted to the: Hearing Clerk (A-110), Environmental Protection Agency, Rm. M-3708, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT:

Lois A. Rossi, Product Manager (PM) 21, Registration Divsion (TS-767C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Office location and telephone number: Rm. 227, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-1900.

SUPPLEMENTARY INFORMATION: EPA issued a notice, published in the **Federal Register** of January 29, 1987 (52 Fr 2969), which announced that Rohm and Haas Co. of Independence Mall West, Philadelphia, PA 19105, had submitted pesticide petition (PP) 7F3476 and food additive petition (FAP) 7H5524 to EPA proposing the establishment of tolerances for the fungicide myclobutanil [alpha-butyl-alpha-(4-chlorophenyl)-1*H*-1,2,4-triazole-1-propanenitrile] and its metabolites containing both the chlorophenyl and triazole rings in or on the following: apples (whole fruit) at 0.5 part per million (ppm), wet apple pomace at 1.0 ppm, and dry apple pomace at 5.0 ppm; grapes (whole fruit) at 1.0 ppm, wet grape pomace at 2.0 ppm, dry grape pomace at 10.0 ppm, raisins at 10.0 ppm, and raisin waste at 25 ppm; milk at 0.1 ppm; meat and meat by-products (bmyp) (except liver) at 0.04 ppm; liver of cattle, goats, hogs, horses, and sheep at 0.5 ppm; and eggs at 0.04 ppm.

Subsequently, Rohm and Haas amended the petitions by: Reducing the tolerance for eggs to 0.02 ppm; and the tolerance for liver of cattle, goats, hogs, horses, and sheep to 0.3 ppm; and milk to 0.05 ppm; proposing increases in the tolerances for meat and meat by-products (except liver) to 0.05 ppm; amending the tolerance expression of meat and meat by-products (except liver) to include fat and to specify cattle, goats, hogs, horses, and sheep; combining the tolerances for residues in apple pomace (wet and dry) at 5.0 ppm and grape pomace (wet and dry) at 10.0 ppm; proposing a tolerance for meat; fat, and meat by-products of poultry at 0.02 ppm; and by amending the tolerance expressions to specify the metabolite(s) to be regulated in the raw and processed commodities.

Former Parts 193 and 561 of Title 21 of the Code of Federal Regulations, in which FAP 7H5524 proposed regulations, have been recodified into 40 CFR Parts 185 and 186, respectively by a document published in the **Federal Register** of June 29, 1988 (53 FR 24666).

There were no comments received in response to the notice of filing.

The data submitted in support of the petitions and other relevant material have been evaluated. The pestiticide is considered useful for the purpose for which the tolerances are sought. The toxicological data considered in support of the tolerances include the following:

1. A 1-year dog feeding study using doses of 0, 10, 100, 400, and 1,600 parts per million (equivalent to doses of 0, 0.34, 3.09, 14.28, and 54.22 milligrams/kilograms (mg/kg) body weight (bwt)/day in males, and 0, 0.40, 3.83, 15.68, and 58.20 mg/kg bwt/day in females. The no-observed-effect level (NOEL) is 100 ppm (3.09 mg/kg/day for males and 3.83 mg/kg/day for females) based upon hepatocellular hypertrophy, and the LOEL is 400 ppm (14.28 mg/kg/day for males and 15.68 mg/kg/day for females)

2. A 2-year chronic feeding/oncogenicity study in rats using dietary concentrations of 0, 50, 200, and 800 ppm (equivalent to doses of 0, 2.49, 9.84, and 39.21 mg/kg bwt/day in males and 0, 3.23, 12.86, and 52.34 mg/kg bwt/day in females). The NOEL for chronic effects other than oncogenicity is 2.49 mg/kg/day, and the LOEL is 9.84 mg/kg/day based on testicular atrophy in males. No other significant effects were observed in either sex at dose levels ranging from 50 to 800 ppm (2.49 to 39.21 mg/kg bwt/day in males and 3.23 to 52.34 mg/kg bwt/day in females) over a 2-year period. In addition, no oncogenic effects were observed in either sex at any of the dose level tested. Based on the toxicological findings, the Maximum Tolerated Dose (MTD) selected for testing (based on the 90-day feeding study) was not high enough to fully characterize the compound's oncogenic potential, and for this reason, the rat study (both sexes) is required to be repeated.

3. A 2-year oncogenicity study in mice using dietary concentrations of 0, 20, 100, and 500 ppm (equivalent to doses of 0, 2.7, 13.7, and 70.2 mg/kg bwt/day in males; and 0, 3.2, 16.5, and 85.2 mg/kg bwt/day in females). The NOEL for chronic effects other than oncogenicity was 20 ppm (or 3.2 mg/kg/day in females and 2.7 mg/kg/day in males). The LOEL was 100 ppm (13.7 mg/kg bwt/day in males and 16.5 mg/kg bwt/day in females) (slight increase in liver mixed function oxidase). Microscopic changes in the liver were evident in both sexes at 500 ppm (70.2 mg/kg bwt/day in males and 85.2 mg/kg bwt/day in females). There were no oncogenic effects in either sex at any dose level tested.

The selected dose (500 ppm) (70.2 mg/kg bwt/day in males and 85.2 mg/kg bwt/day in females) is satisfactory for evaluating the oncogenic potential in male mice. However, this dose was less than a MTD level in the female mice and therefore, not sufficiently high enough to fully evaluate the compouand's oncogenic potential. Therefore, the female portion of the mouse oncogenicity study must be repeated.

4. A rabbit teratology strudy was negative for teratogenic effects at all levels up to 200 mg/kg/day, the highest dose level tested. The NOEL for maternal toxicity was 20.0 mg/kg/day, and the NOEL for developmental toxicity was 60.0 mg/kg/day.

5. A rat teratology study was negative for teraotgenic effects up to and including 469 mg/kg/day (highest dose level tested). The NOEL for maternal toxicity was 313 mg/kg/day, and the NOEL for developmental toxicity was 31 mg/kg/day.

6. A two-generation rat reproduction study with a NOEL of 16 mg/kg/day for reproductive effects and a NOEL of 4 mg/kg/day for systemic effects.

7. A reverse mutation assay (Ames), point mutation in CHO/HGPRT cells, *in vitro* and *in vivo* (mouse) cytogenetic assays, unscheduled DNA synthesis, and a dominant-lethal study in rats, all of which were negative for mutagenic effects.

Myclobutanil was not carcinogenic in either the rat or mouse chronic/oncogenic feeding studies. In the mouse study, increases in liver mixed-function oxidase activity, hepatic microsomal protein content, and absolute and relative liver weights were observed in both sexes at 500 ppm in the diet (highest level tested). In addition, increased incidences of hepatocellular basophilic, clear-cell, eosinophilic, and vacuolated cell foci were also observed in both sexes at this dose level as well as increased incidences of multifocal hepatocellular vacuolation at terminal sacrifice. At the interim sacrifices and in animals that died prior to terminal sacrifice, but not at the terminal sacrifice, increased incidences of hepatocellular centrilobular hypertrophy, Kupffer cell pigmentation and periportal punctate vacuolation, and individual cell hepatocellular necrosis were also obseved at 500 ppm, but primarily in males. These effects were not considered to be of sufficient toxicological significance to indicate

that the animals were tested at the maximum tolerated dose (MTD). However, in the 90-day feeding study in mice, body-weight gains in males at 1,000 ppm (150 mg/kg bwt/day) (the lowest dose tested) were 37-percent less than that of the controls. Bodyweight gains of females were unaffected at this dose level. Therefore, although 500 ppm (75 mg/kg bwt/day) in the mouse chronic study was considered to be sufficiently high enough for an adequate negative study in males, it was not considered to be high enough for females.

The main toxicological effect seen in the rat chronic feeding study was testicular atrophy, seen at both the mid- and high-dose levels (9.84 and 39.21 mg/kg bwt/day in males). Increases in liver mixed-function oxidase activity and in liver weights were also observed in the study. Again, these effects were not considered to be adequate evidence that the animals were tested at the MTD.

Both studies need to be repeated because a MTD was not achieved. However, no preneoplastic lesions were observed in either study to suggest possible carcinogenic activity, and myclobutanil did not induce either genotoxic effects or chromosomal aberrations in a series of mutagenicity tests. In addition, no strong structural activity correlation to other carcinogens has been found.

The acceptable daily intake (ADI) based on the 2-year rat chronic feeding study (NOEL of 2.49 mg/kg bwt/day), and using a hundredfold uncertainty factor, is calculated to be 0.025 mg/kg bwt/day. The theoretical maximum residue contribution of the proposed tolerances is 0.001469 mg/kg bwt/day and utilize 5.9 percent of the ADI.

The nature of the residue is adequately understood, and adequate analytical methods, gas liquid chromatography using nitrogen/phosphorus and electron capture detectors, are available for enforcement. Prior to their publication in the Pesticide Analytical Manual, Vol. II. the enforcement methodology is being made available in interim to anyone who is interested in pesticide enforcement when requested from: By mail: Information Services Section (TS-757C), Program Management and Support Division, Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460. Office location and telephone number: Room 223, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-3262.

The pesticide is considered useful for the purposes for which the tolerances are sought. Based on the information and data considered, the Agency concludes that the establishment of the tolerances will protect the public health. Therefore, the tolerances are proposed as set forth below.

Any person adversely affected by this regulation may, within 15 days after publication of this document in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

Pursuant to the requirement of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

The Office of Management and Budget has exempted this rule from the requirement of section 3 of Executive Order 12291.

List of Subjects in 40 CFR Parts 180, 185, and 186

Administrative practice and procedures, Agricultural commodities, Food additives, Feed additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 20, 1988.

Anne E. Lindsay,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that Chapter I of Title 40 of the Code of Federal Regulations be amended as follows:

PART 180—[AMENDED]

1. In Part 180:

a. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

b. New § 180.443 is added to read as follows:

§ 180.443 Myclobutanil; tolerances for residues.

(a) Tolerances are established for the combined residues of the fungicide myclobutanil [alpha-butyl-alpha-(4-chlorophenyl)-1*H*-1,2,4-triazole-1-propanenitrile] and its metabolite alpha-(3-hydroxybutyl)-alpha-(4-chlorophenyl)-1*H*-1,2,4-triazole-1-propanenitrile (free and bound) in or on:

Commodity	Parts per million
Apples	0.5
Grapes	1.0

(b) Tolerances are established for the combined residues of the fungicide myclobutanil [alpha-butyl-alpha-(4-chlorophenyl)-1*H*-1,2,4-triazole-1-propanenitrile] and its metabolites, alpha-(3-hydroxybutyl)-alpha-(4-chlorophenyl)-1*H*-1,2,4-triazole-1-propanenenitrile (free and bound) and alpha-(4-chlorophenyl)-alpha-(3,4 dihydroxybutyl)-1*H*-1,2,4-triazole-1-propanenitrile, in:

Commodity	Parts per million
Milk	0.05

(c) Tolerances are established for the combined residues of the fungicide myclobutanil [alpha-butyl-alpha-(4-chlorophenyl)-1*H*-1,2,4-triazole-1-propanenitrile] and its metabolite alpha-(3-hydroxybutyl)-alpha-(4-chlorophenyl)-1*H*-1,2,4-triazole-1-propanenitrile (free) in:

Commodity	Parts per million
Cattle, fat	0.05
Cattle, liver	0.3
Cattle, meat	0.05
Cattle, mbyp	0.05
Eggs	0.02
Goats, fat	0.05
Goats, liver	0.3
Goats, meat	0.05
Goats, mbyp	0.05
Hogs, fat	0.05
Hogs, liver	0.3
Hogs, meat	0.05
Hogs, mbyp	0.05
Horses, fat	0.05
Horses, liver	0.3
Horses, meat	0.05
Horses, mbyp	0.05
Poultry, fat	0.02
Poultry, meat	0.02
Poultry, mbyp	0.02
Sheep, fat	0.05
Sheep, liver	0.3
Sheep, meat	0.05
Sheep, mbyp	0.05

PART 185—[AMENDED]

2. In Part 185:

a. The authority citation for Part 1o5 continues to read as follows:

Authority: 21 U.S.C. 348.

b. By revising § 185.4350, to delete the existing temporary food additive tolerance on raisins and replace it with a regulation to read as follows:

§ 185.4350 Myclobutanil.

Tolerances are established for the combined residues of the fungicide myclobutanil [alpha-butyl-alpha-(4-chlorophenyl)-1*H*-1,2,4-triazole-1-propanenitrile] and its metabolite alpha-(3-hydroxybutyl)-alpha-(4-chlorophenyl)-1*H*-1,2,4-triazole-1-propanenitrile (free and bound) in or on the following food additive commodity:

Commodity	Parts per million
Raisins	10.0

PART 186—[AMENDED]

3. In Part 186:

a. The authority citation for Part 186 continues to read as follows:

Authority: 21 U.S.C. 348.

b. By revising § 185.4350, to delete the existing temporary feed additive tolerances on apple pomace, grape pomace, and raisin waste and replace them with a regulation to read as follows:

§ 186.4350 Myclobutanil.

Tolerances are established for the combined residues of the fungicide myclobutanil alpha-butyl-alpha-(4-chlorophenyl)-1*H*-1,2,4-triazole-1-propanenitrile] and its metabolite alpha-(3-hydroxybutyl)-alpha-(4chlorophenyl)-1*H*-1,2,4-triazole-1-propanenitrile (free and bound) in or on the following feed additive commodities:

Commodities	Parts per million
Apple pomace (wet and dry)	5.0
Grape pomace (wet and dry)	10.0
Raisin waste	25.0

[FR Doc. 88-30081 Filed 12-29-88; 8:45 am]
BILLING CODE 6560-50-M

GENERAL SERVICES ADMINISTRATION

41 CFR Part 101-6

[FPMR Amendment A-40]

Federal Advisory Committee Management

AGENCY: Office of Administration, GSA.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule provides administrative and interpretive guidelines and management controls for Federal agencies concerning the implementation of the Federal Advisory Committee Act, as amended (5 U.S.C., App.) (hereinafter "the Act"). In a previous issue of the **Federal Register**, GSA published a final rule on the management of Federal advisory committees (52 FR 45926; December 2, 1987). This new proposed rule consists of revisions to the final rule which are intended to improve the management and use of Federal advisory committees in the Executive Branch of the Federal Government. These revisions (1) clarify the guidelines applicable to achieving committee memberships which are balanced in a way that is fair and consistent with section 5(b) of the Act; (2) add new language which cross-references regulations relating to Federal conflict-of-interest statutes and standards of conduct within the final rule; (3) clarify the procedures for transmitting follow-up reports to the Congress as required by section 6(b) of the Act on Presidential advisory committee recommendations; and (4) provide that annual agency fiscal year reports to GSA shall also include information requested to carry out the annual comprehensive review required by section 7(b) of the Act. Corrections of minor errors in the text of the final rule have also been made in this proposed rule.

DATE: Comments must be received on or before: February 28, 1989.

ADDRESS: Comments should be addressed to: General Services Administration, Committee Management Secretariat (CTM), Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Charles F. Howton, Senior Committee Management Specialist, Committee Management Secretariat, Office of Management Services, Office of Administration, General Services Administration, Washington, DC 20405 (202) 523-4884.

SUPPLEMENTARY INFORMATION:

Background

GSA's authority for administering the Act is contained in section 7 of the Act and Executive Order 12024 (42 FR 61445, 3 CFR, 1977 Comp., p. 158). Under Executive Order 12024, the President delegated to the Administrator of General Services all of the functions vested in the President by the Act, as amended, except that the Annual Report to the Congress required by section 6(c) shall be prepared by the Administrator for the President's consideration and transmittal to the Congress.

Prior Comments

GSA issued a final rule on December 2, 1987, outlining policies and guidelines to be followed in the administration of the Act. Comments used in developing the final rule were received in response to the publication of a proposed rule by GSA in the **Federal Register** on May 19, 1987 (52 FR 18774). Copies of all comments received are available for public inspection in room 7030 of the General Services Building, 18th and F Streets, NW., Washington, DC.

Additional Comments

Since publication of the final rule, GSA has been made aware of Congressional and other concerns that the provision in the final rule covering balanced membership of advisory committees may give rise to erroneous impressions regarding agency responsibilities under the Act. GSA believes this matter should be clarified in the rule and in additional explanatory comments. These improvements will further ensure that agencies obtain the advice and expertise they need to accomplish their missions.

In addition, concerns raised by the Congress and the Federal community regarding the application of Federal conflict-of-interest statutes to advisory committee members have prompted GSA to assess the desirability of issuing guidance in this area.

Finally, as stated in explanatory comments accompanying GSA's final rule published on December 2, 1987 (52 FR 45926), other actions are necessary to implement fully the requirements contained in section 6(b) of the Act, relating to actions taken by the Executive Branch concerning the public recommendations produced by Presidential advisory committees.

Discussion of Proposed Revisions

Provisions Relating to Balanced Membership of Advisory Committees

In a joint letter to GSA, dated December 17, 1987, the Chairman of the Senate Committee on Governmental Affairs and the Chairman of the Subcommittee on Oversight of Government Management expressed concern over the impact of language contained in § 101-6.1007(b)(2)(iii) of the final rule. That language provides that agencies, in fulfilling the Act's requirement for consultation with GSA in the establishment, reestablishment, or renewal of an advisory committee, shall include a "description of the agency's plan to attain balanced membership." The section further provides that "For the purposes of attaining balance,

agencies shall consider for membership interested persons and groups with professional or personal qualifications or experience to contribute to the functions and tasks to be performed. This shall be construed neither to limit the participation, nor compel the selection of any particular individual or group to obtain divergent points of view that are relevant to the business of the advisory committee."

This language differed from that contained in the Notice of Proposed Rulemaking of May 19, 1987 primarily by including the words "nor compel the selection" [of any particular individual or group to obtain divergent points of view].

It appears that this addition could be read to suggest that agencies are not obligated to fully implement the intent of the Congress in requiring that advisory committees be "fairly balanced in terms of points of view represented." The legislative history shows that the requirement for "fairly balanced" membership was intended to mitigate the "great danger" that "special interest groups may use their membership * * * to promote their private concerns."

Given the lack of a precise definition of those elements which constitute balance under the Act, GSA believes it would be impractical to provide an all-inclusive list of considerations to be applied in selecting the membership of every advisory committee. The membership of a committee necessarily depends on its functions. For example, the membership of a committee whose sole function is to consider scientific questions may be limited to qualified scientists. However, as appropriate to the functions and tasks to be performed, a cross-section of scientists representing different points of view should be considered for membership, such as representatives from academia as well as from industry. For other committees, the inclusion of those who would be directly affected by the committee's recommendations and activities, and of other interested parties, may be appropriate. The rule is written so as to ensure that a cross-section of parties is considered for membership, as appropriate to the committee's business.

Accordingly, the language in paragraph (c) of § 101–6.1002 and in paragraph (b)(2)(iii) of § 101–6.1007 has been strengthened to require "fairly balanced" advisory committee membership and to require that an agency's description of its plan to attain fairly balanced membership ensure appropriate consideration of a cross-section of parties. Paragraph (a)(1) of § 101–6.1015 has been expanded to require that an agency's **Federal Register** notice for a new committee also contain the description of this plan.

Provision Relating to Federal Conflict-of-Interest Statutes and Standards of Conduct Applicable to Advisory Committee Members

With regard to concerns expressed by the Congress and Executive Branch agencies relating to the application of Federal conflict-of-interest statutes to advisory committee members, GSA believes it would be useful to cross-reference existing regulations in this area within the final rule. GSA believes that the responsibility for issuing regulations on conflicts of interest and standards of conduct is within the purview of the Office of Government Ethics (OGE). Given the importance of such considerations to the operations of advisory committees, however, GSA and OGE have agreed that a cross-reference would be useful in improving the administration of the Act.

Therefore, § 101–6.1009 has been amended through the addition of a new subsection (j) which reinforces existing requirements of the Office of Government Ethics and each agency for reviewing conflicts of interest which may arise through membership on a Federal advisory committee.

Provisions Relating to Follow-up Reports on Presidential Advisory Committee Recommendations

In the discussion of comments in the final rule (see 52 FR 45926, **SUPPLEMENTARY INFORMATION:**), GSA indicated that it would propose further guidance in a future revision of this rule clarifying the procedures for transmitting follow-up reports to the Congress as required by section 6(b) of the Act on the public recommendations of Presidential advisory committees.

GSA believes that the role of the Administrator of General Services, as the President's delegate in accordance with section 2 of Executive Order 12024 for certain functions vested in the President by section 6(b) of the Act is to assure that such reports are made to the Congress in a timely manner by an appropriate and responsible agency or organization consistent with the policies of the President. GSA has determined, therefore, after consultation with the Office of Management and Budget (OMB) and certain affected agencies, that unless otherwise specified by the President, follow-up reports on Presidential advisory committee recommendations should be prepared and transmitted to the Congress by the agency responsible for providing support to the committee. In the case of an independent Presidential advisory committee, which normally terminates following the submission of its report to the President, GSA proposes to designate the responsible agency or organization to implement this requirement following consultation with the chairperson of the committee.

Accordingly, § 101.6–1008 has been expanded by the addition of a new subsection (d) which outlines the role of GSA in assuring that the requirements of section 6(b) of the Act are fully implemented and provides for consultation with OMB in the matter of follow-up reports. Also, § 101.6–1009 has been amended further through the addition of a new subsection (k) which provides that the head of the agency responsible for the support of a Presidential advisory committee shall carry out the provisions of section 6(b) of the Act. Furthermore, § 101–6.1011 has been amended through the addition of a new subsection (c) which requires that the chairperson of an independent Presidential advisory committee consult with the Administrator in identifying the agency or organization to be responsible for complying with section 6(b) of the Act.

Finally, paragraph (a) of § 101–6.1035 has been modified to reflect the policy established by the addition of paragraph (d) to § 101–6.1008 in this new proposed rule and to provide that follow-up reports shall be consistent with specific instructions issued periodically by the Secretariat.

Provision Relating to the Annual Comprehensive Review of Federal Advisory Committees

Beginning in 1982, in order to simplify the annual agency fiscal year reporting requirements, and to improve the quality of the information furnished to GSA, the Secretariat has required only the submission of a single annual report on each Federal advisory committee in existence during the reporting year. This report requires agencies to furnish both quantitative and qualitative information respectively, to enable the Secretariat to carry out the requirements of section 6(c) of the Act, relating to the President's annual report to the Congress, and the requirements of section 7(b) of the Act, relating to the annual comprehensive review of committees.

Paragraph (b) of § 101–6.1035, therefore, has been modified to state specifically that information required for the conduct of the annual comprehensive review of each advisory committee is included in the annual agency fiscal year reporting requirements.

Discussion of Corrections Required in the Final Rule

Paragraph (a) of § 101–6.1001, the heading of § 101–6.1009, and paragraph (e) of § 101–6.1009 contain minor errors in the text of the final rule. The affected language has been corrected and appears in the new text of this proposed rule.

Executive Order 12291

GSA has determined that this proposed regulatory action is not a major rule for the purposes of Executive Order 12291 of February 17, 1981, because it will not result in an annual effect on the economy of $100 million or more, will not cause a major increase in costs to consumers or others, and will not have significant adverse effects. GSA has based all administrative decisions on this proposed action on adequate information concerning the need for and consequences of this proposed rule. GSA has also determined that the potential benefits to society from this proposed rule far outweigh the potential costs, has maximized the net benefits, and has chosen the alternative involving the least cost to society.

Regulatory Flexibility Act

These regulations are not subject to the regulatory flexibility analysis or other requirements of 5 U.S.C. 603 and 604.

List of Subjects in 41 CFR Part 101–6

Civil Rights, Government property management, Grant programs, Intergovernmental relations, Surplus Government property, Relocation assistance, Real property acquisition, Federal advisory committees.

Accordingly, it is proposed to amend 41 CFR Part 101–6 as follows:

PART 101–6—MISCELLANEOUS REGULATIONS

1. The authority citation for 41 CFR Part 101–6 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); sec. 7, 5 U.S.C., App., and E.O. 12024, 3 CFR 1977 Comp., p. 158.

2. Section 101–6.1001 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 101–6.1001 Scope.

(a) This subpart defines the policies, establishes minimum requirements, and provides guidance to agency management for the establishment, operation, administration, and duration of advisory committees subject to the Federal Advisory Committee Act, as amended.***

* * * * *

3. Section 101–6.1002 is amended by revising paragraph (c) to read as follows:

§ 101–6.1002 Policy

* * * * *

(c) An advisory committee shall be fairly balanced in its membership in terms of the points of view represented and the functions to be performed; and

* * * * *

4. Section 101–6.1007 is amended by revising the introductory text of paragraph (b)(2) and paragraph (b)(2)(iii) to read as follows:

§ 101–6.1007 Agency procedures for establishing advisory committees.

* * * * *

(b) * * *

(2) Submit a letter and the proposed charter to the Secretariat proposing to establish or use, reestablish, or renew an advisory committee. The letter shall include the following information:

* * * * *

(iii) A description of the agency's plan to attain fairly balanced membership. The plan will ensure that, in the selection of members for the committee, the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the committee. Committees requiring technical expertise should include persons with demonstrated professional or personal qualifications and experience relevant to the functions and tasks to be performed.

* * * * *

5. Section 101–6.1008 is amended by adding paragraph (d) to read as follows:

§ 101–6.1008 The role of GSA.

* * * * *

(d) The Secretariat shall assure that follow-up reports required by section 6(b) of the Act are prepared and transmitted to the Congress as directed by the President; either by his delegate, by the agency responsible for providing support to a Presidential advisory committee, or by the responsible agency or organization designated pursuant to paragraph (c) of § 101–6.1011. In performing this function, GSA may solicit the assistance of the Office of Management and Budget and other appropriate organizations, as deemed appropriate.

6. Section 101–6.1009 is amended by revising the heading and paragraphs (e), (h) and (i); and by adding paragraphs (j) and (k) to read as follows:

§ 101–6.1009 Responsibilities of an agency head.

* * * * *

(e) A review, at least annually, of the need to continue each existing advisory committee, consistent with the public interest and the purpose and functions of each committee;

* * * * *

(h) The opportunity for reasonable public participation in advisory committee activities;

(i) That the number of committee members is limited to the fewest necessary to accomplish committee objectives;

(j) That the interests and affiliations of advisory committee members are reviewed consistent with regulations published by the Office of Government Ethics in 5 CFR Parts 734, 735, and 737, and additional requirements, if any, established by the sponsoring agency pursuant to Executive Order 11222, as amended, the conflict-of-interest statutes, and the Ethics in Government Act, as amended, 5 U.S.C., App.; and

(k) Unless otherwise specified by the President, the preparation and transmittal of a follow-up report to the Congress detailing the disposition of the public recommendations of a Presidential advisory committee supported by the agency, in accordance with section 6(b) of the Act.

7. Section 101–6.1011 is amended by revising paragraphs (a) and (b); and by adding paragraph (c) to read as follows:

§ 101–6.1011 Responsibilities of the chairperson of an independent Presidential advisory committee.

* * * * *

(a) Consult with the Administrator concerning the role of the Designated Federal Officer and Committee Management Officer;

(b) Fulfill the responsibilities of an agency head as specified in paragraphs (d), (h) and (j) of § 101–6.1009; and

(c) Unless otherwise specified by the President, consult with the Administrator regarding the designation of an agency or organization responsible for implementing section 6(b) of the Act.

8. Section 101–6.1015 is amended by revising the last sentence of paragraph (a)(1) to read as follows:

§ 101–6.1015 Advisory committee information which must be published in the Federal Register.

(a) * * *

(1) * * * For a new committee, such notice shall also describe the nature and purpose of the committee and the agency's plan to attain fairly balanced membership, and shall include a statement that the committee is necessary and in the public interest.

* * * * *

9. Section 101–6.1035 is amended by revising paragraphs (a) and (b) to read as follows:

§ 101–6.1035 Reports required for advisory committees.

(a) Within one year after a Presidential advisory committee has submitted a public report to the President, a follow-up report will be prepared and transmitted to the Congress as determined under paragraph (d) of § 101–6.1008, detailing the disposition of the committee's recommendations in accordance with section 6(b) of the Act. Reports shall be consistent with specific instructions issued periodically by the Secretariat;

(b) The President's annual report to the Congress shall be prepared by GSA based on reports filed on a fiscal year basis by each agency consistent with the information specified in section 6(c) of the Act. Reports from agencies shall be consistent with instructions provided annually by the Secretariat. Agency reports shall also include information requested to enable the Secretariat to carry out the annual comprehensive review of each advisory committee as required by section 7(b) of the Act. These reports have been cleared in accordance with FIRMR 201–45.6 in 41 CFR Chapter 201 and assigned interagency report control number 0304–GSA–XX.

* * * * *

Dated: December 22, 1988.

Paul T. Weiss,

Associate Administrator for Administration.

[FR Doc. 88–30059 Filed 12–29–88; 8:45 am]

BILLING CODE 6820–34–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 405

[BERC–458–P]

Medicare Program; Physician Liability on Non-Assigned Claims

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would establish in regulations the circumstances in which a nonparticipating physician who does not accept Medicare assignment of a claim is required to refund to the beneficiary any amounts collected for physicians' services determined to be not reasonable and necessary. The purpose of this provision is to extend limitation of liability protection to beneficiaries with non-assigned claims when the physician knew or should have known that the items or services will not be covered by Medicare. Physician appeal rights are also specified.

These changes would conform our regulations to section 9332(c) of the Omnibus Budget Reconciliation Act of 1986. The purpose of this provision is to extend limitation of liability protection to beneficiaries when physicians do not accept assignment.

DATE: To be considered, comments must be mailed or delivered to the appropriate address, as provided below, no later than 5:00 p.m. on February 28, 1989.

ADDRESS: Mail comments to the following address:

Health Care Financing Administration, Department of Health and Human Services, Attention: BERC–458–P, P.O. Box 26676, Baltimore, Maryland 21207

If you prefer, you may deliver your comments to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Ave., SW, Washington, DC,

or

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland.

If comments concern information collection or recordkeeping requirements, please address a copy of comments to:

Office of Management and Budget, Office of Information and Regulatory Affairs, Room 3208, New Executive Office Building, Washington, DC 20503, Attention: Allison Herron.

In commenting, please refer to file code BERC–458–P. Comments received timely will be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, in Room 309–G of the Department's offices at 200 Independence Ave., SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5:00 p.m. (phone: 202–245–7890).

FOR FURTHER INFORMATION CONTACT: Denis Garrison, (301)–966–5643.

SUPPLEMENTARY INFORMATION:

I. Background

Under section 1862(a)(1) of the Social Security Act (the Act), Medicare does not cover any services that are not reasonable and necessary for the diagnosis or treatment of an illness or injury or to improve the functioning of a malformed body member (see Medicare regulations at § 405.310(k)(1)). Prior to October 1, 1987, a physician who did not accept Medicare assignment (as defined in § 405.802(e)), was permitted to collect monies from the beneficiary for services that were determined subsequently to be not reasonable and necessary under section 1862(a)(1) of the Act even though the beneficiary may not have known that Medicare would not pay for the services.

Under section 1879 of the Act, when a physician agrees to accept assignment, either on an individual claims basis or by entering into a Medicare participating physician agreement, the physician is effectively precluded by the indemnification procedures under the limitation of liability provision found in Medicare regulations at § 405.332 from receiving payment for certain denied services if it is established that the physician knew or could reasonably have been expected to know that Medicare would not pay for the services and the beneficiary did not know. However, under this limitation of liability provision, program payment may be made to the physician if neither the physician nor the beneficiary knew, or could reasonably have been expected to know, that Medicare would not pay for the services.

II. Summary of Provision

Under section 9332(c) of Pub. L. 99–509, which adds section 1842(l) to the Act, nonparticipating physicians who do not accept payment on an assignment-related basis must refund to beneficiaries any amounts collected for physicians' services found to be not reasonable and necessary by reason of section 1862(a)(1) of the Act. However, refund is not required if the physician did not know and could not reasonably have been expected to know that Medicare would not pay for the services, or if the beneficiary (or the person acting on behalf of the beneficiary, hereafter referred to as the other person) was informed in advance that Medicare would not pay for the services and agreed to pay for them. Unlike claims submitted on an assigned basis, there is no provision for program payment in the event that neither the physician nor the beneficiary knew or could have reasonably been expected to know that Medicare would not pay for the services because they were not reasonable and necessary. If a refund is required, it must be made within the time limits established in the statute as discussed below. Physicians who knowingly and willfully fail to refund erroneously collected amounts within the allowable time limits may be subject

to civil money penalties, exclusion from the Medicare program, or both. This provision is applicable only to physicians; it does not apply to suppliers and other non-physician providers of Part B services.

The provisions of section 1842(l) of the Act are effective for physicians' services furnished on or after October 1, 1987. In view of the short time frame for implementing the statutory requirements, HCFA has issued instructions in the Medicare Carriers Manual (HCFA Pub. 14–3). These instructions were effective for claims for services furnished on or after October 1, 1987. Upon the publication of final regulations that implement section 9332(c) of Pub. L. 99–509, HCFA will revise its program instructions as needed to reflect any differences between those final regulations and the instructions. The final regulations will be effective 30 days after the publication date of the final regulations.

III. Refund Procedures

In accordance with the provisions of section 1842(l)(1)(B) of the Act, these regulations would require a refund of incorrectly collected amounts to be made to the beneficiary within the following time limits:

- In the case of a physician who does not request review of the denial within that period, the refund would be made to the beneficiary within 30 days after the date of the physician receives notice that Medicare will not pay for the services.
- In the case of a physician who requests review of the denial within 30 days of receipt of the initial determination, the refund would have to be made to the beneficiary within 15 days after the date on which the physician receives notice of adverse determination on the review.

A physician who knowingly and willfully fails to make a refund within the time limits enumerated may be subject to sanctions such as, civil money penalties, and or exclusions from the Medicare program (title XVIII of the Social Security Act) and State health care programs (titles V, XIX, and XX of the Social Security Act). This section of the regulation would be monitored by the Office of Inspector General (OIG) and implementing regulations may be found in Chapter V, Parts 1001, 1002 and 1003 of this Title.

When the beneficiary files a request for review of the denial of payment within 30 days of receipt of the initial determination, the physician's time limit for making the refund would not be extended. The refund would have to be made to the beneficiary within 30 days after the date the physician receives notice that Medicare will not pay the services.

Under section 1842(l)(1)(C) of the Act, a refund would not be required of the physician if either one of the following conditions is met:

- The physician did not know and could not reasonably have been expected to know that payment would not be made for the services because they were not reasonable and necessary as defined by section 1862(a)(1) of the Act; or
- Before the service was provided, the beneficiary (or other person) was informed by the physician that Medicare payment would not be made for the specific services and, after being so informed, the beneficiary (or other person) agreed to pay the physician for the services.

Although not specifically required by the statute, the proposed rule requires that the physician's advance notice to the beneficiary that Medicare is likely to deny payment for the service must be in writing and must give the physician's reasons for believing that Medicare will deny payment. In addition, the beneficiary (or someone who is eligible to sign for the beneficiary under § 424.36(b)) must sign a statement to the effect that he or she agrees to pay for the service. We believe this would be the most effective way of protecting the interests of both the beneficiary and the physician in cases when the physician furnishes services for which he or she believes Medicare is likely to deny payment. In fact, it would strengthen the protection available to the physician since it would eliminate disputes as to whether proper notices was given. It also would conform the rules on unassigned claims to those applicable in assigned claims (existing rules on limitation of liability for assigned claims (§ 405.334(b)) permit a finding of physician nonliability in situations when the physician informs the beneficiary in writing that Medicare will not pay for the services).

Section 1842(l) provides that a refund is not required if the physician informs the beneficiary in advance that Medicare will not pay for the service and the beneficiary (or other person) agrees to pay. We considered the prossibility of finding physicians not liable for refunds on the basis of equivocal notices (that is, notices to the effect that there is a possiblity that Medicare may not pay for the services and that, should Medicare deny payment, the beneficiary agrees to pay). However, that approach would be fundamentally inconsistent with the intent of the provision, which is to discourage physicians from furnishing services that are not reasonable and necessary and to protect beneficiaries from liability when they do. The practice of providing notices on a routine basis that do no more than state that there is a possibility that Medicare will not pay for the services is not acceptable, because these notices do not provide any information that would permit the beneficiary (or other person) to make an informed decision as to whether or not to receive the service and to agree to pay for it, thereby entirely removing the beneficiary protection that advance notice is meant to provide.

For these reasons, the proposed rule specifies that in order to be found not liable for refund, the physician would have to inform the beneficiary (or other person), in writing, using approved notice language as specified in program instructions, that the physician believes that Medicare is likely to deny payment for the particular service. In addition, the physician must give in writing, his or her reasons for believing that Medicare is likely to deny payment for the service. This requirement assures that the beneficiary (or other person), actually receives sufficient relevant information so that he or she can make a truly informed decision. The beneficiary needs to understand the circumstances of denial that the physician foresees in order to make his or her decision regarding the likelihood of denial. The statutory protection of beneficiaries from liability when they, the good faith, receive services from physicians on an unassigned basis that are denied as not reasonable and necessary is only achieved when a beneficiary (or other person), having been duly informed of the circumstances and of his or her options, decides whether or not to receive the services and agrees to pay for them (if necessary).

As part of an overall edcuational effort to familiarize nonparticipating physicians with the provisions of section 1842(l) of the Act, we plan to send to all nonparticipating physicians a letter informing them about the advance notice requirements. The letter will specify acceptable advance notice language and will also include a list of reasons for physicians use in informing beneficiaries when they believe Medicare is likely to deny payment for specified services. The list of reasons will essentially conform to the reasons currently given on beneficiary and physician denial notices when services are denied as not reasonable and necessary.

IV. Physician Appeal Rights

While section 1842(l) of the Act implicitly grants appeal rights to nonparticipating physicians on unassigned claims by referring to physicians requesting reconsideration or seeking appeal, it does not specifically delineate the extent of those rights. Under these regulations, nonparticipating physicians would have the right to appeal determinations on unassigned claims denied because the services were determined to be not reasonable and necessary. The right of appeal also extends to a determination that a refund is required because a physician either knew or could have reasonably been expected to know that Medicare would not pay for the services because they were not reasonable and necessary. Additionally, the right of appeal would extend because the beneficiary (or other person) was not informed in advance that Medicare was likely to deny payment for the services or, if so informed, did not agree to pay for the service. Since the statute requires a refund within 30 days after receipt of the initial determination or 15 days after receipt of an adverse determination on reconsideration or appeal, we considered limiting the time within which a physician can appeal to the same 30-day period with no further appeal rights beyond the review level. We decided, however, to extend to these physicians the existing appeals process for claims under Part B, in 42 CFR Part 405, Subpart H, and the additional rights to an Administrative Law Judge (ALJ) review and judicial review granted by section 9341 of OBRA 86. However, to assure that refunds are made promptly, we would require that they be made within 15 days of receipt of the review determination as described in section III above.

V. Regulatory Impact Statement

A. Executive Order 12291

Executive Order (E.O.) 12291 requires us to prepare and publish an initial regulatory impact analysis for any proposed rule that meets one of the E.O. criteria for a "major rule"; that is, that would be likely to result in: An annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or, significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Section 9332(c) of Pub. L. 99-509 shifts liability for unassigned services denied as not reasonable and necessary from the Medicare beneficiary to the providing physician, subject to the conditions specified elsewhere in the preamble to this proposed rule. We exercised discretion in implementing certain provisions of the statute. First, we addressed the appeal rights of affected physicians, and the review and hearing procedures used by carriers to adjudicate these appeals. The statute implicitly grants these rights to affected physicians, and, in the interest of equity, we propose to give these physicians review rights similar to those that beneficiaries and participating physicians already have under Part 405, Subpart H of our regulations relating to reviews and hearings under the Supplementary Medical Insurance program and the additional rights to ALJ and judicial review granted by section 9341 of OBRA 86. Second, we specified that in order to be found not liable for refunds, a physician needs to inform the beneficiary (or other person), in writing, using approved notice language, that the physician believes Medicare is likely to deny payment for a particular service. The physician would be required to give in writing, his or her reasons for believing that Medicare is likely to deny payment for the service. In addition, the beneficiary (or other person) was informed by the physician that Medicare payment would not be made for the specific services and, after being so informed, the beneficiary (or other person), agreed to pay the physician for the service. These provisions, of themselves, would not result in impacts meeting any of the criteria specified above. For these reasons, we have determined that a regulatory impact analysis is not required.

B. Regulatory Flexibility Act

We generally prepare an initial regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), unless the Secretary certifies that a proposed regulation would not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, we treat all physicians as small entities. However, carriers, as our contractors, and beneficiaries, as individuals, are not small entities within the definitions established by the RFA.

In addition, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis for any rule that may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis also must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital with fewer than 50 beds located outside a Metropolitan Statistical Area.

We are not certain of the effects section 9332(c) of Pub. L. 99-509 may have on physicians. One possible effect of this law is that more physicians may enter into participation agreements, because physicians may no longer bill beneficiaries for unassigned services denied under section 1862(a)(1) of the Act. Additionally, by signing a participation agreement (or by routinely accepting assignment for services provided), the physician may receive payment for denied services in some cases under the limitation of liability provision. Of course, physicians must weigh many factors when deciding whether to enter into Medicare participation agreements, such as the local prevailing charge structure, the annual change in the Medicare economic index, and the timeliness with which the carrier processes claims for payment.

The proposed procedure for implementing section 9332(c) of Pub. L. 99-509 would require physicians who do not accept assignment to complete one additional form. It is possible that some physicians may choose not to provide services to Medicare beneficiaries when faced with the uncertain prospect of either providing refunds to beneficiaries or risking legal sanctions for violation of Medicare requirements. We believe that most physicians may choose to continue providing services to Medicare beneficiaries on an unassigned basis.

Physicians affected by this change would be able to file appeals contesting both carrier denials of payment and carrier determinations that the physician should have known that Medicare would not pay for the service. Physicians providing services on an unassigned basis in the past have not possessed this right. While this legislative change would not affect Medicare program expenditures (it affects only the placement of liability for services that are denied under current standards), we do expect Medicare carriers to incur some incremental administrative costs for the increase in review and hearings workload. These costs would be paid for through the contractor budget development process.

Although the proposed rule would impose an additional administrative requirement on physicians (by requiring physicians to give written notice to beneficiaries that Medicare is like to deny payment), we do not believe it

would result in a significant economic impact. Therefore, we have determined, and the Secretary certifies, that this proposed rule would not have a significant economic impact on a substantial number of small entities, or on the operations of a substantial number of small rural hospitals and we have therefore not prepared a regulatory flexibility analysis or an impact analysis for small rural hospitals.

VI. Other Required Information

A. Response to Comments

Because of the large number of items of correspondence we normally receive on a proposed rule, we are not able to acknowledge or respond to them individually. However, we will consider all comments that we receive by the date and time specified in the "Date" section of this preamble, and, when we proceed with a final rule, we will respond to the comments in the preamble of that rule.

B. Paperwork Reduction Act

Section 405.339 and the physician advance notice to the beneficiary that Medicare is likely to deny payment which is provided for in this section contain information collection requirements that are subject to the Office of Management and Budget approval under the Paperwork Reduction Act of 1980 as amended, 44 U.S.C. 3507–3511. Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the agency official whose name appears in the "ADDRESS" section of this preamble.

List of Subjects in 42 CFR Part 405

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Laboratories, Medicare, Nursing homes, Reporting and recordkeeping requirements, Rural areas, X-rays.

For the reasons set out in the preamble, Title 42, Part 405 would be amended as follows:

PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

1. The authority citation for Part 405, Subpart C continues to read as follows:

Authority: Secs. 1102, 1815, 1833, 1842, 1861, 1862, 1866, 1870, 1871, and 1879 of the Social Security Act (42 U.S.C. 1302, 1395g, 1395l, 1395u, 1395x, 1395y, 1395cc, 1395gg, 1395hh, and 1395pp) and 31 U.S.C. 3711.

2. A new § 405.339 is added to read as follows:

§ 405.339 Refunds of amounts collected for physician services not reasonable and necessary, payment not accepted on an assignment-related basis.

(a) *Basic rule.* Except as provided in paragraph (d) of this section, a physician who furnishes services to an individual on other than an assignment-related basis, must refund to the individual any amounts the physician has collected for services furnished for which Medicare payment is denied because they are not reasonable and necessary under § 405.310(k).

(b) *Time limits for making refunds.* A timely refund of any incorrectly collected amounts of money must be made to the beneficiary to whom the services were furnished. A refund is timely if—

(1) In the case of a physician who does not request review of the denial within that period, the refund is made within 30 days after the date the physician receives the notice of denial; or

(2) When a request for review is filed within 30 days after the physician receives notice of the denial, the refund is made within 15 days after the date the physician receives notice of an adverse determination on his or her request for review of the denial.

(c) *Notices and appeals.* If payment is denied for nonassignment-related claims because the services are found to be not reasonable and necessary, a notice of denial will be sent to both the physician and the beneficiary. The physician will have the same rights as the beneficiary, as detailed in Subpart H of this part, to appeal the determination, and will be subject to the same time limitations.

(d) *When a refund is not required.* A refund of any amounts collected for services not reasonable and necessary is not required if—

(1) The physician did not know, and could not reasonably have been expected to know, that Medicare would not pay for the service; or

(2) Before the service was provided, the physician informed the beneficiary, or someone acting on his or her behalf, in writing that the physician believed that Medicare was likely to deny payment for the specific service and the beneficiary (or someone who is eligible to sign for the beneficiary under § 424.36(b)) signed a written statement agreeing to pay for that service.

(e) *Criteria for determining that a physician knew that services were excluded as not reasonable and necessary.* A physician will be determined by the Medicare carrier to have known that furnished services were excluded from coverage as not reasonable and necessary if one or more of the conditions in § 405.336 of this subpart are met.

(f) *Acceptable evidence of prior notice to a beneficiary that Medicare was likely to deny payment for a particular service.* To qualify for waiver of the refund requirement under paragraph (d)(2) of this section, the physician must inform the beneficiary (or person acting on his or her behalf) in writing, using approved notice language, that the physician believes that Medicare is likely to deny payment, citing the particular service for which payment is likely to be denied, and citing the physician's reasons for this belief. The notice is not acceptable evidence if—

(1) The physician routinely gives this notice to all beneficiaries for whom he or she furnishes services; or

(2) The notice is no more than a statement to the effect that there is a possibility that Medicare may not pay for the service.

(g) *Applicability of sanctions to physicians who fail to make refunds under this section.* A physician who knowingly and willfully fails to make refunds as required by this section may be subject to sanctions as provided for in Chapter V, Parts 1001, 1002, and 1003 of this Title.

(Catalog of Federal Domestic Assistance Program No. 13.774; Medicare—Supplementary Medical Insurance)

Dated: August 3, 1988.

William L. Roper,

Administrator, Health Care Financing Administration.

Approved: September 23, 1988.

Otis R. Bowen,

Secretary.

[FR Doc. 88–30114 Filed 12–29–88; 8:45 am]

BILLING CODE 4120–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 72

National Flood Insurance Program

AGENCY: Federal Insurance Administration (FIA), Federal Emergency Management Agency (FEMA).

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the National Flood Insurance Program (NFIP) regulations dealing with reimbursement procedures for the review of proposed projects to determine if they would qualify for NFIP map revisions upon their completion. The rule would increase the rates for review services and change the payee.

This change is necessary because the source of funding utilized to provide these services has been changed, by Congress, from the General Revenue appropriations to transfers from the National Flood Insurance Fund.

DATE: The period for comments will be thirty days from the date of publication of this proposed rule in the Federal Register.

ADDRESS: Send comments to: Charles A. Lindsey, Chief, Technical Operations Division, Federal Insurance Administration, Federal Emergency Management Agency, Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Charles A. Lindsey (202) 646–2760.

SUPPLEMENTARY INFORMATION: On January 1, 1986, the Federal Insurance Administration implemented 44 CFR, Part 72—Procedures and Fees for Obtaining Conditional Approval of Map Changes. Its purpose was to provide cost recovery for engineering review and administrative processing associated with the issuance of conditional Letters of Map Amendment (LOMAs) and conditional Letters of Map Revision (LOMRs) for proposed floodplain modification projects. The fee structure for the issuance of these conditional LOMAs and LOMRs was based upon the then prevailing private sector labor rate of $25.00 per hour.

Based on a cost analysis conducted during February of 1988, it is proposed that §§ 72.3 and 72.4 be revised to reflect the currently prevailing private sector labor rate of $30.00 per hour. An additional fee category, Structural measures on alluvial fans, will be added under § 72.3, along with a corresponding fee. Alluvial fans are defined as geomorphic features charaterized by a cone or fan-shaped deposit of boulders, gravel, and fine sediments that have been eroded from mountain slopes, transported by flood flows, and then deposited on the valley floors, and are subject to flash flooding, high velocity flows, debris flows, erosion, sediment movement and deposition, and channel migration. The number of hours allotted for the review of proposed structures on alluvial fans is 40, and the corresponding fee, at $30.00 per hour, will be $1,200.00. Section 72.4 will also be revised to specify payment of both the initial fee and the final cost to the National Flood Insurance Program as opposed to the United States Treasury. This change is necessary because the source of funding utilized to provide these services has been changed, by Congress, from General Revenue appropriations to transfers from the National Flood Insurance Fund.

FEMA has determined, based upon an Environmental Assessment, that this rule will not have significant impact upon the quality of the human environment. As a result, an Environmental Impact Statement will not be prepared. A finding of no significant impact is included in the formal docket file and is available for public inspection and copying at the Rules Docket Clerk, Office of General Counsel, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

This rule will not have a significant economic impact on a substantial number of small entities and, hence, has not undergone regulatory flexibility analysis.

This rule is not a "major rule" as defined in Executive Order 12291, dated February 27, 1981, and, hence, no regulatory analysis has been prepared.

FEMA has determined that this rule does not contain a collection of information as described in section 3504(h) of the Paperwork Reduction Act.

List of Subjects in 44 CFR Part 72

Flood insurance, Flood plains.

Accordingly, the proposed changes to 44 CFR Chapter I, Subchapter B, are as follows:

PART 72—PROCEDURE AND FEES FOR OBTAINING CONDITIONAL APPROVAL OF MAP CHANGES

The authority citation for Part 72 will continue to read as follows:

Authority: 42 U.S.C. 4001, et seq.; Reorganization Plan No. 3 of 1978; E.O. 12127.

1. Section 72.3(a) (1) and (2) and (b) (1) through (4) will be revised and § 72.3(b)(5) will be added as follows:

§ 72.3 Initial fee schedule.

(a) * * *

(1) Single-lot	$150
(2) Multi-lot/Subdivision	210
(b) * * *	
(1) New bridge or culvert (no channelization)	420
(2) Channel modifications only	480
(3) Channel modification and new bridge or culvert	630
(4) Levees, berms or other structural measures	810
(5) Structural measures on alluvial fans	1,200

§ 72.4 [Amended]

2. Section 72.4(c) introductory text will be amended by replacing "$25.00" with "$30.00".

3. Section 72.4(e) will be amended by replacing "United States Treasury" with "National Flood Insurance Program".

Harold T. Duryee,

Federal Insurance Administrator.

[FR Doc. 88–29921 Filed 12–29–88; 8:45 am]

BILLING CODE 6718–03–M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1103

[Ex Parte No. 55 (Sub-No. 70)]

Practitioners

AGENCY: Interstate Commerce Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Commission proposes to change its policies and procedures regarding the licensing of nonattorney ICC practitioners. The Commission requests comments on various proposals enumerated below, and solicits any other proposals for altering its current licensing of practitioners.

DATE: Comments must be received by January 30, 1989.

ADDRESS: An original and 15 copies of comments (and any replies) should be sent to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT: Kathleen King, Assistant Secretary, (202) 275–7429, Interstate Commerce Commission, Washington, DC 20423.

(TDD for hearing impaired (202) 275–1721).

SUPPLEMENTARY INFORMATION: The number of applicants for the annual practitioner's examination (see 49 CFR 1103.3) has waned dramatically in recent years, to the point that there were only four applicants for the July 1988 examination. Because persons from virtually every bureau of the Commission are involved in the preparation, administration, and grading of the examination, the Commission (and ultimately taxpayer) resources which must be devoted to the examination seem excessive for so few candidates.

The Commission will consider various alternatives to address this situation, including: (1) Continuing to offer an examination each year, but reducing the expenditure of Commission resources associated with it; (2) amending its present regulations to allow the annual examination to be canceled when the demand for the examination is

insufficient to justify the staff resources involved; (3) allowing the examination to be administered by the ICC practitioners bar, rather than the Commission; (4) eliminating the examination requirement for practitioners and instead requiring general standards of fitness; and (5) discontinuing the licensing of new nonattorney practitioners. In addition to comments on these proposals, the Commission would like to receive any other suggestions from the public (and in particular the Association of Transportation Practitioners) addressing the matter.

Environmental and Energy Considerations

We preliminarily conclude that the proposed action will not significantly affect either the quality of the human environment or the conservation of energy resources. However, we specifically invite parties to comment on these issues.

Initial Regulatory Flexibility Analysis

Pursuant to 5 U.S.C. 603, the Commission is required to examine specifically the impact of a proposed action on small business and small organizations. We preliminarily conclude that this decision will not have a significant impact on a substantial number of small entities.

List of Subjects in 49 CFR Part 1103

Administrative practice and procedure.

Decided: December 20, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley and Phillips.

Noreta R. McGee,

Secretary.

[FR Doc. 88-29754 Filed 12-29-88; 8:45 am]

BILLING CODE 7035-01-M

DEDPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Findings on Petitions and Initiation of Status Reviews

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition findings and status review.

SUMMARY: The Fish and Wildlife Service (Service) announces 90-day findings for three Endangered Species Act listing petitions filed with respect to: (1) Limnanthes floccosa subsp. californica (Butte County meadowfoam), (2) Suisun song sparrow (Melospiza melodia maxillaris), (3) Buena Vista Lake shrew (Sorex ornatus relictus), Santa Catalina shrew (Sorex ornatus willetti), Suisun shrew (Sorex ornatus sinuosus), and salt march wandering shrew (Sorex vagrans halicoetes). All three petitions were found to present substantial information indicating that the requested actions may be warranted. A status review of the Suisun song sparrow (Melospiza *melodia maxillaris*) is initiated herewith. Comments and data on this and the other species (for which status review is already in progress) are requested.

DATES: The findings announced in this notice were made during the period from March 20, 1988, to June 28, 1988. Comments and information should be submitted by February 28, 1989.

ADDRESSES: Information, comments, or questions should be submitted to the Field Supervisor, Endangered Species, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room E-1823, Sacramento, California 95825. The petitions, findings, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. David Harlow, Acting Field Supervisor, at the above address (916/978-4866 or FTS 460-4866).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, (Act) as amended in 1982 (16 U.S.C. 1531 et seq.), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petition action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and the finding is to be published promptly in the Federal Register. If the finding is positive, the Service is also required to promptly commence a review of the status of the involved species.

In recent months the Service has received and made 90-day findings on the following petitions:

Charlice Danielsen, president of the California Native Plant Society, submitted a petition to the Service to emergency list Limnanthes floccosa subsp. californica (Butte County meadowfoam) as an endangered species. This petition was dated February 12, 1988, and received by the Service on February 22, 1988. The petition reported that only four of the original eight known populations remain of this subspecies, which is restricted to vernal pool habitats in Butte County, California. A field survey to precisely delimit the number and distribution of meadowfoam populations recently has been completed. Although reportedly additional population sites were located, the final report regarding the survey result has not been released. All information now available to the Service tends to confirm the petition claim. Therefore, the Service found that this petition did present substantial information indicating that the requested action may be warranted. In the case of positive findings, the Service is required to initiate a status review of the involved species. However, a status review of this taxon already is in progress, as it was included as a categoty 1 species on the Service's Review of Plants in the **Federal Register** of September 27, 1985 (50 FR 39559).

Dr. Joe T. Marshall and nine associates jointly submitted a petition to list as endangered the Suisun song sparrow (Melospiza melodia maxillaris). An incomplete version of this petition was submitted on November 23, 1987, and a complete petition was received by the Service on December 22, 1987. This subspecies of song sparrow is endemic to the tidal marshes of Suisun Bay, Solano County, California. The petition contained documentation that the subspecies has suffered a loss of approximately 90 percent of its historical habitat from diking and filling activities, and that it currently faces lesser threats from a variety of factors, such as predation and pollution. All information presently availale to the Service tends to confirm these claims. The Service, therefore, found that this petition presented substantial information indicating that the required action may be warranted. Additional information is needed, particularly on current threats to this subspecies, before proper status determination can be made. In the case of positive findings, the Service is required to initiate a status review of the involved species. Hence, the Service seeks additional information concerning this song sparrow.

Ms. Doris Dixon, representing The Interfaith Council for the Protection of Animals and Nature, submitted a petition to list four species of California shrews, the Buena Vista lake shrew (Sorex ornatus relictus), Santa Catalina shrew (Sorex ornatus willetti), Suisun shrew (Sorex ornatus sinuosus), and salt

marsh wandering (vagrant) shrew (Sorex vagrans halicoetes). This petition was dated April 15, 1988, and was received by the Service on April 18, 1988. Materials attached to the petition, excerpted from a contract report completed for the California Department of Fish and Game, indicated that these shrews have been severely impacted by conversion or degradation of habitats resulting from wetland modification for urban or agricultural purposes, water diversion, and/or introduction of exotic animal species. Information available from Service-funded status surveys for the Catalina shrew, salt marsh wandering shrew, and Suisun shrew, substantiates this claim. Recent sightings of two Buena Vista lake shrews confim that the subspecies is still extant. The rarity of these animals, however, has restricted the ability of investigators to gather information relating to current distribution and population trends. The Service found that substantial information was presented in the petition and the petitioned action may be warranted for these four taxa. In the case of positive findings, the Service is required to initiate status reviews of the involved species. However, status reviews of the shrews covered by the subject petition already are in progress, as these taxa were included as category 2 species in the Service's Review of Vertebrate Wildlife that was published in the Federal Register of September 18, 1985 (50 FR 37958–37967).

The Service would appreciate any additional data, comments, and suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning the status of these species, particularly the Suisun song sparrow.

Author

This notice was prepared by Dr. Kathleen E. Franzreb, Endangered Species Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room E–1823, Sacramento, California 95825 (916/978–4866 or FTS 460–4866).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended: Pub. L. 93–205, 87 Stat. 884; Pub. L. 94–359, 90 Stat. 911; Pub. L. 95–632, 92 Stat. 3751; Pub. L. 96–159, 93 Stat. 1225; Pub. L. 97–304, 96 Stat. 1411; Pub. L. 100–478, 102 Stat. 2306; Pub. L. 100–653, 102 Stat. 3825 (16 U.S.C. 1531 et seq.); Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Dated: December 22, 1988.

Becky Norton Dunlop,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 88–30100 Filed 12–29–88; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 602

[Docket No. 81011–8211]

Guidelines for Fishery Management Plans

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule.

SUMMARY: NOAA issues this proposed rule to revise the national standard guidelines for fishery conservation and management issued in February 1983 under section 301(b) of the Magnuson Fishery Conservation and Management Act (the Magnuson Act). The national standards represent statutory criteria and principles with which all fishery management plans (FMPs) must be judged consistent by the Secretary of Commerce (Secretary). The Magnuson Act requires the Secretary to issue guidelines based on the national standards to assist in the development and review of FMPs, their amendments, and regulations. Pub. L. 97–453 amended section 301(b) to make the national standard guidelines advisory only. The guidelines are intended to improve the quality of FMPs by providing comprehensive guidance for Regional Fishery Management Councils (Councils) to use in developing FMPs and amendments, and to produce a more uniform understanding of the Secretary's basis for FMP review and implementation. These proposed rules revise the guidelines for national standards 1 and 2 only.

DATE: Comments must be received by February 28, 1989.

ADDRESSES: Send comments on these proposed guidelines to: Richard H. Schaefer, Office of Fisheries Conservation and Management, National Marine Fisheries Service, 1335 East West Highway, Silver Spring, Maryland 20910.

FOR FURTHER INFORMATION CONTACT: Richard H. Schaefer, telephone 301–427–2334.

SUPPLEMENTARY INFORMATION: Revision of the national standard guidelines was precipitated, in part by recommendations of the NOAA Fishery Management Study (the Study), commissioned by the Under Secretary of Commerce for Oceans and Atmosphere, and undertaken to assess and improve the Magnuson Act fishery management system. In June 1986, this Study recommended that NOAA assume the responsibility for determining the biologically acceptable catch (ABC) for each managed fishery. By ABC the Study meant the total allowable removals from the resource which would maintain a healthy and productive resource into the future. As used in this context, the ABC would be the maximum possible quota for the species or species complex in the fishery. It should be noted that this is different from the manner in which the term ABC is used in proposed paragraph 602.11(e). The Study's intent was that stocks be maintained at some level above that which protects the minimum spawning stock from recruitment overfishing. The Study sought a "conservation standard" such that stocks are not continually driven to, or maintained at, the threshold of overfishing.

In April 1987, NOAA distributed for Council/National Marine Fisheries Service (NMFS) pre-publication review and comment a draft revision of the uniform standards governing the organization, practices, and procedures of the Councils and the guidelines for FMPs. That draft revision included a section providing that a maximum fishing mortality (MFM) be established which would maintain the current spawning stock size with consideration of the variabilities in spawning stock estimates, and that ABC be specified so as not to exceed MFM. Again, ABC was to be used as a maximum annual quota for the fishery. Council and NMFS comments concering the MFM proposal made it clear that this proposal was not universally applicable for a variety of reasons.

Accordingly, in August 1987, NOAA convened a technical workship of NMFS fishery scientists and managers, and academic scientists recommended by the Councils, to address the Study's recommendations for a conservation standard and the comments on the April draft. In October 1987, in order to allow

time for a thorough examination of the issues raised by the workshop, the decision was made to separate the revisions concerning the conservation standard from those addressing the organization and administrative questions. In the spring of 1988, a series of Council/NMFS regional workshops was held to discuss the feasibility of the conservation standard concept, using as a basis for discussion the proposed revision of national standard guidelines 1 and 2 produced by the August 1987 technical workshop. Following the workshops, the guidelines were further revised, and served as the basis for discussion at a Council Chairmen's meeting in July 1988.

The proposed guideline revision that follows is responsive to the workshop series and the Council Chairmen's meeting, and sets forth a series of definitions and procedures, which together, are intended to provide the conservation standard.

Comments at the workshops centered primarily on the need for flexibility with regard to: (a) The mandatory nature of any definition of overfishing; (b) the difficulty or impossibility of applying any rigid or universal definition to a large number of diverse species; (c) the fact that the ABC concept is not used by all Councils; (d) the bureaucratic chaos that might result from the proposed Secretarial exemption process; and (e) the burden imposed by the proposed Stock Assessment and Fishery Evaluation (SAFE) requirement.

Concern was also expressed at the workshops that identification of thresholds might serve to establish targets for harvest rather than provide for conservation of the resources. Several Councils stated a need to: (a) Identify measurable "conditions of concern" for each stock, with monitoring and review procedures; (b) allow for conservative approaches when there is uncertainty because of lack of data; and (c) retain ability to take appropriate restrictive management actions at stock levels above the threshold.

Comments at the Council Chairmen's meeting focused primarily on: (a) The division of responsibility between the Councils and NMFS regarding providing data for, and preparing, The SAFE report; (b) including in the SAFE report a recommendation for a threshold level or other definition of overfishing; (c) establishing an OY "reserve", releasable to domestic and foreign fishermen as necessary, to solve operational problems and allow for uncertainties in stock estimates; and (d) several needed editorial clarifications.

Section 602.11 proposes an overall overfishing concept within which each Council must define a specific, measurable definition of overfishing for each stock or stock complex covered by an FMP. That concept is based on the premise that irreversible damage to a resource's ability to recover in a reasonable period of time is unacceptable, and to allow fishing on a stock at a level that severely compromises that stock's future productivity is counter to the goals of the Magnuson Act. As used in this revision, ABC is not meant as a quota for the fishery, but rather, may be used as a step in deriving OY from MSY. (See § 602.11(e).) In this context, the ABC is set by a Council, not NOAA. Since ABC is not necessarily applicable to all fisheries, Councils may establish an ABC level, but are not required to do so. Councils are provided with the flexibility needed to develop a definition of overfishing appropriate to the individual stock or species characteristics, and general criteria are set for th as a bisis for Secretarial review. Comments are particularly solicited on the provision made for phasing-in implementation of the guidelines.

NOAA believes that, although it is difficult to define precisely the level at which overfishing jeopardizes recovery of a stock, there are indicators of existing or impending overfishing that should be heeded. If these conditions exist, the best scientific advice may conclude that immediate remedial action should be taken. Councils are encouraged, but not required, to identify these conditions.

As management regimes become more comprehensive, the interrelationships of fishing pressures on target and non-target (both major and minor) species need to be addressed more directly. NOAA believes that in determining allowable fishing levels Councils should consider all sources of mortality on a stock, including both targeted and non-targeted fishing mortality, and levels of compliance. Because all removals from the stock, whether landed or unlanded, will affect spawning stock biomass levels now or in the near future, the Councils should attempt to obtain estimates of all sources of mortality and consider the estimates in adjusting directed fishing levels. Total fishing mortality on a stock should be managed such that overfishing does not occur.

In selected situations, a Council may determine that overfishing of a minor component species of a multi-species fishery is warranted based on net benefits expected for the fishery as a whole. Although fishing any stock to the extent that it requires protection under the Endangered Species Act should never be allowed to occur, some very limited overfishing may be acceptable if it is identified, and sufficiently analyzed and justified. However, in all cases, alternatives should be considered that would prevent such overfishing.

Section 602.12(e) proposes that a periodic SAFE document or set of documents be prepared or aggregated whereby Councils can obtain an objective periodic overview of the status of stocks and fisheries under management. Several Councils currently produce such fishery reviews annually, which generally provide the kinds of information called for in the SAFE report. The SAFE report would be expected to provide a summary of the best biological, social, and economic information available to a Council when needed: (a) To determine annual harvest levels or optimum yields (OYs) for species in each fishery management unit (FMU), and (b) to evaluate the effectiveness of its management in preventing overfishing as defined by the Council.

The SAFE report would thus provide a useful tracking tool for assessing the relative achievement of FMP objectives. It would establish a time-series data base indicating the relative health of stocks and the industry dependent on them. Including social and economic information in the same document or set of documents with biological information does not diminish the integrity of either type of information. By providing the best scientific information available for each type of data required in the determination of OY, subject to Council and outside peer review, the SAFE report is designed to improve the ability of Councils to derive OY or any specified harvest level as the Magnuson Act prescribes.

While the Secretary would have the responsibility for assuring that the SAFE report is produced, it is not intended to be exclusively authoried by NOAA. The SAFE report could be produced by any combination of talent from Council, academic, government, or other sources. The SAFE reports would not be required to be revised annually, except as there have been new developments or significant changes in a fishery. Although the contents of SAFE reports would not be mandatory, certain basic descriptive data on the stocks and industry should be included.

Classification

The guidelines indicate how NOAA interprets the fishery management principles in the national standards of the Magnuson Act. They describe a range of acceptable management

measures that could be adopted by the councils, appoved by the Secretary, and subsequently translated into regulations. The impact upon the public occurs through specific management measures contained within specific FMPs; until a specific FMP is developed, there is no basis for evaluating the consequences of these guidelines.

These amendments to the national standard guidelines do not themselves affect the human environment. Thus, NOAA has determined that no environmental impact statement (EIS) or environmental assessment (EA) is required. FMPs and FMP amendments developed as a result of these guidelines will require EISs or EAs.

Because these guidelines will not have any direct regulatory impact upon the public, the Under Secretary of Commerce for Oceans and Atmosphere has determined that this proposed rule is not a "major rule" requiring a regulatory impact analysis under E.O. 12291. The proposed rule will not have an annual effect on the economy of $100 million or more; it will not result in a major increase in costs for consumers, individual industries, Federal, State, or local governmental agencies, or geographic regions; and it will not result in significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. A regulatory impact review (RIR) was not prepared.

This proposed rule has been submitted to the Director, Office of Management and Budget, pursuant to E.O. 12291.

Because the proposed guidelines will have no direct regulatory impact on the public, the General Counsel of the Department of Commerce has certified to the Small Business Administration that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities. As a result, a regulatory flexibility analysis (RFA) was not prepared. Any economic impacts on small entities will be addressed through RFAs for individual FMPs.

This rule contains no collection-of-information requirements subject to the Paperwork Reduction Act.

Because the proposed guidelines will have no direct regulatory impact upon the public, NOAA has determined that this proposed rule does not directly affect the coastal zone of any State with an approved coastal zone management program.

This proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

Dated: December 22, 1988.

James W. Brennan,

Assistant Administrator For Fisheries, National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR 602 is proposed to be amended as follows:

PART 602—GUIDELINES FOR FISHERY MANAGEMENT PLANS

1. The authority citation for Part 602 continues to read as follows:

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

2. Section 602.11 is revised, § 602.12(a) is republished, and § 602.12(e) is added to read as follows:

§ 602.11 National Standard 1—Optimum Yield.

(a) *Standard 1.* Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(b) *General.* The determination of OY is a decisional mechanism for resolving the Act's multiple purposes and policies, for implementing an FMP's objectives, and for balancing the various interests that comprise the national welfare. OY is based on MSY, or on MSY as it may be adjusted under paragraph (d)(3) of this section. The most important limitation on the specification of OY is that the choice of OY—and the conservation and management measures proposed to achieve it—must prevent overfishing.

(c) *Overfishing.* (1) Overfishing is a level or rate of fishing mortality that jeopardizes the long-term capacity of a stock or stock complex to produce MSY on a continuing basis. Each FMP must specify, to the maximum extent possible, an objective and measurable definition of overfishing for each stock or stock complex covered by that FMP, and provide an analysis of how the definition was determined and how it relates to reproductive potential.

(2) The definition of overfishing for a stock or stock complex may be developed or expressed in terms of a minimum level of spawning biomass ("threshold"); maximum level or rate of fishing mortality; or formula, model, or other measurable standard designed to ensure the maintenance of the stock's productive capacity. Overfishing must be defined in a way to enable the Council and the Secretary to monitor and evaluate the condition of the stock or stock complex relative to the definition.

(i) If data indicate that an overfished condition exists, a program must be established for rebuilding the stock over a period of time specified by the Councils which is acceptable to the Secretary.

(ii) Councils should identify what actions or combination of actions will be undertaken if it is determined that a stock or stock complex is approaching an overfished condition.

(iii) If overfishing is defined in terms of a threshold biomass level, the Council must ensure that targeted fishing effort does not cause spawning biomass to fall or remain below that threshold.

(iv) If overfishing is defined in terms of a maximum fishing mortality rate, the Councils must ensure that targeted fishing effort on that stock does not cause the maximum rate to be exceeded.

(3) Overfishing definitions must be based on the best scientific information available. Councils should build into the definition appropriate consideration of risk, taking into account uncertainties in estimating domestic harvest, stock conditions, or the effects of environmental factors (see section 602.16). In cases where scientific data are severely limited, the Councils' informed judgment must be used, and effort should be directed to identifying and gathering the needed data (see sections 602.12 and 605.14 of this chapter).

(4) Secretarial approval or disapproval will be based on consideration of whether the proposal:

(i) Has sufficient scientific merit;

(ii) Is likely to result in effective Council action to prevent the stock from closely approaching or reaching an overfished status;

(iii) Provides a basis for objective measurement of the status of the stock against the definition; and

(iv) Is operationally feasible.

(5) Changes in environment/habitat conditions can produce the appearance of overfishing. Significant adverse alterations in the environment increase the possibility that fishing effort will contribute to a stock collapse. Care should be taken to identify the cause of any downward trends in spawning stock sizes or average annual recruitment. Whether these trends are caused by environmental changes or by fishing effort, the only direct control provided for by the Act is to reduce fishing mortality. Unless the Council asserts, as supported by appropriate evidence, that reduced fishing effort would not alleviate the problem, the FMP must include measures to reduce fishing mortality regardless of the cause of the low population level. If man-made environmental changes are contributing to the downward trends, in addition to controlling effort Councils should

recommend restoration of habitat and other ameliorative programs, to the extent possible.

(6) An FMP must prevent overfishing, except in certain limited situations. For example, harvesting the major component of a mixed fishery at its optimum level may result in the overfishing of a minor (smaller or less valuable) stock component in the fishery management unit. A Council may decide to permit this type of overfishing if it is demonstrated by analysis (paragraph (f)(5) of this section) that it will result in net benefits to the fishery as a whole, and if the Council's action will not cause any stock component to require protection under the Endangered Species Act.

(7) Fishing can produce a variety of effects on local and areawide abundance, availability, size, and age composition of a stock. Some of these effects have been called "growth", "localized", or "pulse" overfishing; however, these effects are not necessarily "overfishing" under the national standard 1 definition, which focuses on recruitment and long-term reproductive capacity. A Council may recommend conservation and management measures to prevent or permit these effects, depending on the objectives of a particular FMP, and the specific definition of overfishing established for the stock or stock complex under management. (See Appendix A to Subpart B of this part, which offers cautionary, explanatory material.)

(8) Implementation. (i) All new FMPs and the first amendment for existing FMPs submitted after [insert date six months after the effective date of these guidelines] should include a proposed definition of overfishing for the stock or stock complex managed under the affected FMP.

(ii) An amendment proposing an overfishing definition for each FMP not containing such a definition should be submitted before [insert date 18 months after the effective date of these guidelines].

(d) *MSY.* (1) MSY is an estimate of the largest average annual catch or yield that can be taken over a significant period of time from each stock under prevailing ecological and environmental conditions.

(2) MSY may be presented as a range of values. One MSY may be specified for a related group of species in a mixed-species fishery. Since MSY is a long-term average, it need not be specified annually, but must be based on the best scientific information available.

(3) MSY may be only the starting point in providing a realistic biological description of allowable fishery removals. MSY may need to be adjusted because of environmental factors, stock peculiarities, or other biological variables, prior to the determination of OY. An example of such an adjustment is determination of ABC.

(e) *ABC.* (1) ABC is a preliminary description of the acceptable harvest (or range of harvests) for a given stock or stock complex. Its derivation focuses on the status and dynamics of the stock, environmental conditions, other ecological factors, and prevailing technological characteristics of the fishery.

(2) When ABC is used, its specification constitutes the first step in deriving OY from MSY. Unless the best scientific information available indicates otherwise (see section 602.12), ABC should be no higher than the product of the stock's natural mortality rate and the biomass of the exploitable stock. If a threshold has been specified for the stock, ABC must equal zero when the stock is at or below that threshold (see paragraph (c)(2) of this section). ABC may be expressed in numeric and/or non-numeric terms.

(f) *OY.* (1) *Definition.* The term "optimum" with respect to the yield from a fishery, means the amount of fish which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and which is prescribed as such on the basis of the maximum sustainable yield from each fishery, as modified by any relevant economic, social, or ecological factors (section 3(18)(b) of the Act).

(2) *Values in determination.* In determining the greatest benefit to the Nation, two values that should be weighed are food production and recreational opportunities (section 3(18)(a) of the Act). They should receive serious attention as measures of benefit when considering the economic, ecological, or social factors used in modifying MSY to obtain OY.

(i) "Food production" encompasses the goals of providing seafood to consumers at reasonable prices, maintaining an economically viable fishery, and utilizing the capacity of U.S. fishery resources to meet nutritional needs.

(ii) "Recreational opportunities" includes recognition of the importance of the quality of the recreational fishing experience, and of the contribution of recreational fishing to the national, regional, and local economies and food supplies.

(3) *Factors relevant to OY.* The Act's definition of OY identifies three categories of factors to be used in modifying MSY to arrive at OY: economic, social, and ecological (section 3(18)(b)). Not every factor will be relevant in every fishery; for instance, there may be no Indian treaty rights. For some fisheries, insufficient information may be available with respect to some factors to provide a basis for corresponding modifications to MSY.

(i) *Economic factors.* Examples are promotion of domestic fishing, development of unutilized or underutilized fisheries, satisfaction of consumer and recreational needs, and encouragement of domestic and export markets for U.S.-harvested fish. Some other factors that may be considered are the value of industrial fisheries, the level of capitalization, operating costs of vessels, alternate employment opportunities, and economies of coastal areas.

(ii) *Social factors.* Examples are enjoyment gained from recreational fishing, avoidance of gear conflicts and resulting disputes, preservation of a way of life for fishermen and their families, and dependence of local communities on a fishery. Among other factors that may be considered are the cultural place of subsistence fishing, obligations under Indian treaties, and world-wide nutritional needs.

(iii) *Ecological factors.* Examples are the vulnerability of incidental or unregulated species in a mixed-species fishery, predator-prey or competitive interactions, and dependence of marine mammals and birds or endangered species on a stock of fish. Equally important are environmental conditions that stress marine organisms, such as natural and man-made changes in wetlands or nursery grounds, and effects of pollutants on habitat and stocks.

(4) *Specification.* (i) The "amount of fish" that constitutes the OY need not be expressed in terms of numbers or weight of fish. The economic, social, or ecological modifications to MSY may be expressed by describing fish having common characteristics, the harvest of which provides the greatest overall benefit to the Nation. For instance, OY may be expressed as a formula that converts periodic stock assessments into quotas or guideline harvest levels for recreational, commercial, and other fishing. OY may be defined in terms of an annual harvest of fish or shellfish having a minimum weight, length, or other measurement. OY may also be expressed as an amount of fish taken only in certain areas, or in certain seasons, or with particular gear, or by a specified amount of fishing effort. In the case of a mixed-species fishery, the incidental species OY may be a function

of the directed catch, or absorbed into an OY for related species.

(ii) If a numerical OY is chosen, a range or average may be specified.

(iii) In a fishery where there is a significant discard component, the OY may either include or exclude discards, consistent with the other yield determinations.

(iv) The OY specification can be converted into an annual numerical estimate to establish any TALFF and to analyze impacts of the management regime. There should be a mechanism in a multiyear plan for periodic reassessment of the OY specification, so that it is responsive to changing circumstances in the fishery. (See § 602.12(e).)

(v) The determination of OY requires a specification of MSY. However, where sufficient scientific data as to the biological characteristics of the stock do not exist, or the period of exploitation or investigation has not been long enough for adequate understanding of stock dynamics, or where frequent large-scale fluctuations in stock size make this concept of limited value, the OY should be based not on a fabricated MSY but on the best scientific information available.

(5) *Analysis.* An FMP must contain an analysis of how its OY specification was determined (section 303(a)(3) of the Act). It should relate the explanation of overfishing in paragraph (c) of this section to conditions in the particular fishery, and explain how its choice of OY and conservation and management measures will prevent overfishing in that fishery. If overfishing is permitted under paragraph (c)(6) of this section, the analysis must contain a justification in terms of overall benefits and an assessment of the risk of the species or stock component reaching a "threatened" or "endangered" status. A Council must identify those economic, social, and ecological factors relevant to management of a particular fishery, then evaluate them to arrive at the modification (if any) of MSY. The choice of a particular OY must be carefully defined and documented to show that the OY selected will produce the greatest benefit to the Nation.

(g) *OY as a target.* (1) The specification of OY in an FMP is not automatically a quota or ceiling, although quotas may be derived from the OY where appropriate. OY is a target or goal; an FMP must contain conservation and management measures, and provisions for information collection, that are designed to achieve OY. These measures should allow for practical and effective implementation and enforcement of the management regime, so that the harvest is allowed to reach but not to exceed OY by a substantial amount. The Secretary has an obligation to implement and enforce the FMP so that OY is achieved. If management measures prove unenforceable—or too restrictive or not rigorous enough to realize OY—they should be modified; an alternative is to reexamine the adequacy of the OY specification.

(2) Exceeding OY does not necessarily constitute overfishing, although they might coincide. Even if no overfishing resulted, continual harvest at a level about a fixed-value OY would violate national standard 1 because OY was exceeded (not achieved) on a continuing basis.

(3) Part of the OY may be held as a reserve to allow for uncertainties in estimates of stock size and of DAH or to solve operational problems in achieving (but not exceeding) OY. If an OY reserve is established, an adequate mechanism should be included in the FMP to permit timely release of the reserve to domestic or foreign fishermen, if necessary.

(h) *OY and foreign fishing.* Section 201(d) of the Act provides that fishing by foreign nations is limited to that portion of the OY that will not be harvested by vessesls of the United States.

(1) *DAH.* Councils must consider the capacity of, and the extent to which, U.S. vessels will harvest the OY on an annual basis. Estimating the amount that U.S. fishing vessels will actually harvest is required to determine the surplus.

(2) *DAP.* Each FMP must identify the capacity of U.S. processors. It must also identify the amount of DAP, which is the sum of two estimates:

(i) The amount of U.S. harvest that domestic processors will process. This estimate may be based on historical performance and on surveys of the expressed intention of manufacturers to process, supported by evidence of contracts, plant expansion, or other relevant information; and

(ii) The amount of fish that will be harvested, but not processed (e.g., marketed as fresh whole fish, used for private consumption, or used for bait).

(3) *JVP.* When DAH exceeds DAP, the surplus is available for JVP. JVP is a part of DAH.

§ 602.12 National Standard 2—Scientific Information.

(a) *Standard 2.* Conservation and management measures shall be based upon the best scientific information available.

* * * * *

(e) *Stock Assessment and Fishery Evaluation (SAFE) Report.* (1) The SAFE report is a document or set of documents that provides Councils with a summary of the most recent biological condition of species in the fishery management unit (FMU), and the social and economic condition of the recreational and commercial fishing industries and the fish processing industries. It summarizes, on a periodic basis, the best available scientific information concerning the past, present, and possible future condition of the stocks and fisheries being managed under Federal regulation.

(i) The Secretary has the responsibility to assure that a SAFE report or similar document is prepared, reviewed annually, and changed as necessary for each FMP. The Secretary or Councils may utilize any combination of talent from Council, State, university, or other sources (but at a minimum must include Council and NMFS representatives) to acquire and analyze data and produce the SAFE report.

(ii) The SAFE report provides information to the Councils for determining annual harvest levels from each stock, documenting significant trends or changes in the resource and fishery over time, and assessing the relative success of existing State and Federal fishery management programs. In addition, the SAFE report may be used to update or expand previous environmental and regulatory impact documents, and ecosystem and habitat descriptions.

(iii) Each SAFE report must be scientifically based, cite data sources and interpretations.

(2) Each SAFE report should contain information on which to base harvest specifications, such as:

(i) Estimates of total biomass and/or spawning biomass for each stock in the FMU;

(ii) Estimates of the annual surplus production (ASP) and MSY for each stock in the FMU;

(iii) Description of the estimated biomass, ASP, and MSY in previous years relative to those estimates for the current or next year;

(iv) Description of the model or assumptions on which these estimates are based and a discussion of the reliability of each estimate;

(v) If a stock is below the level which will produce MSY, estimated time necessary to allow the stock to rebuild to MSY, threshold or other specified level under various harvest levels and prevailing environmental conditions; and

(vi) Significant changes (if any) in the habitat or ecosystem since it was last described in the FMP, an amendment to the FMP, or previous SAFE report.

(3) Each SAFE report should contain information on which to assess the condition of the recreational and commercial fishing industries and fish processing industries, such as:

(i) Estimate of the amount of fish harvested from each stock in the FMU, by gear type and area, in the most recent three years and in the year immediately prior to implementation of the FMP governing fisheries for (or in) the FMU. If applicable, the amount of fish harvested in the same time period by wholly domestic, joint venture and foreign fisheries;

(ii) The approximate exvessel value of the harvested fish described in paragraph (e)(3)(i) of this section;

(iii) Amounts and estimated value of each type of processed products derived from the harvested fish described in paragraph (e)(3)(i) of this section;

(iv) Estimates of the numbers of commercial vessels, by gear type and in terms of individual vessels, involved in each fishery for (or in) the FMU;

(v) Estimates of the number of commercial fishermen employed in each fishery for (or in) the FMU;

(vi) The numbers of processing plants, floating and shore based, individual and by product type, involved in processing the harvested fish described in paragraph (e)(3)(i) of this section;

(vii) Estimates of the number of individuals employed in the processing plants described in paragraph (e)(3)(vi) of this section.

(viii) Estimates of the amount of fish harvested by recreational fishermen from the FMU;

(ix) Estimates of the numbers of recreational fishermen who harvested fish from the FMU;

(x) Estimates of the number of charter vessels and party boats involved in the recreational fishery; and

(xi) The estimated value of the recreational fishery for (or in) the FMU.

(4) Each SAFE report may contain additional economic, social, and ecological information pertinent to the success of management or the achievement of objectives of each FMP, such as:

(i) Enforcement actions taken and penalties assessed and collected over the most recent three years under an implemented FMP;

(ii) Significant changes (if any) in State regulations pertinent to the FMU and their known or anticipated effects on stocks in the FMU;

(iii) Significant changes (if any) in related fisheries which may affect the fishing effort for (or in) the FMU; and

(iv) Potential conservation and management problems, their possible causes and solutions.

[FR Doc. 88-30007 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-22-M

Notices

Federal Register
Vol. 53, No. 251
Friday, December 30, 1988

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 88-031N]

National Advisory Committee on Microbiological Criteria for Foods; Solicitation for Membership Nominations

This notice announces the Department's intent to solicit nominations for membership on the National Advisory Committee on Microbiological Criteria for Foods.

The Committee was established in April 1988 as a result of a recommendation by a 1985 report of the National Academy of Sciences Committee on Food Protection, Subcommittee on Microbiological Criteria, entitled "An Evaluation of the Role of Microbiological Criteria for Foods."

The Committee provides advice and recommendations to the Secretaries of Agriculture and Health and Human Services concerning the development of microbiological criteria by which the safety and wholesomeness of food can be assessed, including criteria for microorganisms that indicate whether food has been processed using good manufacturing practices.

Nominations for membership are being sought from individuals with scientific expertise in the fields of Epidemiology, Food Technology, Microbiology, Packaging, Pathology, Public Health, and/or Toxicology.

Appointment(s) to the Committee will be made by the Secretary of Agriculture. Because of the complexity of the issues to be addressed, full Committee meetings will be held quarterly and subcommittees will meet as deemed necessary.

Interested persons are invited to submit a typed resume to Catherine M. DeRoever, Director, Executive Secretariat, Food Safety and Inspection Service, Room 3175–South Building, 14th and Independence Avenue, SW., Washington, DC 20250. Nominations for membership must be postmarked no later than January 30, 1989. For additional information, please contact Ms. DeRoever at the above address, or by telephone on (202) 447–9150.

Done at Washington, DC, on December 27, 1988.

Lester M. Crawford,

Administrator, Food Safety and Inspection Service.

[FR Doc. 88-30071 Filed 12-29-88; 8:45 am]

BILLING CODE 3410-DM-M

Forest Service

Lake Bradford Land Exchange; Apalachicola National Forest, FL

AGENCY: Forest Service, USDA.

ACTION: Environmental Impact Statement Cancellation Notice.

SUMMARY: Airport Properties, Inc., has withdrawn its proposal to exchange 3,100 acres of private land for 330 acres of National Forest System land located in the Wakulla Ranger District, Apalachicola National Forest, Leon County, Florida.

The Notice of Intent, published in the **Federal Register** of August 5, 1988, is hereby rescinded (53 FR 29504).

FOR FURTHER INFORMATION CONTACT: Direct questions about the proposed environmental impact statement cancellation to Raymond K. Mason, Planning Staff Officer, National Forests in Florida, 227 N. Bronough St., Suite 4061 Tallahassee, Florida 32301, phone 904–681–7265.

Date: December 20, 1988.

John E. Alcock,

Regional Forester.

[FR Doc. 88-30063 Filed 12-29-88; 8:45 am]

BILLING CODE 3410-11-M

Soil Conservation Service

Soap Creek Watershed, IA; Availability of a Record of Decision

December 13, 1988.

AGENCY: Soil Conservation Service, USDA.

ACTION: Notice of availability of a record of decision.

SUMMARY: J. Michael Nethery, Responsible Federal Official for projects administered under the provisions of Pub. L. 83–566, 16 U.S.C. 1001–1008, in the State of Iowa, is hereby providing notification that a record of decision to proceed with the installation of the Soap Creek Watershed project is available. Single copies of their record of decision may be obtained from J. Michael Nethery at the address shown below.

FOR FURTHER INFORMATION CONTACT: J. Michael Nethery, State Conservationist, Soil Conservation Service, 693 Federal Building, 210 Walnut Street, Des Moines, Iowa 50309, Telephone: 515–284–4261.

J. Michael Nethery,

State Conservationist.

December 13, 1988.

Record of Decision Soap Creek Watershed

Appanoose, Davis, Monroe, and Wapello Counties, Iowa

1. Purpose

As State Conservationist for the Soil Conservation Service, I am the Responsible Federal Official (RFO) for all Soil Conservation Service projects in Iowa.

The recommended plan for Soap Creek Watershed involves works of improvement to be installed under authorities administered by the Soil Conservation Service. This project will install 154 floodwater retarding structures. These are all single-purpose structures for flood prevention.

The Soap Creek Watershed plan was prepared under the authority of the Watershed Protection and Flood Prevention Act (Pub. L. 83–566, 83rd Congress, 66 Stat. 666, as amended) by the Appanoose, Davis, Monroe, and Wapello Soil and Water Conservation Districts. The scoping meetings, held during May 1985, established the Soil Conservation Service (SCS), U.S. Department of Agriculture as lead agency, and with the Forest Service—USDA and the Fish and Wildlife Service—USDI las cooperating agencies.

2. Measusres Taken To Comply with National Environmental Policies

The Soap Creek Watershed project has been planned in accordance with existing Federal legislation concerned with the preservation of environmental values. The following actions were taken to ensure that the Soap Creek Watershed plan is consistent with national goals and policies.

Inter-agency meetings conducted by an inter-disciplinary team under the direction of SCS, were held prior to the May, 1985 scoping meeting as part of the on-going environmental evaluation process. The inter-disciplinary team concluded that significant impacts on the human environment may occur because of the complexity and public interest of the proposed action. As RFO, I directed that a draft environmental impact statement (EIS) be prepared.

The inter-disciplinary environmental evaluation of the Soap Creek Watershed project was conducted by the sponsors, cooperating agencies, and Soil Conservation Service. Information was obtained from many groups and agencies. Reviews were held with the Environmental Protection Agency, Fish and Wildlife Service, Iowa Department of Natural resources, State Historic Preservation Officer, and the Iowa State Archeologist. Input from these reviews were included in the EIS.

Public meetings were held on July 9, 1982; July 18, 25, 30, August 1, 16, and September 4, 5, 1984 to solicit public participation in the environmental evaluation process, to assure that all interested practices had sufficient information to understand how their concerns are affected by water resource problems, to afford local interests in opportunity to express their views regarding the plans which can best solve these problems, and to provide all interests an opportunity to participate in the plan selection. More than 180 parties were notified by mail of the joint public meeting. A transcript of the minutes was developed and is on file.

The formal environmental evaluation was held on May 7, 1985. Eighty letters of invitation were mailed to local, State, and Federal agencies and to environmental groups. Residents of the watershed were invited by newspaper and radio notices.

Testimony and recommendation were received relative to the following subjects:

a. Type, location, and size of structures to be used for flood water damage reduction.

b. Potential impacts on fish and wildlife.

A draft environmental impact statement was prepared in March, 1988 and made available for public review. The recommendations and comments obtained from public meetings held during project planning and assessment were considered in the preparation of the statement. Projects of other agencies were included only when they related to the Public Law 566 project, and they were not evaluated with regard to their individual merit.

A public meeting to review the draft environmental impact statement was held on April 12, 1988 with 114 people in attendance.

More than 100 copies of the draft environmental impact statement were distributed to agencies, conservation groups, organizations. The draft environmental impact statement was filed with the Environmental Protection agency of June 20, 1988.

All existing data and information pertaining to the project's probable environmental consequences were obtained with assistance from other scientists and engineers. Documentary information as well as the views of interested Federal, State, and local agencies and concerned individuals and organizations having special knowledge of, competence over, or interest in the project's environmental impact were sought. This process continued until it was felt that all the information necessary for a comprehensive, reliable assessment had been gathered.

A complete picture of the project's current and probable furture environmental setting was assembled to determine the proposed project's impact and identify unavoidable adverse environmental impacts that might be produced.

The consequences of a full range of reasonable and viable alternatives to specific project features were considered, studied, and analyzed. In reviewing these alternatives, all courses of action that could reasonably accomplish the project purposes were considered. Attempts were made to identify the economic, social, and environmental values affected by each alternative. In accordance with existing policy and procedures, the possibilities of structural and nonstructural alternatives for the project were considered.

The one alternative considered a reasonable alternative to accomplish the project's objectives was the NED plan which was the selected plan. It consists of the installation of 154 floodwater retarding structures on small drainageways later to the main streams.

3. Conclusions

The following conclusions were reached after carefully reviewing the proposed Soap Creek Watershed project in light of all national goals and policies, particularly those expressed in the National Environmental Policy Act, and after evaluating the overall merit of possible alternatives to the project:

A. The Soap Creek Watershed project will employ a reasonable and practicable means that is consistent with the National Environmental Policy Act while permitting the application of other national policies and interests. These means include, but are not limited to, a project planned and designed to minimize adverse effects on the natural environment, while accomplishing an authorized project purpose. Project features designed to preserve existing environmental values for future generations include:

(1) Establishment of wildlife habitat areas adjacent to floodwater-retarding structures, along the main streams, and other areas in the watershed to offset losses due to the structures; and

(2) Establishment of grasses and legumes on dams and offsite borrow areas to protect them from erosion and provide food and cover for wildlife.

b. The Soap Creek Watershed project was planned using a systematic inter-disciplinary approach involving integrated uses of the natural and social sciences and environmental design arts. The results of this review constitutes the basis for the conclusions and recommendations. All conclusions concerming the environmental impact of the project and overall merit of existing plans were based on a review of data and information that would be reasonably expected to reveal significant environmental consequences of the proposed project. These data included additional studies prepared specifically for the project and comments and views of all interested Federal, State, and local agencies and individuals. The project will not affect any cultural resources eligible for inclusion in the National Register of Historic Places. Nor will the project affect any species of fish, wildlife, or plant or their habitats that have been designated as endangered or threatened.

c. In studying and evaluating the environmental impact of the Soap Creek Watershed project, every effort was made to express all environmental values quantitatively. Any failure to quantify particular environmental amenities and values is the result of the absence of a methodology having general scientific acceptance. Nevertheless, every effort was made to identify and give appropriate weight and consideration of nonquantifiable environmental values.

d. Every possible effort has been made to identify those adverse environmental effects which cannot be avoided if the project is constructed.

e. The long-term and short-term resource uses, long-term productivity, and the irreversible and irretrievable commitment of resources are accurately described in the final environmental impact statement.

f. All reasonable and viable alternative to project features and to the project itself were studied and analyzed with reference to national policies and goals, especially those expressed in the National Environmental Policy Act and the Federal waters resource development legislation under which the project was planned. Each possible course of action was evaluated as to its possible economic, technical, social, and overall environmental consequences to determine the tradeoffs necessary to accommodate all national policies and interests. However, no alternative or combination of alternatives will afford greater protection of the environmental values while accomplishing the other project goals and objectives.

g. I conclude, therefore, that the proposed project will be the most effective means of meeting national goals and serving the public interst.

4. Recommendations

Having concluded that the proposed Soap Creek Watershed project uses all practicable means, consistent with other essential considerations of the national policy, to meet the goals established in the National Environmental Policy Act, that the project will thus serve the overall public interest, that the final environmental impact statement has been prepared, reviewed, and accepted in accordance with the provisions of the National Environmental Policy Act, that the project will thus serve the overall public interest, that the final environmental impact statement has been prepared, reviewed, and accepted in accordance with the provisions of the National Environmental Policy Act as implemented by Departmental regulations for the preparation of environmental impact statements, and that the project meets the needs of the project sponsors, I propose to implement the Soap Creek Watershed project.

J. Michael Nethery,

State Conservationist, Soil Conservation Service, U.S. Department of Agriculture.

Date: December 13, 1988.

[FR Doc. 88-30060 Filed 12-29-88; 8:45 am]

BILLING CODE 3410-16-M

COMMISSION ON CIVIL RIGHTS

North Carolina Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Forum Subcommittee of the North Carolina Advisory Committee to the Commission will convene at 2:30 p.m. and adjourn at 6:30 p.m. on Friday, January 20, 1989, in the Sheraton Hotel, 301 North Elm Street, Greensboro, N.C. 27401. The Subcommittee will discuss plans for a community forum on equal educational opportunity in public schools in the State.

Persons desiring additional information, or planning a presentation to the Subcommittee, contact Subcommittee Chairperson Dr. Richard Robbins or John I. Binkley, Director, Eastern Regional Division at (202) 523-5264, TDD (202) 376-8117. Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Eastern Regional Division at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, December 23, 1988.

Melvin L. Jenkins,

Acting Staff Director.

[FR Doc. 88-30065 Filed 12-29-88; 8:45 am]

BILLING CODE 6335-01-M

DEPARTMENT OF COMMERCE

Export Now Advisory Committee; Open Meeting

AGENCY: Department of Commerce.

A meeting of the Export Now Advisory Committee will be held on January 11, 1989, 1:45 p.m.-3:00 p.m. at the U.S. Department of Commerce, Room 4830, 14th Street and Constitution Avenue, NW., Washington, DC 20230. This meeting will be in lieu of the January 12, 1989, meeting previously announced in the **Federal Register** (53 FR 46101, November 16, 1988). The meeting will be open to the public with a limited number of seats available. Any member of the public may submit written comments concerning the Committee's affairs at any time before or after the meeting.

The Committee was established by the Secretary of Commerce on February 25, 1988 to advice Department officials on the objectives and conduct of the Export Now Program, including methods of increasing public awareness of the advantages of exporting, improving Federal coordination with state, local and private sector export activities, and implementing programs of education and training to increase the export effectiveness of all segments of the U.S. economy.

The purpose of the meeting is to report on the status of the Export Now Program and to receive advice from the public on the conduct and future implementation of the program. A more specific agenda will be available to the public at the beginning of the meeting.

For further information or copies of the minutes, contact Alan R. Severson or John Hayes, Export Now Program, Herbert C. Hoover Building, Room 1066, 14th Street and Constitution Avenue, NW., Washington, DC 20230, (202) 377-2073.

Date: December 27, 1988.

Robert H. Brumley,

General Counsel.

[FR Doc. 88-30088 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-CW-M

Foreign-Trade Zones Board

[Order No. 411]

Resolution and Order Approving the Application of the Huntsville-Madison County Airport Authority for a Special-Purpose Subzone at the Chrysler Plant in Huntsville, AL

Proceedings of the Foreign-Trade Zones Board, Washington, DC.

Resolution and Order

Pursuant to the Authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the Huntsville-Madison County Airport Authority, grantee of FTZ 83, filed with the Foreign-Trade Zones Board (the Board) on Febuary 24, 1986, and amended on April 29, 1987, requesting special-purpose subzone status at the auto electronic components plant of Chrysler Corporation in Huntsville, Alabama, the Board finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations are satisfied, and that the proposal is in the public interest, approves the application.

The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

Grant of Authority To Establish a Foreign-Trade Subzone at the Chrysler Plant in Huntsville, Alabama

Whereas, by an Act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes", as amended (19 U.S.C. 81a-81u) (the Act), the Foreign-Trade Zones Board (the

Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Board's regulations (15 CFR 400.304) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and where a significant public benefit will result;

Whereas, the Huntsville-Madison County Airport Authority, grantee of Foreign-Trade Zone No. 83, has made application (filed February 24, 1986, FTZ Docket 8–86, 51 FR 9235, and amended on April 29, 1987, 52 FR 16426) in due and proper form to the Board for authority to establish a special-purpose subzone at the automobile electronic components manufacturing plant of Chrysler Corporation in Huntsville, Alabama;

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard; and

Whereas, the Board has found that the requirements of the Act and the Board's regulations are satisfied;

Now, therefore, in accordance with the application filed on February 24, 1986, and amended on April 29, 1987, the Board hereby authorizes the establishment of a subzone at Chrysler's Huntsville plant, designated on the records of the Board as Foreign-Trade Subzone No. 83A at the location mentioned above and more particularly described on the maps and drawings accompanying the application, said grant of authority being subject to the provisions and restrictions of the Act and Regulations issued thereunder, to the same extent as though the same were fully set forth herein, and also to the following express conditions and limitations:

Activation of the subzone shall be commenced within a reasonable time from the date of issuance of the grant, and prior thereto, any necessary permits shall be obtained from Federal, State, and municipal authorities.

Officers and employees of the United States shall have free and unrestricted access to and throughout the foreign-trade subzone in the performance of their official duties.

The grant shall not be construed to relieve responsible parties from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said subzone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and District Army Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness whereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer or his delegate at Washington, D.C. this 21st day of December, 1988, pursuant to Order of the Board.

Foreign-Trade Zones Board.

Jan W. Mares,

Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 88–30117 Filed 12–29–88; 8:45 am]

BILLING CODE 3510-DS-M

[Order No. 415]

Resolution and Order Approving the Application of the State of Hawaii for a Subzone at the Chevron U.S.A., Inc., Refinery in Ewa, Oahu, HI

Proceedings of the Foreign-Trade Zones Board, Washington, DC.

Resolution and Order

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the State of Hawaii (Department of Business and Economic Development), grantee of FTZ 9, filed with the Foreign-Trade Zones Board (the Board) on December 30, 1987, requesting special-purpose subzone status for the crude oil refinery of Chevron U.S.A., Inc., located in Ewa, Oahu, Hawaii, adjacent to the Honolulu Customs port of entry, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations would be satisfied, and that the proposal would be in the public interest, if approval is subject to certain conditions, approves the application subject to the following conditions:

1. Foreign crude oil used as fuel for the refinery shall be dutiable.

2. Chevron shall elect privileged foreign status on foreign crude oil and other foreign merchandise admitted to the subzone.

3. The U.S. Customs Service shall inform the Foreign-Trade Zones Board on or before July 1, 1991, that a satisfactory control system has been implemented so that the revenue can be fully protected; otherwise, the authority under this grant shall expire on that date.

The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

Grant of Authority to Establish a Foreign-Trade Subzone at the Chevron U.S.A., Inc. Refinery in Ewa, Oahu, Hawaii

Whereas, by an Act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes", as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Board's regulations (15 CFR 400.304) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and where a significant public benefit will result;

Whereas, the State of Hawaii (Department of Business and Economic Development), grantee of Foreign-Trade Zone No. 9, has made application (filed December 30, 1987, FTZ Docket 49–87, 53 FR 784) in due and proper form to the Board for authority to establish a special-purpose subzone at the oil refinery of Chevron U.S.A., Inc. (Chevron), located in Ewa, Oahu, Hawaii;

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard; and

Whereas, the Board has found that the requirements of the Act and the Board's regulations are satisfied and that the proposal would be in the public interest if approval is given subject to the conditions in the resolution accompanying this action;

Now, therefore, in accordance with the application filed December 30, 1987, the Board hereby authorizes the establishment of a subzone at the Chevron refinery, designated on the records of the Board as Foreign-Trade Subzone No. 9E, at the location mentioned above and more particularly described on the maps and drawings accompanying the application, said grant of authority being subject to the provisions and restrictions of the Act and the Regulations issued thereunder.

and those stated in the resolution accompanying this action, and also to the following express conditions and limitations:

Activation of the subzone shall be commenced within a reasonable time from the date of issuance of the grant, and prior thereto, any necessary permits shall be obtained from Federal, State, and municipal authorities.

Officers and employees of the United States shall have free and unrestricted access to and throughout the foreign-trade subzone in the performance of their official duties.

The grant shall not be construed to relieve responsible parties from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said subzone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and District Army Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness whereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer or his delegate at Washington, DC, this 21st day of December, 1988, pursuant to Order of the Board.

Foreign-Trade Zones Board.

Jan. W. Mares,

Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 88-30115 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M

[Order No. 414]

Resolution and Order Approving the Application of the Port of Corpus Christi Authority for a Subzone at the Valero Refining Company Refinery in Nueces County, TX

Proceedings of the Foreign-Trade Zones Board, Washington, DC

Resolution and Order

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the Port of Corpus Christi Authority, grantee of FTZ 122, filed with the Foreign-Trade Zones Board (the Board) on December 30, 1987, requesting special-purpose subzone status for the crude oil refinery of Valero Refining Company, located in Nueces County, Texas, adjacent to the Corpus Christi Customs port of entry, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations would be satisfied, and that the proposal would be in the public interest, if approval is subject to certain conditions, approves the application subject to the following conditions:

1. Foreign crude oil used as fuel for the refinery shall be dutiable.

2. Valero shall elect privileged foreign status on foreign crude oil and other foreign merchandise admitted to the subzone.

3. The U.S. Customs Service shall inform the Foreign-Trade Zones Board on or before July 1, 1991, that a satisfactory control system has been implemented so that the revenue can be fully protected; otherwise, the authority under this grant shall expire on that date.

The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

Grant of Authority To Establish a Foreign-Trade Subzone at the Valero Refining Company in Nueces County, Texas

Whereas, by an Act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes", as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Board's regulations (15 CFR 400.304) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and where a significant public benefit will result;

Whereas, the Port of Corpus Christi Authority, grantee of Foreign-Trade Zone No. 122, has made application (filed December 30, 1987, FTZ Docket 47–87, 53 FR 783) in due and proper form to the Board for authority to establish a special-purpose subzone at the oil refinery of Valero Refining Company (Valero) located in Nueces County, Texas;

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard; and

Whereas, the Board has found that the requirements of the Act and the Board's regulations would be satisfied and that the proposal would be in the public interest if approval is given subject to the conditions in the resolution accompanying this action;

Now, therefore, in accordance with the application filed December 30, 1987, the Board hereby authorizes the establishment of a subzone at the Valero refinery, designated on the records of the Board as Foreign-Trade Subzone No. 122J, at the location mentioned above and more particularly described on the maps and drawings accompanying the application, said grant of authority being subject to the provisions and restrictions of the Act and the Regulations issued thereunder, and those stated in the resolution accompanying this action, and also to the following express conditions and limitations:

Activation of the subzone shall be commenced within a reasonable time from the date of issuance of the grant, and prior thereto, any necessary permits shall be obtained from Federal, State, and municipal authorities.

Officers and employees of the United States shall have free and unrestricted access to and througout the foreign-trade subzone in the performance of their official duties.

The grant shall not be construed to relieve responsible parties from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said subzone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and District Army Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness thereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer or his delegate at Washington, DC, this 21st day of December, 1988, pursuant to Order of the Board.

Foreign-Trade Zones Board.

Jan W. Mares,

Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates.

Attest

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 88-30016 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M

[Order No. 410]

Approval for Amendment of Zone Plan of Foreign-Trade Zone No. 84, Harris County, TX, Within the Houston Customs Port of Entry

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), and the Foreign-Trade Zones Board Regulations (15 CFR Part 400), the Foreign-Trade Zones Board (the Board) adopts the following order:

Whereas, the Port of Houston Authority (PHA), Grantee of Foreign-Trade Zone No. 84, has applied to the Board for authority to amend its zone plan by including an additional private site for the petroleum and chemical storage and blending facilities of GATX Terminals Corporation, located in Harris County, Texas, within the Houston Customs port of entry;

Whereas, the application was accepted for filing on October 25, 1985, and notice inviting public comment was given in the **Federal Register** on November 12, 1985 (FTZ Doc. 41–85, 50 FR 46678);

Whereas, an examiners committee has investigated the application in accordance with the Board's regulations and recommends conditional approval;

Whereas, the Board has found that the requirements of the Foreign-Trade Zone Act, as amended, and the Board's regulations would be satisfied if approval is given subject to the conditions stated below;

Now, therefore, the Board hereby orders:

That the Grantee is authorized to amend its zone plan in accordance with the application filed October 25, 1985, subject to the following conditions:

1. Operations at this site shall be subject to the restrictions applicable to FTZ 84 by virtue of Board Order 214 (7/15/83).

2. Full zone benefits for blending and processing shall be available only for export activity.

3. Privileged foreign status (19 CFR 146.65) shall be elected for any foreign merchandise prior to any blending or processing operation.

4. This approval is for a period ending January 15, 1989, subject to Board action on the pending PHA application for a permanent extension of the "B" sites of the Houston zone (FTZ Doc. 8–88).

The Grantee shall notify the Board for approval prior to the commencement of any manufacturing or blending operation not specifically described in the application. The authority given in this Order is subject to settlement locally by the District Director of Customs and the District Army Engineer regarding compliance with their respective requirements relating to foreign-trade zones.

Signed at Washington, DC, this 21st day of December 1988.

Jan W. Mares,

Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary

[FR Doc. 88-30118 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M

[Order No. 409]

Approval for Amendment of Zone Plan of Foreign-Trade Zone No. 84, Harris County, TX, Within the Houston Customs Port of Entry

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), and the Foreign-Trade Zones Board Regulations (15 CFR Part 400), the Foreign-Trade Zones Board (the Board) adopts the following order:

Whereas, the Port of Houston Authority (PHA), Grantee of Foreign-Trade Zone No. 84, has applied to the Board for authority to amend its zone plan by including an additional private site for the petroleum and chemical storage and blending facilities of Oiltanking of Texas, Inc., located in Harris County, Texas, within the Houston Customs port of entry;

Whereas, the application was accepted for filing on July 14, 1987, and notice inviting public comment was given in the **Federal Register** on July 23, 1987 (FTZ Doc. 7–87, 52 FR 27696);

Whereas, an examiners committee has investigated the application in accordance with the Board's regulations and recommends conditional approval;

Whereas, the Board has found that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations would be satisfied if approval is given subject to the conditions stated below;

Now, therefore, the Board hereby orders:

That the Grantee is authorized to amend its zone plan in accordance with the application filed July 14, 1987, subject to the following conditions:

1. Operations at this site shall be subject to the restrictions applicable to FTZ 84 by virtue of Board Order 214 (7/15/83).

2. Full zone benefits for blending and processing shall be available only for export activity.

3. Privileged foreign status (19 CFR 146.65) shall be elected for any foreign merchandise prior to any blending or processing operation.

4. This approval is for a period ending January 15, 1989, subject to Board action on the pending PHA application for a permanent extension of the "B" sites of the Houston zone (FTZ Doc. 8–88).

The Grantee shall notify the Board for approval prior to the commencement of any manufacturing or blending operation not specifically described in the application. The authority given in this Order is subject to settlement locally by the District Director of Customs and the District Army Engineer regarding compliance with their respective requirements relating to foreign-trade zones.

Signed at Washington, DC, this 21st day of December 1988.

Jan W. Mares,

Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 88-30119 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M

[Order No. 408]

Approval for Amendment of Zone Plan of Foreign-Trade Zone No. 84, Harris County, TX, Within the Houston Customs of Port of Entry

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), and the Foreign-Trade Zones Board Regulations (15 CFR Part 400), the Foreign-Trade Zones Board (the Board) adopts the following order:

Whereas, the Port of Houston Authority (PHA), Grantee of Foreign-Trade Zones No. 84, has applied to the Board for authority to amend its zone plan by including an additional private site for the petroleum and chemical

storage and blending facilities of Intercontinental Terminals Company, located in Harris County, Texas, within the Houston Customs port of entry;

Whereas, the application was accepted for filing on June 9, 1986, and notice inviting public comment was given in the Federal Register on June 26, 1986 (FTZ Doc. 20–86, 51 FR 23252);

Whereas, an examiners committee has investigated application in accordance with the Board's regulations and recommends conditional approval;

Whereas, the Board has found that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations would be satisfied if approval is given subject to the conditions stated below;

Now, therefore, the Board hereby orders:

That the Grantee is authorized to amend its zone plan in accordance with the application filed June 9, 1986, subject to the following conditions:

1. Operations at this site shall be subject to the restrictions applicable to FTZ 84 by virtue of Board Order 214 (7/15/83).

2. Full zone benefits for blending and processing shall be available only for export activity.

3. Privileged foreign status (19 CFR 146.65) shall be elected for any foreign merchandise prior to any blending or processing operation.

4. This approval is for a period ending January 15, 1989, subject to Board action on the pending PHA application for a permanent extension of the "B" sites of the Houston zone (FTZ Doc. 8–88).

The Grantee shall notify the Board for approval prior to the commencement of any manufacturing or blending operation not specifically described in the application. The authority given in this Order is subject to settlement locally by the District Director of Customs and the District Army Engineer regarding compliance with their respective requirements relating to foreign-trade zones.

Signed at Washington, DC, this 21st day of December 1988.

Jan W. Mares,

Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 88–30120 Filed 12–29–88; 8:45 am]

BILLING CODE 3510–DS–M

International Trade Administration

[A–588–015]

Television Receivers, Monochrome and Color, from Japan; Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review.

SUMMARY: In response to requests by the petitioners and the respondents, the Department of Commerce has conducted an administrative review of the antidumping finding on television receivers from Japan. The review covers five manufacturers/exporters of this merchandise to the United States and various periods from April 1, 1981 through February 29, 1988. The review indicates the existence of dumping margins for certain firms during certain periods.

As a result of the review, the Department has preliminarily determined to assess antidumping duties equal to the differences between United States price and foreign market value.

If we received no company-supplied information or if information was inadequate or untimely, we used the best information available for assessment and cash deposit purposes.

Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: December 30, 1988.

FOR FURTHER INFORMATION CONTACT: Wendy J. Frankel, Michael J. Heaney, or John R. Kugelman, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377–2923/3601.

SUPPLEMENTARY INFORMATION:

Background

On August 18, 1983 and September 27, 1983, the Department of Commerce ("the Department") published in the Federal Register tentative determinations to revoke in part the finding on television receivers, monochrome and color, from Japan (36 FR 4597, March 10, 1971) as regards Matsushita and Victor (48 FR 37506), and Toshiba (48 FR 44100). On February 11, 1988, the Department published in the Federal Register (53 FR 4050) the final results of its last administrative review of the finding.

The petitioners and respondents requested in accordance with 19 CFR 353.53a(a) that we conduct administrative reviews. We published notices of initiation of the antidumping duty administrative reviews on November 27, 1985 (50 FR 44825), July 9, 1986 (51 FR 24883), November 20, 1987 (52 FR 44621), and March 8, 1988 (53 FR 7383). As required by section 751 of the Tariff Act of 1930 ("the Tariff Act"), the Department has now conducted these administrative reviews. NEC Corporation ("NEC") failed to respond to our sales questionnaire for the ninth review period. Therefore, we used NEC's most recent rate as the best information available.

We verified in Japan and in the U.S. questionnaire responses, submitted by Matsushita Electric Industrial Company, Ltd. ("Matsushita"), and Victor Company of Japan ("Victor"), covering various periods. In accordance with section 776(b) of the Tariff Act we verified the information used in making our preliminary determination. We used standard verification procedures including examination of relevant accounting records and original source documents.

Scope of the Review

Imports covered by the review are shipments of television receiving sets, monochrome and color, from Japan. Television receiving sets include, but are not limited to, units known as projection televisions, receiver monitors, and kits (containing all parts necessary to receive a broadcast television signal and produce a video image). Not included are certain monitors not capable of receiving a broadcast signal, certain combination units (combination television receivers with other electrical entertainment components such as tape recorders, radio receivers, etc.), and certain subassemblies not containing the components essential for receiving a broadcast television signal and producing a video image.

This review covers five manufacturers/exporters of Japanese television receivers, monochrome and color, and various periods from April 1, 1981 through February 29, 1988. All reviewed periods are identified in the *Preliminary Results of Review.*

United States Price

In calculating United States price the Department used purchase price or exporter's sales price ("ESP"), both as defined in section 772 of the Tariff Act, as appropriate. Purchase price and ESP were based on the packed f.o.b., c.i.f., or delivered price to unrelated purchasers in the United States. We made adjustments, as applicable, for ocean freight, marine insurance, U.S. and Japanese inland freight, inland freight insurance, U.S. and Japanese brokerage

fees, Japanese customs clearance fees, wharfage, export license fees, forwarding and handling charges, export selling expenses incurred in Japan, discounts, royalties, rebates, commissions to unrelated parties, and the U.S. subsidiaries' selling expenses. For Matsushita for periods three and four, we used best information available to calculate indirect selling expenses for ESP sales. We accounted for taxes imposed in Japan, but rebated or not collected by reason of the exportation of the merchandise to the United States, by multiplying the ex-factory price of the televisions sold in the United States by the tax rate and adding the result to the U.S. price.

Foreign Market Value

In calculating foreign market value ("FMV") the Department used home market price, as defined in section 773 of the Tariff Act, when sufficient quantities of such or similar merchandise were sold in the home market to provide a basis for comparison. When the quantities of such or similar merchandise sold in the home market were insufficient to provide a basis for comparison, we used constructed value, as defined in section 773 of the Tariff Act. A petitioner, Zenith, alleged sales below cost in the home market by Fujitsu General, Matsushita, and Victor during the eighth review.

For Matsushita's sales during the eighth review, when we found more than 10 percent, but less than 90 percent, of the sales of a comparison model were below the cost of production, we excluded those sales and used the remaining sales to calculate FMV. For the fifth and eighth reviews, we used constructed value when there were no sales of such or similar home market models.

For Victor's sales during the eighth review, we used constructed value when all sales of a comparison model were below the cost of production and when there were no sales of such or similar home market models. When we found more than 10 percent, but less than 90 percent, of the sales of a comparison model were below the cost of production, we excluded those sales and used the remaining sales to calculate FMV.

We calculated constructed value as the sum of material and fabrication costs, general expenses, profit, and the cost of packing. Since Matsushita's and Victor's actual general expenses were greater than the statutory minimum of 10 percent of the sum of materials and fabrication costs, we used their actual general expenses. Since actual profits for these two firms were less than eight percent of the sum of material costs, fabrication costs, and general expenses, we used the eight percent statutory minimum, as provided by section 773 of the Tariff Act.

For all firms except Toshiba Corporation ("Toshiba"), home market price was based on the packed, ex-factory or delivered price to unrelated purchasers in the home market. For Thoshiba we used the price to both related and unrelated purchasers in the home market because we are satisfied that they were of an arms-length nature. As applicable, we made adjustments for inland freight, insurance, rebates, discounts, and for differences in credit expenses, warranties, advertising, sales promotion, royalties, physical characteristics of the merchandise, and packing. We made further adjustments, as applicable, for indirect selling expenses to offset U.S. commissions to unrelated parties and U.S. selling expenses for ESP calculations. Finally, we made circumstances-of-sale adjustments for commodity tax differences, where appropriate.

For Matsushita, for periods three and four, we did not deduct a discount and a rebate granted to related credit companies because we consider such transactions between related parties as intracorporate transfers of funds rather than selling expenses. We disallowed the following claimed adjustments as differences in circumstances of sales because they were not directly related to reviewed sales: "dealer help activity," "sales training," "marketing information, etc.," "assistance to Matsushita Dealer's Association members," and indirect warranty, service, and repair costs. However, we allowed them as indirectly-related selling expenses. Further, we did not have quantities sold either in the home market or in the U.S. Thus, we have provided simple averages for these periods for Matsushita.

For Matsushita and Victor, for periods five and eight, we did not consider their technical service fees as directly-related selling expenses because neither firm was able to show what portions of these expenses were directly related to sales; rather, we consider these expenses to be indirect selling expenses.

For periods five and eight we considered Victor's related service companies' warranty labor expenses as indirectly-related selling expenses because these firms are related. We disallow those portions of Victor's claimed discounts, advertising, and sales promotion expenses that we could not verify.

No other adjustments were claimed or allowed.

Preliminary Results of Review

As a result of our review, we preliminarily determine that the following margins exist:

Manufacturer	Review No.	Period of review	Margin (percent)
Funai Electric	9	03/01/87 to 02/29/88.	[1] 21.93
Matsushita	3	04/01/81 to 03/31/82.	0.03
Do	4	04/01/82 to 03/31/83.	2.94
Do	5	04/01/83 to 08/18/83.	4.73
Do	8	03/01/86 to 02/28/87.	27.92
NEC	9	03/01/87 to 02/29/88.	16.32
Toshiba	4	04/01/82 to 03/31/83.	0.00
Victor	3	04/01/81 to 03/31/82.	0.00
Do	4	04/01/82 to 03/31/83.	0.00
Do	5	04/01/83 to 08/18/83.	0.40
Do	8	03/01/86 to 02/28/87.	16.21

[1] No shipments during the period; rate from last review in which there were shipments.

Interested parties may request disclosure and/or an administrative protective order within 5 days of the date of publication of this notice and may request a hearing within 8 days of publication. Any hearing, if requested, will be held on January 27, 1989. Pre-hearing briefs and/or written comments from interested parties may be submitted not later than January 13, 1989. Rebuttal briefs and rebuttal comments, limited to issues raised in those comments, may be filed not later than January 20, 1989. The Department will publish the final results of this administrative review including the results of its analysis of issues raised in any such written comments or at a hearing.

We preliminarily find margins for Matsushita and Victor in this review. If we continue to find more than de minimis margins for these two firms in the final results of this review, we will not consider them further for revocation.

The Department will determine, and the Customs Service will assess, antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentages stated above. The Department will issue appraisement instructions on each exporter directly to the Customs Service.

Further, as provided for by § 353.48(b) of the Commerce Regulations, a cash deposit of estimated antidumping duties based on the most recent of the above margins will be required for the above

firms. For any shipments of this merchandise manufactured by Fujitsu General Ltd. (Fjuitsu General), Mitsubishi Electric Corporation (Mitsubishi), Hitachi Ltd. (Hitachi), Sanyo Electric Company, Ltd. (Sanyo), or Sharp Corporation (Sharp), the cash deposit will continue to be at the rates published in the final results of the last administrative review for these firms (Fujitsu General and Mitsubishi, 53 FR 4050, February 11, 1988; Hitachi and Sanyo, 52 FR 8940, March 20, 1987; Sharp, 50 FR 24278, June 10, 1985).

For any future entries of this merchandise from a new exporter, not covered in this or prior reviews, the first shipments of which occurred after February 29, 1987 and which is unrelated to any reviewed firm or any previously reviewed firms, a cash deposit of 27.92 percent shall be required. These deposit requirements are effective for all shipments of Japanese television receivers, monochrome or color, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.53a.

Date: December 21, 1988.

Jan W. Mares,

Assistant Secretary for Import Administration.

[FR Doc. 88-30122 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M

[C-201-015]

Unprocessed Float Glass from Mexico; Preliminary Results of Countervailing Duty Administrative Review and Tentative Determination To Terminate Suspension Agreement

AGENCY: International Trade Administration, Import Administration, Department of Commerce.

ACTION: Notice of preliminary results of countervailing duty administrative review and tentative determination to terminate suspension agreement.

SUMMARY: The Department of Commerce has conducted an administrative review of the agreement suspending the countervailing duty investigation on unprocessed float glass from Mexico. We preliminarily determine that the signatories to the suspension agreement have complied with the terms of the suspension agreement during the period January 1, 1986 through December 31, 1986. We also tentatively determine to terminate the suspension agreement. We invite interested parties to comment on these preliminary results.

EFFECTIVE DATE: December 30, 1988.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore or Paul McGarr, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2786.

SUPPLEMENTARY INFORMATION:

Background

On December 10, 1986, the Department of Commerce ("the Department") published in the Federal Register (51 FR 44503) the final results of its last administrative review of the suspension agreement on unprocessed float glass from Mexico (49 FR 7267; February 28, 1984). On February 27, 1987, the Government of Mexico requested an administrative review in accordance with § 355.10 of the Commerce Regulations and also requested termination of the suspension agreement in accordance with § 355.42. We published the initiation on March 19, 1987 (52 FR 8636). The Department has now conducted that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of Review

The United States has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. On January 1, 1989, the U.S. tariff schedules will be fully converted to the *Harmonized Tariff Schedule* (HTS). All merchandise entered, or withdrawn from warehouse, for consumption on or after this date will be classified solely according to the appropriate HTS item number(s). Until that time, however, the Department will be providing both the appropriate *Tariff Schedules of the United States Annotated* ("TSUSA") item number(s) and the appropriate HTS item number(s) with our product descriptions. As with the TSUSA, the HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

We are requesting petitioners to include the appropriate HTS item numbers(s) as well as the TSUSA item number(s) in all new petitions filed with the Department. A reference copy of the HTS schedule is available for consultation at the Central Records Unit, Room B-099, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Additionally, all Customs offices have reference copies, and petitioners may contact the Import Specialist at their local Customs office to consult the schedule.

Imports covered by this review are shipments of Mexican unprocessed float glass, a type of flat glass produced by floating molten glass over a bed of molten tin. Such merchandise is currently classifiable under TSUSA item numbers 543.2100 through 543.6900. These products are currently classifiable under HTS item numbers 7005.29.05, 7005.29.15, 7005.29.25 and 7005.10.00. We invite interested parties to comment on these HTS classifications.

The review covers the period January 1, 1986 through December 31, 1986 and ten programs. The review covers two exporters, Vitro Flotado, S.A. (Vitro Flotado) and Vidrio Plano de Mexico, S.A. (Vidrio Plano) ("the signatories").

Analysis of Programs

(1) FOMEX

The Fund for the Promotion of Exports of Mexican Manufactured Products ("FOMEX") is a trust of the Mexican Treasury Department, with the National Bank of Foreign Trade acting as trustee for the program. The National Bank of Foreign Trade, through financial institutions, makes FOMEX loans available at preferential rates to manufacturers and exporters for two purposes: pre-export financing and export financing. We consider both pre-export and export FOMEX loans to be export bounties or grants since these loans are given only on merchandise destined for export.

Neither Vitro Flotado nor Vidrio Plano received benefits from FOMEX loans based on exports to the United States. Therefore, we preliminarily determine that the signatories did not benefit from this program during the period of review.

(2) CEPROFI

Certificates of Fiscal Promotion ("CEPROFI") are tax certificates used to promote the goals of the National Development Plan ("NDP"). CEPROFI's are granted in conjunction with investments in designated industrial activities or geographic regions and can be used to pay a variety of federal tax liabilities.

The signatories did not receive or use CEPROFI's nor did they benefit indirectly by the transfer to other firms in the Vitro group of CEPROFI benefits earned on their exports of float glass during the period of review. Therefore, we preliminarily determine that the signatories received no benefits from this program.

(3) FICORCA

On December 20, 1982, the Government of Mexico and the Banco de Mexico established the Trust Fund for Coverage of Risks ("FICORCA"), which operates through credit institutions. All Mexican firms with registered long-term debt in foreign currency and payable abroad to foreign financial institutions or suppliers were able to purchase, at a controlled rate, the amount in dollars necessary to pay the principal on that debt.

In the final determination (49 FR 23097; June 14, 1984), we determined that the FICORCA program was available to all Mexican firms with foreign indebtedness and that it was not targeted to a specific industry or region, and that it was not tied to exports. Therefore, we determined that it was not countervailable.

The petitioner, PPG Industries, Inc. ("PPG"), requested that the Department reevaluate FICORCA in light of new information and/or changes to existing regulations. PPG asserts that: (1) Capitalization of unpaid interest on FICORCA debt provides a benefit equalling the difference between what the float glass companies would have paid in the commercial sector and the amounts they actually paid; (2) special permission from the Mexican government is required to enroll nonbank debt, such as commercial paper, in FICORCA; (3) the Mexican government allowed companies in the Vitrol group to provisionally enroll unrescheduled debt in the program; (4) companies in the Vitro group converted a portion of the FICORCA debt into floating rate notes to avoid the 15 percent withholding tax levied on interest payments; and (5) Mexican firms with foreign debt enrolled in FICORCA could capitalize this debt and benefit from the sale of their FICORCA contracts.

All FICORCA contracts are structured so that regular, minimum interest payments are required. In the early stages of the loan, the minimum payment is less than the interest payment due. The remaining unpaid interest is capitalized and added to the outstanding principal. As a result, the debt increases and subsequent interest payments are computed based on a larger balance. In the latter stages of repayment, the firm is faced with a balloon payment and higher interest amounts. We find no benefit with this method of payment because the firm is not relieved of any debt obligations. The capitalization of interest is no different from what would happen on a commercial loan.

According to the terms of the FICORCA regulations, there is no special permission required to enroll nonbank debt. Mexican firms with foreign debt payable to banks, finance companies or suppliers, were eligible to participate in the FICORCA program.

When the period for registering debt into FICORCA closed, some companies had not yet concluded their FICORCA negotiations. The creditors issued a "provisional" notice that the debt was in a rescheduling process, which many firms referred to as provisional enrollment in FICORCA. The Vitro group reported long-term foreign debt "provisionally" enrolled in FICORCA in notes to its 1984 financial statements. This merely meant that, until the creditors submitted a written statement to FICORCA advising that the debt had been rescheduled, FICORCA contracts would not be issued to the company or group. As stipulated in the FICORCA regulations, foreign debt had to be rescheduled prior to enrollment in the FICORCA program.

On fixed-interest rate notes, the Mexican government taxes the interest income of the Foreign bank at the rate of 15 percent, so that 15 percent of the company's interest payment goes to the Government of Mexico and 85 percent goes to the foreign banks. Floating rate notes are exempt from the 15 percent tax on interest income, and all of the interest paid on floating rate notes goes to the foreign bank. In either case, the Mexican firms continue to pay the full amount of the interest. Therefore, we preliminarily determine that there is no benefit to Mexican firms in the conversion of FICORCA debt into floating rate notes.

FICORCA contracts are negotiable instruments. As such, FICORCA does not participate in the transfer or sale of such contracts and only requires that the new firm have foreign debt registered with the Secretaria de Hacienda y Credito Publico. Approval from the foreign creditor must also be obtained. When a FICORCA contract is sold, a new contract is not issued to the new firm, and the terms and conditions on the original contract remain in force.

The information PPG presented on new programs or changes to existing programs contains various features of the FICORCA program that are part of the original regulations. We believe that this information does not change the Department's understanding of the operation of the program or the reasoning that led to our decision in the final determination., Therefore, we preliminarily reaffirm our prior determination that FICORCA is not countervailable.

(4) Lease of Government Land

PPG contends that Vidrio Plano is leasing land at an artificially low fee from the Government of Mexico. This contention is based on a disclosure in the notes to the 1984 financial statements. PPG infers from this information that the low fee charged by the government for land occupied by the company was a bounty or grant.

Vidrio Plano has leased a small strip of land from the Ministry of Property and Industrial Development since March 1, 1965. The "leased" land is actually an easement (right of passageway) obtained by Vidrio Plano in order to gain access to the company's property from a public road. The easement is a fee paid in exchange for the right to use government land. There is no "commercial" benchmark to use as a point of comparision to determine preferentiality, and there is no flat rate charged by the government for easements. Each one depends on the size of the piece of land and the purpose of the easement. We consider the levy of an easement fee to be a normal government function that is in no way connected to the promotion of exports or the development of specific enterprises or industries. Therefore, we preliminarily determine that Vidrio Plano received no benefit from this program.

(5) Other Programs

We also examined the following programs and preliminarily determine that the signatories did not use them during the period of review:

(A) Import duty reductions and exemptions;

(B) NDP preferential discounts;

(C) Delay of payment to PEMEX of fuel charges;

(D) Preferential state investment incentives;

(E) State tax incentives;

(F) CEDI tax certificates; and

(G) Debt/Equity swaps.

Preliminary Results of Review and Tentative Determination To Terminate Suspension Agreement

As a result of our review, we preliminarily determine that Vitro Flotado and Vidrio Plano have compiled with the terms of the suspension agreement for the period January 1, 1986 through December 31, 1986.

The signatories have requested that the Department terminate the suspension agreement based on the absence of a bounty or grant for at least

two years, as provided in 19 CFR 355.42(b). Furthermore, in accordance with 19 CFR 355.42(e), the signatories have agreed in writing to an immediate suspension of liquidation and continuation of the investigation if circumstances develop which indicate that the merchandise thereafter imported into the United States is benefiting from a bounty or grant on its manufacture, production or exportation. Because the signatories have complied with the terms and conditions of the suspension agreement for at least a two-year period, we tentatively determine to terminate the suspension agreement. The termination will not become final until the completion of an administrative review establishing that no bounty or grant was received during the period January 1, 1987 through the date of publication of this notice.

Interested parties may submit written comments on these preliminary results and tentative determination to terminate within 30 days of the date of publication of this notice and may request disclosure and/or a hearing within 10 days of the date of publication. Any hearing, if requested, will be held 30 days from the date of publication, or the first workday afterwards. Any request for an administrative protective order must be made no later than five days after the date of publication. The Department will publish the final results of its analysis of issues raised in any such written comments or at a hearing.

This administrative review, tentative determination to terminate and notice are in accordance with sections 751 (a)(1) and (c) of the Tariff Act (19 U.S.C. 1675 (a)(1) and (c)) and 19 CFR 355.10 and 355.42.

Date: December 22, 1988.

Jan W. Mares,

Assistant Secretary for Import Administration.

[FR Doc. 88-30123 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M

Enforcement of Export Limits for Certain Machine Tools Produced in Japan or in the Territory Represented by the Coordination Council for North American Affairs, and Destined for Consumption in the United States Between January 1, 1987, and December 31, 1991

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: On October 14, 1988, the Secretary of Commerce requested the Secretary of the Treasury to enforce agreements concerning trade in certain machine tools. It is the Department of Commerce's intent under paragraph two of the letter cited below that the Customs Service use all authority under Customs laws and regulations, including the seizure and forfeiture of merchandise, to enforce the provisions of the agreements, including the export licensing requirements for covered machine tool products entered, or withdrawn from warehouse, for consumption in the United States in violation of laws enforced by Customs.

SUMMARY: Supplemental instructions to Commissioner of Customs on enforcement of the Arrangement Between the Government of Japan and the Government of the United States of America Concerning Trade in Certain Machine Tools, and the Arrangement Between the Coordination Council for North American Affairs and the American Institute in Taiwan Concerning Trade in Certain Machine Tools.

EFFECTIVE DATE: January 1, 1989.

Authority: Section 1501(c) of the Omnibus Trade and Competitiveness Act of 1988.

FOR FURTHER INFORMATION CONTACT: Nicholas C. Tolerico, Director, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, Room 7866, 14th Street and Constitution Avenue, NW., Washington, DC 20230 (202) 377-3793.

October 14, 1988

Honorable Nicholas F. Brady,

Secretary of the Treasury, Washington, DC 20220.

Dear Mr. Secretary: Pursuant to an Arrangement between Japan and the United States, dated December 16, 1986, and an Arrangement between the Coordination Council for North American Affairs (CCNAA) and the American Institute in Taiwan, dated December 15, 1986, concerning trade in certain machine tools, the parties have agreed to establish a system of export licensing with respect to machine tool products specified under these Arrangements, which are exported to or destined for consumption in the United States between January 1, 1987, and December 31, 1991.

Accordingly, under section 1501(c) of the Omnibus Trade and Competitiveness Act of 1988, I request that effective immediately, you monitor and enforce the measures provided for under these Arrangements, by requiring the presentation of valid export certificates or licenses issued by the appropriate authorities of Japan or the territory represented by CCNAA, when required under the Arrangements, as a condition of entry into the United States of machine tool products specified by the Arrangements.

If you would like more information concerning this matter, please call the Assistant Secretary for Import Administration, Jan W. Mares, at 377-1780.

Sincerely,

C. William Verity,

Secretary of Commerce.

December 22, 1988.

Jan W. Mares,

Assistant Secretary for Import Administration.

[FR Doc. 88-30121 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M

Minority Business Development Agency

American Indian Business Consultants Applications; Continental U.S.

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: The Minority Business Development Agency (MBDA) announces that it is soliciting competitive applications under the American Indian Business Consultant (AIBC) component of its American Indian Program (AIP) to operate an AIBC for a 3-year period, subject to available funds. The cost of performance for the first 12 months is estimated at $200,000 for the budget period May 1, 1989 to April 30, 1990. The AIBC will operate in the Continental U.S.

The funding instrument for the AIBC will be a cooperative agreement and competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The AIBC component of the AIP is designed to provide specialized consultant services to minority business community in general and, in particular, to American Indian clients who are interested in becoming owners of businesses, or are owners of business firms, and are located in the Continental U.S. To this end, MBDA funds AIBC projects under its AIP that can coordinate and broker public and private resources on behalf of American Indian and other minority individuals and firms; offer a full range of specialized consultant services; and serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated on the following criteria: the experience and capabilities of the firm and its staff in addressing the needs of the minority business community in general and, specifically, the special needs of American Indian businesses, individuals and organizations (50 points); the resources available to the firm in providing management and technical

assistance (10 points); the firm's approach to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to each evaluation criteria category to be considered programmatically acceptable and responsive.

The AIBC may continue to operate, after the initial competitive year, for up to 2 additional budget periods. Periodic reviews culminating in year-to-date quantitative and qualitative evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an AIBC's satisfactory performance, the availability of funds and Agency priorities.

Closing Date: The closing date for applications is January 31, 1989. Applications must be postmarked on or before January 31, 1989.

ADDRESS: Chief, Business Development Division, Minority Business Development Agency, Dept. of Commerce, Rm. 5099–C, Washington, DC 20230, Area Code/Telephone Number: 202/377–2366.

FOR FURTHER INFORMATION CONTACT: Luis G. Encinias at the above address.

SUPPLEMENTARY INFORMATION: Anticipated processing time of this award is 120 days. Executive Order 12372 "Intergovernmental Review of Federal Programs" is not applicable to this program. Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

11.801 Minority Business Development (Catalog of Federal Domestic Assistance)

Date: December 15, 1988.

Luis G. Encinias,

Chief, Business Development Division.

[FR Doc. 88–30142 Filed 12–29–88; 8:45 am]

BILLING CODE 3510-21-M

Business Development Center Applications: Ponce, Puerto Rico

AGENCY: Minority Business Development Agency Commerce.

ACTION: Notice.

SUMMARY: The Minority Business Development Agency (MBDA) announces that it is soliciting competitive applications under its Minority Business Development Center (MBDC) program to operate an MBDC for approximately a 3 year period, subject to the availability of funds. The cost of performance for the first 12 months is estimated at $184,260 in Federal funds and a minimum of $32,516 in non-Federal contributions for the budget period June 1, 1989 to May 31, 1990. Cost-sharing contributions may be in the form of cash contributions, client fees for services, in-kind contributions, or combinations thereof. The MBDC will operate in the Ponce, Puerto Rico SMSA geographic service area.

The funding instrument for the MBDC will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The MBDC program is designed to provide business development services to the minoirty business community for the establishment and operation of viable minority businesses. To this end, MBDA funds organizations that can coordinate and broker public and private resources on behalf of minority individuals and firms; offer a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated on the following criteria: the experience and capabilities of the firm and its staff in addressing the need of the business community in general and, specifically, the special needs of minority business, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodology) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to any one evaluation criteria category to be considered programmatically acceptable and responsive.

MBDCs shall be required to contribute at least 15% of the total project cost through non-Federal contributions. Client fees for billable management and technical assistance (M&TA) rendered must be charged by MBDCs. Based on a standard rate of $50 per hour, MBDCs will charge client fees at 20% of the total cost for firms with gross sales of $500,000 or less and 35% of the total cost for firms with gross sales of over $500,000.

The MBDC may continue to operate, after the initial competitive year, for up to 2 additional budget periods. Periodic reviews culminating in year-to-date quantitative and qualitative evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an MBDC's satisfactory performance, the availability of funds and Agency priorites.

CLOSING DATE: The closing date for applications is February 13, 1989. Applications must be postmarked on or before February 13, 1989.

ADDRESS: New York Regional Office, Minoirty Business Development Agency, Jacob K. Javits Federal Building, Room 3720, New York, New York 10278, Area Code/Telephone Number (212) 264–3262.

FOR FURTHER INFORMATION CONTACT: Gina A. Sanchez, Regional Director, New York Regional Office. (212) 264–3262.

SUPPLEMENTARY INFORMATION: Anticipated processing time of this award is 120 days. Executive Order 12372 "Intergovernmental Review of Federal Programs" is not applicable to this program. Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

11.800 Minority Business Development. (Catalog of Federal Domestic Assistance)

William R. Fuller,

Deputy Regional Director, New York Regional Office.

Date: December 20, 1988.

[FR Doc. 88–30038 Filed 12–29–88; 8:45 am]

BILLING CODE 3510-21-M

National Institute of Standards and Technology

National Voluntary Laboratory Accreditation Program; Public Workshop

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice of public workshop.

The National Institute of Standards and Technology (NIST) will host a public workshop on March 28, 1989 to provide interested parties an opportunity to participate in the development of technical requirements for accrediting laboratories that perform airborne asbestos analysis.

DATES: The workshop will be held from 9:00 a.m. to 5:00 p.m. on March 28, 1989. Persons planning to attend the workshop should inform Harvey Berger, NVLAP, National Institute of Standards and Technology, Admin. A527, Gaithersburg, MD 20899 by February 28, 1989, in order to obtain draft technical

documents to be reviewed at the workshop.

Place: The workshop will be held at the Inn at the Park in Anaheim, GA in conjunction with the National Asbestos Council's 6th Annual Asbestos Abatement Conference and Exposition to be held March 29–31, 1989 in Anaheim.

SUPPLEMENTARY INFORMATION:

Background

This notice is issued in accordance with the NVLAP Procedures (15 CFR Part 7). In a **Federal Register** Notice dated October 26, 1987 [52 CFR 39977–39978] the National Institute of Standards and Technology (formerly the National Bureau of Standards (NBS)) announced the establishment of an accreditation program for laboratories that perform analyses for asbestos content in (1) bulk insulation and building material collected during public school inspections, and (2) airborne particulates collected following asbestos abatement projects.

Establishment of the program is pursuant to section 206d of Pub. L. 99–519, the Asbestos Hazard Emergency Response Act (AHERA) of October 1986. Accreditation will be offered to all laboratories under procedures of the National Voluntary Laboratory Accreditation Program (NVLAP).

Technical criteria, requirements, and procedures for accreditation of laboratories performing analysis of airborne asbestos content by Transmission Electronic Microscopy (TEM) are being developed and will be presented at the workshop. All interested parties will have an opportunity to comment on all phases of the program. The workshop is part of the NVLAP process of assuring that accreditation programs are of high technical quality and are relevant to the needs of those affected by accreditation.

1. *Purpose:* The workshop will provide all interested person with an opportunity to: (1) Participate in the development of technical criteria, requirements, and procedures for evaluation and accreditation of laboratories that perform analysis of airborne asbestos by Transmission Electronic Microscopy (TEM): and (2) discuss standards and/or other protocols applicable to the accreditation program.

2. *Procedure:* The workshop will be an informal meeting. The presiding NIST chairperson will allocate the time available for discussion of each issue to be addressed, and exercise such authority as may be necessary to insure the equitable and efficient conduct of the workshop and to proceed in an orderly manner.

3. *Provisions:* This workshop will be open to the public. No registration is required for the public workshop; housing is the responsibility of the attendees.

Documents in Public Record

Summary minutes of the meeting will be prepared and made available for inspection and copying in the NVLAP program office, Room A527, Administration Building, Gaithersburg, Maryland.

Raymond G. Kammer,

Acting Director.

Date: December 22, 1988.

[FR Doc. 88–30029 Filed 12–29–88; 8:45 am]

BILLING CODE 3510–13–M

National Oceanic and Atmospheric Administration

Findings Regarding the Issuance of a Notice of Designation for the Proposed Cordell Bank National Marine Sanctuary, CA

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Adminstration (NOAA), Department of Commerce (DOC).

ACTION: Notice.

SUMMARY: The Secretary of Commerce is required to issue a Notice of Designation under section 304(b)(1) of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1431 *et seq.*), as amended, with respect to the proposed Cordell Bank National Marine Sanctuary, as generally described in the **Federal Register** notice of June 30, 1983, not later than December 31, 1988 (Ref. section 202, Pub. L. 100–627). This notice contains findings regarding why the Notice of Designation will not be published by December 31, 1988, in adherence to the intent of section 202, Pub. L. 100–627. A Notice of Designation for the proposed Cordell Bank National Marine Sanctuary will be issued by March 31, 1989.

EFFECTIVE DATE: December 31, 1988.

FOR FURTHER INFORMATION CONTACT: Joseph A. Uravitch, Chief, or Franklin D. Christhilf, Regional Manager, Marine and Estuarine Management Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., Washington, DC 20235 (202) 673–5126.

SUPPLEMENTARY INFORMATION: Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (The Act, 1431 *et seq.*) authorizes the Secretary of Commerce to designate ocean waters as National Marine Sanctuaries for the purpose of preserving or restoring their conservation, recreational, ecological, historical or esthetic values. The purpose of this notice is to comply with section 304(b)(1) of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (16 U.S.C. 1434(b)(1)) with respect to the publication of findings regarding why a Notice of Designation for the proposed Cordell Bank National Marine Sanctuary has not been issued by December 31, 1988.

The waters surrounding Cordell Bank were nominated for status as a National Marine Sanctuary in July 1981. On June 30, 1983, NOAA declared the area an active candidate for further consideration as a National Marine Sanctuary. A public scoping meeting to gather information to determine the range and significance of issues related to Sanctuary designation and management was held on April 25, 1984.

On August 28, 1987, NOAA published proposed regulations for the Sanctuary in the **Federal Register** (52 FR 32563) and at the same time issued a Draft Environmental Impact Statement and Management Plan (DEIS/MP) which described in detail the proposed regulatory regime and alternatives to it. On the same date, in accordance with section 304(a)(1)(C) of the Act (16 U.S.C. 1433(a)(1)(C)), a Designation Prospectus for the proposed Cordell Bank National Marine Sanctuary was sent to the House Merchant Marine and Fisheries Committee and the Senate Commerce, Science and Transportation Committee for review and approval.

Public hearings to receive comments on the proposed designation were held in Bodega, California, on September 29, 1987, and in San Francisco, California, on September 30, 1987. Comments received by NOAA on the DEIS/MP were reviewed and, where appropriate, were incorporated into the Final Environmental Impact Statement and Management Plan (FEIS/MP).

The Amendments to the National Marine Sanctuaries Program (Pub. L. 100–627), which became law on November 7, 1988, require the Secretary of Commerce to issue a Notice of Designation with respect to Cordell Bank National Marine Sanctuary by December 31, 1988. In view of a delay in issuing the notice of Designation, and in adherence with the intent of section 202

of Pub. L. 100–627, this notice issues findings regarding why the Secretary of Commerce will be unable to issue the notice of Designation for Cordell Bank National Marine Sanctuary on or before December 31, 1988. A Notice of Designation for the Cordell Bank National Marine Sanctuary will be issued by March 31, 1989.

Congress pursuant to section 304(b) of the Act then has the opportunity to review the designation and regulations before they take effect. The designation and regulations shall take effect and become final after the close of a review period of forty-five days of continuous session of Congress beginning on the day on which the Sanctuary Designation Document is published unless the designation or any of its terms is disapproved by Congress through enactment of a joint resolution.

Findings

Because of the complexity of the issues in the DEIS/MP, a large number of comments were received which supported diverse views on what should and should not be regulated. More time was required to respond to all of the comments and to determine an appropriate balance with regard to regulations than was anticipated. Further, when the Congressionally mandated deadline of December 31, 1988, for issuing a Designation Document became law on November 7, 1988, there was not sufficient time available to meet the mandatory procedural provisions of both the National Environmental Policy Act and the Marine Protection, Research and Sanctuaries Act by that date. The Secretary of Commerce will issue the Notice of Sanctuary Designation including the final Sanctuary regulations, the final environmental impact statement and management plan by March 31, 1989.

Thomas J. Maginnis,

Assistant Administrator for Ocean Services and Coastal Zone Management.

Date: December 27, 1988.

Federal Domestic Assistance Catalog Number 11.429

National Marine Sanctuary Program

[FR Doc. 88–30101 Filed 12–29–88; 8:45 am]

BILLING CODE 3510–08–M

Marine Mammals: Issuance of Permit; Dr. Randall S. Wells (319B)

On October 19, 1988, notice was published in the **Federal Register** (53 FR 40941) that an application has been filed by Dr. Randall S. Wells, Dolphin Biology Research Associates, c/o Long Marine Laboratory, 100 Shaffer Road, Santa Cruz, California, to capture, sample, mark and release as many as 150 Atlantic bottlenose dolphin (*Tursiops truncatus*) for scientific research.

Notice is hereby given that on December 20, 1988, as authorized by the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361–1407), the National Marine Fisheries Service issued a Permit for the above taking subject to certain conditions set forth therein.

The Permit is available for review by interested persons in the following offices:

Office of Protected Resources, National Marine Fisheries Service, 1335 East-West Highway, Room 7330, Silver Spring, Maryland 20910;

Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Boulevard, St. Petersburg, Florida 33702; and

Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, California 90731–7415.

Date: December 20, 1988.

Nancy Foster,

Director, Office of Protected Resources and Habitat Programs.

[FR Doc. 88–30104 Filed 12–29–88; 8:45 am]

BILLING CODE 3510–22–M

National Telecommunications and Information Administration

[Docket No. 81267–8267]

Study of the Impact of the Restrictions Prohibiting the Bell Companies from Engaging in Research and Development, and Product Design for the Manufacturing of Telecommunications and Related Equipment

AGENCY: National Telecommunications and Information Administration (NTIA), Commerce.

ACTION: Notice of inquiry.

In accordance with House Report 100–979, the National Telecommunications and Information Administration (NTIA) will conduct a study to evaluate the impact on the U.S. telecommunications marketplace, and in particular on the provision of new and innovative information services, resulting from the AT&T consent decree prohibitions on Bell companies' participation in research and development, and product design for the manufacturing of telecommunications and related equipment. NTIA seeks information focusing on these issues.

DATE: Comments in response to this notice must be received by Tuesday, January 31, 1989, in order to receive full consideration.

ADDRESS: Send comments to: Alfred C. Sikes, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration, Room H4898, U.S. Department of Commerce, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Alfred Lee, Acting Associate Administrator, Office of Policy Analysis and Development, National Telecommunications and Information Administration, Room H4725, U.S. Department of Commerce, Washington, DC 20230, (202) 377–1880.

Alfred C. Sikes,

Assistant Secretary of Commerce for Communications and Information.

[FR Doc. 88–30141 Filed 12–29–88; 8:45 am]

BILLING CODE 3510–60–M

CONSUMER PRODUCT SAFETY COMMISSION

Request for Approval of Survey of Consumers Who Own or Operate All-Terrain Vehicles

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35), the Consumer Product Safety Commission has submitted a request to the Office of Management and Budget for approval of a collection of information in the form of a telephone survey of 1,000 consumers who own or operate all terrain vehicles (hereinafter ATVs). ATVs are three- and four-wheeled motorized vehicles intended for off-road use.

The survey will seek current information about the various kinds of ATVs now in use, characteristics of operators, and frequency and patterns of ATV use.

The Commission will use the information obtained from this survey in conjuction with current information about injuries associated with ATVs to determine what factors contribute to injuries from accidents associated with ATVs.

Additional Information About the Proposed Collection of Information

Agency Address: Consumer Product Safety Commission, Washington, DC 20207.

Title of Information Collection: ATV Consumer Exposure Survey.

Type of Request: New collection.

Frequency of Collection: One time.
General Description of Respondents: Consumers who own or use ATVs.
Estimated Number of Respondents: 1,000.
Number of Responses per Respondent: 1.
Estimated Average Number of Hours per Response: 0.33.
Estimated Number of Hours for All Respondents: 333.
Comments: Comments about this request for approval of a collection of information should be addressed to Pamela Barr, Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503; telephone (202) 395-7340. Copies of the request for approval of a collection of information are available from Francine Schacter, Office of Planning and Evaluation, Consumer Product Safety Commission, Washington, DC 20207; telephone: (301) 492-6416.

This is not a proposal to which 44 U.S.C. 3504(h) is applicable.

Dated: December 27, 1988.

Sheldon D. Butts,

Deputy Secretary, Consumer Product Safety Commission.

[FR Doc. 30138 Filed 12-29-88; 8:45 am]

BILLING CODE 6355-01-M

DEPARTMENT OF EDUCATION

[CFDA No.: 84.003J]

Notice Inviting Applications for New Awards under the Bilingual Education; Family English Literacy Program for Fiscal Year 1989

Purpose: Provides grants to local educational agencies, institutions of higher education, including junior or community colleges, and private nonprofit organizations. Eligible applicants may apply separately or jointly. The purpose of the awards is to establish, operate, and improve family English literacy programs.
Deadline for Transmittal of Applications: February 24, 1989.
Deadline for Intergovernmental Review Comments: April 24, 1989.
Applications Available: January 9, 1989.
Available Funds: $2,000,000.
Estimated Range of Awards: $100,000-$150,000.
Estimated Average Size of Awards: $125,000.
Estimated Number of Awards: 16.
Project Period: 36 months.
Applicable Regulations: (a) The Bilingual Education: Family English Literacy Program Regulations, (34 CFR Part 525), and (b) the Education Department General Administrative Regulations, (34 CFR Parts 74, 75, 77, and 79, and 80).

Additional Factors: In accordance with 34 CFR 525.32(b) the Secretary—in evaluating applications under the published criteria—distributes an additional 15 points among the factors listed in § 525.32(a) as follows: (1) Historically underserved (4 points); (2) Geographic distribution (4 points); (3) Need (4 points); (4) Relative number and proportion of children from low-income families (3 points).

For Applications or Information Contact: Office of Bilingual Education and Minority Languages Affairs, U.S. Department of Education, 400 Maryland Avenue, SW. (Room 5628, Mary E. Switzer Building), Washington, DC 20202-6642. Telephone (202) 732-5722.

Program Authority: 20 U.S.C. 3231(a)(5).

Dated: December 23, 1988.

Alicia Coro,

Acting Director, Office of Bilingual Education and Minority Languages Affairs.

[FR Doc. 88-30140 Filed 12-29-88; 8:45 am]

BILLING Code 4000-01-M

Intergovernmental Advisory Council on Education; Meeting

AGENCY: Intergovernmental Advisory Council on Education, Education.

ACTION: Notice of meetings.

SUMMARY: This notice sets forth the schedule and proposed agenda of forthcoming meetings of the Intergovernmental Advisory Council on Education and its Executive Committee. This notice also describes the functions of the Council. Notice of these meetings is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend.

DATES: January 18-19, 1989.

ADDRESS: Bethesda Holiday Inn, Gallery Room, 8120 Wisconsin Avenue, Bethesda, Maryland 20814.

FOR FURTHER INFORMATION CONTACT: Gwen A. Anderson, Executive Director, Intergovernmental Advisory Council on Education, Room 3036, 400 Maryland Avenue, SW., Washington, DC 20202-7576, 202-732-3844.

SUPPLEMENTARY INFORMATION: The Intergovernmental Advisory Council on Education was established under section 213 of the Department of Education Organization Act (20 U.S.C. 3423). The Council was established to provide assistance and make recommendations to the Secretary and the President concerning intergovernmental policies and relations pertaining to education.

On January 18, the Executive Committee of the Intergovernmental Advisory Council on Education will meet from 9:30 a.m. to 2:00 p.m. (hours are tentative). Interested parties may call the information contact on January 17 for the exact hours. The meeting is open to the public. The proposed agenda of the meeting includes discussion of the status of dissemination of the Absent Parent Report, a budget review, and planning for the 1989 conference.

On January 19, the full Council will meet from 9:30 a.m. to 2:30 p.m. The meeting is open to the public. The proposed agenda of the meeting includes the introduction of new Council members, a review of the history of the Council and Council conferences, and a status report on and planning for the 1989 conference on business/education partnerships in Texas.

Records are kept of all Council proceedings, and are available for public inspection at the Office of the Intergovernmental Advisory Council on Education, 400 Maryland Avenue, SW., Room 3036, Washington, DC, 20202-7576, from the hours of 9:00 a.m. to 5:00 p.m.

Dated: December 16, 1988.

Michelle Easton,

Deputy Under Secretary for Intergovernmental and Interagency Affairs.

[FR Doc. 88-30136 Filed 12-29-88; 8:45 am]

BILLING CODE 4000-01-M

National Advisory Council on Indian Education; Meeting

AGENCY: National Advisory Council on Indian Education, Education.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Advisory Council on Indian Education. This notice also describes the functions of the Council. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of opportunity to attend.

DATE: January 17-19, 1989, 9:00 a.m. until conclusion of business each day.

ADDRESS: Holiday Inn Bethesda, 8120 Wisconsin Avenue, Bethesda, Maryland 20814 (301)652-2000.

FOR FURTHER INFORMATION CONTACT: Jo Jo Hunt, Executive Director, National Advisory Council on Indian Education, 330 C Street, SW., Room 4072, Switzer

Building, Washington, DC 20202–7556 (202/732–1353).

SUPPLEMENTARY INFORMATION: The National Advisory Council on Indian Education is established under section 5342 of the Indian Education Act of 1988 (25 U.S.C. 2642). The Council is established to, among other things, assist the Secretary of Education in carrying out responsibilities under the Indian Education Act of 1988 (Title V, Part C of Pub. L. 100–297) and to advise Congress and the Secretary of Education with regard to federal education programs benefiting Indian children and adults.

On January 17, 1989, beginning at approximately 9 a.m., the full Council will meet in open discussion with Indian educators, representatives of Indian tribes and organizations, and others interested in the education of Indian children and adults to identify issues and problems, determine the best solutions, and develop action plans to address these concerns. This session will end at approximately 12 noon.

On January 17, 1989, beginning at approximately 1:30 p.m., the full Council will meet in open session for a general business session, including reports of the Chairman and Executive Director, action on previous minutes, approval of the FY'88 annual report, discussion of the new Council charter, and other business.

On January 18, 1989, beginning at approximately 9 a.m., the full Council will meet to hear reports from the Acting Director of the Office of Indian Education of the Department of Education, the Director of the Indian Health Service Scholarship Program, the Director of the Office of Education of the Bureau of Indian Affairs, and others. This session will end at approximately 12 noon.

On January 18, 1989, beginning at approximately 1:30 p.m., the full Council will meet for discussion and to make committee assignments. The Council standing committees will then meet until conclusion of business and will meet from 9 a.m. until 10:30 a.m. on January 19, 1989.

On January 19, 1989, the full Council will meet beginning at 10:30 a.m. until the conclusion of business to plan Council activities for the remainder of FY'89 and to discuss other Council business.

Records shall be kept of all Council proceedings and shall be available for public inspection at the Office of the National Advisory Council on Indian Education located at 330 C Street, SW., Room 4072, Washington, DC 20202–7556.

Date: December 27, 1988.

Signed at Washington, DC.

Jo Jo Hunt,

Executive Director, National Advisory Council on Indian Education.

[FR Doc. 88–30155 Filed 12–29–88; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Intent To Prepare an Environmental Impact Statement for Completion of West Valley Demonstration Project Activities and Closure of the Western New York Nuclear Service Center

AGENCY: U.S. Department of Energy.

ACTION: Notice of intent to prepare an Environmental Impact Statement.

SUMMARY: Notice is hereby given that the United States Department of Energy (DOE) and the New York State Energy Research and Development Authority (NYSERDA) intend to prepare an Environmental Impact Statement (EIS) in accordance with section 102(2)(C) of the National Environmental Policy Act (NEPA) and Section 8–0109 of the New York State Environmental Quality Review Act (SEQRA). The EIS is to provide environmental information for consideration in Federal and State decision-making related to West Valley Demonstration Project (WVDP or Project) completion activities by DOE and State decision-making on closure of the Western New York Nuclear Service Center (Center) by NYSERDA. DOE is the lead Federal agency for purposes of compliance with NEPA. NYSERDA is the lead State agency for purposes of compliance with SEQRA. If necessary, to effectively and efficiently fulfill their respective mandated obligations, the DOE or NYSERDA may elect at any time to proceed independently.

As mandated by the West Valley Demonstration Project Act (Pub. L. 96–368), DOE, in cooperation with NYSERDA, is currently carrying out the solidification of the estimated 600,000 gallons (2.2 million liters) of liquid high level radioactive waste (HLW) stored at the Center into a form suitable for transportation to a Federal repository. The processing of this HLW is expected to result in approximately 300 solid borosilicate glass logs contained in steel canisters. The decisions to incorporate processed HLW into this terminal waste form and contain it in steel canisters were based on the environmental review in DOE/EIS–0081, "Final Environmental Impact Statement—Long-Term Management of Liquid High Level Radioactive Waste Stored at the Western New York Nuclear Service Center, West Valley", dated June 1982, and a supplemental analysis dated March, 1983.

A large volume of radioactive waste that is not high-level waste will result from WVDP solidification and decontamination and decommissioning activities. Disposal of most of this waste was evaluated in an Environmental Assessment (DOE/EA–0295, April 1986). Consistent with a settlement agreement resolving litigation regarding the on-site disposal of this waste, DOE is temporarily storing it and will review disposal alternatives within the scope of this EIS.

In accordance with the provisions of the West Valley Demonstration Project Act, decontamination and decommissioning of the facilities used by the Project, shipment of the solidified HLW to an appropriate Federal respository for permanent disposal, and disposal of transuranic (TRU) wastes and low-level radioactive wastes (LLW) resulting from the Project represent the remaining major tasks for completion of the Project. It is these Project completion activities together with NYSERDA's repossession of the Premises used by DOE for the WVDP, decontamination and decommissioning of the balance of the Center as a whole, and site closure and/or long-term management that are the subject of the ensuring NEPA and SEQRA process.

The purpose of this notice (being published in both the **Federal Register** and the New York State Environmental Notice Bulletin) is to present pertinent background information on the proposed scope and content of the EIS and to solicit comments and suggestions for consideration in its preparation. Upon completion of a draft EIS (DEIS), its availability will be announced in the **Federal Register** and the New York State Environmental Notice Bulletin, at which time comments from the pubic will again be solicited. Comments received during the DEIS public review period will be used in preparing the final EIS.

Invitation To Comment

To ensure that the full range of issues related to this proposal are addressed, comments on the proposed scope and content of the EIS are invited from all interested parties. Written comments or suggestions to assist DOE and NYSERDA in identifying significant environmental issues and the appropriate scope of the EIS should be postmarked by February 23, 1989. Comments received after that date will be considered to the extent practicable. Agencies, organizations, and the general public are also invited to pr sent oral

comments or suggestions pertinent to preparation of this EIS at the public scoping meeting scheduled as indicated below. A transcript will be prepared. Written and oral comments will be given equal weight in the scoping process. Comments and suggestions received during the scoping period will be considered in preparing the draft EIS. When the DEIS is completed, its availability will be announced in the Federal Register and the New York State Environmental Notice Bulletin and public comments will be solicited. Comments on the DEIS will be considered in preparing the final EIS.

ADDRESSES: Questions concerning the Project completion activities should be directed to: Mr. Charles Ljungberg, West Valley Project Office, U.S. Department of Energy, P.O. Box 191, West Valley, New York 14171–0191, (716) 942–4800.

Questions concerning the Center closure should be directed to: Mr. Richard G. Spaunburgh, Program Manager, New York State Energy Research and Development Authority, P.O. Box 191, West Valley, New York 14171–0191, (716) 942–4800.

Written comments or suggestions on the scope of the EIS, or requests to speak at the scoping meeting, should be directed to either Mr. Ljungberg or Mr. Spaunburgh.

Those persons who wish to receive a copy of the draft EIS shold make their request to either Mr. Ljungberg or Mr. Spaunburgh.

FOR FURTHER INFORMATION CONTACT: Those seeking general information on the NEPA process should contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Project Assistance (EH–25), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–4600.

Those seeking general information on the SEQRA process should contact: Mr. Howard A. Jack, Esq., General Counsel and Secretary, New York State Energy Research and Development Authority, Agency Building No. 2, Empire State Plaza, Albany, New York 12223, (518) 465–6251.

DATES: Written comments and suggestions on the proposed scope of the EIS should be postmarked by February 23, 1989, to assure consideration in the preparation of the EIS. Comments received after that date will be considered to the extent practicable. The scoping meeting will be held at St. Aloysius Church Hall, 190 Franklin Street, Springville, NY on February 9, 1989, at 2:00 p.m. and at 7:00 p.m.

Background Information

The Center consists of a 3,345 acre (1,335 hectare) reservation in rural western New York. The site and the principal facilities on it are the property of the State of New York. The Center is the site of the only commercial nuclear fuel reprocessing facility to have operated in the United States.

In May of 1963, the Atomic Energy Commission (AEC), under authorities now vested in the Nuclear Regulatory Commission (NRC), issued a permit authorizing construction for the reprocessing facility. Construction was completed in early 1966, and on April 19th of that year the AEC issued a license to the newly formed Nuclear Fuel Services, Inc. (NFS), as operator, and the State of New York, as owner, by and through a predecessor of the New York State Energy Research and Development Authority (NYSERDA).

The reprocessing facility operated from 1966 to 1972 when it was shut down for modifications and never resumed operations. During the six year period of operation, approximately 600,000 gallons (2.2 million liters) of HLW (containing roughly 31 million curies) were produced which are now stored in two steel tanks in underground vaults at the facility. (All reported curie levels in this notice represent 1987 levels). In addition, approximately 5,600 cubic yards (4,300 cubic meters) of lower activity solid wastes generated in conjunction with the reprocessing activity were disposed of by shallow land burial in an area currently referred to as the NRC-Licensed Disposal Area (NDA). The NDA is on the Project Premises (see below). The NDA may further be divided into two subareas: One received the above described waste (about 110,000 curies) from the former reprocessing facility through 1981, and the second received plant waste (less than 1,000 curies in radioactivity level, but about 5,200 cubic yards or 4,000 cubic meters in volume) from WVDP activities since the Department of Energy's takeover of site operations until 1986. The NDA has not been used for disposal of waste since 1986. However, the NDA has been expanded to include a cell for storage of drums of cement-stabilized radioactive waste resulting from WVDP activities.

Adjacent to and in the vicinity of the NDA, but not on Project Premises (see below), is an area referred to as the State Licensed Disposal Area (SDA). From 1963 to 1975, NFS operated the SDA as a commercial LLW disposal area. This site was licensed by New York State under authority granted by the Atomic Energy Act of 1954 by the AEC. It has not been used for disposal since 1975 and is currently maintained by NYSERDA. Approximately 87,000 cubic yards (67,000 cubic meters) of radioactive waste have been disposed of by shallow land burial at this commercial facility, with an estimated radioactivity level of 200,000 curies.

On October 1, 1980, the President signed the West Valley Demonstration Project Act (WVDP Act) into law for the purpose of demonstrating solidification techniques which can be used for preparing HLW for disposal. The WVDP Act directs the Secretary of Energy to:

1. * * * solidify, in a form suitable for transportation and disposal, the high level radioactive waste at the Center * * *;
2. * * * develop containers suitable for the permanent disposal of the high level radioactive waste solidified at the Center;
3. * * * as soon as feasible, transport, in accordance with applicable provisions of law, the waste solidified at the Center to an appropriate federal repository for permanent disposal;
4. * * * dispose of the low level radioactive waste and transuranic waste produced by solidification of the high level radioactive wastes under the project; and
5. * * * decontaminate and decommission—(A) the tanks and other facilities of the Center in which the high level radioactive waste solidified under the project was stored, (b) the facilities used in the solidification of the wastes, and (C) any material and hardware used in connection with the project, in accordance with such requirements as the Commission (NRC) may prescribe.

Pursuant to the WVDP Act, DOE and NYSERDA entered into a Cooperative Agreement effective October 1, 1980, that specifies the responsibilities and conditions agreed upon by each for the purpose of carrying out the WVDP. Under the agreement, NYSERDA has made available, without transfer of title, an approximately 200 acre (80 hectare) portion of the Center known as the "Project Premises," which includes the high level waste located at the Center. The Project Premises consist primarily of the complex of facilities constructed and operated by NFS to reprocess spent nuclear fuel. This complex included a chemical reprocessing plant, a spent nuclear fuel receiving and storage area, liquid HLW storage tanks, a liquid LLW treatment facility with associated lagoons, the NDA, and some other minor support facilities. The State of New York retained possession and the right to use of the "Retained Premises," which comprise the remaining portion of the 3,345 acre (1,355 hectare) Center. As set forth in the WVDP Act, the Cooperative Agreement requires NYSERDA to pay 10 percent of Project costs.

In accordance with the requirements of the WVDP Act, the DOE executed a Memorandum of Understanding (MOU) with the NRC on September 27, 1981 (46 FR 56960–56962, November 19, 1981). The MOU established (1) arrangements for NRC review and consultation, (2) responsibilities for NRC review of issues related to safety and environmental documentation, and (3) provisions for NRC monitoring of Project activities to assure protection of public health and safety. On September 30, 1981, the NRC issued an amendment to the facility license which permitted transfer of a portion of the Center, now known as the Project Premises, to DOE for purposes of carrying out the WVDP (46 FR 49237). Under the provisions of the Cooperative Agreement, NYSERDA is to apply to the NRC for any licensing action that may be required for repossession of the Project Premises after completion of the WVDP.

The Department of Energy published a Final Environmental Impact Statement (FEIS) in June of 1982 (DOE/EIS–0081), "Final Environmental Impact Statement—Long-Term Management of Liquid High Level Radioactive Waste Stored at the Western New York Nuclear Service Center, West Valley." The FEIS assessed the environmental impacts of the alternatives for long-term management of the estimated 600,000 gallon (2.2 million liters) of HLW stored in underground steel tanks at the Center. Preparation of the FEIS was coordinated with New York State to ensure that it met the requirements of SEQRA.

In DOE's Record of Decision (47 FR 40705, September 15, 1982), DOE determined it would construct and operate facilities at the Center to solidify the HLW stored in underground tanks. The FEIS stated that because of their advanced state of development, borosilicate glass monoliths would be utilized as the reference terminal waste form, noting that a different terminal waste form would not be selected unless it had equal or better processing or product characteristics. A final determination was deferred pending completion of a number of on-going studies on alternate waste forms. Based upon a subsequent Environmental Assessment (DOE/EA–0179, July 1982) which reviewed the results of these studies, DOE analyzed the options and selected borosilicate glass as the terminal waste form for immobilizing the liquid HLW (March 1983). The borosilicate glass will be contained in approximately 300 large steel canisters. DOE reviewed the WVDP canister configuration in WVDP–056 (July 1986), "Description of WVDP Reference High Level Waste Form and Canister," and confirmed the ability of the canister to meet repository specifications (October 9, 1986). These borosilicate glass logs will be temporarily stored on-site in a decontaminated portion of the chemical processing plant pending shipout.

Approximately 17,000 cubic yards (13,000 cubic meters) of radioactive waste (not HLW) totaling about 58,000 curies are expected to result from WVDP solidification activities. About two-thirds of this waste volume (containing less than a tenth of one percent of its activity) will result from decontamination activities and Project systems operations and will be classified as Class A waste under current NRC regulations. It consists of material such as contaminated protective clothing. The remaining third of the waste volume will result from the processing of the 600,000 gallons (2.2 million liters) of HLW. This waste will be stabilized in cement and placed in an estimated 15,000 seventy-one gallon (270 liter) drums. Additional radioactive waste (not HLW) will result from other post-solidification decontamination and decommissioning activities associated with Project completion and site closure.

Disposal of radioactive wastes, not classified as HLW, resulting from solidification was subjected to review in an Environmental Assessment (DOE/EA–0295, dated April 1986). The proposed on-site disposal was challenged in the United States District Court for the Western District of New York, *Coalition on West Valley Nuclear Wastes et al.* v. *U.S. Department of Energy et al.*, Civil Action No. 86–1052–C. Consistent with Stipulation of Compromise Settlement (Stipulation), approved by the Court in that case, DOE is including within the scope of the current EIS a review of disposal alternatives for this waste. DOE is also seeking a determination or prescription from the NRC as to whether the cement-stabilized wastes are TRU or LLW as provided in the WVDP Act. DOE presently maintains these wastes in a retrievable and temporarily-stored status.

In addition, very small amounts of TRU may result from decontamination activities. Disposal of this TRU is within the scope of this EIS.

Although DOE's post-solidification responsibilities were reviewed by the 1982 FEIS in general, detailed review and subsequent implementation decisions were deferred until more technical information was available and major institutional issues were wholly or partially resolved. The FEIS stated that the DOE's decisions concerning final decontamination and decommissioning of the facilities used for the solidification project must take into account current NRC requirements for decommissioning nuclear facilities and the status and plans of the State of New York for other parts of the Center, particularly in the State Licensed Disposal Area. The FEIS identified that DOE has no authority with respect to final disposition of those parts of the Project Premises not used in the solidification project, nor does DOE generally have any authority with regard to facilities not on Project Premises. Any decisions in these areas would have to be based on further environmental analyses by the responsible State agency.

At this time, NYSERDA intends to enter into its own decision-making processes to support taking repossession of Project Premises upon completion of the WVDP and to effect closure of the Center as a whole in accordance with the provisions of SEQRA. These activities will relate to decontamination, decommissioning, stabilization or remediation of non-WVDP facilities, and other necessary follow-on or complementary actions to DOE's completion of Project activities at the Center.

DOE and NYSERDA wish to cooperate to the fullest extent possible in these decision-making processes. The aim is to reduce duplication of efforts consistent with NEPA and SEQRA, to ensure integration of the environmental evaluation of WVDP completion and closure of the Center into State and local planning processes and to promote consistency and efficiency in the Federal and State decision-making processes. To fulfill these objectives, DOE and NYSERDA intend to prepare cooperatively an EIS to cover comprehensively the issues relating to the Federal and State decisions which will involve joint planning processes, joint environmental studies, and joint public hearings.

It is recognized that although DOE and NYSERDA have common interests, they have separate and distinct missions regarding the site. DOE's authorities and responsibilities for carrying on the WVDP are limited by the terms of the WVDP Act. For example, DOE is mandated to decontaminate and decommission only those facilities and hardware it uses for the WVDP. DOE has no authority under the WVDP Act toward the SDA.

Decision-making and resulting implementation actions of DOE and NYSERDA regarding various evaluated alternatives are expected to share

elements of common timing and geography. In addition, the interrelated nature of the Federal and State activities and the cumulative impacts that would result encourage formulation of a comprehensive plan for the site. DOE and NYSERDA intend to adopt a flexible cooperative approach which will ultimately provide a basis to promote consistent decision-making and coordinated implementation taking into account separate responsibilities and authorities. Cost participation, responsibilities, and procedures will be defined by separate agreement consistent with existing legislative mandate. Nothing in this cooperative process is intended to result in any alteration to DOE's and NYSERDA's respective statutory authorities, including the requirements of the NEPA or SEQRA processes. If necessary, to effectively and efficiently fulfill their separate mandated obligations, the DOE or NYSERDA may elect at any time to proceed independently, in whole or in part.

The items that will be evaluated for Project completion and Center closure are generally confined to the approximately 200 acre (80 hectare) developed area of the Center and are described below.

The primary items that will be evaluated for Federal and State decision-making related to Project completion are as follows:

- Primary and auxiliary buildings, structures, and system components at the Center including:
  - —The former reprocessing plant together with the newly installed systems (e.g., Liquid Waste Treatment System, Cement Solidification System and the HLW Interim Storage Facility.)
  - —The HLW storage tanks and vaults
  - —The Supernatant Treatment System
  - —The HLW Vitrification Facility
  - —Miscellaneous auxiliary structures and systems (e.g. sewage treatment plants, warehouses, administrative buildings)
- Solid and liquid waste management or disposal units:
  - —Several radioactive waste storage structures
  - —Temporarily stored solidified HLW, LLW and TRU waste resulting from Project activities.
  - —The portion of the NDA used for disposal and/or storage of Project waste
  - —The original low-level liquid radioactive waste treatment facility

The primary items that will be evaluated for State decision-making related to Center closure are as follows:

- —The portion of the NDA used for disposal of non-Project waste
- —The shut down State-licensed disposal area (SDA)
- —The Center grounds outside the Project Premises
- —The Project Premises after Project completion and surrender of the Project Premises to NYSERDA by DOE.

Federal and State laws and regulations will apply to the proposed actions including those regarding radioactive and hazardous materials; radioactive, hazardous, and mixed (radioactive and hazardous) waste; and air and water pollution. The proposed Project activities will also be subject to DOE Orders which establish policies, procedures, and standards that govern DOE operations. In addition to these requirements, and pursuant to the WVDP Act, the Project is subject to NRC prescription of the requirements to be applied for decontamination and decommissioning of tanks, facilities, material and hardware used in connection with the Project.

Proposed Actions:

In accordance with the provisions of the West Valley Demonstration Project Act, the proposed actions to be evaluated are transportation of solidified HLW to a Federal repository for permanent disposal, disposal of Project TRU and LLW waste, some of which may be mixed waste; and decontamination and decommissioning of tanks, facilities, material and hardware used in connection with the Project. These Federal Project activities, in the context of NYSERDA's activities on closure of the Center, are the subject of the NEPA process. Proposed New York State actions to be evaluated are repossession of the Premises used by DOE for the WVDP, decontamination and decommissioning of the balance of the Center as a whole, and site closure and/or long-term management. These State center activities, in the context of DOE's activities on Project completion, are the subject of the SEQRA process. These actions, in total, will seek to effect comprehensive, integrated site closure.

Alternatives for the Proposed Actions

Each component of the WVDP and the Center presents several alternative courses of action (in addition to the no action alternative) that will be considered both individually and in combination with the alternatives for other components in order to assess potential cumulative impacts of the proposed action. Corrective, removal, or remedial actions pursuant to the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation and Liability Act will be evaluated. The applicability of other State and Federal environmental statutes, regulations, and other requirements, will also be evaluated. All applicable requirements will be met. Evaluation of DOE's Project completion activities and evaluation of NYSERDA's repossession and site closure activities will be coordinated to the maximum extent practical.

The major components and their related individual alternatives are listed below.

I. Decontamination, Decommissioning and Closure

- The primary buildings, structures and systems at the Center (e.g., former reprocessing plant, HLW tanks, vitrification facility.)
  - Decontamination for unrestricted use
  - Decontamination and sealing for restricted access, surveillance and site monitoring
  - Decontamination, demolition and in situ disposal
  - Decontamination, demolition and off-site disposal
  - No action, restricted access, surveillance and site monitoring
- The solid and liquid waste management or disposal units (e.g., NDA, SDA, lagoons.)
  - Stabilization and closure
  - Exhumation, repackaging and disposal
  - No action, restricted access, surveillance and site monitoring

II. Disposal of Radioactive Waste Other than HLW

- On-site disposal
- Off-site disposal
- Interim storage pending availability of disposal capacity
- No action, restricted access, surveillance and site monitoring

III. Transportation for Disposal of the Stored HLW

- Early shipout to an interim storage site
- On-site storage awaiting availability of a licensed repository
- No action, restricted access, surveillance and site monitoring

These alternatives will likely have sub-alternatives which relate to different technical approaches to their accomplishment and will require considerable effort to describe, analyze and evaluate individually and in the various possible combinations. Analysis of the no action alternative is required under NEPA and SEQRA and provides a

baseline for comparison of the other alternatives.

Preliminary List of Potential Issues

Items to be addressed for the proposed action and alternatives during preparation of the EIS include the following:

- Potential impacts to the general population and on-site workers from radiological and nonradiological releases caused by Project completion and overall site closure;
- Potential environmental impacts, including air and water quality impacts, caused by Project completion and site closure;
- Potential transportation impacts caused by shipments of radioactive or hazardous material or radioactive, hazardous, or mixed waste;
- Potential impacts caused by postulated accidents;
- Potential socioeconomic impacts to surrounding communities;
- Short-term vs. long-term land use impacts;
- Irretrievable and irreversible commitment of resources;
- Characterization of the wastes previously disposed of at the Center;
- Potential impacts from on-site and off-site waste disposal;
- The potential impacts of interim storage of wastes at locations other than the Center pending availability of repositories or disposal sites;
- The concentration limits of transuranic radionuclides for waste disposal purposes;
- Decontamination and decommissioning criteria for facilities at the Center;
- The influence of, and potential interactions of, wastes remaining at the Center after Project completion and site closure;
- The institutional issues associated with closure, post closure monitoring and maintenance, and subsequent control;
- The means and extent of erosion protection;
- Other cumulative impacts not implicit in the categories listed above.

In addition to these unique considerations, the impacts common to most construction or demolition activities such as disruption of existing vegetation, stream siltation, dust and noise, are to be expected and will require analyses. This list should not be considered all inclusive; additions or deletions to this list may occur as a result of the scoping process.

The disposition of HLW will be subjected to separate NEPA reviews in conjunction with the development of the facilities in the integrated disposal system, including any interim storage facilities and a repository, by the Office of Civilian Radioactive Waste Management. Development of casks and related transportation issues are being reviewed as part of this other program. The WVDP anticipates that storage and transportation issues will be better defined by documentation developed by the Office of Civilian Radioactive Waste Management, and the Project will use that documentation to the extent possible.

Comments and Scoping

All interested parties are invited to submit written comments or suggestions concerning the scope of the issues that should be addressed in the DEIS. They may also attend the public scoping meeting at which oral comments and suggestions will be received and written comments may be submitted.

This will be an informal meeting with a moderator. DOE and NYSERDA will establish procedures governing the conduct of the public scoping meeting. The meeting will not be conducted as an evidentiary hearing, and those who choose to make statements may not be cross-examined by other speakers. To provide DOE and NYSERDA with as much pertinent information as possible and as many views as can be reasonably obtained, and to provide interested persons with equitable opportunities to express their views, the following procedures will be used:

Those individuals desiring to make oral comments should mail their requests to Mr. Charles Ljungberg or Mr. Richard G. Spaunburgh at the addresses listed above. DOE and NYSERDA reserve the right to arrange the times and schedules of presentations to be heard and to establish procedures governing the conduct of the meeting.

Interested individuals and organizations should notify DOE or NYSERDA in writing of their desire to speak at least two weeks in advance of the scoping meeting.

Before the meeting, DOE and NYSERDA will, in turn, notify prospective speakers of the times and schedules for presentations. Requests for time should include a telephone number for such notification. Those persons wishing to speak on behalf of an organization should identify their affiliation in their request. Also, persons who have not submitted a request to speak in advance may register to speak at the scoping meeting and will be called on to present their comments if time permits. To assure that all persons wishing to make presentations can be heard, a five minute limit for each individual may be established.

If subsequent to the meeting, any person or organization desires to provide further information for the record, it may be submitted to Mr. Charles Ljungberg or Mr. Richard G. Spaunburgh at the addresses listed above within two weeks after the scoping meeting. Comments received after that date will be considered to the degree practicable.

A transcript of the meeting will be prepared, retained by DOE, and made available for public review at the locations given below. In addition, anyone may make arrangements with the reporter to purchase a copy of the transcript.

Those not desiring to submit comments or suggestions at this time, but who would like to receive a copy of the Draft EIS for review and comment when it is issued, should notify Mr. Charles Ljungberg or Mr. Richard G. Spaunburgh at the addresses listed above. When the DEIS is complete, its availability will be announced in the **Federal Register** and the New York State Environmental Notice Bulletin and in local news media, and comments will again be solicited.

Other Documentation

Copies of the "Final Environmental Impact Statement—Long-Term Management of Liquid High Level Radioactive Wastes Stored at the Western New York Nuclear Service Center, West Valley" (dated 1982, DOE/EIS–0081, referenced in this notice) and other documentation that is planned to be used in preparing the EIS, as well as other related background information, will be available for inspection at the following locations:

U.S. Department of Energy,
Forrestal Building, Freedom of Information Reading Room,
IE–190, 1000 Independence Avenue, SW.,
Washington, DC 20585,
(202) 586–6020.

U.S. Department of Energy,
West Valley Demonstration Project Technical Library,
P.O. Box 191,
West Valley, New York 14171,
(716) 942–4387.

Legislative and Governmental Services Office,
Cultural Education Center,
Empire State Plaza,
Albany, New York 12230,
(518) 474–3940.

Concord Public Library,
23 North Buffalo Street,
Springville, New York 14141,
(716) 592–7742.

Issued in Washington, DC, on December 27, 1988.

Ernest C. Baynard, III,

Assistant Secretary, Environment, Safety and Health.

[FR Doc. 88-30160 Filed 12-28-88; 11:13 am]

BILLING CODE 6450-01-M

Nuclear Waste Repositories; the Site Characterization Plan (SCP) for the Yucca Mountain Site, NV

AGENCY: Office of Civilian Radioactive Waste Management, DOE.

ACTION: Notice on the availability of the Site Characterization Plan; announcement of public hearings and solicitation of comments.

SUMMARY: The Department of Energy (DOE) has published, distributed, and made available to the public the Site Characterization Plan (SCP) for the Yucca Mountain, Nevada, site for 90 days of public comment to begin January 15, 1989. Section 113(b) of the Nuclear Waste Policy Act of 1982 (NWPA) requires that the SCP provide "a general plan for site characterization activities" to be conducted. The purpose of site characterization is to obtain the information necessary to evaluate whether the site is suitable for a repository and, if suitable, to allow DOE to prepare a license application and obtain from the Nuclear Regulatory Commission (NRC) authorization to construct a repository.

The Yucca Mountain site was designated for site characterization in the Nuclear Waste Policy Amendments Act of 1987. The SCP includes a description of the candidate site, a description of planned site characterization tests and activities, plans for decontamination and decommissioning should the site not be found suitable for development as a repository, and criteria to be used to determine suitability. The SCP also describes the conceptual design for a repository at the site and the possible packaging for the high-level radioactive waste and spent nuclear fuel to be emplaced in such a repository.

DATE: Written comments should be received at DOE by April 15, 1989.

ADDRESS: Written comments on the SCP should be addressed to: SCP Comments, Yucca Mountain Project Office, U.S. Department of Energy, Box 98518, Las Vegas, Nevada 89193-8518.

FOR FURTHER INFORMATION CONTACT:

Stephen H. Kale, Associate Director, Office of Facilities Siting and Development, Office of Civilian Radioactive Waste Management, U.S. Department of Energy, RW-20, 1000 Independence Avenue, SW., Washington, DC 20585.

or

Carl P. Gertz, Project Manager, Yucca Mountain Project Office, U.S. Department of Energy, Box 98518, Las Vegas, Nevada 89193-8518

In addition to sending copies of the SCP to individuals upon request, DOE will make the SCP available for public inspection in local libraries in surrounding areas, the Yucca Mountain Information Office, the public reading rooms at DOE Operations Offices, and DOE Headquarters.

Public Hearings will be held at several locations in Nevada to receive oral and written comments on the SCP. The schedule and procedures for those hearings are presented later in this Notice.

SUPPLEMENTARY INFORMATION:

I. Background

At the direction of the U.S. Congress, DOE has been conducting a program for siting the Nation's first geologic repository for high-level radioactive waste. The process and the schedule for this program were set forth in the Nuclear Waste Policy Act of 1982. In May 1986, DOE recommended and the President approved the Yucca Mountain site as one of the three candidate sites for detailed study. In the Nuclear Waste Policy Amendments Act of 1987, the Congress directed that only the Yucca Mountain candidate site be characterized for a permanent geologic repository.

Section 113 of the NWPA, as amended, specifies that, before starting to construct exploratory shafts at Yucca Mountain, DOE must meet the following two requirements: (1) Submit to the NRC, as well as the Governor and the legislature of the State of Nevada, a Site Characterization Plan for their review and comment and (2) make the SCP available to the public and hold public hearings to inform residents in the vicinity of the site of the SCP and to receive their comments.

To meet both of these requirements, DOE has submitted copies of the SCP to the NRC and to the Governor and the legislature of Nevada. In addition, DOE has submitted the SCP to the affected units of local government in Nye, Clark, and Lincoln Counties, Nevada. To ensure that the SCP is available to the public, DOE has placed copies of the SCP in selected public libraries in Nevada and in its public reading rooms across the country. Individual copies are available upon request. To assist the public in the review of the SCP, DOE has prepared an SCP Overview and an SCP Public Handbook and has widely circulated both of these documents. In addition, DOE will inform the public about the SCP and public comment process through its regular Project Update Meetings, and brief Federal, State, and local officials upon request, as well as conduct public hearings to receive comments.

The release of the SCP follows nearly a year of interaction on a consultation draft SCP that was developed by DOE and issued in January 1988 to solicit comments from the State of Nevada and the NRC. Workshops were held in Nevada and Washington, DC, to discuss SCP technical concerns and means to resolve them. Comments on the consultation draft received during the comment period were considered in preparing the SCP that now has been issued for public comment. The SCP incorporates the results of this consultation process.

Comments received on the SCP during the public comment period will be considered by DOE, and changes made in the plans described in the SCP as a result of these comments will be addressed in semiannual progress reports to be issued by DOE. These progress reports will also summarization the results of site characterize activities and will explain any changes that may be made in the test program as information is collected and evaluated.

The site characterization program is expected to take a number of years to complete, and during this time DOE will be issuing semiannual progress reports. The public will be kept informed and involved throughout the process, and comments on the program will continue to be accepted and considered. Consequently, DOE encourages the NRC, the State of Nevada, and others, during this particular 90-day comment period, to focus on issues related to the start of the exploratory shaft. All comments received during the 90-day comment period will be considered before commencing construction of the exploratory shaft. Comments received after the close of the comment period will be considered to the extent practicable before starting the exploratory shaft, but will nevertheless be considered as part of subsequent semiannual progress reports.

II. Public Meetings

The DOE Yucca Mountain Project Office will conduct public Project Update Meetings to inform interested parties of DOE's planned activities and the site characterization process. These

meetings will be held at the following locations and times and are for informational purposes only and not for the presentation of comments. Comments should be provided at the public hearings discussed later in this Notice.

February 15, 1989, at 7–10 p.m. in Beatty, at Beatty Community Center
February 16, 1989, at 7–10 p.m. in Las Vegas, at Aladdin Hotel
February 21, 1989, at 7–10 p.m. in Caliente, at Caliente Girls Training Center
February 23, 1989, at 7–10 p.m. in Reno, at Reno-Sparks Convention Center

III. Comment Procedures

a. Availability

Copies of the SCP have been distributed directly to a number of interested Federal, State, and local agencies. The SCP is available for public inspection at the following DOE Reading Rooms:

1. DOE Headquarters, Room 1E–190, 1000 Independence Avenue, SW., Washington, DC 20585.
2. Albuquerque Operations Office, U.S. DOE, Pennsylvania & H Streets, Kirkland Air Force Base, Albuquerque, NM 87115
3. Chicago Operations Office, U.S. DOE, 9800 South Cass, Avenue, Argonne, IL 60439
4. Idaho Operations Office, Technical Library, 785 DOE Place, Idaho Falls, ID 83402
5. Nevada Operations Office, U.S. DOE, 2753 So. Highland Drive, Las Vegas, Nevada 89193–8518
6. Oak Ridge Operations Office, U.S. DOE, 200 Administration Road, Oak Ridge, TN 37830
7. Richland Operations Office, U.S. DOE, 825 Jadwin Avenue, Richland, WA 99352
8. San Francisco Operations Office, U.S. DOE, 1333 Broadway, Oakland, VA 94612
9. Savannah River Operations Office, U.S. DOE, University of South, Carolina-Aiken, Gregg-Graniteville, Library, 171 Parkway, Aiken, SC 29801

In addition to the reading rooms, the SCP will be avilable for public inspection at the following locations in Nevada.

1. Yucca Mountain Information Office, U.S. Department of Energy, U.S. Route 95 and State Route 374, Beatty, NV 89003
2. Amargosa Valley Community Library, HCR 69–2, BOX 401–T, Amargosa Valley, NV 89020
3. Beatty Community Library, P.O. Box 128, Fourth and Ward Street, Beatty, NV 89003
4. Clark County Library District, Reference Department, 1401 E. Flamingo Road, Las Vegas, NV 89119
5. Getchell Library, University of Nevada, Reno, Reno, NV 89557–0044
6. Nevada State Library, 401 North Carson Street, Carson City, NV 89710
7. Tonopah Public Library, 171 Central, Tonopah, NV 89049
8. University of Nevada, Las Vegas, James R. Dickinson Library, 4505 Maryland Parkway, Las Vegas, NV 89154
9. U.S. DOE/NV Technical Library, 2753 South Highland Drive, Las Vegas, NV 89193–8518
10. Washoe County Library, 301 S. Center, Reno, NV 89501

The SCP is a 9-volume document, approximately 6,300 pages in length. To assist the public in the review of the SCP, DOE has developed the SCP Public Handbook and the SCP Overview. These documents serve to introduce the reader to the SCP and assist the reader in understanding where in the SCP areas of particular interest may be located. Copies of the SCP, SCP Public Handbook or the SCP Overview are available upon request from:

Yucca Mountain Project Office, U.S. Department of Energy, Box 98518, Las Vegas, Nevada 89193–8518
or:
Office of Civilian Radioactive Waste Management Program (RW–43) U.S. Department of Energy 1000 Independence Avenue, SW. Washington, DC 20585

b. Written Comments

Interested parties are invited to provide written comments on the SCP to: SCP COMMENTS, Yucca Mountain Project Office, U.S. Department of Energy, Box 98518, Las Vegas, Nevada 89193–8518

The comments should be received at this address by April 15, 1989, to assure consideration prior to the Department's commencement of exploratory shaft construction.

c. Public Hearings

Following the public Project Update Meetings, DOE will hold public hearings to receive comments at the following times and locations:

March 20, 1989 at 2–5 p.m. and 7–10 p.m. at Amargosa Valley Community Center
March 21, 1989 at 2–5 p.m. and 7–10 p.m. at Aladdin Hotel in Las Vegas
March 23, 1989 at 2–5 p.m. and 7–10 p.m. at Reno Hilton Hotel

IV. Presentation Procedure

Any person or representative of a group may submit a written request for an opportunity to make an oral presentation at a public hearing. Such requests should be addressed to Yucca Mountain Project Office, U.S. Department of Energy, Box 98518, Las Vegas, Nevada 89193–8518, and will be accepted up to 10 days in advance of each hearing. Specific times for presentations during the hearing may be requested; otherwise, presentation times will be assigned by the moderator. Anyone making a request to speak should provide a telephone number where he or she may be contacted during business hours; this telephone number will be used to confirm the time assigned to the speaker. All written requests for opportunities to present comments will be acknowledged by DOE. Each person making a presentation is requested to bring a written copy of his or her statement for submission for the hearing record.

At the hearing, those who have registered in advance will be heard first or at times reserved for them. Anyone present at the hearing who would like to speak but did not preregister may request an opportunity to speak. The moderator at the hearing will determine if such requests can be accommodated within the time period scheduled for the hearing.

V. Conduct of Hearings

DOE reserves the right to arrange the schedule of presentations to be heard and to establish additional procedures governing the conduct of the hearing. To ensure that as many interested persons as possible are given the opportunity to present oral comments, the length of each presentation will be limited to no more than 10 minutes, and may be further limited by the moderator for a particular hearing depending upon the number of persons requesting to be heard.

Clarification questions may be asked only by those conducting each hearing, and there will be no cross-examination of persons presenting statements. Any further procedural rules needed for the proper conduct of the hearing will be announced by the moderator at the start of the hearing.

Issued in Washington, DC, December 28, 1988.

Samuel Rousso,

Acting Director, Office of Civilian Radioactive Waste Management.

[FR Doc. 88–30201 Filed 12–29–88; 8:45 am]

BILLING CODE 6450–01–M

Assistant Secretary for International Affairs and Energy Emergencies

Proposed Subsequent Arrangement; Atomic Energy

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160), notice is hereby given of a proposed "subsequent arrangement" under the Agreement for Cooperation between the Government of the United States of America and the Government of Canada concerning Civil Uses of Atomic Energy, as amended.

The subsequent arrangement to be carried out under the above-mentioned agreement involves approval of the following contract: Contract Number DE–SC05–88UEO 7168, for the supply of 4.05 kilograms of uranium, enriched to 93.15 percent in the isotope uranium-235, for use as fuel in the McMaster Nuclear Research Reactor, McMaster University, Canada.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteen days after the date of publication of this notice.

For the Department of Energy.

Date: December 27, 1988.

George J. Bradley, Jr.,

Principal Deputy Assistant Secretary for International Affairs and Energy Emergencies.

[FR Doc. 88–30126 Filed 12–29–88; 8:45 am]

BILLING CODE 6450–01–M

Proposed Subsequent Arrangement; Atomic Energy

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160), notice is hereby given of a proposed "subsequent arrangement" under the Additional Agreement for Cooperation between the Government of the United States of America and the European Atomic Energy Community (EURATOM) concerning Peaceful Uses of Atomic Energy, as amended, and the Agreement for Cooperation between the Government of the United States of America and the Government of Norway concerning Peaceful Uses of Nuclear Energy.

The subsequent arrangement to be carried out under the above-mentoned agreements involves approval of the following retransfer: RTD/NO(EU)–56, for the transfer of 5 pressurized water reactor fuel rod segments containing 1.207 kilograms of uranium, enriched to 1.3 percent in the isotope uranium-235 and 11 grams of plutonium from the Federal Republic of Germany to Halden, Norway for irradiation experiments in the Halden boiling water reactor.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteen days after the date of publication to this notice.

For the Department of Energy.

Dated: December 27, 1988.

George J. Bradley, Jr.,

Principal Deputy Assistant Secretary for International Affairs and Energy Emergencies.

[FR Doc. 88–30127 Filed 12–29–88; 8:45 am]

BILLING CODE 6450–01–M

Energy Information Administration

Annual Report for Enhanced Oil Recovery Incentive Program

AGENCY: Energy Information Administration, DOE.

ACTION: Request for comments on a proposed extension of the Annual Report for Enhanced Oil Recovery Incentive Program, Form FE–748.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, the Energy Information Administration (EIA), as required by the Paperwork Reduction Act, conducts a consultation program to provide the public with an opportunity to comment on proposed and continuing reporting forms. This program helps to ensure that requested data can be provided in the desired format, reporting burden is minimized, reporting forms are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

At this time, EIA requests comments on the extension of the Annual Report for Enhanced Oil Recovery (EOR) Incentive Program, Form FE–748, for three years. The form is described in the Supplementary Information Section of this Notice. Interested persons are asked to review the form and its instructions and provide comments to the information contact listed below.

DATES: Written comments must be submitted on or before January 30, 1989.

ADDRESS: Comments should be sent to Ms. Edith Allison at the address listed immediately below.

FOR FURTHER INFORMATION OR COPIES OF THE FORM AND INSTRUCTIONS CONTACT: Ms. Edith Allison, Project Manager, Reservoir Data and Analysis, Bartlesville Project Office, P.O. Box 1398, Bartlesville, OK 74005. Telephone (918) 336–4390.

SUPPLEMENTARY INFORMATION:

I. Background
II. Comment Procedures

I. Background

The EIA announces a proposed extension of the Form FE–748, "Annual Report for Enhanced Oil Recovery (EOR) Incentive Program." The information on Form FE–748 is requested annually from all individuals or companies that had EOR projects approved for the Incentive Program. This form provides DOE and industry with the only readily available source of data with which to assess the performance and success of the projects in the Incentive Program. The form provides information on changes in oil well data and description of operation, and average monthly production and injection.

II. Comment Procedures

The EIA invites prospective respondents and users of the data from this collection to comment within 30 days of the publication of this notice. The following general guidelines are provided to assist in the responses. (As a potential data provider:)

A. Are the instructions and definitions clear and sufficient? If not, which instructions require clarification?

B. Can the data be submitted using the definitions included in the instructions?

C. Can the data be submitted in accordance with the response time specified in the instructions?

D. Public reporting burden (estimated average hours per response) for this collection is .71 hours per response. How much time, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information do you estimate it will require you to complete and submit this form.

E. What is the estimated cost of completing the form, including direct and indirect costs associated with the data collection? Direct costs should include all costs, such as administrative costs, development, assembly, equipment, ADP, and any other one-time or recurring costs.

F. How can this form be improved?

G. Do you know of other Federal, State, or local agencies that collect

similar data? If yes, specify the agency, the data elements, and the means of collection.

(As a potential data user:)

A. Can you use data at the levels of detail indicated on the form?

B. For what purpose would you use these data? (Be specific.)

C. How could the form be improved to better meet your specific data needs?

D. Are there alternative sources of data, and do you now use them? What are their deficiencies?

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this survey and will become a matter of public record.

Statutory Authorities: Sections 5(a), 5(b), 13(b), and 52 of Pub. L. 93–275, Federal Energy Administration Act of 1974, as amended. (15 U.S.C. 764(a), 764(b), 772(b), and 790(a).

Issued in Washington, DC, on December 23, 1988.

Yvonne M. Bishop,

Director, Statistical Standards, Energy Information Administration.

[FR Doc. 88–30125 Filed 12–29–88; 8:45 am]

BILLING CODE 6450–01–M

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–3501–3]

Environmental Impact Statements; Availability

Responsible Agency: Office of Federal Activities, General Information (202) 382–5076 or (202) 382–5075.

Availability of Environmental Impact Statements Filed December 19, 1988 Through December 23, 1988 Pursuant to 40 CFR 1506.9.

EIS No. 880422, DSuppl, OSM, REG, Office of Surface Mining Reclamation and Enforcement (OSMRE) Revisions to Permanent Program Regulations Implementing Section 552(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Due February 13, 1989, Contact: Catherine Roy (202) 343–5143.

EIS No. 880423, Draft, FHW, IN, US 24 Relocation, IN–13 to IN–9/37, Funding and 404 Permits, Wabash and Huntington Counties, IN, Due February 27, 1989, Contact: James E. Threlkeld (317) 269–7494.

EIS No. 880424, Final FHW, NY, Southwest Lockport Bypass Construction, Robinson Road to NY–31, Funding, Section 10, 404 and Coast Guard Bridge Permits, Niagara County, NY, Due: January 30, 1989, Contact: Harold J. Brown (518) 472–3616

Dated: December 27, 1988.

Richard E. Sanderson,

Director, Office of Federal Activities.

[FR Doc. 88–30133 Filed 12–29–88; 8:45 am]

BILLING CODE 6560–50–M

[FRL–3500–4]

Environmental Engineering Committee; Open Meeting; January 26 and 27, 1989

Under Pub. L. 92–463, notice is hereby given that the Science Advisory Baord's Products Incomplete Combustion Subcommittee will meet January 26–27, 1989 in the Administrator's Conference Room, 1101 West Tower, 401 M Street, SW., Washington, DC. The meeting will begin at 9:00 a.m. on Thursday and adjourn no later than 5:00 p.m. on Friday.

The purpose of the meeting is to review the Agency's proposed controls for emissions of Products of Incomplete Combustion (PICs) for hazardous waste incineration.

The meeting is open to the public. This is the second public meeting on this subject. The first meeting was held on December 15–16, 1988 (See 53 FR 44658—November 4, 1988).

Any member of the public wishing further information on the meeting, or those who wish to submit written comments should contact Dr. K. Jack Kooyoomjian, Executive Secretary, Science Advisory Baord (A101–F) U.S. Environmental Proteciton Agency, Washington, DC 20460 at 202/382–2552 by January 9, 1989. Seating at the meeting will be on first come basis.

Donald G. Barnes,

Director, Science Advisory Board.

Date: December 22, 1988.

[FR Doc. 30087 Filed 12–29–88; 8:45 am]

BILLING CODE 6560–50–M

[FRL–3500–5]

Virginia's Application To Administer the National Pollutant Discharge Elimination System (NPDES) Pretreatment Program

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule; notice of application.

SUMMARY: The State Water Control Board of the Commonwealth of Virginia has requested approval of its Pretreatment Program, and submitted a signed Attorney General's statement, dated October 3, 1988, stating that the Commonwealth of Virginia has the necessary authority to operate the program, along with copies of the legal authority, a program description dated May, 1988 that describes how the State proposes to operate the program and a Memorandum of Agreement to be entered into with EPA. This notice provides for a comment period on Virginia's request. Under U.S. EPA regulations the Administrator shall approve or disapprove this request after taking into consideration all comments received. The Administrator has delegated this authority to the Regional Administrator.

DATES: To be considered, comments must be received on or before January 30, 1989. Interested persons may also request a public hearing on the Commonwealth's request. If there is significant public interest expressed in the comments, U.S. EPA will schedule such a hearing. In the event U.S. EPA decides to hold a public hearing, prior notice of the date, time, and location of such a hearing will be given. Any requests for a public hearing must be submitted on or before the expiration of the comment period.

ADDRESS: Comments should be addressed to: U.S. EPA, Region III, 841 Chestnut Building, Philadelphia, PA 19107, Attention: Mr. Kenneth J. Cox, Permits Enforcement Branch (3WM52).

FOR FURTHER INFORMATION CONTACT: Kenneth J. Cox, Permits Enforcement Branch (3WM52), U.S. EPA, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; 215/597–7099.

SUPPLEMENTARY INFORMATION: On June 26, 1978, the United States Environmental Protection Agency (U.S. EPA) promulgated the general Pretreatment Regulations (40 CFR Part 403). Amendments to the General Pretreatment Regulations were promulgated on January 28, 1981. These regulations mandated by the Clean Water Act of 1977 (Pub. L. 95–217), govern the control of industrial wastes introduced into Publicly Owned Treatment Works (POTWs), commonly referred to as municipal sewage treatments plants. The objectives of the regulations are to: (1) Prevent introduction of pollutants into POTWs which will interfere with plant operations and/or disposal or use of municipal sludges; (2) prevent introduction of pollutants into POTWs which will pass through treatment works in unacceptable amounts to receiving waters; and (3) improve the feasibility of recycling and reclaiming

municipal and industrial wastewaters and sludges.

The Commonwealth of Virginia received NPDES permit authority on March 31, 1975. One of the Keystones of the industrial waste control program as set forth in the general Pretreatment Regulations is the establishment of Pretreatment Programs as a supplement to the existing State National Pollutant Discharge Elimination System (NPDES) Permit program. In order to be approved, a request for State Pretreatment Program approval must demonstrate that the State has legal authority, procedures, available funding, and qualified personnel to implement a State Pretreatment Program as specified in § 403.10 of the Regulations. Generally, local Pretreatment Programs are the primary vehicle for administering, applying, and enforcing Pretreatment Standards for Industrial Users of POTWs. States are required to apply and enforce Pretreatment Standards directly against industries that discharge to POTWs where local programs are not required or have not been developed.

The Regional Administrator's decision to approve or disapprove the proposed treatment program will be based on a determination on whether the proposed program meets the requirements of the Clean Water Act and 40 CFR Part 403 and on the comments received.

The Virginia submission may be reviewed by the public at the Commonwealth of Virginia, State Water Control Board, 2111 Hamilton Street, Richmond, Virgina 23230–1143 and the U.S. EPA office in Philadelphia at the address appearing at the beginning of the notice. Copies of the submittal may also be obtained (at a cost of 20 cents a page) from these offices.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

List of Subjects in 40 CFR Part 403

Confidential business information, Reporting and recordkeeping requirements, Waste treatment disposal, Water pollution control.

Dated: December 10, 1988.

James M. Seif,

Regional Administrator, Region III.

[FR Doc. 88–30086 Filed 12–29–88; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL MARITIME COMMISSION

The Federal Maritime Commission hereby gives notice that the following agreement(s) has been filed with the Commission pursuant to section 15 of the Shipping Act, 1916, and section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit protests or comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments and protests are found in § 560.7 and/or § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Any person filing a comment or protest with the Commission shall, at the same time, deliver a copy of that document to the person filing the agreement at the address shown below.

Agreement No.: 224–200201.

Title: Florida Coast Stevedores Teminal Agreement.

Parties:

Cooper/T. Smith
Palmetto Shipping and Stevedoring Co., Inc.

Filing Party: John P. Meade, O'Connor & Hannan, 1919 Pennsylvania Avenue, NW., Suite 800, Washington, DC 20006–3483.

Synopsis: The agreement provides for the establishment and operation of a partnership to perform stevedoring and teminal services for the port of Jacksonville, Florida, and such other ports within the state of Florida as the partners may agree to, and related assistance functions with respect to such ports.

By Order of the Federal Maritime Commission.

Dated: December 27, 1988.

Tony P. Kominoth,

Assistant Secretary.

[FR Doc. 88–30039 Filed 12–29–88; 8:45 am]

BILLING CODE 6730–01–M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224–010774–002.

Title: Georgia Ports Authority Terminal Agreement.

Parties:

Georgia Ports Authority (GPA)
Evergreen Marine Corporation (Taiwan), Ltd.
Costa Container Lines SPA

Synopsis: The agreement amends Agreement No. 224–010774, a terminal lease and services agreement. The agreement sets forth the rate schedule which will apply for the services to be provided by GPA.

Agreement No.: 224–010774–003.

Title: Georgia Ports Authority Terminal Agreement.

Parties:

Georgia Ports Authority
Evergreen Marine Corporation (Taiwan), Ltd.
Costa Container Lines SPA
Italia D. Navigation S.P.A. (IDN)

Synopsis: The agreement amends Agreement No. 224–010774, a terminal lease and services agreement by adding IDN as a party to the Agreement. It also adds a field services consolidated rate that applies only to IDN.

Agreement No.: 224–200109–002.

Title: City of Long Beach Terminal Agreement.

Parties:

City of Long Beach
Cooper/T. Smith Stevedoring Co., Inc.

Synopsis: The Agreement extends the term of the basis preferential assignment agreement for Pier A Facilities in the Harbor District of the City of Long Beach of April 30, 1989.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

Dated: December 27, 1988.

[FR Doc. 88–30040 Filed 12–29–88; 8:45 am]

BILLING CODE 6730–01–M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the

Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224–200202.

Title: City of Los Angeles Marine Terminal Agreement.

Parties:

City of Los Angeles (The City)

American President Lines, Ltd. (APL)

Synopsis: The agreement provides that the City will provide APL with five (5) acres of land within the City of Los Angeles Harbor District to be used for the storage of chassis and containers, and purposes incidental thereto.

Agreement No.: 224–200203.

Title: New Orleans Terminal Agreement.

Parties:

The port of New Orleans (NO)

Trans Ocean Terminal Operators, Inc. (TTO)

Synopsis: The agreement provides for TTO's five (5) year lease of NO property for use in the marshalling, storage and transfer of containers and the storage of stevedoring and cargo handling equipment.

Agreement No.: 224–200200.

Title: Port of Vancouver Marine Terminal Management Agreement.

Parties:

Port of Vancouver (Port)

Marine Terminal Corporation (MTC)

Synopsis: The agreement provides for MTC to furnish terminal services and non-exclusive stevedore services at the Port's Terminal 3 facility for a five year term. The Port and MTC shall share gross receipts from wharfage, storage charges and certain miscellaneous items assessed under the Port's tariff. MTC guarantees to pay the Port an annual minimum of $600,000 for the first year, and $650,000 for the second year. For the remaining one year periods of the term, the minimum guarantee shall be adjusted by the parties based on the amount the Port adjusts its wharfage and dockage charges in its published tariff.

By Order of the Federal Maritime Commission.

Tony P. Kominoth,

Assistant Secretary.

Dated: December 27, 1988.

[FR Doc. 88–30041 Filed 12–29–88; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Federal Open Market Committee; Domestic Policy Directive of November 1, 1988

In accordance with § 271.5 of its Rules Regarding Availability of Information (12 CFR 271, *et seq.*), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on November 1, 1988.[1] The directive was issued to the Federal Reserve Bank of New York as follows:

The information reviewed at this meeting indicates that the expansion in economic activity has moderated from the vigorous pace earlier in the year. Total nonfarm payroll employment grew considerably in the third quarter but the gains were less than those registered in the first half of the year and employment in manufacturing declined in August and September. The civilian unemployment rate fell to 5.4 percent in September, remaining in the narrow range that has prevailed since early spring. Industrial production advanced only slightly on balance in August and September after a sharp increase in July, while housing construction has been flat in recent months. Consumer spending increased substantially on average in the third quarter but aparently slowed in recent months. Indicators of business capital spending suggest considerably slower expansion in the third quarter, following very rapid growth in the first half of the year. Preliminary data for the nominal U.S. merchandise trade deficit in August showed a greater deficit than in July, but the average for July-August was slightly less than the second-quarter rate. The latest information on prices and wages suggests little if any change from recent trends.

Interest rates in long-term debt markets have declined a little further since the Committee meeting on September 20, while rates in short-term markets have edged higher. The trade-weighted foreign exchange value of the dollar in terms of the other G–10 currencies declined appreciably over the intermeeting period from the high level of last summer.

Expansion of M2 has slowed considerably in recent months; growth of M3 moderated in August and September but appears to have strengthened somewhat in October. Thus far this year, M2 has grown at a rate somewhat below, and M3 at a rate somewhat above, the midpoint of the ranges established by the Committee for 1988. M1 has increased only slightly on balance in recent months after registering relatively strong growth in June and July. Expansion of total domestic nonfinancial debt for the year thus far appears to be at a pace somewhat below that in 1987.

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability over time, promote growth in output on a sustainable basis, and contribute to an improved pattern of international transactions. In furtherance of these objectives, the Committee at its meeting in late June reaffirmed the ranges it had established in February for growth of 4 to 8 percent for both M2 and M3, measured from the fourth quarter of 1987 to the fourth quarter of 1988. The monitoring range for growth of total domestic nonfinancial debt was also maintained at 7 to 11 percent for the year.

For 1989, the Committee agreed on tentative ranges for monetary growth, measured from the fourth quarter of 1988 to the fourth quarter of 1989, of 3 to 7 percent for M2 and 3½ to 7½ percent for M3. The Committee set the associated monitoring range for growth of total domestic nonfinancial debt at 6½ to 10½ percent. It was understood that all these ranges were provisional and that they would be reviewed in early 1989 in the light of intervening developments.

With respect to M1, the Committe reaffirmed its decision in February not to establish a specific target for 1988 and also decided not to set a tentative range for 1989. The behavior of this aggregate will continue to be evaluated in the light of movements in its velocity, developments in the economy and financial markets, and the nature of emerging price pressures.

In the implementation of policy for the immediate future, the Committee seeks to maintain the existing degree of pressure on reserve positions. Taking account of indications of inflationary pressures, the strength of the business expansion, the behavior of the monetary aggregates, and developments in foreign exchange and domestic financial markets, somewhat greater reserve restraint would, or slightly lesser reserve restraint might, be acceptable in the intermeeting period. The contemplated reserve conditions are expected to be consistent with growth of M2 and M3 over the period from September through December at annual rates of about 2½ and 6 percent, respectively. The Chairman may call for Committee consultation if it appears to the Manager for Domestic Operations that reserve conditions during the period before the next meeting are likely to be associated with a federal funds rate persistently outside a range of 6 to 10 percent.

By order of the Federal Open Market Committee, December 22, 1988.

Normand Bernard,

Assistant Secretary Federal Open Market Committee.

[FR Doc. 88–30032 Filed 12–29–88; 8:45 am]

BILLING CODE 6210–01–M

[1] Copies of the record of policy actions of the Committee for the meeting of November 1, 1988, are available upon request to The Board of Governors of the Federal Reserve System, Washington, DC 20551.

Change in Bank Control Notice; Acquisition of Shares of Banks or Bank Holding Companies; Arlen H. Andelson

The notificant listed below has applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7))

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 13, 1989.

A. **Federal Reserve Bank of San Francisco** (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. *Arlen H. Andelson*, and Arlen H. Andelson Family Trust, Beverly Hills, California; to acquire 3.0 percent of the voting shares of BKLA Bancorp, Inc., West Hollywood, California, and thereby immediately acquire Bank of Los Angeles, Los Angeles, California.

Board of Governors of the Federal Reserve System, December 23, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-30030 Filed 12-29-88; 8:45 am]

BILLING CODE 6210-01-M

Antrim Financial Corp., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than January 20, 1989.

A. **Federal Reserve Bank of Chicago** (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Antrim Financial Corporation*, Mancelona, Michigan; to acquire 100 percent of the voting shares of First of America Bank-Grand Traverse, National Association, Traverse City, Michigan.

2. *First of America Bank Corporation*, Kalamazoo, Michigan; to acquire 100 percent of the voting shares of Antrim Financial Corporation, Mancelona, Michigan, and thereby indirectly acquire Antrim County State Bank, Mancelona, Michigan.

B. **Federal Reserve Bank of San Francisco** (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. *Napa Valley Bancorp*, Napa, California; to acquire 100 percent of the voting shares of Suisun Valley Bank, Fairfield, California.

Board of Governors of the Federal Reserve System, December 23, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-30031 Filed 12-29-88; 8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Department of Health and Human Services (HHS) publishes a list of information collection packages it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). The following are those packages submitted to OMB since the last list was published on December 23, 1988.

Public Health Service

(Call Reports Clearance Officer on 202-245-2100 for copies of package)

1. Premarket Notification Submission (510(k)), Subpart E-0910-0120—Manufacturers wishing to distribute new or changed medical devices must submit a premarket notification to FSA 90 days before marketing. FDA reviews the notification and determines whether the product is substantially equivalent to a preamendments device. Those which are equivalent may be marketed immediately, and those which are not may not be marketed without further evaluation. Respondents: Businesses or other for-profit, Small businesses or organizations; Number of Respondents: 5,000; Number of Responses per Respondent: 1; Average Burden per response: 15.6; Estimated Annual Burden: 78,000 hours.

2. Medical Device Conformance Assessment to Voluntary Standards—NEW—The conformance assessment program will evaluate the extent that certain high priority medical devices adhere to voluntary standards and will assess the impact of these on the safety and effectiveness of these devices. Conformance will be accomplished by review and analysis of information obtained from manufacturers. Respondents: Businesses or other for-profit; Small businesses or organizations; Number of Respondents: 200; Number of Responses per Respondent: 1; Average Burden per Response: 4; Estimated Annual Burden: 800.

Case-Control Study of Drug Use and Syphilis—NEW—This study will investigate to what extent the association between illegal drug use and syphilis is responsible for the syphilis increases from 1986 and 1987. Ten Sexually Transmitted Disease (STD) clinic sites around the U.S. will be central points where syphilis patients will be asked to participate as cases. Controls are selected from patients of the clinics who do not have syphilis. 240 controls will also be selected from communities surrounding two of the sites. Respondents: Individuals and households; Number of Respondents: 4,680; Number of Responses per Respondent: 1; Average Burden per Response: .288; Estimated Annual Burden: 1,350.

4. Product License Application for the Manufacture of Human Immunodeficiency Virus for In-Vitro Diagnostic Use—0910-0211—This report is mandated by section 351 of the Public Health Act; The Federal Food, Drug and Csotmetic Act, sec. 502 and 505; and Title 21 CFR, Part 600—"No license may be granted unless this completed application has been received." Respondents: Businesses or other for-

profit, Non-profit institutions, Small businesses or organizations;

1st information collection	2nd information collection
Reporting:	Recordkeeping:
Title: Product license application for the manufacture of human immunodeficiency virus for in-vitro diagnostic use.	Title: Product license application for the manufacture of human immunodeficiency virus for in-vitro diagnostic use.
Number of respondents 9.	9.
Number of responses per respondent 2.	1.
Average burden per response 12.8.	20.4.
Total annual burden: 414..	

OMB Desk Officer: Shannah Koss-McCallum.

Health Care Financing Administration

(Call Reports Clearance Officer on 301–966–2088 for copies of package)

1. Indirect Cost or Medical Information—0938–0457—Hospitals are required to submit an annual report on the number of interns and residents furnishing services. This report will facilitate final adjustments to cost reports. Respondents: Businesses or other for-profit; Number of Respondents: 1,015; Annual Frequency 1; Average Burden per Response: 2; Estimated Annual Burden: 2,030 hours.

2. Attending Physicians Certification of Medical for Home Oxygen Therapy—NEW—Coverage of oxygen for use in a patient's home requires that certain medical documentation be submitted to HCFA Carriers to support the payment of claims. The provisions ensure consistent coverage determinations by the Medicare carriers. Respondents: Small businesses or organizations Physicians; Number of Respondents: 600,000; Annual Frequency: 1; Average Burden Per Repsonse: 25 minutes; Estimated Annual Burden: 250,000 hours.

Office of the Secretary

(Call Reports Clearance Officer on 202–245–6511 for copies of package)

1. Survey of Beneficiary Response to Social Security Messages Included on Bank Account Statements—NEW—Information on beneficiary responses to Social Security messages included on bank account statements is necessary to determine the effectiveness of using this method to contact beneficiaries about Social Security matters and to decide on possible expanded use. Respondents: Individuals or households; Number of Respondents: 381; Annual Frequency: 1; Average Burden per Response: 10 minutes; Estimated Annual Burden: 64 hours.

OMB Desk Officer: Shannah Koss-McCallum.

As mentioned above, copies of the information collection clearance packages can be obtained by calling the Reports Clearance Officer on one of the following numbers:

PHS: (202) 245–2100
HCFA: (301) 966–2088
SSA: (301) 965–4149
OS: (202) 472–4415

Written comments and recommendations for the proposed information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address:

OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503.

Date: December 27, 1988.

James E. Larson,

Acting Deputy Assistant Secretary for Information Resources Management.

[FR Doc. 88–30110 Filed 12–29–88; 8:45 am]

BILLING CODE 4150–04–M

Alcohol, Drug Abuse, and Mental Health Administration

Short-Term Clinical Training Grants in Diagnosis and Treatment of Depressive Disorders

AGENCY: National Institute of Mental Health.

ACTION: Notice of Restricted Eligibility.

SUMMARY: The National Institute of Mental Health (NIMH) announces the availability of Short-Term Clinical Training Grants in Diagnosis and Treatment of Depressive Disorders, MH–88–07. These grants will be made under the authority of section 303, of the Public Health Service Act, 42 U.S.C. 242a, which authorizes grants for clinical training.

The goals of this program are to improve the knowledge of mental health professionals and primary care physicians regarding the diagnosis and treatment of clinical depression by promoting continuing education for such professionals, particularly in rural or other underserved areas. Each grantee will be required to provide training for a maximum of five days duration at each of the six different sites. The training is intended to provide health professionals with a didactic and experiential program that will increase their capacity to recognize, diagnose, and treat clinical depression effectively. Training must include major research findings on psychosocial and pharmacological aspects of treatment.

In fiscal year 1989, NIMH will fund approximately 4 grants at a maximum of $100,000 per grant (direct and indirect costs). Each grant will be for a twelve month period, with a maximum of three years support.

NIMH is limiting potential applicants under this announcement to university-based departments of psychology offering doctoral training in clinical psychology, or a school of professional psychology with appropriate accreditation for doctoral training in clinical psychology; college or university schools of nursing which offer graduate programs in psychiatric nursing; graduate schools of social work; departments of psychiatry in, or associated with, schools of medicine or free standing mental health institutions with an approved psychiatric residency program and; schools of medicine. The reasons for limitation of eligibility to academic departments are threefold: First, such departments are experienced in the provision of continuing education, and are able to develop outreach programs focused on the needs of specific target audiences. Second, they are able to utilize multidisciplinary faculty which models desirable professional working relationships, and third, they have experience in implementing training that is based on sound research and clinical knowledge.

For additional program guidance, potential applicants should contact:

Harold Goldstein, Ph.D., Director of Training

or

Ms. Joyce B. Lazar, Director, Depression Awareness, Recognition, and Treatment Program (D/ART)

National Institute of Mental Health, 5600 Fishers Lane, Room 14–105, Rockville, Md. 20857, Telephone: (301) 443–4140

The Catalog of Federal Domestic Assistance number for this program is 13.244.

Frederick K. Goodwin,

Administrator, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 88–30061 Filed 12–29–88; 8:45 am]

BILLING CODE 4160–20–M

ADAMHA Small Instrumentation Program

AGENCY: Alcohol, Drug Abuse, and Mental Health Administration.

ACTION: Notice of Limited Competition.

SUMMARY: The Alcohol, Drug Abuse, and Mental Health Administration

(ADAMHA) is announcing the establishment of an ADAMHA Small Instrumentation Program. This grant program was authorized by section 501(m) of the Public Health Service Act, as amended, in response to findings that much of the research instrumentation in the Nation's principal universities is either obsolete or poorly maintained. These findings identified the need for upgrading equipment currently in use. The most significant need was for relatively low-cost pieces of equipment. The purpose of the program is to help fund items of equipment which are difficult to justify within the context of an individual research project, but which will upgrade the institution's research infrastructure.

Eligible institutions or institutional components are those that had, in FY 1988, three or more active ADAMHA research grants (types R01, R23, R29, or R37) or cooperative agreements (types U01 or U10) totaling at least $640,000 in direct costs. Competition is being limited as stated above to ensure that the equipment will be provided to the most research-intensive institutions.

The equipment requested must be available for use by more than one project either currently or in the future. The primary user(s) of the equipment must be one or more principal investigators of active ADAMHA-supported research grants. The total purchase price of a requested piece of equipment may not be less than $5,000 or more than $100,000, regardless of source of support. The program will provide awards which will range from $20,000 to $60,000. One-year awards will be made. A Catalog of Federal Domestic Assistance number is being obtained for this program.

Additional information may be obtained from:

National Institute on Alcohol Abuse and Alcoholism

Dr. Louise Hsu, Division of Basic Research, NIAAA, Room 14C-20, (301) 443-4223.

National Institute on Drug Abuse

Dr. Stephen Szara, Division of Preclinical Research, NIDA, Room 10A-31, (301) 443-6300.

National Institute of Mental Health

Mr. James Moynihan, Division of Basic Sciences, NIMH, Room 11-95, (301) 443-3107.

Dr. Leonard Lash, Division of Clinical Research, NIMH, Room 10-95, (301) 443-3264.

Dr. Kenneth Lutterman, Division of Biometry and Applied Sciences, NIMH, Room 18C-26, (301) 443-3685.

The mailing address for the above individuals is: 5600 Fishers Lane, Rockville, Maryland 20857.

Joseph R. Leone,

Associate Administrator for Management, ADAMHA.

[FR Doc. 88-30062 Filed 12-29-88; 8:45 am]

BILLING CODE 4160-20-M

Office of Human Development Services

Child Abuse and Neglect Prevention and Treatment; Proposed Research and Demonstration Priorities for Fiscal Year 1989

AGENCY: Office of Human Development Services (OHDS), Department of Health and Human Services (DHHS).

ACTION: Notice of Proposed Fiscal Year 1989 Child Abuse and Neglect Research and Demonstration Priorities for the Office of Human Development Services.

SUMMARY: This notice identifies proposed priorities for research programs related to the causes, prevention, identification and treatment of child abuse and neglect and for demonstration or service programs and projects designed to prevent, identify and treat child abuse and neglect. Comments on these priorities and suggestions for other topics are invited. The actual solicitation of grant applications will be published separately, at a later date in the **Federal Register**. No proposals, concept papers or other forms of application should be submitted at this time.

Section 6(a)2(B) of the Child Abuse Prevention and Treatment Act of 1988 requires the Department to publish proposed priorities for research and demonstration activities for the purpose of soliciting comments from individuals knowledgeable in the field of prevention and treatment of child abuse and neglect. Final priorities selected will reflect the expertise and recommendations received from the field in response to this notice.

DATE: In order to be considered, comments must be received no later than February 28, 1989.

ADDRESS: Comments shall be sent to: Commissioner, Administration for Children, Youth and Families, Attention: National Center on Child Abuse and Neglect, P.O. Box 1182, Washington, DC 20013 (202) 245-2859.

SUPPLEMENTARY INFORMATION:

I. Background

The National Center on Child Abuse and Neglect (NCCAN) is located in the Children's Bureau within the Administration for Children, Youth and Families.

NCCAN conducts activities designed to assist and enhance national, State and community efforts to prevent, identify and treat child abuse and neglect. These activities include: Conducting research and demonstrations; supporting service improvement projects; gathering, analyzing and disseminating information through a national clearinghouse; providing grants to eligible States for strengthening and improving child protective service programs; and coordinating Federal activities related to child abuse and neglect through an Advisory Board on Child Abuse and Neglect and an Interagency Task Force on Child Abuse and Neglect composed of Federal agencies.

The Child Abuse Prevention, Adoption, and Family Services Act of 1988 (Pub. L. 100-294) amended the Child Abuse Prevention and Treatment Act (the Act). Pursuant to section 6(a)2(B) of the Act, this notice identifies proposed priorities for research on the causes, prevention, identification and treatment of child abuse and neglect and on demonstration or service programs and projects designed to prevent, identify, and treat child abuse and neglect. The demonstration and service projects include priorities for training, innovative programs and other projects which show promise for addressing these issues.

Fourteen research priorities are proposed as well as two research symposia. Seven demonstration or service projects are proposed as well as one demonstration symposium. Final priorities selected for child abuse and neglect efforts for fiscal year (FY) 1989 will be supported either by grant or contract. Announcement of the final discretionary grant priorities will be published in the **Federal Register**.

In addition to projects funded under priority areas selected as a result of this announcement, in FY 1989 NCCAN intends to continue the Clearinghouse on Child Abuse and Neglect Information and the National Information Clearinghouse for Infants with Disabilities and Life Threatening Conditions, and to support development of a system for collecting data from official State reports on child abuse and neglect. Four special studies mandated by Pub. L. 100-294 will also be supported: (1) Child Abuse and Disability—the incidence of and relationship between child abuse and neglect and children with handicapping conditions; (2) Child Abuse and

Alcoholic Families—the incidence of and relationship between child abuse and neglect and familial alcoholism; (3) Study of Guardians Ad Litem—State data related to models of legal representation utilized for children in abuse and neglect cases and their effectiveness; and (4) High Risk Study—identification of underserved and/or unserved groups and the incidence of child abuse and neglect within these populations.

NCCAN also intends to support a competitively awarded project to plan and administer the ninth National Conference on Child Abuse and Neglect, which will take place in 1991.

II. Recent Research and Demonstration Topics

Research and demonstration projects supported by NCCAN in fiscal years 1987 and 1988 have addressed the following topics:

NCCAN Priority Areas Funded in FY 1987

- Models to Assist Teenage Parents on Preventing Child Abuse and Neglect.
- Chronic Neglect of Children.
- Training of Foster Parents to Deal with Sexually Abused Children.
- Improving Protective Services Administration and Performance.
- Coordination of Court Actions on Child Abuse and Neglect Cases.
- Improving Child Protective Services on Indian Reservations.
- Prevention of Abuse and Neglect in Infants of Chemically Dependent Mothers.
- Risk Assessment Systems Utilized by Child Protective Services in the Decision-Making Process.
- Abused and Neglected Children Involved in Court Actions.
- Methods Used in Interviewing Child Victims.
- Removal of the Perpetrator Versus Removal of the Victim from the Home: Effects on the Victim and the Family.
- The Relationship of Child Maltreatment to Childrens' Social and Emotional Development and School Performance.
- Assessing the Impact of Child Abuse and Neglect on Victims.
- Effectiveness of Child Abuse and Neglect Prevention Programs.
- Child Abuse and Neglect Interdisciplinary Training.

NCCAN Priority Areas Funded in FY 1988

- Advocates for Children in Criminal Court Proceedings.
- Prevention of Serious or Fatal Maltreatment.
- Minority Organizations Assisting in Combating Child Abuse and Neglect.
- Public/Private Partnerships to Combat Child Abuse and Neglect.
- Child Sexual Abuse Curricula Adapted for use by Native Americans.
- Treatment Approaches for Intra-Familial Child Sexual Abuse.
- Diagnosing and Treating Chronic Neglect.
- Child Fatalities Resulting from Child Abuse and Neglect.
- Impact of Investigations on Families where Child Abuse and Neglect was Not Substantiated.
- Relationship Between Child Abuse and Teenage Pregnancy.
- Field Initiated Research on Child Abuse and Neglect.

Because the project periods for many of the grants funded to address these topics may extend for two or three years, the above subject areas, with two exceptions, are not being considered for repetition or further elaboration in FY 1989. The two exceptions are: (1) Child Sexual Abuse Curricula Adapted for Use by Native American Populations, which is being republished with a broader category of eligible applicants, and (2) Field Initiated Research on Child Abuse and Neglect, which is being repeated.

In addition, although NCCAN published a priority area for conducting a planning project for a Longitudinal Study on Child Abuse and Neglect in FY 1988, the proposals submitted lacked strong methodological approaches and sought data from too limited a number of sites. Therefore, no projects were funded in this area in FY 1988, and a new priority area for Longitudinal Studies will be included as an FY 1989 priority area.

III. Proposed Child Abuse and Neglect Research and Demonstration Priorities for FY 1989

OHDS solicits specific comments and suggestions concerning each of the proposed priorities for FY 1989 described below. We also solicit suggestions for topics not covered in this announcement, but which are timely and relate to specific needs in the field of child abuse and neglect. Any suggestions of new topics should keep in mind the issues already being addressed in current projects, as listed above, and build on the current base of knowledge in child abuse and neglect and its prevention, identification and treatment. Proposed research and demonstration priorities should benefit the field and lead to improved services for children and families.

One half of the funds available for discretionary research and demonstration grants will be made available for a broad range of activities pertaining to prevention of child abuse and neglect.

No acknowledgement will be made of the comments in response to this notice, but all comments received by the deadline will be considered in preparing the final funding priorities in child abuse and neglect activities for FY 1989. Copies of the final program announcement will be sent to all persons who comment on these proposed priorities.

A. Proposed Research Priorities

NCCAN conducted three Research Symposia in FY 1988 on the topics of child neglect, sexual abuse and systems issues at the community level. Approximately 24 specific research priority areas were recommended by participants in these symposia. Fourteen of these priorities are being published here for comment. Where the symposia participants described specific techniques or methodologies which they believed were germane to their recommendations, such techniques and methodologies are included. Respondents are encouraged to comment on the content as well as to suggest time periods and recommendations for prioritization of these issues, since it will not be feasible to include all of these priorities in the FY 1989 solicitation announcement in the **Federal Register.**

1. Research Priorities for Soliciting Discrete Projects

a. *Intervening Variables That Moderate the Influence of Child Neglect on the Child.* It is important to understand the factors in the child, the family system and the environment that help to explain differences in functioning, or mastery of age-appropriate tasks and social relationships. Proposals should focusd on one or more age levels, using cross-sectional and/or longitudinal designs and have a theoretical base and outcomes that relate to hypotheses generated by the theory. Alternative models can be tested.

Research issues to be addressed include the development of parental competence in child nurturing and the effects of different types of neglect as follows:

- What are the components of parental competence and how does parental competence develop? What is the relationship between particular aspects (or models) of parental competence and the recovery of children and families from child neglect?

• How do different types of neglect differentially affect children? Do these effects vary by children's age, sex and birth order, and/or other characteristics?

b. *Family Functioning.* Within the framework of families as systems, there are several tasks or functions that all families should perform to meet the basic needs of individual family members, for example: Economic support, parenting function, and social control. Although general information is available about types of neglect in families, there is little information about the ways that neglectful families function in comparison with non-neglectful families. There are many issues that need to be researched within the family framework to enhance an understanding of neglectful families and provide more information for prevention and intervention strategies. There are also many methodological issues which should be addressed in developing research proposals, including the use of clear and relevant operational definitions and addressing potentially compounding factors in sampling and/or analysis, such as socioeconomic status and ethnicity.

Research questions proposed in this area are:

• Can distinguishable differences in functioning be identified between neglectful and non-neglectful families?

• What are the characteristics of the men in neglectful vs. non-neglectful families? What functions do they serve in the family, and how do they impact on family functioning?

• What is the impact of mental health problems and/or all forms of substance abuse on family functioning and neglectful families?

• Can minimal levels of performance be identified that define at what point families begin to neglect?

c. *Community-Based Prevention of Child Maltreatment.* A number of prevention strategies have been utilized and there is the need to examine the knowledge and experience of the field to date. Research in this area should include a three-part literature review and evaluation of approaches to ongoing community-based prevention of child maltreatment, as follows:

• Review and analyze literature and materials on the development of community prevention programs for child abuse and neglect and other fields with respect to the following issues: Community planning and development, planning models, effective fund-raising, and types of community leadership.

• Identify and classify existing community-based prevention programs, including those developed under Children's Trust Funds and Challenge Grants. The study should attempt to measure the program's relative effectiveness, the area of the State covered, funding sources, groups targeted, and other factors.

• Synthesize materials and findings in a manual (and/or dissemination modes) on how to plan, fund, initiate, implement and maintain community-wide prevention programs, with emphasis on empirical findings on ways of producing change.

d. *Joint Police/Child Protective Services Investigations of Complaints of Child Maltreatment.* Child protective service agencies and law enforcement agencies have differing responsibilities related to the investigation of child maltreatment cases. There is very little guidance or objective knowledge about how these two agencies can work together to improve outcomes for children and their families.

The research should include a review of the literature to determine the state-of-the-art. The study should be designed to address such questions as: Are joint investigations effective? If so, for which types of cases? What are the case or system factors that trigger joint investigations?

The study should further compare outcomes of those cases using police/social worker teams with matched cases using single agency investigation to answer the following questions:

• Which cases involved more successful prosecutions and/or reunifications?

• Did the use of joint teams require fewer interviews?

• Was there a reduction in the length of time required for system decisions about placement, prosecution, or family reunification?

• What are the police/social worker team and client perceptions of the joint investigation process?

• When joint investigative teams are used, are there different outcomes depending on the type of abuse?

e. *Prosecution of Child Maltreatment Cases.* Little data have been aggregated regarding the number, type and outcomes of judicial handling of child abuse cases. NCCAN is interested in approaching this informational need by proposing the following research questions related to sexual abuse, physical abuse, and neglect, by level of risk. An experimental or quasi-experimental design is recommended using cases matched by type of abuse, age of child, family composition, and severity of injury.

• What kinds of cases are referred for prosecution?

• How does early prosecutorial involvement affect conviction or reunification rates?

• How does the composition of a multidisciplinary team affect prosecutorial decision making?

• How can multidisciplinary teams be managed to maximize interagency communication between child protective services and criminal justice systems?

f. *Risk Assessment.* Considerable resources have been diverted in many States to the use of risk assessment as a tool for helping agencies to set priorities for investigation of reports of child abuse and neglect, to measure and evaluate the results of the investigation, and to determine intervention priorities. The following additional efforts are proposed to address this priority area:

• Conduct additional validity studies to determine whether risk factors are actually predictive of likely future harm.

• Develop audience-specific syntheses of current research on risk assessment and treatment services. Audiences would include judges, the legal profession, schools, medical professions, counseling services, and others. The project would develop a systematic mechanism to disseminate information in pilot communities. This component would include pre- and post-data collection to determine whether there was a shift in practices based on the information.

• Identify the effectiveness of risk models at different decision points in the system; for example, relevant risk factors at intake vs. predictive factors after investigation.

g. *Judicial Review Process.* Needy, abused and neglected children who are placed in foster care as a protective measure are thereafter also covered by the provisions of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96–272, which has a goal of permanency for the child either through rehabilitation of the child's own home or through an alternative placement.

Public Law 96–272 requires periodic *judicial* review of foster care cases to insure that goals are met in a timely manner. Research is needed to determine how these judicial reviews are being conducted in various jurisdictions and how this review process specifically addresses and contributes to treatment and rehabilitation of abusive and/or neglecting families, including support of these children in foster care. Questions to be addressed include:

• How do States and jurisdictions implement the judicial review process and how are the child abuse and neglect issues considered in this process (e.g.,

how are the frequency of the review, sources of data for the review, and progress towards goals affected by the type and severity of the incident of child abuse and neglect)?

• What are the outcomes of judicial reviews for abused and neglected children (e.g., redirection of services, increased monitoring, additional legal sanctions, reduced recidivism, length of foster care, proportion returned home or freed for adoption, etc.)?

• What are the relationships among various types of reviews (e.g., judicial, administrative, and citizen) and which approach is more effective in serving abused and neglected children?

h. *Effectiveness of Child Protective Services Intervention.* While some efforts have been made to study the effectiveness of various Child Protective Services (CPS) interventions, there is a need to better classify areas of family dysfunction, the types of interventions used, and the variety of outcome measures appropriate for evaluation research in this field. The purpose of these new classification schemes should be to identify effective interventions for specific problem areas.

This multiyear priority area will require several studies over time. The studies should proceed sequentially (those in the last area depend on the successful completion of the previous three) as follows:

(i) Classification of Areas of Dysfunction

This study should review the literature and current research to develop and validate a classification system of the types of family and individual problems typical of the CPS referrals and caseloads. Accepted statistical techniques should be used on at least two separate populations. It may be necessary to conduct several small studies in different geographic locations, using similar classification systems, to validate the findings for various populations.

(ii) Classification of Intervention Systems

This study should examine various techniques in use in CPS and develop a classification system for interventions to be used in future research. This system should also include information regarding the potential impacts of the various interventions.

(iii) Identification of Outcome Measures

This study should relate the goals of specific interventions to *observable* and *measurable* case or individual outcomes. While the measures considered appropriate will vary depending on the service goals defined, it would be useful to define a basic set of outcome measures consistently collected on all interventions. This study would be critical in that it links the client and intervention classification systems developed in research areas (i) and (ii) to valid measures. The selection of measures should be based on a review of available literature, assessment tools, and interviews with CPS workers.

(iv) Evaluation of Effectiveness of Intervention

Using the classification systems and outcome measures resulting from the three research areas outlined above, several studies should be developed to evaluate the effectiveness of different types of interventions for various populations and problem types. While each investigator may have an idea of specific issues to be examined, all should agree to use at least a minimal list of variables and measures derived from previous research. Preference should be given to experimental or quasi-experimental designs where there is some ability to control the intervention system on some known purity of techniques in already existing systems.

i. *Peer and Sibling Sexual Abuse.* Data suggest that peer and sibling sexual abuse may be a substantial component of the total child victimization problem. This study would determine the prevalence and characteristics of peer and sibling abuse. In particular, the following indicators need to be addressed:

• Scope of victimization;
• Sex of victim;
• Sex of offender;
• Relationship between victim and offender; and
• Cultural variables.

In addition, this study would need to explore:

• How does this type of abuse differentiate itself from normal sibling and peer social interaction?

• Are either victim or offender involved in other abusive family contexts?

• Are the offenders also in victim roles as well?

j. *Impact of Treatment Approaches for Intra-familial Child Sexual Abuse.* There are little objective data on the use of incarceration and diversion programs for cases of intra-familial sexual abuse and how treatment approaches can be used effectively with these programs to improve the outcomes for children and families. This priority proposes to conduct a comparative multi-site study on intra-familial sexual abuse that would include:

• Incarceration—without treatment;
• Incarceration—with treatment;
• Diversion program—pre-trial and post-trial; and
• No formal intervention program

The study should focus on the outcome indicators for victim, offender, and family unit. In particular, the outcomes need to address recidivism, cost of the program, and victim and family functioning. An advisory committee, to include juvenile/family court judges and women's groups as well as appropriate professionals, is recommended. The purpose of this study would be to provide information for decreasing child victimization and critical and useful information for the judiciary system to assist them in making effective sentencing decisions.

k. *Utilizing Results of Research on Child as Witness Projects.* NCCAN has funded several projects to research different interviewing techniques used with children who have been abused. A rigorous analysis of this topic is needed to closely examine issues related to evidentiary testimony; the use of hearsay exceptions; and the validation of anatomically correct dolls as an interviewing technique, especially for child victims under the age of six.

An effort is needed to research and interpret the available data, to synthesize the results, and to propose strategies for disseminating findings on the utility of different techniques. The Department of Justice has also funded projects with a similar objective and all applicants would be expected to included these project findings in the synthesis.

l. *Status of Measurement Development in the Study of Child Abuse and Neglect.* A substantial body of research knowledge has accumulated through the use, development and adaptation of an array of measurement techniques. There is the need for a state-of-the-art review of the measures and instruments utilized in studies of child abuse and neglect. These measures may concern children, their families, and communities and include their demographic characteristics and environmental settings; parent-child and family interactions; child social-emotional development and school performance; family strengths, needs, resources, and stress factors; social and economic support systems; and service availability and provision. This review of measures should cover psychometric properties including validity and reliability, the domains addressed for the instruments, identification of any

gaps and next steps to be taken in their use, and adaptation or development of new measures.

Anticipated products from this project would consist of a paper on the state-of-the-art on instrument development, a directory of measurements/instruments established as a computer file with a proposed strategy for ongoing maintenance, a hard copy reference directory for research applications and a manual for practitioners, a recommended set of common data elements to be collected across studies to enable comparability, and a library set of these measures and manuals for their utilization.

m. *Field Initiated Research for Child Abuse and Neglect.* NCCAN is interested in supporting new research initiated by researchers in the child abuse and neglect field to carry out the legislative responsibilities established for the National Center on Child Abuse and Neglect by the Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. 100–294. One of these responsibilities is to conduct research on the causes, prevention, identification and treatment of child abuse and neglect, and on appropriate and effective investigative, administrative and judicial procedures in cases of child abuse.

Basic research in the behavioral and social sciences which contributes to theory development is not within the purview of this announcement. Also, it is not intended for program evaluation and demonstration projects to be included in this category. Current issues having widespread impact on the field of child abuse and neglect and on the target population are of particular interest. Secondary analyses of data from the 1986 study of the national incidence and prevalence of child abuse and neglect will also be considered.

n. *Longitudinal Study.* NCCAN proposes to support a consortium of longitudinal studies to address aspects of the life course of families at risk of child maltreatment. These studies are expected to contribute to our knowledge of the etiology and ecolgy of child maltreatment and contribute new insights into prevention, treatment and the organization of protective services.

The consortium of longitudinal studies would have two parts: (1) A central grantee to oversee methodological issues and perform data analyses, and (2) satellite grantees who would identify data sources, collect data and turn these data over to NCCAN for analysis. A two phased funding approach is anticipated for this priority. During Phase One, NCCAN proposes to fund a planning grant for a central grantee and up to three planning grants for satellite grantees. The central grantee would be asked to provide an experimental longitudinal study design which addresses sampling and data analysis plans, and to pilot test instruments. The satellite grantees would be asked to propose the location of sources of data, obtain agreements to participate, propose a data collection procedure and pilot test the subjects. They would have the opportunity to develop their own special analyses along with those about which they collaborate with the central grantee. Subsequent Federal funding for Phase Two, the implementation of a consortium of longitudinal studies, would be based on a determination of the feasibility of the total effort.

2. Research Symposia

In addition to soliciting applications for the above described studies, during FY 1989 NCCAN will continue to convene research symposia with knowledgeable groups of selected experts on subject areas of critical concern to the field. Selection of topics for the symposia will focus on issues on which some research and demonstration efforts have occurred but for which there is no clear direction for further development.

The purpose of the research symposia is to review what is known to the field which needs further exploration, and what is unknown and needs close examination.

The symposia may also provide advice on multi-year strategies to implement the needed research . This will be accomplished by bringing together small groups of selected experts who will assess the major issues, identify trends and problems in the field, and prepare substantive symposia reports of publishable quality.

NCCAN successfully convened three of the four symposia announced for FY 1988 as follows:

(a) Child Neglect;

(b) Child Sexual Abuse;

(c) Child Abuse and Neglect: Systems Issues at the Community Level.

In FY 1989, NCCAN will hold the fourth symposium as described in the proposed priorities for FY 1988 on Intervention Approaches for Child Maltreatment (FR, Vol. 52, No. 105, Tuesday June 2, 1987, p. 20647). In addition, one new research symposium will also be conducted focusing on Ritualistic Abuse. The purpose of this symposium will be to examine the knowledge and experience of the field in dealing with ritualistic abuse and to determine what areas of research should be conducted to fully identify and understand the problem.

B. Proposed Demonstration and Service Priorities

In recent years, NCCAN has funded numerous demonstration projects on a wide range of subjects relating to child abuse and neglect. For fiscal year 1989, NCCAN is interested in examining, in a disciplined and organized fashion, selected topics of interest. The purpose of these proposed demonstration and service priorities is to distill and disseminate project findings and the results of previously funded programs so that the field can have greater access to existing information and resources; and to further the demonstration and utilization of successful approaches to combating child maltreatment.

1. Demonstration and Service Program Priorities for Soliciting Discrete Projects

a. *Utilizing Results of Demonstration Grant Clusters.* Over the past several years NCCAN has provided support to clusters of grants relating to a common program theme and purpose in child abuse prevention and treatment. These projects are valuable to the communities they serve and for the knowledge and program expertise they have generated which can be transferred to other communities to improve child abuse and neglect services. The field needs to become more aware of successful, relevant programs that have reasonable costs and are easily adapted and implemented.

For several of the successful cluster grant programs there has been no final effort to consolidate the results of individual projects into a cluster report for the field, including a review of their individual final reports and other materials developed by the projects which reflect information about objectives, implementation strategies, costs and outcomes. There is a need for various experts in the field, who have special interests in the subject matter either by virtue of their professional or academic experience, to distill and synthesize the significant project findings into reports to the field, including development of utilization strategies. Dissemination strategies appropriate to the needs of various user groups also need to be addressed.

Four grant clusters which have a solid body of information suitable for this analysis include:

(a) Residential Child Abuse and Neglect;

(b) Parent Aide and Respite Care Programs;

(c) Education of School-aged Children to Prevent Child Sexual Abuse and Development of Educational Materials

Geared to Preschool-aged Children and Adolescents;

(d) Models to Assist Teenage Mothers in Preventing Child Abuse and Neglect.

b. *Utilizing Results of the Central Registry Research Grant.* All States require that certain persons report child maltreatment and most States have established a Statewide central registry system to record these reports. However, the functions which the registries were established to perform in the 1960's have changed significantly. Their original goals focussed on diagnosis, teaching, research and case management. The registries continue to be evaluated on the basis of how they perform their original functions rather than on the basis of how they perform their current functions which now include record keeping, due process safeguards, and data utilization. In 1986, NCCAN awarded a research grant to the National Center for State Courts to evaluate the central registries' performance in these areas.

Two significant conclusions of the survey were: (1) That there is a tremendous variety in record keeping practices, due process safeguards, and data usage among central registries; and (2) that every registry is in the process of changing some aspect of its procedures, whether record keeping, risk assessment, central hotline or computer system. Because the state-of-the-art for central registries is in flux, many States would be highly motivated and interested in utilizing the information generated by this research to apply to various aspects of their central registry systems. Therefore, NCCAN is interested in developing a dissemination and utilization strategy to encourage States to use the research findings to improve or enhance various aspects of their registry systems.

c. *Demonstration of the Feasibility of a Child Abuse and Neglect Telecommunications Network.* The purpose of this priority area is to conduct a feasibility study on the design of a telecommunications network which will enable those in the field of child abuse and neglect (1) to communicate with each other and with NCCAN and (2) to have access to significant and appropriate databases on child abuse and neglect. The network would enable practitioners and researchers to address concerns in the field more effectively. Areas of interest to be addressed include: network justification and its uses; who can supply the necessary services; what are the system operator's responsibilities; who are the potential users; what hardware/software will be used; what training is necessary to access and utilize the system; what are the timetables for phasing in implementation; and what are the implementation and maintenance costs.

d. *Adaptation of Child Sexual Abuse Training Curricula for Demonstration with Native American Populations.* Child sexual abuse is recognized as pervading modern society with estimates that, by the age of eighteen, 15–25 percent of girls and 3–10 percent of boys will be sexually abused.

Several curricula have been developed and used to train children, parents and teachers on: (1) How to talk about and cope with past child sexual abuse, and (2) how to prevent future child sexual abuse. Many experts believe that the manner of presentation and the environment in which the material is presented affects how children accept and incorporate the information. An educational setting is believed to be a non-threatening environment to childern and a teacher is often viewed as a responsible person that the children will trust and will communicate with openly.

NCCAN is interested in funding projects to adapt existing child sexual abuse prevention training curricula for children in grades two through six on Indian reservations. Eligibility would be limited to Federally recognized Indian Tribes, national Indian organizations, historically Native American colleges and universities and other institutions of higher education which have a history of serving the educational needs of Native Americans.

e. *Dissemination and Utilization of Professional Child Abuse and Neglect Training Curricula.* Over the past several years, NCCAN has provided support for the development of a number of professional curricula on child abuse and neglect issues. These curricula have been prepared for educators, nurses, physicians, psychologists, judges, court personnel, social workers, prosecutors and law enforcement personnel. Some of the curricula have received wide publicity and some have not. They address a number of issues such as:

—Child sexual abuse issues related to the concerns of judges and court personnel;

—Continuing education programs for nurses, physicians, psychologists and social workers to increase awareness about the treatment and prevention of child sexual abuse;

—Curricula and other educational materials for use in law school, family law courses, juvenile clinical programming and continuing legal education programs; and

—Curricula for law enforcement officers for reporting and investigating child sexual assaults in out-of-home child care settings.

In addition, outside of those efforts supported by NCCAN, other Federal government agencies, such as the Office of Juvenile Justice, have supported efforts for the development of curricula related to child maltreatment issues. NCCAN is interested in supporting a project to identify and review all the professional curricula developed over the past several years in order to learn what types of training have been emphasized, the target groups, the quality of the training curriculum and the results of the training. NCCAN wants to obtain an overview of the available curricula, an assessment of the quality of the curricula and a delineation of the efforts that need to be undertaken to ensure the dissemination of quality materials to interested professionals.

f. *Parents' Self-help Group.* From its inception, NCCAN has supported efforts of national networks of parent self-help groups that utilize techniques of self-help for the treatment of parents who abuse and neglect their children and also serve as a resource to other troubled parents who believe that without this help they might harm their children. As these groups have expanded in the States and local communities, they have become a significant part of the intervention strategy for working with these parents and their children.

NCCAN is interested in continuing to support a parent self-help program of demonstrated effectiveness which is national in scope. This program should include furthering the development of a national focus and network of parent self-help groups by establishing new groups and/or strengthening the capacity of existing groups.

Examples of activities that might be considered under this priority area are:

- Strengthening the relationships between parent self-help groups and public and private agencies which serve abused and neglected children in order to encourage consistent use of parent self-help as part of the intervention strategy;
- Promoting the further development and expansion of local chapters which have limited resources;
- Enhancing the capacity for local chapters and State organizations to network and participate in national leadership development and agenda building;
- Supporting the preparation and dissemination of written materials for chapter leadership and development.

g. *Prevention of Physical Child Abuse and Neglect.* Considerable evidence has

been amassed in recent years which suggests that reports of child abuse and neglect are growing and that the child protective services system does not have the capacity to effectively handle all these reports. Further, while a large percentage of these reports go unsubstantiated, a significant number of additional cases go unreported. There is the need, therefore, to once again focus on and support comprehensive community-based approaches to the prevention of child abuse and neglect which capture and use the knowledge developed over the past decade.

NCCAN has supported a large number of research and demonstration projects in the area of prevention. Additionally, Children's Trust Funds have been established in 46 States, and 44 States have received Challenge Grant funds to establish prevention programs in child abuse and neglect. Through these and other related efforts designed to prevent child maltreatment, a wide variety of prevention strategies are being utilized in communities across the United States. However, these are scattered and may not include the full range of components necessary to reach all children and families who may be at risk or in need of help.

NCCAN is interested in providing support in two phases for the planning and development of model comprehensive community-based physical child abuse and neglect prevention programs in a number of communities across the country reflecting urban, suburban and rural settings. These model programs would be designed to consist of the following components:

- Public awareness programs for citizens about positive family support;
- Home health visitor program for all newborns;
- Parent education;
- Resources such as child care, respite care, crisis nurseries, and self-help groups for parents who need help in parenting;
- School-based prevention education programs for all elementary school children;
- Hospital-based information and referral services for parents of children with handicaps and children who have been neglected or abused by their parents;
- Projects for the prevention of alcohol and drug-related child abuse and neglect;
- Multidisciplinary training programs for professionals involved in the planning and implementation of these model community programs;
- Establishment of a community-based interdisciplinary task force, including the private sector, to plan, develop, implement, and oversee the model community program.

During the first phase, NCCAN would fund projects for up to nine months for the development of program plans. The second phase would consist of four year competitive grants which would be awarded to the extent that funds are available to applicants who have completed the planning study and submit successful applications for funds to establish a model program. During the second phase, successful applicants would be expected to participate in a common data collection and evaluation effort. It is not anticipated that funds would be used for direct services.

2. Demonstration Symposium

In addition to soliciting applications for the above described priorities supporting demonstration and service programs in FY 1989, the National Center on Child Abuse and Neglect is interested in convening one demonstration symposium on the subject of Child Abuse and Neglect in Divorce and Custody Cases. The purpose of this symposium would be to explore the research and demonstration findings already available in the literature and to develop recommendations for how to use what is known to improve the practice of agencies and courts in addressing the problems of child abuse and neglect which arise during divorce and custody proceedings.

(Catalog of Federal Domestic Assistance Program Number 13.670, Child Abuse and Neglect Prevention and Treatment.)

Dated: December 7, 1988.

Dodie Borup,

Commissioner, Administration for Children, Youth and Families.

Approved: December 23, 1988.

W. Douglas Badger,

Deputy Assistant Secretary for Human Development Services.

[FR Doc. 88-30109 Filed 12-29-88; 8:45 am]

BILLING CODE 4130-01-M

Administration for Children, Youth and Families; Allotment Percentages for Child Welfare Services State Grants

AGENCY: Office of Human Development Services, HHS.

ACTION: Biennial publication of allotment percentages for States under the title IV-B Child Welfare Services State Grants program.

SUMMARY: As required by section 421(c) of the Social Security Act (42 U.S.C. 621(c)), the Department is publishing the allotment percentage for each State under the title IV-B Child Welfare Services State Grants Program. Under section 421(a), the allotment percentages are one of the factors used in the computation of the Federal grants awarded under the program.

DATES: The table indicates the allotment percentages to be used for fiscal years 1990 and 1991.

FOR FURTHER INFORMATION CONTACT: Mrs. Ellen Fagins, Formula Grants Division, Children's Bureau, Administration for Children, Youth and Families, P.O. Box 1182, Washington, DC 20013, (202) 755-4780.

SUPPLEMENTARY INFORMATION: The allotment percentage for each State is determined on the basis of paragraphs (b) and (c) of section 421 of the Act. The allotment percentage for each State is as follows:

State	Allotment percentage
Alabama	61.42
Alaska	37.09
Arizona	53.45
Arkansas	62.42
California	42.44
Colorado	48.42
Connecticut	32.89
Delaware	46.81
District of Columbia	35.10
Florida	49.84
Georgia	54.10
Hawaii	49.72
Idaho	61.50
Illinois	46.94
Indiana	55.13
Iowa	54.37
Kansas	50.60
Kentucky	61.23
Louisiana	61.35
Maine	56.03
Maryland	41.98
Massachusetts	39.65
Michigan	49.74
Minnesota	48.76
Mississippi	66.81
Missouri	52.38
Montana	60.10
Nebraska	58.52
Nevada	47.15
New Hampshire	43.96
New Jersey	35.46
New Mexico	60.74
New York	42.46
North Carolina	57.48
North Dakota	57.52
Ohio	52.61
Oklahoma	58.02
Oregon	54.63
Pennsylvania	51.04
Rhode Island	50.09
South Carolina	61.32
South Dakota	59.79
Tennessee	58.93
Texas	53.59
Utah	62.51
Vermont	54.52
Virginia	47.24
Washington	49.38
West Virginia	63.96
Wisconsin	52.44
Wyoming	56.51

State	Allotment percentage
Guam	70.00
Northern Marianas	70.00
Puerto Rico	70.00
American Samoa	70.00
Virgin Islands	70.00

Dated: December 20, 1988.

Dodie Truman Borup,

Commissioner, Administration for Children, Youth and Families.

Approved: December 21, 1988.

Sydney Olson,

Assistant Secretary for Human Development Services.

[FR Doc. 88-30108 Filed 12-29-88; 8:45 am]

BILLING CODE 4130-01-M

Public Health Service

Statement of Organization, Functions, and Delegations of Authority; Food and Drug Administration

Part H, Chapter HF (Food and Drug Administration) of the Statement of Organizations, Functions, and Delegations of Authority for the Department of Health and Human Services (35 FR 3685, February 25, 1970, as amended most recently in pertinent parts at 51 FR 8033, March 7, 1986) is amended to update the functional statements of staffs within the Office of Health Affairs, Food and Drug Administration (FDA). The changes include adding descriptions of the Office's functions regarding patent term restoration, international drug scheduling, health hazard evaluation, and recall classification activities to the functional statements of the Health Assessment Policy Staff within OHA. Technology assessment and technology national policy coverage decisions functions are being added to OHA's Medicine Staff. Minor revisions are also being made to the functional statements of all three OHA staffs to update and clarify them.

Section HF-B, Organization and Functions is amended as follows:

1. Following paragpraph (g) *Office of Health Affairs (HFA5)* delete subparagraphs (g-1) through (g-3) in their entirety and insert new subparagraphs (g-1) through (g-3) reading as follows:

(g-1) *International Affairs Staff (HFA56).* Serves as the Agency focal point for developing and maintaining international communications, policies, and programs.

Establishes and provides an Agency liaison on international activities with the Department, PHS, and other Federal Government agencies, foreign governments, including foreign embassies, and international organizations.

Represents the Agency at meetings, conferences, and symposia relating to international obligations; briefs Agency participants in such international activities.

Establishes, identifies, interprets, and clarifies, in cooperation with appropriate Agency components, the Agencys' international obligations and needs, including those associated with bilateral programs which involve extra-budgetary support.

Establishes and maintains an international information exchange program concerning Agency policies and programs to provide interchange between FDA and counterpart agencies in foreign countries and international organizations.

Assists in the development, negotiation, and monitoring of agreements with foreign governments and international organizations in cooperation with appropriate Agency components; and acts as the Agency focal point for intergovernmental conferences.

Negotiates the preparation and implementation of technical assistance programs (including formal training programs and surveys) with foreign governments and international organizations in areas relating to the Agency mission. Coordinates ongoing technical assistance operations with the Department's Office of International Affairs, the PHS Office of International Health, and appropriate Agency components.

Directs the Agency's International Visitors Program, providing participants with policy briefings, technical training, and/or assistance in response to specific needs.

(g-2) *Medicine Staff (HFA51).* Provides leadership and direction on medical issues; provides consultation and medical review of clinical/preclinical data for recalls and Agency and departmental reports, as requested by the Agency.

Represents the Agency in matters concerning technology assessment and national policy coverage decision on those technologies involving FDA-regulated products.

Provides an Agencywide focal point for communications with health professional organizations and their publications.

Maintains continual awareness of changing concepts in health care delivery and medical research. Evaluates their impact on medical programs and policies of the Agency.

Provides medical/scientific reviews of hearing requests and of proposed Commissioner's decisions following initial decision by a public board of inquiry or by the Administrative Law Judge after formal evidentiary hearings.

Advises the Commissioner of the impact of major medical policy initiatives of the Department and makes recommendations for Agency implementation of these programs.

Represents the Agency on task forces, committees, and before Congress on medical policies and long-term program direction and goals of the Agency.

Initiates liaison and coordinates activities with medical, pharmacy, nursing, and related health professionals to promote understanding and support of Agency programs.

(g-3) *Health Assessment Policy Staff (HFA52).* Serves as the focal point for Agency activities for implementation of Tilte II of the Drug Price Competition and Patent Term Restoration Act of 1984. Coordinates patent term restoration activities and provides eligibility assistance and regulatory review period determinations to the U.S. Patent And Trademark Office.

Under the provision of the FDA/NIDA Memorandum of Understanding, Provides staff coordination of domestic and international drug scheduling issues. Develops Agency international drug scheduling policies and strategies. Recommends Agency international and domestic scheduling positions to the Assistant Secretary for Health, in cooperation with the National Institute on Drug Abuse, the PHS Office of International Health, other Agency components, and other Federal agencies as appropriate.

Advises the Associate Commissioner and other key Agency officials, including the Commissioner, of the protection needs of human subjects of medical research and of initiatives which will affect Agency activities in regard to human protection. Serves as focal point for all Agency Institutional Review Board activities, including informational and educational activities. Provides staff support to the FDA Research involving Human Subjects Committee.

Provides staff support in informal administrative hearings and appeals from formal evidentiary hearings. Organizes informal hearings regarding clinical investigators and regulated products and prepares documents for the presiding officer. Reviews initial decision by Public Board of Inquiry or the Administrative Law Judge on appeal

to the Commissioner. Assists in drafting issue memoranda and decisions for the Commissioner after formal evidentiary hearings. Coordinates responses to clinical investigators seeking reinstatement.

Provides reviews and recommendations of health hazard evaluations and recall classification, and recommends changes in the classification as appropriate, in cooperation with other appropriate Agency components.

Serves as the Agency focal point for the coordination of specific health issues, particularly those related to the cross-cutting activities of the Agency's centers and other federal agencies.

Provides assistance, advice, or recommendations to unresolved inter-agency and intra-agency issues and pending legislation affecting certain Agency policies and public health. Evaluates initiatives and actions affecting major health policies. Develops implementation plans for certain Agency actions required by new legislation.

Robert E. Windom,

Assistant Secretary for Health.

Dated: December 20, 1988.

[FR Doc. 88-30069 Filed 12-29-88; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ-020-09-4212-15; AZA 23648]

Realty Action; Classification of Public Minerals for State Indemnity Selection; Arizona

The Arizona State Land Department has petitioned for classification and filed an application to acquire the public minerals, described below, under the provisions of the Enabling Act of June 20, 1910. The state owns the surface.

Gila and Salt River Meridian, Maricopa County

T. 3 N., R. 1 W.,
Sec. 1, lot 2, SW¼NE¼, E½SE¼.
Containing 167.44 acres.

The Bureau of Land Management will determine the suitability of the mineral disposition including any statutory constraints that would bar transfer.

Classification of the mineral estate would be in accordance with the provisions of 43 CFR Part 2400 and section 7 of the Act of June 28, 1934.

Notice of Realty Action AZA 23330 is hereby terminated as it affects the mineral estate herein described.

For a period of sixty (60) days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments to the District Manager, Phoenix District Office, 2015 West Deer Valley Road, Phoenix, Arizona 85027. Any adverse comments will be evaluated by the Stte Director who may sustain, vacate or modify this realty action. In the absence of any objections, this realty action will become the final determination of the Department of the Interior.

Henri R. Bisson,

District Manager.

Dated: December 22, 1988.

[FR Doc. 88-30097 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-32-M

[NM-03-09-7122-8004]

Intent To Prepare an Environmental Impact Statement on Federal Coal Leasing in the Fence Lake Area of Catron and Cibola Counties, NM

AGENCY: Bureau of Land Management, Las Cruces District, New Mexico.

ACTION: Notice of intent to prepare an environmental impact statement (EIS) and notice of scoping meetings.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, the Bureau of Land Management (BLM), Las Cruces District, will be directing the preparation of an EIS to be prepared by a third-party contractor on the impacts of Federal coal leasing on public land and Federal mineral ownership in the Fence Lake Area of Catron and Cibola Counties, New Mexico.

DATE: Comments relating to scoping of this Federal coal leasing proposal will be accepted until February 10, 1989.

ADDRESS: Comments should be sent to: Charles Hodgin, Project Coordinator, Bureau of Land Management, Las Cruces District, 1800 Marquess, Las Cruces, New Mexico 88005.

FOR FURTHER INFORMATION CONTACT: Charles Hodgin, Project Coordinator, (505) 525-8228 or John Kenny, Environmental Specialist, (505) 988-6024.

SUPPLEMENTARY INFORMATION: The Salt River Project Agricultural Improvement and Power District (SRP) has submitted a Federal coal lease application for approximately 6,800 acres within the Fence Lake Area. The application was prepared pursuant to title 43 Code of Federal Regulations (CFR), subpart 3400 (Lease by Application). BLM has determined that an EIS must be prepared to comply with the provisions of NEPA, and all subsequent regulations implementing this law.

To expedite the leasing process, SRP and BLM signed, on May 9, 1988 a Memorandum of Agreement to allow a third-party environmental contractor to prepare the EIS as authorized by NEPA, 42 USC Part 4321 and 43 CFR 3400 and Section 307 of the Federal Land Policy and Management Act of 1976 (90 Statute 2765). The Fence Lake Project EIS will tier off the Socorro Resource Management Plan (RMP).

During the development of the Socorro RMP, all four land-use planning screens for coal (coal development potential, surface owner consultation, unsuitability criteria, and multiple use screens) were applied to the Fence Lake Area. The remaining public land and Federal mineral ownership containing approximately 31,640 acres will be carried forward for impact analysis in the Fence Lake Project EIS.

The San Juan River Regional Coal Team (RCT) decided at the August 9, 1988 meeting to recommend changing from a regional leasing mode to a lease by application mode. Acting upon that recommendation, the BLM Director opened the region to lease by application on December 7, 1988 (53 FR 44956, November 7, 1988). Under lease by application, a site-specific EIS would be completed to address cumulative impacts of Federal coal leasing in the Fence Lake Project Area.

The regulations set forth in Title 43 of the CFR, subpart 3400, provide the framework under which the Department of the Interior conducts leasing of the rights to extract Federal coal. The objectives of these regulations are to establish policies and procedures for considering development of coal deposits through a leasing system involving land-use planning and environmental impact analysis. Additionally, the regulations are intended to ensure that coal deposits are developed in consultation, cooperation, and coordination with the public, State and local governments, Indian tribes, and involved Federal agencies.

BLM's scoping process for the EIS will include: (1) Identification of issues to be addressed; (2) Identification of viable alternatives; and (3) Notification of interested groups, individuals, and agencies so that additional information concerning these issues can be obtained.

The scoping process will consist of a Notice of Intent in the **Federal Register**; a news release in State and local papers announcing the start of the EIS process; newsletters of invitation to participate in the scoping process; presentations to groups and governmental agencies; and public scoping meetings which will be

held at the following times and locations.

Date	Time	Meeting location
Jan. 30, 1989	7:00 p.m.	Quemado, New Mexico High School Multipurpose Room.
Jan. 31, 1989	7:00 p.m.	Reserve, New Mexico Reserve Community Center.
Feb. 1, 1989	7:00 p.m.	Zuni, New Mexico Tribal Assembly Room.
Feb. 2, 1989	7:00 p.m.	St. Johns, Arizona 4-H Community Center.
Feb. 7, 1989	7:00 p.m.	Albuquerque, New Mexico Mariott Hotel 2101Louisiana Blvd., NE.

Larry L. Woodard,

State Director.

[FR Doc. 88-30054 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-FB-M

[Alaska AA-48675-0]

Proposed Reinstatement of a Terminated Oil and Gas Lease; Alaska

In accordance with Title IV of the Federal Oil and Gas Royalty Management Act (Pub. L. 97-451), a petition for reinstatement of oil and gas lease AA-48675-0 has been received covering the following lands:

Copper River Meridian, Alaska

T. 11 N., R. 10 W.,
Sec. 35, E 1/2.—(320 acres)

The proposed reinstatement of the lease would be under the same terms and conditions of the original lease, except the rental will be increased to $5 per acre per year, and royalty increased to 16⅔ percent. The $500 administrative fee and the cost of publishing this Notice have been paid. The required rentals and royalties accruing from July 1, 1988, the date of termination, have been paid.

Having met all the requirements for reinstatement of lease AA-48675-0 as set out in section 31(d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate the lease, effective July 1, 1988, subject to the terms and conditions cited above.

Dated: December 12, 1988.

Kay F. Kletka,

Chief, Branch of Mineral Adjudication.

[FR Doc. 88-30056 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-JA-M

[WY-920-09-4111-15; WYW97286]

Proposed Reinstatement of Terminated Oil and Gas Lease; Wyoming

December 19, 1988.

Pursuant to the provisions of Pub. L. 97-451, 96 Stat. 2462-2466, and Regulation 43 CFR 3108.2-3(a) and (b)(1), a petition for reinstatement of oil and gas lease WYW97286 for lands in Sweetwater County, Wyoming, was timely filed and was accompanied by all the required rentals accruing from the date of termination.

The lessee has agreed to the amended lease terms for rentals and royalties at rates of $5.00 per acre, or fraction thereof, per year and 16 ⅔ percent, respectively.

The lessee has paid the required $500 administrative fee and $125 to reimburse the Department for the cost of this Federal Register notice. The lessee has met all the requirements for reinstatement of the lease as set out in section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW97286 effective February 1, 1988, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Andrew L. Tarshis,

Chief, Leasing Section.

[FR Doc. 88-30057 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-22-M

Realty Action; Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent to Prepare a Planning Amendment to the Royal Gorge Management Framework Plan and Notice of Realty Action COC-44110, Exchange of Public Land in Fremont County for Private Land in Fremont and Park Counties, Colorado. Availability of Environmental Assessment and Land Report.

SUMMARY: The following described public lands are to be considered for suitability for disposal by exchange under Section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1716:

Sixth Principal Meridian, Colorado

T. 16 S., R. 73 W.
Sec. 6, Lots 2, 5, and 9—128.02 acres

New Mexico Principal Meridian

T. 51 N., R. 11 E.
Sec. 2, SW¼SE¼—40 acres
Sec. 15, S½S½—160 Acres

T. 51 N., R. 12 E.
Sec. 1, Lot 2—23.05 acres
Sec. 3, Lots 3 and 4, S½SW¼—130.80 acres
Sec. 4, Lot 1, SE¼SE¼—64.47 acres
Sec. 6, Lot 2, SW¼SE¼—68.40 acres
Sec. 9, E½-E½—160 acres
Sec. 14, SW¼NW¼, N½SW¼, SW¼ SW¼—160 acres
Sec. 15, E½—320 acres
Sec. 18, E½SE¼—80 acres
Sec. 19, NE¼NE¼, NE¼SW¼—80 acres
Sec. 22, N½NE¼—80 acres
Sec. 23, N½NW¼—80 acres
Sec. 30, Lot 4, SW¼SE¼, SE¼SW¼—119.17 acres
Sec. 31, Lot 1, NE¼NW¼—79.39 acres
Sec. 32, NE¼—160 acres
Fremont County Total Selected Public Land—1933.30 acres

If these lands are found suitable for disposal, the United States will acquire by exchange the following described private land of equal value from Mr. Richard Gossage.

Sixth Principal Meridian

T. 15 S., R. 74 W.
Sec. 33, NW¼SW¼, S½S½, N½SE¼—280 acres
Sec. 34, W½E½, NE¼NW¼, SW¼—360 acres
Park County Total Offered Private Land—640 acres

New Mexico Principal Meridian

T. 51 N., R. 12 E.
Sec. 4, Lots 3 and 4, S½SW¼—131.36 acres
Sec. 5, Lots 1, 2, 3, and 4, S½S½—266.00 acres
Sec. 8, Lots 1 and 2, M.S. 16073, E½, W½ NW¼, SW¼—639.89 acres
Sec. 9, NW¼, N½SW¼—240 acres
Fremont County Total Offered Private Land—1277.25 acres
Grand Total Offered Private Land—1917.25 acres

DATES: Interested parties may submit comments to the Bureau of Land Management, at the address shown below until February 17, 1989. For Further Information Contact: Mr. Mac Berta, Area Manager Royal Gorge Resource Area, 3170 East Main Street, P.O. Box 311, Canon City, Colorado 81212. (719) 275-0631.

SUPPLEMENTARY INFORMATION: A draft environmental assessment and land report will be available for review. Any adverse comments will be evaluated by the District Manager, who may sustain, vacate, or modify this realty action. In the absence of any action by the District Manager, this realty action will become final.

The publication of this notice segregates the public lands described above from the public land laws, including the mining laws, but not from exchange pursuant to section 206 of the Federal Land Policy and Management Act of 1976 for a period of 2 years from

the date of first publication. The exchange will be made subject to:

1. A reservation to the United States of a right-of-way for ditches or canals in accordance with 43 U.S.C. 945.

2. All valid existing rights.

Donnie R. Sparks,

District Manager.

[FR Doc. 88-30052 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-JB-M

Realty Action; Rio Grande County, CO; Correction

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction.

SUMMARY: The legal description for the public lands classified for Recreation and Public Purposes in the notice published on August 9, 1988 (53 FR 29955), should read as follows:

New Mexico Principal Meridian, Colorado

T. 39 N., R. 6 E.
Sec. 11, E½NE¼.

Containing 80 acres.

Donnie R. Sparks,

District Manager.

[FR Doc. 88-30051 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-JB-M

[NV-930-09-4212-11; N-48049]

Realty Action; Orovada, NV

ACTION: Notice of realty action—direct sale of Public Lands for a waste water treatment facility to Humboldt County for community of Orovada, Nevada.

SUMMARY: Notice is hereby given that pursuant to the Act of October 21, 1976, Pub. L. 94-579, The Federal Land Policy and Management Act, Section 203, the Bureau of Land Management will sell to Humboldt County a parcel of public land for the construction and operation of a waste water treatment facility to serve the community of Orovada, Nevada. The following public lands are involved:

Mount Diablo Meridian, Nevada

T. 43 N., R. 37 E.
Sec. 34, SE¼NE¼—40 acres

For a period of 45 days from the date of publication of this notice, interested parties may submit comments to the District Manager, Bureau of Land Management, 705 East 4th Street, Winnemucca, NV 89445.

DATE: January 30, 1989.

FOR FURTHER INFORMATION CONTACT: Hal Green, District Realty Specialist, Bureau of Land Management, 705 East 4th Street, Winnemucca, NV 89445 (702) 623-3676.

SUPPLEMENTAL INFORMATION: Publication of this notice in the Federal Register shall segregate the public lands to the extent that the land will not be subject to appropriation under the public land laws, including the mining laws. Any subsequent application shall not be considered as filed and shall be returned to the applicant. This segregative effect of the notice of realty action shall terminate upon issuance of the patent or other document of conveyance to Humboldt County or publication of the notice of termination in the Federal Register or 270 days from the date of publication of this notice, whichever occurs first.

Dated: December 19, 1988.

Ronald Wenker,

District Manager, Winnemucca.

[FR Doc. 88-30055 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-HC-M

[UT-020-89-4212-14; U-61694]

Realty Action; Sale of Public Land in Box Elder County, UT

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action—sale of public lands.

SUMMARY: The following described land has been examined and identified as suitable for disposal under section 203 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2750, 43 U.S.C. 1713), at no less than the appraised fair market value shown:

Parcel No.	Legal description	Acreage	Value	Preference right bidder
U-61694	T. 15 N., R. 6 W., SLM sec. 31, lots 14, 15, 16	100.77	$7,550	T. Scott Tolman

The above described land will be sold in order to dispose of lands which because of location and other characteristics are difficult and uneconomical to manage. The sale is consistent with the Bureau's planning system and the public interest will be served by offering these lands for sale.

The lands described are hereby segregated from appropriation under the public land laws, including the mining laws, pending disposition of this action.

The above described land will be offered for sale on March 8, 1989, by sealed bid under modified competitive procedures. The preference right bidder listed above will have the opportunity to meet the highest bid submitted for the parcel as shown. All bids must be received by 10 a.m. on March 8, 1989, at the Bureau of Land Management (BLM) Salt Lake District Office at 2370 South 2300 West, Salt Lake City, Utah 84119. Bids will be opened and a high bidder declared at 11 a.m. on March 8, 1989. No bids will be accepted for less than the appraised fair market value shown above.

Under modified competitive sale procedures, an apparent high bid will be declared at public auction. The apparent high bidder and the preference right bidder will be notified. The preference right bidder shall have 10 days from the date of the sale to exercise the preference consideration given to meet the high bid. Should the preference right bidder fail to submit a bid that matches the apparent high bid within which the specified time period, the apparent high bidder shall be declared high bidder.

Bids may be made by a principal or duly qualified agent. Qualified bidders include: citizens of the United States 18 years of age or over; a corporation subject to the laws of any state or of the United States; a state, instrumentality or political subdivision authorized to hold property; and any entities capable of holding lands or interests therein under the laws of the state within the lands to be conveyed are located. Entities include, but are not limited to, associations, partnerships, and other legal entities.

Each bid shall be accompanied by a certified check, postal money order, bank draft or cashier's check, made payable to the Department of the Interior, BLM, for not less than one-third of the amount bid and shall be enclosed in a sealed envelope clearly marked "Bid for Public Land, Tract Number U _____" (tract numbers are shown above). If two or more bids for the same amount are received, the apparent high

bidder shall be determined by supplemental bidding pursuant to 43 CFR 2711.3–1(c).

The terms and conditions applicable to the sale are:

1. The high bidder shall submit the remainder of the full bid amount within 180 days from date of sale. Failure to submit the full bid price prior to, but not including the 180th day following the sale, shall result in the disqualification of the bidder and the deposit shall be forfeited.

2. The authorized officer may reject the highest qualified bid and release the bidder from his/her obligation and withdraw the tract for sale, if he determines that consummation of the sale would be inconsistent with provisions of any existing law or collusive or other activities have hindered or restrained free and open bidding or consummation of the sale would encourage or promote speculation in public lands.

3. The patent will contain a reservation for ditches and canals and be subject to all valid existing rights.

4. All minerals will be reserved to the United States including the right of ingress or egress for mineral development.

5. The United States does not, by the terms of this sale, guarantee to any party physical or legal access to the tract of land being sold.

6. In the event that any of the lands offered for sale are not sold on the date of the sale, they shall continue to be offered for sale at the appraised fair market value on the third Wednesday of each succeeding month after that date until sold or until further notice. Any person wishing to purchase any of these lands after the initial date of sale must present his/her bid at the BLM office shown above accompanied by a certified check, postal money order, bank draft or cashier's check for not less than one-third of the amount bid. All applicable terms and conditions as listed above will continue to apply regardless of when the land is actually sold except there will be no preference right bidder privilege after the original date of sale.

For a period of 45 days after the date of publication of this notice, interested parties may submit comments to the District Manager, BLM, 2370 South 2300 West, Salt Lake City, Utah 84119. Any adverse comments will be evaluated by the State Director who may vacate or modify this realty action and issue a final determination. In the absence of any action by the State Director, this realty action will become the final determination of the Department of the Interior.

Deane H. Zeller,

District Manager.

Date: December 14, 1988.

[FR Doc. 88–30135 Filed 12–29–88; 8:45 am]

BILLING CODE 4310–DQ–M

[WY–060–09–4212–12: WYW114131]

Realty Action; Exchange; Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action for the Exchange of Public Lands in Crook and Weston Counties, Wyoming for State lands in Johnson County, Wyoming.

SUMMARY: The Bureau of Land Management (BLM) proposes to exchange public lands in Crook and Weston Counties, Wyoming for State lands in Johnson County, Wyoming. The following public lands administered by the BLM are being considered for disposal by exchange pursuant to section 206 of the Federal Land Policy and Management Act (FLPMA) of 1976, 43 U.S.C. 1716:

T. 47 N., R. 60 W.,
Sec. 9, NE¼, E½W¼;
Sec. 10, lots 5 and 6;
Sec. 15, lots 5–7 incl.;
Sec. 21, NW¼NW¼.
T. 48 N., R. 60 W.,
Sec. 4, lot 5;
Sec. 7, lot 4;
Sec. 15, lots 5–8 incl.;
Sec. 17, lot 5;
Sec. 18; lot 5;
Sec. 22, lots 5–7 incl.
T. 46 N., R. 62 W.,
Sec. 15, NW¼NW¼, N½SW¼;
Sec. 23, SW¼NE¼, SE¼NW¼;
Sec. 25, NW¼;
Sec. 27, NE¼SE¼, SW¼SE¼.
T. 55 N., R. 65 W.,
Sec. 31, lots 8–10 incl.
T. 54 N., R. 66 W.,
Sec. 25, SW¼SW¼;
Sec. 26, S½SE¼
Sec. 27, NE¼NW¼, SW¼SW¼;
Sec. 35, N½NE¼.
The above land aggregates 1701.25 acres.

In exchange, the United States proposes to acquire lands from the State of Wyoming described as:

Sixth Principal Meridian

T. 42 N., R. 84 W.,
Sec. 21, S½;
Sec. 22, NE¼, S½NW¼, SW¼, NW¼SE¼;
Sec. 23, NW¼NE¼, N½NW¼.
The above land aggregates 880 acres.

FOR FURTHER INFORMATION CONTACT: Distict Manager, Casper District Office, 1701 East 'E' Street, Casper, WY 82601 (307) 261–5101.

SUPPLEMENTARY INFORMATION: The BLM proposes to exchange public land with the State of Wyoming in order to achieve more efficient management of the public lands through consolidation of ownership. Conveyance of the lands would be subject to any valid rights identified during the evaluation process.

The EA/Land Report covering the proposed exchange when completed as well as the appropriate planning documents will be available for review at the following locations:

Bureau of Land Management, Casper District Office, 1701 East 'E' Street, Casper, WY 82601
Bureau of Land Management, Buffalo Resource Area, 189 North Cedar, Buffalo, WY 82834
Bureau of Land Management, Newcastle Resource Area, 1501 Highway 16 Bypass, Newcastle, WY 82701

The Bureau of Land Management administered public lands described above are segregated from entry under the mining laws, except the mineral leasing laws, effective upon publication of this Notice in the **Federal Register**. The segregation effect will terminate an issuance of the patent to the State of Wyoming, upon publication in the **Federal Register** of termination of the segregation, or 2 years from the date of this publication, whatever comes first.

For a period of 45 days from the date of this notice interested parties may submit comments on this action to the District Manager, Casper District, Bureau of Land Management, 1701 East 'E' Street, Casper, WY 82601. Any adverse comments will be evaluated by the State Director, who may vacate or modify the realty action and issue a final detemination. In absence of adverse comments or in the absence of any action by the State Director, this realty action will become final.

James W. Monroe,

District Manager.

Date: December 22, 1988.

[FR Doc. 88–30064 Filed 12–29–88; 8:45 am]

BILLING CODE 4310–22–M

[ID–942–09–4730–12]

Idaho; Filing of Plats of Survey

The plats of survey of the following described lands were officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 10:00 a.m., December 22, 1988.

The plat representing the dependent resurvey of a portion of the south and west boundaries and subdivisional lines, and the subdivision of certain sections in T. 11 S., R. 27 E., Boise

Meridian, Idaho, Group No. 665, was accepted December 12, 1988.

The supplemental plat prepared to show the subdivision of old lot 3 into lots 5 and 6 in section 3, T. 15 S., R. 22 E., Boise Meridian, Idaho, was accepted December 12, 1988.

The survey was executed and the supplemental plat was prepared to meet certain administrative needs of this Bureau.

All inquiries about this land should be sent to the Idaho State Office, Bureau of land Management, 3380 Americana Terrace, Boise, Idaho, 83706.

December 22, 1988.

Duane E. Olsen,

Chief Cadastral Surveyor for Idaho.

[FR Doc. 88-30058 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-GG-M

INTERNATIONAL TRADE COMMISSION

[Investigation No. TA-131(b)-14]

Probable Economic Effect on U.S. Industries and Consumers of Modification of U.S. Tariffs and Modification or Removal of Certain U.S. Nontariff Measures

AGENCY: International Trade Commission.

ACTION: Institution of investigation and scheduling of public hearings.

SUMMARY: Following receipt on December 23, 1988, of a request from the U.S. Trade Representative (USTR), the Commission instituted investigation No. TA-131(b)-14 under section 131(b) of the Trade Act of 1974, as amended (19 U.S.C. 2151(b)).

As requested by USTR, the Commission, in accordance with section 131(b) of the Trade Act, will—

(1) Adviser the President with respect to each article on a list to be supplied to the Commission shortly, of its judgment as to the probable economic effect of modification of the tariff on industries producing like or directly competitive articles and on consumers. It is anticipated that this list will cover substantially all tariff line items. In providing this advice the Commission will also identify in its report those articles for which no staging of duty reductions is required under paragraph 1102(a)(3)(B) of the Omnibus Trade and Competitiveness Act of 1988; and

(2) With respect to products of least-developed developing countries (LDDC's) and beneficiary countries under the Caribbean Basin Economic Recovery Act (CBERA), offer separate advice on the additional effect of providing immediate duty-free teatment for products (other than textiles and apparel) of LDDC's as a group and CBERA countries as a group.

USTR also indicated that it would request advice on the modification or removal of certain U.S. nontariff measures which have been requested informally by other governments in the context of work in the Uruguary Round Negotiating Group on Nontariff Measures. USTR indicated that it would provide its list of such measures to the Commission in the near future.

USTR notes that its request by no means implies an intention to take action of these tariff and nontariff measures. It merely indicates an interest in obtaining factual advice from the Commission on the probable economic effects of their reduction or elimination.

As requested by USTR, the Commission will provide the advice with respect to U.S. duties not later than 6 months after receipt of the request and will provide as much advice at that time with respect to the nontariff measures as is practical. The Commission will structure its advice in terms of the *Harmonized Tariff Schedule of the United States Annotated for Statistical Reporting Purposes (HTS)*, First Edition, Supplement 3 (USITC publication 2030). Copies of the USTR request of December 22, 1988 and the lists of articles and nontariff measures (when available) may be obtained from the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

EFFECTIVE DATE: December 27, 1988.

FOR FURTHER INFORMATION CONTACT: Aaron Chesser (202-252-1380) or Sylvia McDonough (202-252-1393), Office of Industries, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. For information on the legal aspects of the investigation, contact William W. Gearhart of the Commission's Office of the General Counsel (202-252-1091). For information on a product basis, contact the appropriate member of the Commission's Office of Industries, as follows:

(1)Agriculture, Fisheries, and Forest Products Division, David Ingersoll, Chief (202-252-1309)

(2) Textiles, Leather Products, and Apparel Division, David Konkel, Chief, (202-252-1451)

(3) Energy and Chemicals Division, John Gersic, Chief (202-252-1342)

(4) Minerals and Metals Division, Larry Brookhart, Chief (202-252-1419)

(5) Machinery and Equipment Division, Aaron Chesser, Chief (202-252-1380)

(6) General Manufactures Division, Walter Trezevant, Chief, (202-252-1482)

Public Hearings and Prehearing Briefs

As previously announced on November 15, 1988 (53 FR 47589, November 23, 1988) and again by USITC Press Release on November 21, 1988, the Commission will hold a series of hearings throughout the United States to solicit the views and opinions of the business community, labor, consumers, and other interested parties in connection with this investigation.

All testimony and written briefs should relate only to the areas that the Commission will address in its report to the USTR. As the Commission has been requested to provide detailed advice on narrowly defined industries and product lines, testimony should focus on specific industries and products rather than on broad issues of trade policy and strategy.

Procedure for Conduct of Hearings

The individual hearings in connection with this investigation will be held at the hearing sites indicated below; the exact hearing room at each facility will be posted at an obvious location inside the main entrance at each location. All hearings will begin promptly at 9:30 a.m., local time, on the day indicated. Persons wishing to appear at one of the public hearings must file a request to appear not later than noon of the deadline date indicated for that particular hearing, and must file any prehearing briefs (original and 14 copies) on the date indicated with the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. All persons will have the right to appear in person or be represented by counsel, to present information, and to be heard. Such requests shall contain the following information:

a. A description of the article or articles on which testimony will be presented, including, if possible, the item number or numbers in the HTS covering the article or articles.

b. The name and organization of the witness or witneesses who will testify, and the name, address, telephone number, and organization of the person filing the request.

c. A statement indicating whether the testimony to be presented will be on behalf of importers, domestic producers, consumers, or other interests.

d. A careful estimate of the aggregate time desired for presentation of oral

testimony by all witnesses for whose appearances the request is filed.

Allotment of Time for Oral Presentation

Because the President's list will cover substantially all tariff line items, limitation of time for the presentation of oral testimony is in the public interest to ensure that all viewpoints are aired. Accordingly, in scheduling appearances at the hearing the time to be allotted to witnesses for the presentation of oral testimony will be limited. Individuals and individual groups are generally limited to 10 minutes for the presentation of direct testimony. Witnesses should be prepared to provide additional information in response to questions by the Commission and its staff. Supplemental written materials will be allowed in all cases, and may be submitted at the time of presentation of oral testimony.

To the extent practicable the hearings at each city will follow the numeric order of Chapters 1–99 of the HTS.

Questioning of witnesses will be limited to members of the Commission and its staff.

Witnesses should be aware that they need not appear at more than one Commission hearing to restate their views. In the interest of time conservation at the hearings, witnesses are requested to condense their presentations to summaries only.

Posthearing Submissions

Responses to Commission questions are due from witnesses no later than the close of business on the date specified for each hearing, which is 7 business days following the conclusion of the hearing.

Other Written Submissions

In lieu of, or in addition to, appearance at the public hearings, interested persons are invited to submit written statements concerning the investigation. Commercial or financial information which a submitting party desires the Commission to treat as confidential must be submitted on separate sheets of paper, each clearly 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 made available for inspection by interested persons. To be assured of consideration by the Commission, written statements should be submitted at the earliest possible date, but not later than April 13, 1989. All submissions should be addressed to the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

Hearing-impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on (202) 724–0002.

Schedule of Hearings and Related Documentation

Following is the schedule of public hearings and deadlines for filing appropriate notices and other documentation in connection with the hearings:

SCHEDULE FOR MTN FIELD HEARINGS BY THE U.S. INTERNATIONAL TRADE COMMISSION

Hearing city and location	Hearing date (1989)	Deadline for notification to appear at hearing (1989)	Deadline for filing prehearing briefs (1989)	Deadline for posthearing submissions (1989)
Houston, TX: Houston Marriott Hotel at the Astrodome, 2100 S. Braeswood at Greenbriar, Houston, TX 77030.	Mon., Jan. 30	Noon, Jan. 19	Noon, Jan. 23	Feb. 8
New Orleans, LA: Clarion Hotel, 1500 Canal St., New Orleans, LA 70112	Wed., Feb. 1	do	Noon, Jan. 25	Feb. 10
Miami, FL: Miami Marriott Dadeland Hotel, 9090 South Dadeland Blvd., Miami, FL 33156	Fri., Feb. 3	do	Noon, Jan. 27	Feb. 14
Atlanta, GA: Lanier Plaza Hotel and Conference Center, 418 Armour Dr., NE., Atlanta, GA 30324	Mon., Feb. 6	do	do	Feb. 15
Los Angeles, CA: Hyatt Wilshire Hotel, 3515 Wilshire Blvd., Los Angeles, CA 90010	Mon., Feb. 13	Noon, Jan. 24	Noon, Feb. 6	Feb. 23
San Francisco, CA: Hyatt Regency San Francisco, 5 Embarcadero Center, San Francisco, CA 94111	Wed., Feb. 15	do	Noon, Feb. 8	Feb. 27
Portland, OR: The Greenwood Inn, 10700 SW. Allen Blvd., Beaverton, OR 97005	Fri., Feb. 17	do	Noon, Feb. 10	Mar. 1
Denver, CO: Hyatt Regency Denver, 1750 Welton St., Denver, CO 80202	Fri., Feb. 24	Noon, Feb. 6	Noon, Feb. 17	Mar. 7
Chicago, IL: Sheraton Plaza Chicago, 160 East Huron, Chicago, IL 60611	Mon., Feb. 27	do	do	Mar. 8
Minneapolis, MN: Minneapolis Metrodome Hilton Hotel, 1330 Industrial Blvd., Minneapolis, MN 55413	Wed., Mar. 1	do	Noon, Feb. 22	Mar. 10
Kansas City, MO: Adam's Mark Hotel, 9103 E. 39th St., Kansas City, MO 64133	Thurs., Mar. 2	do	Noon, Feb. 23	Mar. 13
New York, NY: Sheraton Centre Hotel and Towers, 7th Ave. at 52nd St., New York, NY 10019	Mon., Mar. 13	Noon, Feb. 21	Noon, Mar. 6	Mar. 22
Boston, MA: Thomas P. O'Neill Federal Building, 10 Cosway, Boston, MA 02107	Wed., Mar. 15	do	Noon, Mar. 8	Mar. 24
Pittsburgh, PA: Hyatt Pittsburgh, 112 Washington Pl., Pittsburgh, PA 15219	Fri., Mar. 17	do	Noon, Mar. 10	Mar. 28
Washington, DC: U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436	Mon., Apr. 3 and Tue., Apr. 4.	Noon, Mar. 13	Noon, Mar. 27	Apr. 13

By order of the Commission.

Issued: December 28, 1988.

Kenneth R. Mason,

Secretary.

[FR Doc. 88-30145 Filed 12-29-88; 8:45 am]

BILLING CODE 7035-02-M

INTERSTATE COMMERCE COMMISSION

Motor Carrier Applications To Consolidate, Merge, or Acquire Control

The following applications seek approval to consolidate, purchase, merge, lease operating rights and properties, or acquire control of motor carriers pursuant to 49 U.S.C. 11343 or 11344. Also, applications directly related to these motor finance applications (such as conversions, gateway eliminations, and securities issuances) may be involved.

The applications are governed by 49 CFR 1182.1.

Persons wishing to oppose an application must follow the rules under 49 CFR 1182.2. If the protest includes a request for oral hearing, the request shall meet the requirements of 49 CFR 1182.3 and shall include the required certification. Failure seasonably to oppose will be construed as a waiver of opposition and participation in the proceeding.

In the absence of legally sufficient protests as the finance application or any application directly related thereto filed within 45 days of publication (or, if the application later becomes unopposed), appropriate authority will be issued to each applicant (unless the application involves impediments) upon compliance with certain requirements which will be set forth in a notification of effective of this decision-notice.

Application(s) must comply with all conditions set forth in the grant or grants of authority within the time period specified in the notification of effectiveness of this decision-notice or the application of a non-complying applicant shall stand denied.

Findings

The finding for these application are set forth at 49 CFR 1182.6.

No. MC-F-19287, filed November 4, 1988.

Leisure Time Tours [Leisure] (4 Leisure Lane, Mahwah, NJ 07430)—Purchase (Portion)—All Jersey Trails, Inc. [Jersey] (284 Main Street, Butler, NJ 07405), and Atlantic Coast Tours, Inc. [Atlantic] (284 Main Street, Butler, NJ 07405); Gerdaneu, Inc. [Gerdaneu] (4 Leisure Lane, Mahwah, NJ 07430)—Purchase (Portion)—All Jersey Trails, Inc.

Representative: Steven Morey Greenberg, Two University Plaza, Hackensack, NJ 07601; (201) 487-7755.

Leisure (MC-142011) seeks authority to purchase: (1) The operating authority held by Jersey in Certificate No. CB-95232 (Sub-No. 3), authorizing passenger transporation, over regular routes, extending generally between various points in northern New Jersey and southern New York and Atlantic City, NJ; (2) the New Jersey intrastate operating rights held by Jersey in Route File Nos. 668-520, 669-520, 670-520, 671-520, 672-520, 673-520, 686-520, and 551-520, authorizing regular-route passenger transportation within New Jersey and to and from hotels and casinos in Atlantic City, NJ; (3) Jersey's entire fleet of 5 buses; and (4) New York intrastate operating rights held by Atlantic in Case No. 25311, authorizing passenger transporation within New York as a contract carrier.

Gerdaneu, a noncarrier, seeks authority to purchase: (1) The operating authority held by Jersey in Certificate No. MC-95232 (Sub/No. 1), authorizing passenger transportation, in charter and special operations, between points in the United States (except Hawaii); and (2) the New Jersey intrastate operating rights held by Jersey in Docket No. 7311-906 NJPUC No. 255C, authorizing passenger transportation within New Jersey in charter and special operations.

In connection with the transaction, (a) Jersey will surrender Certificate No. MC-95232 (Sub-No. 2), authorizing passenger transportation, over regular routes, between certain points in New Jersey and New York, and (b) Atlantic will surrender Certificate No. MC-145784 (Sub-No. 1), authorizing passenger transportation, in charter and special operations, and Certificate No. MC-145784, authorizing passenger transportation over irregular routes. Both Jersey and Atlantic, accordingly, will cease operations.

Jersey and Atlantic are each wholly owned by Arthur Jordon, a noncarrier individual. Leisure and Gerdaneu are each owned by Gerald Mercadante (70 per cent), Daniel Mercadante (15 per cent), and Eugenia Opperman (15 per cent).

Decided: December 21, 1988.

By the Commission, Motor Carrier Board, Members Guyton, Barnes, and Hodge (Board Member Hodge not participating).

Noreta R. McGee,

Secretary.

[FR Doc. 30089 Filed 12-29-88; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research Act of 1984, Petroleum Environmental Research Forum

Notice is hereby given that, on December 1, 1988, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), the participants of the Petroleum Environmental Research Forum ("PERF") Project No. 87-05, titled "Microbiological Degradation of Petroleum Oily Sludges", filed a written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to Project 87-05 and (2) the nature and objective of the research program to be performed in accordance with said project. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties participating in Project No. 87-05 together with the nature and objective of the research program are given below.

The current parties to Project 87-05 identified by this notice are: Amoco Oil Company; Chevron Research Company; Conoco Inc.; and Mobil Research & Development Corporation. The objective of this project is to conduct research and development toward establishing a commercially feasible process for the microbiological degradation of petroleum oily sludges. Participation in this project will remain open until May 15, 1989 or the completion of the First Step of the research and development, whichever is earlier, and the parties intend to file additional written notification disclosing all changes in membership of this project. The "First Step" is demonstration (on a bench scale) of a biotreatment process(es) for petroleum oily sludges. Information regarding participation in this project may be obtained from Chevron Corporation, P.O. Box 7141, San Francisco, California 94120-7141.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 88-30049 Filed 12-29-88; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage an Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S-3504, Washington, DC 20210.

Modifications to General Wage Determination Decisions

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State, and page number(s). Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I:

None.

Volume II:

None.

Volume III:

None.

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any of or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 10 which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC, this 23 day of December 1988.

Robert V. Setera,

Acting Director, Division of Wage Determinations.

[FR Doc. 88-29880 Filed 12-29-88; 8:45 am]

BILLING CODE 4510-27-M

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance; Alamco, Inc., et al.

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than January 9, 1989.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than January 9, 1989.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 601 D Street NW., Washington, DC 20213.

Signed at Washington, DC, this 5th day of December 1988.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

APPENDIX

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Alamco, Inc. (Workers)	Clarksburg, WV	11/18/88	11/4/88	22,007	Oil & Gas.
Allegheny Nuclear Surveys, Inc. (Workers)	Weston, WV	11/18/88	11/16/88	22,008	Do.
Do.	Elderton, PA	11/18/88	11/16/88	22,009	Do.
Atlas Energy Group, Inc. (Workers)	Copaopolis, PA	11/18/88	11/16/88	22,010	Do.
B.B.&K Oil Co. (Company)	Bradford, PA	11/18/88	11/10/88	22,011	Do.
Bechtel Construction, (UAJAPPI)	San Francisco, CA	11/18/88	11/14/88	22,012	Do.
Beu-Tex (Workers)	Morganton, NC	11/18/88	11/14/88	22,013	Fabric.
Bragg Crane & Rigging (Workers)	Long Beach, CA	11/18/88	11/1/98	22,014	Oil & Gas
Bullock Drilling, Inc. (Workers)	Casper, WY	11/18/88	11/17/88	22,015	Do.
Cedar (Workers)	Reno, NV	11/18/88	11/14/88	22,016	Do.
Century Drilling, Inc. (Company	Pittsburgh, PA	11/18/88	11/17/88	22,017	Do.
Clarostat-Gorham, Inc. (Workers)	Gorham, ME	11/18/88	11/9/88	22,018	Resistors.
Clyde Sportswear (Workers)	Brooklyn, NY	11/18/88	11/11/88	22,019	Skirts, Pants, Blouses & Jackets.
Commodore Oil & Gas (Workers)	Burkesville, KY	11/18/88	11/3/88	22,020	Oil & Gas.
Consolidated Oil Well Services, Inc. (Workers)	Chanute, KS	11/18/88	11/15/88	22,021	Do.
Consolidated Resources of America, Inc. (Company)	Cincinnati, OH	11/18/88	11/15/88	22,022	Do.
Crystal Springs Oil, Inc. (Workers)	Seneca, PA	11/18/88	11/17/88	22,023	Do.
Damac Drilling Inc. (Workers)	Great Bend, KS	11/18/88	11/17/88	22,024	Do.
Davis Frac Tanks & Supply Co. (Workers)	Wooster, OH	11/18/88	11/14/88	22,025	Do.
Dresser Industries, Inc. (USWA)	Huntington Park, CA	11/18/88	11/10/88	22,026	Do.
ELIASOF Bros., Inc. (Workers)	Closter, NJ	11/18/88	11/7/88	22,027	Childrens Sportswear.
EPIC International, Inc. (UAJAPPI)	San Francisco, CA	11/18/88	11/14/88	22,028	Oil & Gas.
East Tennessee Consultants, Inc. (Workers)	Sunbright, TN	11/18/88	11/14/88	22,029	Do.
Elenburg Exploration, Inc. (Workers)	Casper, WY	11/18/88	11/14/88	22,030	Do.
Emphasis Oil Operations (Workers)	Russell, KS	11/18/88	11/17/88	22,031	Do.
Eureka Crude Purchasing (Workers)	Eureka, KS 18	11/18/88	11/17/88	22,032	Do.
Excel Energy Corp. (Workers)	Denver, CO	11/18/88	11/18/88	22,033	Do.
Farrar Oil Co. (Workers)	Mt. Vernon, IL	11/18/88	11/15/88	22,034	Do.
Freeman Drilling (Company)	Bradford, PA	11/18/88	11/10/88	22,035	Do.
Freeman & Freeman (Company)	.....do	11/18/88	11/10/88	22,036	Do.
G&S Drilling (Workers)	Olney, IL	11/18/88	11/18/88	22,037	Do.
Gauin Energy Service Corp. (Subdivision) (Laborer)	Titusville, PA	11/18/88	11/15/88	22,038	Do.
General Atlantic Energy Corp. (Workers)	Denver, CO	11/18/88	11/9/88	22,039	Do.
Gilmore, Howard & Provins Drilling Co. (Workers)	Traverse City, MI	11/18/88	11/16/88	22,040	Do.
H&S Rotary Drilling (Workers)	Bradford, PA	11/18/88	11/14/88	22,041	Do.
H&S Drilling (Workers)	.....do	11/18/88	11/14/88	22,042	Do.
Harpel Drilling Co. (Company)	Casper, WY	11/18/88	11/16/88	22,043	Do.
J.L. Beck Drilling Co. (Workers)	Pleasantville, PA	11/18/88	11/6/88	22,044	Do.
Johnson & Johnson (Workers)	Skillman, NJ	11/18/88	11/7/88	22,045	Adult Diapers.
Kaw Pipe Line (Workers)	Russell, KS	11/18/88	11/15/88	22,046	Oil & Gas.
Lingafelter Drill, Co. (Workers)	Wayne City, IL	11/18/88	11/14/88	22,047	Do.
Manning Drilling (Workers)	Mills, WY	11/18/88	11/15/88	22,048	Do.
Do.	Denver, CO	11/18/88	11/15/88	22,049	Do.
Mid-Kansas Acid, Inc. (Workers)	Russell, KS	11/18/88	11/14/88	22,050	Do.
O.H.&F., Inc. (Workers)	Grayville, IL	11/18/88	10/31/88	22,051	Do.
Ohio L&M Co., Inc. (Workers)	Reno, OH	11/18/88	11/16/88	22,052	Do.
Parsons Const. (UAJAPPI)	Pasadena, CA	11/18/88	11/14/88	22,053	Do.
Peacock, Williams & Co. (VEDC)	Pittsburgh, PA	11/18/88	11/14/88	22,054	Do.
Penn American Energy (Laborer)	Titusville, PA	11/18/88	11/15/88	22,055	Do.
Pfeifer Well Service, Inc.	Hill City, KS	11/18/88	11/15/88	22,056	Do.
Pioneer Drilling Co. Inc. (Company)	Plainville, KS	11/18/88	11/14/88	22,057	Do.
Ponderosa Co. (The) (Company)	Casper, WY	11/18/88	11/17/88	22,058	Do.
R.E. Puckett Energy Co. (Company)	Denver, CO	11/18/88	11/16/88	22,059	Do.
Rawhide Mud Co. (Company)	Casper, WY	11/18/88	11/17/88	22,060	Do.
Rich Bros. Servicing, Inc. (Workers)	Newcastle, WY	11/18/88	11/18/88	22,061	Do.
Rio Lucy Mfg. Co. (Workers)	Broadway, NY	11/18/88	9/7/88	22,062	Skirts.
Renn Drilling, Inc. (Workers)	McLeansboro, IL	11/18/88	11/11/88	22,063	Oil & Gas.
Selin Sportswear, Inc. (Workers)	Brooklyn, NY	11/18/88	9/7/88	22,064	Ladies' Skirts.
Shape Optimedia, Sub Div.(APMO)	Sanford, ME	11/18/88	11/14/88	22,065	Compact Discs.
Shape, Inc. (APMO)	Biddeford, ME	11/18/88	11/14/88	22,066	Do.
Sheehan Exploration (Workers)	Casper, WY	11/18/88	11/14/88	22,067	Oil & Gas.
Do.	Sidney, MT	11/18/88	11/14/88	22,068	Do.
Shelby Drilling, Co. (Company)	Englewood, CO	11/18/88	11/15/88	22,069	Do.
Shields Drilling (Workers)	Russell, KS	11/18/88	11/17/88	22,070	Do.
Southern Triangle Oil Co. (Workers)	Mt. Carmel, IL	11/18/88	11/15/88	22,071	Do.
Stellum Oil Field Supply, Inc.	Olney, IL	11/18/88	8/12/88	22,072	Do.
Straus Knitting Mills (Workers)	St. Paul, MN	11/18/88	11/14/88	22,073	Knit Trim for Outer Wear.
Summit Gas & Oil (Workers)	Bradford, PA	11/18/88	11/14/88	22,074	Oil & Gas.
Sundstrand Heat Transfer Inc. (UAW)	Dowagiac, MI	11/18/88	11/10/88	22,075	A/C Refrigeration & Heating
Taylor Drilling Co. (Workers)	Chehalis, WA	11/18/88	10/11/88	22,076	Oil & Gas.
Do.	Olney, IL	11/18/88	11/18/88	22,077	Do.

APPENDIX—Continued

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Teledyne Amco (USAW)	Mohnton, PA	11/18/88	11/10/88	22,078	Sewing Machine Equipment.
Terrell Drilling Inc. (Workers)	Grayville, IL	11/18/88	11/15/88	22,079	Oil & Gas.
Terrell Tractor & Well Service (Workers)	do	11/18/88	11/15/88	22,080	Do.
Thompson Oil & Gas Co. (Workers)	Pleasantville PA	11/18/88	11/14/88	22,081	Do.
Tioga Swabbing Service, Inc. (Workers)	Tioga, ND	11/18/88	11/6/88	22,082	Do.
Triangle Industries, Inc./American Natl Can Co. (USWA)	Chicago, IL	11/18/88	11/10/88	22,083	Can Containers.
Trico Industries, Inc. (USWA)	Huntington Park, CA	11/18/88	11/10/88	22,084	Oil & Gas.
Trico Industries, Inc. (Workers)	Bradford, PA	11/18/88	11/14/88	22,085	Do.
Trident Drilling Completion & Services, Inc. (Workers)	Olney, IL	11/18/88	11/9/88	22,086	Do.
Triple B Oil Producers, Inc.	do	11/18/88	11/9/88	22,087	Do.
Verlyn Berger Excavating (Workers)	Lambert, MT	11/18/88	11/11/88	22,088	Do.
Victory Energy Development Co. (Subdiv.) (VEDC)	Indiana, PA	11/18/88	11/14/88	22,089	Do.
Warrior Drilling Co. (Workers)	Wichita, KS	11/18/88	11/12/88	22,090	Do.
Western Geophysical Co. (Workers)	Englewood, CO	11/18/88	11/18/88	22,091	Do.
Wintershall Corp. (Workers)	do	11/18/88	11/18/88	22,092	Do.
Wismer & Becker (UAJAPPI)	Sacramento, CA	11/18/88	11/14/88	22,093	Do.
Wurlitzer (Workers)	Corinth, MS	11/18/88	11/10/88	22,094	Electronic Keyboard Organs.
Wyoming Casing Service (Workers)	Gillette, WY	11/18/88	11/16/88	22,095	Oil & Gas.
Acaliana Reporting Service, Inc. (Company)	Lafayette, LA	11/18/88	11/18/88	22,096	Do.
Alliance Well Service, Inc. (Workers)	Liberty, TX	11/18/88	11/18/88	22,097	Do.
Do	Lovington, NM	11/18/88	11/18/88	22,098	Do.
Do	Farmington, NM	11/18/88	11/18/88	22,099	Do.
Do	El Campo, TX	11/18/88	11/18/88	22,100	Do.
Do	El Reno, LA	11/18/88	11/18/88	22,101	Do.
Anidarkco (Workers)	Houston, TX	11/18/88	11/2/88	22,102	Do.
ARCO Oil & Gas Co. Southeastern Dist. Ofc. (Company)	Lafayette, LA	11/18/88	11/18/88	22,103	Do.
ARCO Oil & Gas Co. Central Dist. Ofc. (Company)	Midland, TX	11/18/88	11/18/88	22,104	Do.
ARCO Oil & Gas Co. Western Dist. (Company)	Bakersfield, CA	11/18/88	11/18/88	22,105	Do.
ARK-LA Oil & Gas (Workers)	Smackover, LA	11/18/88	11/9/88	22,106	Do.
ARMCO, Inc. (USWA)	Gainesville, TX	11/18/88	11/17/88	22,107	Do.
ATSF Railroad/BN Railroad (TCU)	Amarillo, TX	11/18/88	10/25/88	22,108	Do.
Arkansas Oil & Gas Commission (Company)	El Dorado, AR	11/18/88	11/14/88	22,109	Do.
Atlas Wireline (Workers)	Ventura, CA	11/18/88	11/14/88	22,110	Do.
Baker Industries (Workers)	Pine River, MN	11/18/88	11/14/88	22,111	Wood Reels for Cables.
Bayou State Oil Corp. (Workers)	Shreveport, LA	11/18/88	11/10/88	22,112	Oil & Gas.
Brazos Production Co. (Company)	Stafford, TX	11/18/88	11/12/88	22,113	Do.
Burris Drilling Co. (Workers)	Denver, CO	11/18/88	11/18/88	22,114	Do.
CENEX (Workers)	Laurel, MT	11/18/88	11/18/88	22,115	Do.
CGG American Serv., Inc. (Workers)	Houston, TX	11/18/88	11/8/88	22,116	Do.
COFSCO, Inc. (Company)	Wooster, OH	11/18/88	11/16/88	22,117	Do.
Commonwealth Savings Assoc. (Workers)	Houston, TX	11/18/88	11/13/88	22,118	Do.
Consolidated Energy Corp. (Workers)	Seneca, PA	11/18/88	11/3/88	22,119	Do.
Council of Energy Resource Tribes (Workers)	Denver, CO	11/18/88	11/17/88	22,120	Do.
Daniel Geophysical, Inc. (Workers)	Denver, CO	11/18/88	11/14/88	22,121	Do.
Davis Mud & Chemical (Company)	Mills, WY	11/18/88	11/16/88	22,122	Do.
Dresser Atlas (Workers)	Mt Vernon, IL	11/18/88	11/9/88	22,123	Do.
Dwight's Hotline Energy Reports (Workers)	Oklahoma City, OK	11/18/88	11/17/88	22,124	Do.
EL Paso Natural Gas Co. (Workers)	Farmington, NM	11/18/88	11/17/88	22,125	Do.
Eastman Whipstock, Inc. (Company)	Brookhaven, MS	11/18/88	11/17/88	22,126	Do.
Eastman Whipstock, Inc. (Company)	Corpus Christi, TX	11/18/88	11/17/88	22,127	Do.
Do	Houston, TX	11/18/88	11/17/88	22,128	Do.
Energy Operating Corp. (Workers)	Dallas, TX	11/18/88	10/24/88	22,129	Do.
Do	Billings, MT	11/18/88	10/24/88	22,130	Do.
Do	Oklahoma City, OK	11/18/88	10/24/88	22,131	Do.
Ensearch Alaska Construction Inc.	Achorage, AK	11/18/88	11/1/88	22,132	Do.
Envirogas, Inc. (Workers)	Mayville, NY	11/18/88	11/16/88	22,133	Do.
Evers Electric (Company)	El Dorado, AR	11/18/88	11/15/88	22,134	Do.
Exxon Production Research Co. (Workers)	Houston, TX	11/18/88	11/16/88	22,135	Do.

[FR Doc. 88-30091 Filed 12-29-88; 8:45 am]
BILLING CODE 4510-30-M

[TA-W-20, 909]

APV Chemical Machinery, Inc., Saginaw, MI; Negative Determination Regarding Application for Reconsideration

By an application dated November 10, 1988, with Congressional support, the petitioners requested administrative reconsideration of the subject petition for trade adjustment assistance. The denial notice was signed on October 28, 1988 and published in the **Federal Register** on November 17, 1988 (53 FR 46509).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If, in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The workers at the subject firm produced chemical machinery for the aerospace, chemical and pharmaceutical industries.

The petitioners claim that the subject firm had designed and manufactured batch mixers and extruded equipment like the ones currently being imported

from France and England, respectively. It is also claimed that nameplates were placed on the machinery once the imported equipment was received in Saginaw indicating that the machines were made in Saginaw. Some electric motors were also attached to the imported equipment.

The Department's denial was based on the fact that the "contributed importantly" test of the Group Eligibility Requirements of the Trade Act of 1974 was not met. The Department's survey of the subject firm's major customers which accounted for over 100 percent of the firm's 1987 sales decline shows that none of the respondent's reported import purchases of chemical machinery in 1986, 1987 or in the first nine months of 1988.

Section 223(b)(1) of the Trade Act states that the Department cannot certify workers for adjustment assistance who were laid off more than one year prior to the date of the petition. The date of the subject petition is August 24, 1988. Other findings in the investigation show that there were no batch makers or extruded equipment produced at the Saginaw plant in 1987 or in 1988.

The Saginaw plant closed in December 1987 and all production was transferred to another domestic corporate plant. A domestic transfer of production would not form a basis for certification.

The imported equipment (batch makers and extruded equipment) had a positive employment effect on the workforce at Saginaw since additional work was performed on the imported equipment, i.e., attaching nameplates and motors. Imported power panels were reworked at Saginaw in order to fit U.S. voltage requirements. Power plants were not manufactured at the subject plant in 1987 or in 1988.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 12th Day of December 1988.

Stephen A. Wandner,

Deputy Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 88-29786 Filed 12-29-88; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-20,984]

BethEnergy Mines, Inc., Wilson Shop, Ellsworth, PA; Negative Determination Regarding Application for Reconsideration

By an application dated November 16, 1988, Local 1197 of the United Mine Workers of America requested administrative reconsideration of the subject petition for trade adjustment assistance. The denial notice was signed on November 3, 1988.

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If, in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The workers at the Wilson Shop provide maintenance services for affiliated bituminous coal mines.

The union claims that the Department's denial in the subject case is contrary to the decision granted earlier to workers at Mine 84 of BethEnergy Mines in TA-W-15,956 issued in August, 1984. It is also claimed that foreign steel imports deterred the reopening of the mine.

Investigation findings show that historically, the Wilson Shop serviced three mines. In 1986 one of the mines became depleted. In March, 1988 a catastrohic fire occurred at another mine and this, in effect, became the "dominant cause" for worker separations at the Wilson Shop. Accordingly, in August 1988 the company found that it could no longer economically justify keeping all the workers in the Wilson Shop. The company retained only enough maintenance workers to service the remaining mine.

In order for service workers like those at the Wilson Shop to become certified eligible for adjustment assistance their separations must be caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control. In any case, the reduction in demand for services must originate at a production facility whose workers independently meet the statutory criteria for certification and the reduction must directly relate to the product impacted by imports. These conditions have not been met for workers at the Wilson Shop. Workers at the mines serviced by the Wilson Shop are not currently certified eligible to apply for adjustment assistance.

In the earlier cerfification (TA-W-15,956) referenced by the union, it should be noted that the investigation was for a different worker group in a different time period. Further, the predominant portion of the coal mined was being shipped to Bethlehem steelmaking facilities in Lackawanna, New York, (TA-W-13,644); Bethlehem, Pennsylvania, (TA-W-13,269) and Sparrows Point, Maryland, (TA-W-15,742) where workers were under certifications. These certifications have long since expired and no new ones have been issued. Therefore, decisions issued on those petitions are not relevant to the subject case.

Further, deterrents to reopening one of the mines (e.g., decreased orders for domestic coal production because of foreign steel imports) would not provide a basis for certification.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 12th Day of December, 1988.

Barbara Ann Farmer,

Director, Office of Program Management, UIS.

[FR Doc. 88-29787 Filed 12-29-88; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-21,055, et al.]

Adjustment Assistance; B. J. Titan Service, et al.

In the matter of: B.J. titan Service, TA-W-21,055, B.J. Titan Service, Hays, Kansas, TA-W-21,056, B.J. Titan Service, Plainville, Kansas, TA-W-21,160, B.J. Titan Service Regional Areas Headquartered in Houston, Texas and Operating at the following locations:

TA-W-21,160A, Houston/Tomball/South & East Texas Region Headquartered in Houston, Texas with Operations at:

Alice, Texas	Bryan, Texas
Corpus Christi, Texas	Houston, Texas
Pleasanton, Texas	Tomball, Texas
Tyler, Texas	

TA-W-21,160B, West Texas Region Headquartered in Midland, Texas with Operations at:

Abilene, Texas	Breckenridge, Texas
Brownsfield, Texas	Jacksboro, Texas
Odessa, Texas	Snyder, Texas
Hobbs, New Mexico	Roswell, New Mexico

TA-W-21,160C, Oklahoma/Kansas Region Headquartered in Oklahoma City, Oklahoma with Operations at:

Medicine Lodge, Kansas	Enid, Oklahoma
Ardmore, Okl	homa City,
Hominy, Okla	ahoma
Yukon, Oklaho	yton, Texas
Oakley, Kansas	

TA-W-21,160D, West Coast/Alaska Region Headquartered in Signal Hill, California with Operations at:

Anchorage, Alaska	North Slope, Alaska
Kenai, Alaska	Arenal, California
Bakersfield, California	Shafter, California
Signal Hill, California	Ventura, California
Fernly, Nevada	

TA-W-21,160E, Rocky Mountain Region Headquartered in Denver, Colorado with Operations at:

Denver, Colorado	Farmington, New Mexico
Dickinson, North Dakota	Roosevelt, Utah
Casper, Wyoming	Powell, Wyoming
Riverton, Wyoming	

TA-W-21,160F, Offshore/Southeastern Region Headquartered in Lafayette, Louisiana with Operations at:

Crowely, Louisiana	Harvey, Louisiana
Lafayette, Louisiana	New Iberia, Lousiana
Port Allen, Louisiana	Alvin, Texas
Beaumont, Texas	Galveston, Texas
Sabine Path, Texas	Victoria, Texas

Certifications Regarding Eligibility To Apply for Worker Adjustment Assistance

All workers of B.J. Titan Service, in the above cited locations who became totally or partially separated from employment on or after October 1, 1985 are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

Dated December 21, 1988.

[FR Doc. 88-30092 Filed 12-29-88; 8:45 am]

BILLING CODE 4510-30-M

Mine Safety and Health Administration

[Docket No. M-88-216-C]

Mettiki Coal Corp.; Petition for Modification of Application of Mandatory Safety Standard

Mettiki Coal Corporation, Route 3, Box 124A, Deer Park, Maryland 21550 has filed a petition to modify the application of 30 CFR 75.511 (low-, medium-, or high-voltage distribution circuits and equipment repair) to its Mettiki Mine (I.D. No. 18-00621) located in Garrett County, Maryland. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that electrical work including locking out and tagging disconnecting devices be performed on low-, medium-, or high-voltage distribution circuits or equipment, by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person.

2. There is an insufficient number of high-voltage electricians available at the mine to supervise or perform power center moves in addition to other essential duties.

3. As an alternate method, petitioner proposes to train low- and medium-voltage electricians, in the skills necessary to safely deenergize and reenergize high-voltage branch lines to underground power centers, in accordance with the training program outlined in the petition.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before January 30, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: December 21, 1988.

[FR Doc. 88-30093 Filed 12-29-88; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-224-C]

Old Ben Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Old Ben Coal Company, 500 North DuQuoin Street, Benton, Illinois 62812 has filed a petition to modify the application of 30 CFR 77.216-3(a) (water, sediment, or slurry impoundments and impounding structures; inspection requirements; correction of hazards; program requirements) to its Mine No. 21 (I.D. No. 11-00588), (Impoundment No. 1211-IL08-00588) its Mine No. 24 (I.D. No. 11-00589), (Impoundment No. 1211-IL08-00589) its John Ross Preparation Plant (I.D. No. 11-02416), (Impoundment No. 1211-IL08-02416) and its Mine No. 26 (I.D. 11-00590), (Impoundment No. 1211-IL08-00590) all located in Franklin County, Illinois. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the peititoner's statements follows:

1. The petition concerns the requirement that all water, sediment or slurry impoundments be examined by a qualified person designated by the person owning, operating or controlling the impounding structure at intervals not exceeding seven days for appearances of structural weakness and other hazardous conditions.

2. An alternate method, petitioner proposes that for these impoundments and for future impoundments at these mines, examinations for signs of structural weakness or other hazards would be conducted monthly.

3. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before January 30, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: December 21, 1988.

[FR Doc. 88-30094 Filed 12-29-88; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-227-C]

Pyro Mining Co.; Petition for Modification of Application of Mandatory Safety Standard

Pyro Mining Company, P.O. Box 267, Sturgis, Kentucky 42459 has filed a petition to modify the application of 30 CFR 75.1700 (oil and gas wells) to its Pyro No. 9 Slope, William Station Mine (I.D. No. 15-13881) located in Union County, Kentucky. The petition is filed

under section 101(c) of the Federal Mine Safety and Health Act of 1967.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that barriers be established and maintained around oil wells penetrating coal beds.

2. The barrier around oil and gas wells interferes with maintenance of effective roof control, improvement of mining safety and conservation of mineral resources.

3. As an alternate method, petitioner proposed to clean out, plug and mine through the oil and gas wells on a mine wide basis using specific techniques and procedures as outlined in the petition.

4. Prior to mining through the plugged oil or gas well an approval of the specific mining procedures would be requested of the MSAH District Manager, and appropriate officials would be allowed to observe the process and all mining would be under the direct supervision of a certified official. In addition:

(a) Drivage sites would be established.

(b) Equipment would be checked for permissibility and serviced prior to mining through the well.

(c) Methane monitors would be calibrated prior to the shift and tests would be made during mining approximately every 10 minutes; and

(d) When the wellbore is intersected, all equipment would be deenergized and safety checks would be made before mining would continue inby the well a sufficient distance to permit adequate ventilation around the areas of the wellbore.

5. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variance, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarket or received in that office on or before January 30, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Solvey,

Director, Office of Standards, Regulations and Variances.

Date: December 21, 1988.

[FR Doc. 88-30095 Filed 12-29-88; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-226-C]

Rough Diamond, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Rough Diamond, Inc., P.O. Box 2239, Middlesboro, Kentucky 40965 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its Mine No. 2 (I.D. No. 15-00237) located in Bell County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statement follows:

1. The petition concerns the requirement that return aircourses be examined in their entirety on a weekly basis.

2. Petitioner states that due to a roof fall and poor roof conditions, the return entry of the mine cannot be safely traveled.

3. As an alternate method, petitioner proposes that a qualified person would take weekly methane and airflow readings along with an inspection of the area.

4. In support of this request, petitioner states that—

(a) The roof fall can be inspected on either end and the height is sufficient over the fall to be inspected from one end to the other;

(b) The height over the fall is sufficient for normal airflow to pass; and

(c) due to poor roof conditions, no employees would be allowed in the area to cleanup the fall.

4. For these reasons, petitioner requests a modification of the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarket or received in that office on or before January 30, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: December 21, 1988.

[FR Doc. 88-30096 Filed 12-29-88; 8:45 am]

BILLING CODE 4510-43-M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-321 and 50-366]

Georgia Power Co. et al.; Issuance of Environmental Assessment and Finding of No Significant Impact

The United States Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. DPR-57 and NPF-5, issued to Georgia Power Company, et al. (the licensee) for operation of the Edwin I. Hatch Nuclear Plant, Units 1 and 2, located in Appling County, Georgia.

Environmental Assessment

Identification of Proposed Action

The amendments would consist of changes to the operating licenses to extend the expiration dates of the operating licenses to August 6, 2014 for Hatch Unit 1, and to June 13, 2018 for Hatch Unit 2. The proposed license amendments are responsive to the licensee's application dated February 28, 1986. The Commission's staff has prepared an Environmental Assessment of the proposed action, "Environmental Assessment by the Office of Nuclear Reactor Regulation Relating to the Change in Expiration Dates of Facility Operating Licenses DPR-57 and NPF-5, Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Edwin I. Hatch Nuclear Plant, Units 1 and 2, Docket Numbers 50-321 and 50-366, dated 12/23/88."

Summary of Environmental Assessment

The Commission's staff has reviewed the potential environmental impact of the proposed changes in expiration dates of the Operating Licenses for the Edwin I. Hatch Nuclear Plant, Units 1 and 2. This evaluation considered the previous environmental studies, including the "Final Environmental Statement for the Edwin I. Hatch Nuclear Plant, Unit 1 and Unit 2," October 1972, the "Final Environmental Statement Related to Operation of Edwin I. Hatch Nuclear Plant, Unit No. 2," NUREG-0417, March 1978, and more recent NRC policy.

Radiological Impacts

The staff concludes that the Exclusion Area, the Low Population Zone and the nearest population center distances will likely be unchanged from those described in the October 1972 Final Environmental Statement. The population living within 10 miles of the

plant in 1988 is essentially double the number of people estimated to live within the 10-mile zone based upon the 1970 census, as reported in NUREG–0417. The total number of residents within the 10-mile zone is still less than 10,000. This slow, small increase in the number of people living within the 10-mile zone and the continuing rural nature of the area indicate that the numbers of people living around the plant should pose no problem to the proposed extension of the operating licenses.

The additional period of plant operation would not significantly affect the probability or consequences of any reactor accident. Station radiological effluents to unrestricted areas during normal operation have been well within Commission regulations regarding as-low-as-is-reasonably-achievable (ALARA) limits, and are indicative of future releases. The proposed additional years of reactor operation do not increase the annual public risk from reactor operation.

With regard to normal plant operation, the occupational exposures for the Hatch Nuclear Plant have been less than the national average for boiling water reactors. The licensee is striving for further dose reductions in accordance with ALARA principles and the staff expects further reductions to be achieved using advanced technologies and equipment that will likely be available.

Accordingly, annual radiological impacts on man, both offsite and onsite, are not more severe than previously estimated in the FES, and our previous cost-benefit conclusions remain valid.

The environmental impacts attributable to transportation of fuel to and waste from the Hatch Nuclear Plant, with respect to normal conditions of transport and possible accidents in transport, would be bounded as set forth in Summary Table S–4 of 10 CFR Part 51.52. The values in Table S–4 would continue to represent the contribution of transportation to the environmental costs associated with plant operation.

Non-Radiological Impacts

The Commission has concluded that the proposed extensions will not cause a significant increase in the impacts to the environment and will not change any conclusions reached by the Commission in the FESs.

Finding of No Significant Impact

The Commission has reviewed the proposed changes to the expiration dates of the Edwin I. Hatch Nuclear Plant, Units 1 and 2, facility operating licenses relative to the requirements set forth in 10 CFR Part 51. Based upon the environmental assessment, the staff concluded that there are no significant radiological or non-radiological impacts associated with the proposed action and that the proposed license amendments will not have a significant effect on the quality of the human environment. Therefore, the Commission has determined, pursuant to 10 CFR 51.31, not to prepare an environmental impact statement for the proposed amendments.

For further details with respect to this action, see (1) the application for amendments dated February 28, 1986, as supplemented on September 25, 1986, December 23, 1986, and December 15, 1988, (2) the Final Environmental Statement for the Edwin I. Hatch Nuclear Plant, Unit 1 and Unit 2, issued October 1972, (3) the Final Environmental Statement Related to Operation of Edwin I. Hatch Nuclear Plant, Unit 2, issued March 1978, and (4) the Environmental Assessment dated December 23, 1988. These documents are available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC, and at the Appling County Public Library, 301 City Hall Drive, Baxley, Georgia 31513.

Dated at Rockville, Maryland, this 23rd day of December 1988.

For the Nuclear Regulatory Commission.

Lawrence P. Crocker,

Acting Director, Project Directorate II–3, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc 88–30102 Filed 12–29–88; 8:45 am]

BILLING CODE 7590–01–M

Biweekly Notice Applications and Amendments to Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to Public Law (P.L.) 97-415, the Nuclear Regulatory Commission (the Commission) is publishing this regular biweekly notice. P.L. 97-415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be issued, under a new provision of section 189 of the Act. This provision grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from December 5, 1988 through December 16, 1988. The last biweekly notice was published on December 14, 1988 (53 FR 50320).

NOTICE OF CONSIDERATION OF ISSUANCE OF AMENDMENT TO FACILITY OPERATING LICENSE AND PROPOSED NO SIGNIFICANT HAZARDS CONSIDERATION DETERMINATION AND OPPORTUNITY FOR HEARING

The Commission has made a proposed determination that the following amendment requests involve 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 amendments 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. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Written comments may be submitted by mail to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room P-216, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland from 7:30 a.m. to 4:15 p.m. 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 January 30, 1989, 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 petition for leave to intervene. Requests for a hearing and petitions 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. 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 a 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 fifteen (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 fifteen (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, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. 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 involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

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 before action is taken. Should the Commission take this action, it will publish 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.

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, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to (*Project Director*): petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to the 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 factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room for the particular facility involved.

Commonwealth Edison Company, Docket No. 50-456 Braidwood Station, Unit No. 1 Will County, Illinois

Date of application for amendment: October 26, 1988, supplemented November 22, 1988, November 29, 1988, and December 5, 1988.

Description of amendment request: The amendment would revise Technical Specification 4.8.1.1.2f to extend, on a one-time basis, the frequency for performing certain diesel generator surveillance tests for an additional 7 months from the previous extension of 31 months. This would allow such tests to be performed during the refueling outage of Braidwood Station Unit 1. The current Technical Specification includes the phrase ..."18 months, during shutdown ...". This wording implies that the surveillance tests were intended to be performed during a refueling outage shutdown. The refueling outage for Braidwood Unit 1 is scheduled for September 1989. Commonwealth Edison Company has stated that Braidwood Station does not intend to use any of the 25% extension permitted by Technical Specification 4.0.2 if this amendment is approved, since this could result in scheduling concerns for subsequent fuel cycles.

Basis for proposed no significant hazards consideration determination: The staff has evaluated this proposed amendment and has determined that it involves no significant hazards considerations. According to 10 CFR 50.92(c), a proposed amendment to an operating license involves no significant hazards considerations if 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.

This proposed amendment involves the frequency of surveillance tests to prove diesel generator availability. Previously evaluated accidents which involve a loss of offsite power are the only accidents which depend on diesel generator availability. The probability of other accidents concurrent with a loss of offsite power are not affected by this diesel generator surveillance frequency.

The consequences of previously evaluated accidents would not be significantly increased because the diesel generator availability would not be significantly decreased. The previously established preventive maintenance programs at each station are sufficient to detect up to 95% of the potential failure modes that would be detectable during the performance of the deferred surveillances. The remaining 5% of the potential failure modes are mostly related to a mechanical wear type of failure. Because the operation time of the diesel generators is small, these kinds of failures have a small probability of occurring. Additionally, the licensee has utilized the service group of the diesel generator manufacturer to perform a dynamic test of the diesel generator using the ENSPEC 3000 Engine Analyzer. The test concluded that engine performance exceeded that required by the 18 month inspection procedures. This information provides confidence that the diesels will be capable of performing their intended function, resulting in no significant increase in the consequences of an accident previously evaluated.

The change does not add or modify any existing equipment, nor introduce a new mode of plant operation. The operability of the diesel generators will continue to be verified by performing the other related Technical Specification required surveillances, which remain unchanged. As such, the possibility of a new or different kind of accident from any accident previously evaluated is not created.

Commonwealth Edison Company indicated that the proposed change has been discussed with the diesel generator manufacturer and that they found the change to be acceptable. Deferral of the surveillance will not significantly increase the possibility of undetected degradation of the diesel generators because they are operated infrequently for short periods of time. Since the actual operation time of the diesel generator is small, the probability of a diesel generator failure due to mechanical wear is small. Commonwealth Edison Company reviewed the failure history for the diesel generator and did not find any trends identifying abnormal failures. The limiting conditions for operation and other surveillance requirements to verify operability are unchanged and will remain in effect. The monthly and quarterly diesel generator surveillances will continue to be performed during the surveillance interval extension, as well as the previously indicated preventive maintenance programs. As such, the margin of safety is not reduced.

Therefore, based upon the above analysis, the staff concludes that the proposed amendment to the Technical Specifications does not involve significant hazards consideration.

Local Public Document Room location: Wilmington Township Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481.

Attorney to licensee: Michael Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

NRC Project Director: Daniel R. Muller

Commonwealth Edison Company, Docket Nos. 50-237 and 249, Dresden Nuclear Power Station, Unit Nos. 2 and 3, Grundy County, Illinois

Date of application for amendment request: October 5, 1988 and November 7, 1988

Description of amendment request: This amendment would delete Figure 6.1-1, "Offsite Organization," and Figure 6.1-2, "Station Organization," from the Technical Specifications (TS) and would revise Section 6 to require inclusion of these organization charts in the QA Topical Report. However, the NRC will continue to be notified of licensee organization changes through other regulatory controls. In accordance with 10 CFR 50.34(b)(6)(i), the applicant's organizational structure is required to be included in the Final Safety Analysis Report (FSAR). Chapter 13 of the FSAR provides a description of the station organization and a detailed organization chart. Updates to the FSAR are required by 10 CFR 50.71(e) to be submitted annually to the NRC. Even through Figures 6.1-1 and 6.1-2 would be deleted from TS, Section 6 of the TS would be revised to require inclusion of these organization charts in the Commonwealth Edison Company (CECo) QA Topical. Whereupon, Appendix B to 10 CFR Part 50, and 10 CFR 50.4(b)(7), will govern any changes made to the organization as it is described in the Quality Assurance (QA) program. Finally, it is CECo's normal practice to inform the NRC of organizational changes affecting their nuclear facilities prior to implementation.

Basis for proposed no significant hazards consideration determination: The Commission has provided standards in 10 CFR 50.92(c) for determining whether a significant hazards consideration exists. A proposed amendment to an Operating License for a facility involves no significant hazards consideration if 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, (2) involve a significant increase in the probability of a new or different kind of accident from any accident previously evaluated, or (3) involve a significant reduction in a margin of safety. CECo evaluated the proposed TS changes and determined, and the NRC staff agrees that:

(1) The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated because deletion of the organization charts from the TS does not affect plant operation, nor does it involve any physical modification of the plant. Furthermore, the aforementioned administrative and regulatory controls remain in force to ensure that organizational changes are reviewed by the NRC.

(2) The proposed amendment does not create the possibility of a new or different kind of accident than previously evaluated because the proposed change is administrative in nature; and does not physically alter any systems or components, or the way they are operated.

(3) The proposed amendment does not involve a significant reduction in a margin of safety because CECo through its quality assurance program, and its commitment to maintain only qualified personnel in positions of responsibility, and other required controls, assures that safety-related operations will be performed at a high level of competence. Furthermore, this amendment does not change any setpoints or operating parameters. Consequently, removal of organization charts from the TS will not affect the margin of safety. The NRC staff has reviewed the licensee's evaluation related to the proposed changes and concurs with their conclusions.

In addition the associated editorial TS changes proposed by CECo are considered representative of example (i) in the Commission's guidance (51 FR 7751) for examples of no significant hazards, which is defined as "a purely administrative change to TS; for example a change to achieve consistency throughout the TS, correction of an error, or change in nomenclature."

Therefore, the NRC staff proposed to determine that this amendment request does not involve significant hazards consideration based upon a preliminary review of the application, the licensee's evaluation of no significant hazards, and NRC guidance.

Local Public Document Room location: Morris Public Library, 604 Liberty Street, Morris, Illinois 60450.

Attorney for licensee: Michael 1. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

NRC Project Director: Daniel R. Muller

Commonwealth Edison Company, Docket Nos. 50-373 and 50-374, LaSalle County Station, Unit Nos. 1 and 2, LaSalle County, Illinois

Date of application for amendment: November 26, 1986; January 14 and June 1, 1988.

Description of amendment request: In accordance with the requirements of 10 CFR 73.55, the licensee submitted an amendment to the LaSalle County Station Security Plan to reflect recent changes to that regulation. The proposed amendment would modify paragraph 2.C.(27) of Facility Operating License No. NPF-11 and paragraph 2.C.(16) of Facility Operating License No. NPF-18 to require compliance with the revised plan.

Basis for proposed no significant hazards consideration determination: On August 4, 1986 (51 FR 27817 and 27822), the Nuclear Regulatory Commission amended Part 73 of its regulations, "Physical Protection of Plants and Materials," to clarify plant security requirements to afford an increased assurance of plant safety. The amended regulations required that each nuclear power reactor licensee submit proposed amendments to its security plan to implement the revised provisions of 10 CFR 73.55. The licensee submitted its revised plan on November 26, 1986; January 14 and June 1, 1988 to satisfy the requirements of the amended regulations. The Commission proposes to amend the license to reference the revised plan.

In the Supplementary Materials accompanying the amended regulations, the Commission indicated that it was amending its regulations "to provide a more safety conscious safeguards system while maintaining the current levels of protection" and that the "Commission believes that the clarification and refinement of requirements as reflected in these amendments is appropriate because they afford an increased assurance of plant safety."

The Commission has provided guidance concerning the application of the criteria for determining whether a significant hazards consideration exists by providing certain examples of actions involving significant hazards considerations (51 FR 7750). One of these examples of actions involving no significant hazards considerations is example (vii) "a change to conform a license to changes in the regulations, where the license change results in very minor changes to facility operations clearly in keeping with the regulations." The changes in this case fall within the scope of the example. For the foregoing reasons, the Commission proposes to determine that the proposed amendment involves no significant hazards consideration.

Local Public Document Room location: Public Library of Illinois, Valley Community College, Rural Route No. 1, Ogelsby, Illinois 61348.

Attorney for licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

NRC Project Director: Daniel R. Muller

Commonwealth Edison Company, Docket Nos. 50-373 and 50-374, LaSalle County Station, Unit Nos. 1 and 2, LaSalle County, Illinois

Date of application for amendments: September 9, 1988

Description of amendments request: The proposed amendments to Operating License No. NPF-11 and Operating License No. NPF-18 would revise the LaSalle Units 1 and 2 Technical Specifications by providing flexibility to align snubber inspection intervals with refueling outages when no failures are encountered.

This change would modify the LaSalle County Station Technical Specification requirement 4.7.9.b "Subsequent Visual Inspection Period" for zero failures from 18 months (2725%) to 18 months (-50% +25). This would allow adequate flexibility to bring the snubber surveillance date back into conformance with the refueling outage sequence. This will also prevent a shutdown for the sole purpose of performing snubber inspections which would have been required for Unit 1 this cycle.

In June of 1987, snubber visual inspections were preformed on LaSalle Unit 1 and no failures were found. The next inspection interval was set at 18 months 2725% making the surveillance due in December of 1988 with an early start date (-25%) near the end of July and a critical date (+25%) of April 1989. the Unit 1 second refueling outage was started in March 1988 after an 11 month run and ended in the beginning of July 1988. This was short of the early start date for the visual inspection. The next scheduled outage is October 1989. This could have resulted in a need to shut down mid-cycle to perform the surveillance. Unit startup was delayed and the surveillance was performed in late July under the early window.

Basis for proposed no significant hazards consideration determination: The Commission has provided standards for determining whether no significant hazards consideration exists as stated in 10 CFR 50.92(c). A proposed amendment to an operating license for a facility involves no significant hazards consideration if 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 an accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The licensee has determined, and the NRC staff agrees, that the proposed amendment will not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated because this change has been evaluated against those criteria for which the original limit of minus 25% was established. That limit was imposed to insure adequate service life occurred to be able to visually observe degradation. After nine months, sufficient service life will have occurred to allow a detection of snubber degradation, thus establishing the basis for the next cycle.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated because the proposed revisions do not add or remove plant equipment or affect how this equipment is operated.

3. Involve a significant reduction in the margin of safety because snubbers visually inspected after a nine month cycle have gone through sufficient service life to detect any degradation if it existed. This change does not extend the service time between inspections.

Local Public Document Room location: Public Library of Illinois Valley Community College, Rural Route No. 1, Ogelsby, Illinois 61348.

Attorney to licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

NRC Project Director: Daniel R. Muller

Commonwealth Edison Company, Docket Nos. 50-373 and 50-374, LaSalle County Station, Unit Nos. 1 and 2, LaSalle County, Illinois

Date of application for amendments: October 7, 1988

Description of amendments request: The proposed amendments to Operating License No. NPF-11 and Operating License No. NPF-18 would revise the LaSalle Units 1 and 2 Technical Specifications by allowing operation of both units with suppression pool temperatures of up to 105° F.

The suppression pool is cooled during normal, as well as abnormal, conditions by using the suppression pool cooling mode of the Residual Heat Removal (RHR) system. The cooling water for the RHR heat exchangers is the RHR Service Water system which uses the LaSalle cooling lake as a heat sink. This is located at the coolest part of the station cooling lake. When the cooling lake temperature rises, the lowest temperature that the suppression pool can be maintained at also increases. During previous summers, the suppression pool was able to be maintained below the limit of 100° F.

Illinois has experienced record hot weather in 1988 exceeding all expectations. The cooling lake temperature increased due to several consecutive days of very hot weather. During these periods, the suppression pool temperature increased to very near the limit of 100° F. However, the weather cooled sufficiently at that time to provide relief and the lake and suppression pool temperatures decreased. It is anticipated that these elevated temperatures will pose a recurring problem at LaSalle County Station in future years during the summer months.

Basis for proposed no significant hazards consideration determination: The Commission has provided standards for determining whether no significant hazards consideration exists as stated in 10 CFR 50.92(c). A proposed amendment to an operating license for a facility involves no significant hazards consideration if 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 an accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The licensee has determined, and the NRC staff agrees, that the proposed amendment will not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated because this change has been evaluated against those criteria for which the original limit of 100° F was established. It has been concluded that the original limit of 100° F includes conservatisms which were not expected to cause operational impact. However, due to unforeseen external environmental conditions, some of the conservatism may be reduced without significant impact on plant safety.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated because the change does not add or remove plant equipment or affect how this equipment is operated. The plant has been evaluated for various conditions relating to the suppression pool temperature previously and this change will not provide conditions with the possibility for a new or different accident.

3. Involve a significant reduction in the margin of safety because the basis for Technical Specification 3/4.6.2 shows the margin between the analyzed temperature rise in the suppression pool during blowdown and the ultimate limit of 200° F is large even with a new initial suppression pool temperature of 105° F. Therefore any reduction in the margin of safety is not significant.

Local Public Document Room location: Public Library of Illinois Valley Community College, Rural Route No. 1, Ogelsby, Illinois 61348.

Attorney to licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

NRC Project Director: Daniel R. Muller

Commonwealth Edison Company, Docket Nos. 50-373 and 50-374, LaSalle County Station, Unit Nos. 1 and 2, LaSalle County, Illinois

Date of application for amendments: November 29, 1988

Description of amendments request: The proposed amendments to Operating License No. NPF-11 and Operating License No. NPF-18 would revise the LaSalle Units 1 and 2 Technical Specifications by removing specific load profiles for each specific DC Battery. This revision will eliminate the need to revise the Technical Specifications every time a DC system load profile change is made. Listings of DC bus load profiles will continue to be maintained in the UFSAR Tables 8.3-12 through 8.3-14. These DC System Load Tables will be updated annually as changes are made in accordance with 10 CFR 50.71(e). The elimination of specific load profiles for each battery charger and battery will make Technical Specifications 4.8.2.3.2.c.4 and 4.8.2.3.2.d similar to the Byron Station Technical Specifications 4.8.2.1.2.c.4 and 4.8.2.1.2.d, covering the same area. No changes to the Technical Specification Bases are being proposed. No change to the Technical Specification Limiting Conditions for Operation or actual surveillance testing requirements are being proposed.

Basis for proposed no significant hazards consideration determination: The Commission has provided standards for determining whether no significant hazards consideration exists as stated in 10 CFR 50.92(c). A proposed amendment to an operating license for a facility involves no significant hazards consideration if 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 an accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The licensee has determined, and the NRC staff agrees, that the proposed amendment will not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated because the tables proposed to be removed from the Technical Specifications are an administrative listing of DC loads. These tables currently exist and will continue to be maintained in the UFSAR.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated because the basis design of the DC Power System and its interfaces with other systems will remain unchanged. There are no proposed changes to the Technical Specification Bases.

3. Involve a significant reduction in the margin of safety because current testing frequencies will remain unchanged. The change will facilitate testing because the values will better reflect installed loads in the plant.

Local Public Document Room location: Public Library of Illinois Valley Community College, Rural Route No. 1, Ogelsby, Illinois 61348.

Attorney to licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.
NRC Project Director: Daniel R. Muller

Commonwealth Edison Company, Docket No. 50-374, LaSalle County Station, Unit No. 2, LaSalle County, Illinois

Date of application for amendment: September 7, 1988
Description of amendment request: The proposed amendment to Operating License No. NPF-18 would revise the LaSalle Unit 2 Technical Specifications by deleting the specifications added to allow installation and use of the Fine Motion Control Rod Drive (FMCRD) during the Unit 2 Cycle 2. That test has been completed and the FMCRD will be removed during the Unit 2 outage which began in October 1988.

The Fine Motion Control Rod Demonstration (FMCRD) Test, General Electric NEDO-31130, was approved by NRC prior to being installed at LaSalle Unit 2 for the second fuel cycle. This special control rod is at a peripheral location (02-43) limiting plant impact. At the end of this second fuel cycle, the FMCRD and all associated equipment are to be removed and the original locking piston design control rod drive is to be reinstalled, bringing the entire Control Rod Drive system back to its original design.

Technical Specification Special Test Exceptions (3/4.10.8, 3/4.10.9, 3/4.10.10) were added to the Technical Specifications to allow testing of the FMCRD at the control location 02-43. These Technical Specification Special Test Exceptions are to be deleted upon removal of FMCRD, along with the references to them, contained in Technical Specifications 3.1.3.1 through 3.1.3.7 for Operational Conditions. Technical Specification 3.9.1 will be modified to delete the requirement to fully insert FMCRD and disarm the motor electrically before core alterations.

Basis for proposed no significant hazards consideration determination: The Commission has provided standards for determining whether no significant hazards consideration exists as stated in 10 CFR 50.92(c). A proposed amendment to an operating license for a facility involves no significant hazards consideration if 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 an accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The licensee has determined, and the NRC staff agrees, that the proposed amendment will not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated because the Fine Motion Control Rod Drive (FMCRD) will be removed and a locking piston control rod drive (CRD) of the original design will be reinstalled. This will restore the CRD system to the configuration of its original design. The Technical Specifications will likewise be returned to their original state.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated because this proposed amendment and actions that are scheduled for removing the FMCRD and reinstalling a locking piston CRD will restore the CRD system to the configuration of its original design. All the original accident evaluations will again be valid for the CRD system.

3. Involve a significant reduction in the margin of safety because the CRD system will be returned to its original design and therefore all of the original safety evaluation will apply. The margin of safety will likewise return to its original level.

Local Public Document Room location: Public Library of Illinois Valley Community College, Rural Route No. 1, Ogelsby, Illinois 61348.
Attorney to licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.
NRC Project Director: Daniel R. Muller

Commonwealth Edison Company, Docket Nos. 50-254 and 50-265, Quad Cities Nuclear Power Station, Units 1 and 2, Rock Island County, Illinois

Date of application for amendments: November 15, 1988
Description of amendments request: Commonwealth Edison Company (CECo, the licensee) proposes to amend Operating Licenses DPR-29 and DPR-30 for Quad Cities Station to conform with the recommendations of Generic Letter (GL) 84-13 which allows for deleting Snubber Table 3.6-1 from Technical Specifications (TS). There are three types of TS changes associated with the proposed license amendment. The first is a result of GL 84-13; the second change removes references to hydraulic snubbers; while the last type of change corrects typographical errors and renumbers the TS.

GL 84-13 concluded that detailed listings of snubbers in TS are not necessary, provided TS are modified to specify what snubbers are required to be operable. CECo's amendment application followed this guidance by eliminating Table 3.6-1, and replacing all references to TS Table 3.6-1 with a statement that specifies "all snubbers on safety-related piping systems." The record of installed safety related snubbers will be maintained within the control of Quad Cities Administrative procedures in order to comply with the surveillance requirements of TS paragraph 4.6.I.1.

Test requirements for hydraulic snubbers are no longer needed by the Station since the total population of snubbers on safety-related piping systems consist of mechanical snubbers. Therefore, the proposed TS change will delete all references to hydraulic snubbers due to the inapplicability of this type of snubber to the station's current as-built condition of safety-related systems. Similarly, several typographical errors have been corrected and some specifications have been renumbered as a result of the deletion of the hydraulic snubbers from the Technical Specifications.

Basis for proposed no significant hazards consideration determination: The Commission has provided standards for determining whether a significant hazards consideration exists (10 CFR 50.92(c)). A proposed amendment to an operating license for a facility involves no significant hazards consideration if 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; (2) create the possibility of a new or different kind of accident from an accident previously evaluated; or (3) involve a significant reduction in a margin of safety. In accordance with 10 CFR 50.92, CECo conducted an analysis of their proposed amendment and concluded that it does not involve significant hazards consideration. This conclusion was based upon the determination that the operation of Quad Cities Station in conformance with the proposed amendment:

(1) Would not involve a significant increase in the probability or consequences of an accident previously evaluated because required testing of safety-related snubbers has not changed. Current functional and visual testing of these snubbers will not be affected. The proposed change transfers the official record of installed safety-related snubbers from TS to the control of Quad Cities administrative procedures. All references to Table 3.6-1 in the TS text would be replaced with a blanket statement - "all snubbers on

safety-related piping system." The operability and surveillance requirements of safety-related snubbers remain unaffected.

The proposed change will also remove all references to hydraulic snubbers. The scope of required snubber testing will not be affected because the station does not have hydraulic snubbers installed on safety-related piping systems.

(2) Would not create the possibility of a new or different kind of accident from any accident previously evaluated because the testing methods and type of snubbers (i.e. safety-related) tested remain unchanged. Since, the snubber listing will be documented and controlled in a separate administrative procedure, snubber capability will still be adequately monitored. Also, since the station does not have hydraulic snubbers installed on safety-related systems, the removal of all references to this type of snubber will not impact the purpose of snubber testing. Operability and testing of required snubbers are not affected.

(3) Would not involve a significant reduction in the margin of safety because the intent, methods, and quantity of snubbers to be tested remain the same. Also, since the station does not have hydraulic snubbers installed on safety-related systems, the removal of all references to this type of snubber will not impact snubber testing. This TS change for the deletion of Snubber Table 3.6-1 and Hydraulic Snubber test requirements will not decrease the safety margin of the integrity of the piping systems because no decrease in snubber functional and visual testing requirements is proposed.

As for the proposed typographical and editorial changes, the NRC has provided guidance (51 FR 7751) on what changes are considered examples of no significant hazards. The proposed changes do conform with example (i) which reads "a purely administrative change to TS; for example a change to achieve consistency throughout the Technical Specifications, correction of an error, or change in nomenclature."

NRC staff reviewed the licensee's application and analysis of no significant hazards consideration. Based upon this review, and the above discussion, the NRC staff proposes to determine that this amendment request does not involve significant hazards considerations.

Local Public Document Room location: Dixon Public Library, 221 Hennepin Avenue, Dixon, Illinois 61021.

Attorney for licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

NRC Project Director: Daniel R. Muller

Commonwealth Edison Company, Docket Nos. 50-295 and 50-304, Zion Nuclear Power Station, Unit Nos. 1 and 2, Lake County, Illinois

Date of application for amendments: September 28, 1988

Brief description of amendments: This amendment request will modify Technical Specification Section 4.2.1.F.1 (Boric Acid System) in the existing Technical Specifications. The purpose of this change is to clarify the testing requirements for the heat trace which protects piping from the Boric Acid Tanks (BAT) to the Charging Pump suction lines. This change replaces the existing ambiguous surveillance requirement (i.e., functional test) with a clear and concise description of how this heat trace system shall be demonstrated Operable. This change will increase the surveillance frequency from weekly to daily and delineate the appropriate surveillance requirements.

Basis for proposed no significant hazards consideration determination: The Commission has provided standards for determining whether a significant hazards consideration exists as stated in (10 CFR 50.92(c)). A proposed amendment to an operating license for a facility involves no significant hazards consideration if 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 possiblity of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The licensee provided the following discussion regarding the above three criteria.

Criterion 1

This change adds the surveillance requirement of verifying daily that at least one channel is energized and the redundant channel is available. This is a significant increase over the current surveillance requirements of functionally testing heat tracing operation weekly. In addition, a requirement to Energize each heat trace channel weekly provides a more specific requirement rather than to functionally test the operation of the heat trace system and alarm circuits weekly. The control room annunciator has been deleted from the surveillance reqirements since it is not required by Standard Technical Specification and is not considered necessary to ensure operability of the heat trace system. The annunciator is neither safety-related nor reliability related.

Because the proposed change involves the expansion and clarification of the affected section, the example (ii) of 48 FR 14869 is applicable in this instance. Example (ii) reads as follows: "A change that constitutes an additonal limitation, restriction, or control not presently in Technical Specification: for example a more stringent surveillance requirement."

Criterion 2

This proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated, since it increases the reliability of heat trace operations by requiring more frequent surveillance of system operations and removes ambiguous testing requirements.

Also, since the change does not create a change in system operation, a new or different kind of accident from those previously evaluated in the FSAR is not created.

Criterion 3

The proposed change will increase the margin of safety since the change is more conservative than is currently required by the Technical Specifications. Specifically, the heat trace for the Boric Acid Tanks to the Charging Pumps suction lines are verified operable daily versus weekly. Thus, this change does not involve a reduction in the margin of safety.

Since the application for amendment satisfies the criteria specified in 10 CFR 50.92 and is similar to examples for which no significant hazards consideration exists, Commonwealth Edison Company has made a determination that the application involves no significant hazards consideration.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis.

Accordingly, the Commission proposes to determine that the proposed changes to the Technical Specifications involve no significant hazards consideration.

Local Public Document Room location: Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085.

Attorney to licensee: Michael I. Miller, Esq., Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

NRC Project Director: Daniel R. Muller

GPU Nuclear Corporation, et al., Docket No. 50-320, Three Mile Island Nuclear Station, Unit No. 2, Dauphin County, Pennsylvania

Date of amendment request: April 4, 1988

Description of amendment request: The proposed amendment would revise TMI-2 Operating License No. DPR-73 by modifying Appendix B Technical Specifications Sections 1.0, "Definitions" and 2.0, "Limiting Conditions for Operation." The proposed changes would revise certain surveillance terms and definitions in the Appendix B Technical Specifications consistent with the meaning in the Appendix A Technical Specifications.

In Section 1 the licensee proposes a change in the definition of "Calibration". The term "functional test" in the definition would be changed to "channel functional test." Also in Section 1 the licensee proposes to delete the terms and associated definitions for "functional check" and "functional test". These two terms would be replaced by "channel functional test" and "channel check." The definitions for these two terms are identical to the Appendix A Technical Specification definitions.

Section 2.1.1, Liquid Effluents, defines the limits and conditions for the controlled release of liquid radioactive effluents to the environment. This section also specifies the surveillance requirements for the monitoring equipment. The liquid effluent radiation monitor currently receives an instrument channel test monthly and a source check prior to each liquid discharge. The licensee proposes to change the terminology such that the liquid radiation monitor receives a channel functional test monthly and a channel check prior to each liquid discharge.

Section 2.1.2, Gaseous Effluents, defines the limits and conditions for the controlled release of radioactive gaseous effluents to the environment. This section also specifies the surveillance requirements for the monitoring equipment. The unit vent monitors for TMI-2 currently receive an instrument channel check at least monthly and a sensor check at least daily. The licensee proposes to change the terminology such that the vent monitors receive a channel functional test at least monthly and a channel check at least daily.

Section 2.1.3, Radioactive Gaseous Effluent Monitoring Instrumentation, requires that each channel of each radioactive gaseous effluent monitor demonstrate operability by performance of a channel check, source check, channel calibration and channel functional test operations at specific intervals of time. The licensee proposes to delete the requirement for a monthly source check. The licensee finds that the methodology used for performing the daily channel check on the current monitor verifies the same degree of operability as the monthly source check.

Table 2.1-36 specifies the time interval for the various instrument surveillance requirements. The current Technical Specifications require a source check for the Noble Gas activity monitor. The licensee proposes to delete this requirement from the table to be consistent with the proposed deletion of the requirement to conduct a source check.

Basis for proposed no significant hazards consideration determination: The Commission has provided standards for determining whether a significant hazards consideration exists in 10 CFR 50.92(c). A proposed amendment to an operating license for a facility involves no significant hazards consideration if 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, (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.

TMI-2 is currently in a post-accident, cold shutdown, long-term cleanup mode, with sufficient decay heat removal assured by direct heat loss from the reactor coolant system to the reactor building atmosphere. The licensee is presently engaged in defueling the damaged reactor, decontaminating the facility and readying the plant for long-term storage. As of the end of September 1988, approximately 68 percent of the fuel contained in the reactor vessel has been removed. Defueling the facility has progressed to the regions below the location of the original core volume. Defueling activities within the reactor building will be completed in the fall of 1989. The staff has determined in previous license amendments, that the potential accidents analyzed for TMI-2 in the current cleanup-mode are bounded in scope and severity by the range of accidents originally analyzed in the facility FSAR. The changes proposed by the licensee are changes to the Appendix B Technical Specifications. These changes have been proposed by the licensee to ensure consistent usage of terms throughout both the Appendix A and Appendix B specifications. Terms that are no longer referenced in the Appendix B Technical Specifications would be deleted from Section 1.0.

The proposed changes do not significantly increase the probability or consequences of an accident previously evaluated because no changes are proposed to current safety systems or setpoints. The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated because no new modes of operation or new equipment are being introduced. The proposed changes revise the definitions used to characterize the surveillance requirements for environmental monitoring equipment and as such does not affect the potential or severity of an accident at TMI-2. The proposed changes do not involve a significant reduction in a margin of safety, because, as mentioned previously, the changes are administrative in nature and result in consistency of definitions throughout the Technical Specifications. Furthermore no active components are required to maintain the current safe shutdown of TMI-2.

Based on the above considerations, the staff proposes to determine that the proposed changes do not involve a significant hazards consideration.

Local Public Document Room location: State Library of Pennsylvania Government Publications Section, Education Building, Walnut Street and Commonwealth Avenue, Harrisburg, Pennsylvania 17126.

Attorney for licensee: Ernest L. Blake, Jr., Esquire, Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Project Director: John F. Stolz

Indiana Michigan Power Company, Dockets Nos. 50-315 and 50-316, Donald C. Cook Nuclear Plant, Units Nos. 1 and 2, Berrien County, Michigan

Date of amendment request: December 2, 1986, November 23, 1987, and July 21, 1988.

Description of amendment request: In accordance with the requirements of 10 CFR 73.55, the licensee submitted an amendment to the Physical Security Plan for the Donald C. Cook Nuclear Plant to reflect recent changes to that regulation. The proposed amendments would modify paragraphs 2.D of Facility Operating Licenses Nos. DPR-58 and DPR-74 to require compliance with the revised Plan.

Basis for proposed no significant hazards consideration determination: On August 4, 1986 (51 FR 27817 and 27822), the Nuclear Regulatory Commission amended Part 73 of its regulations, "Physical Protection of

Plants and Materials," to clarify plant security requirements to afford an increased assurance of plant safety. The amended regulations required that each nuclear power reactor licensee submit proposed amendments to its security plan to implement the revised provisions of 10 CFR 73.55. The licensee submitted its revised plan on December 2, 1986, November 23, 1987, and July 21, 1988, to satisfy the requirements of the amended regulations. The Commission proposes to amend the licenses to reference the revised plan.

In the Supplementary Materials accompanying the amended regulations, the Commission indicated that it was amending its regulations "to provide a more safety conscious safeguards system while maintaining the current levels of protection" and that the "Commission believes that the clarification and refinement of requirements as reflected in these amendments is appropriate because they afford an increased assurance of plant safety."

The Commission has provided guidance concerning the application of the criteria for determining whether a significant hazards consideration exists by providing certain examples of actions involving no significant hazards considerations and examples of actions involving significant hazards considerations (51 FR 7750). One of these examples of actions involving no significant hazards considerations is example (vii) "a change to conform a license to changes in the regulations, where the license change results in very minor changes to facility operations clearly in keeping with the regulations." The changes in this case fall within the scope of the example. For the foregoing reasons, the Commission proposes to determine that the proposed amendments involve no significant hazards consideration.

Local Public Document Room location: Maude Preston Palenske Memorial Library, 500 Market Street, St. Joseph, Michigan 49085.

Attorney for licensee: Gerald Charnoff, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Project Director: Theodore R. Quay, Acting.

Long Island Lighting Company, Docket No. 50-322, Shoreham Nuclear Power Station, Suffolk County, New York

Date of amendment request: July 15, 1988

Description of amendment request: This amendment would revise Technical Specifications 3/4.8.1, A. C. Sources, to adopt staff recommended changes to improve and maintain diesel generator reliability (Generic Letter 84-15).

Basis for proposed no significant hazards consideration determination: The Commission has provided standards for determining whether a significant hazards consideration exists as stated in 10 CFR 50.92(c). A proposed amendment to an operating license for a facility involves no significant hazards considerations if 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.

In accordance with 10 CFR 50.92 the licensee has reviewed the proposed changes and has concluded as follows:

The proposed license change does not involve a significant hazards consideration because operation of the Shoreham Nuclear Power Station, in accordance with this change, would not:

(1) involve a significant increase in the probability or consequences of an accident previously evaluated as it does not alter the onsite standby power supply system design or the system's operability and availability requirements. The diesel generators are required to supply the same emergency load service regardless of the proposed change. The reduction of test frequency, the independent testing and the loading to 1400 KW should reduce the potential for failures caused by excessive testing and running diesels at low or no load. Surveillance Testing of the diesel generators at a load of 3300 KW will continue to be performed every 31 days.

(2) create the possibility of a new or different kind of accident from any accident previously evaluated as onsite standby power supply system design and operability requirements are not affected by the proposed change.

(3) involve a significant reduction in a margin of safety as the diesel generators are required to supply the same emergency load service, regardless of the proposed change. Performance of diesel generator testing within 1 hour and every 8 hours thereafter, upon inoperability of one or more offsite circuits (3.8.1.1 a, e), provides little additional assurance of diesel generator operability than testing within 24 hours of a previous surveillance test or within 8 hours. Upon loss of offsite circuits, diesel generator reliability is not expected to be adversely affected, thus, surveillance testing within 24 or 8 hours provides adequate assurance of diesel generator operability. It also allows time for pre-test inspection, if required, and sequential testing of diesel generators. The proposed requirement (3.8.1.1.b,c) that upon unplanned inoperability of the diesel being tested, the remaining diesels are individually tested within 24 hours, is incorporated to determine if a common mode failure exists. Otherwise, testing of the remaining diesel generators is not required. The addition of Surveillance Requirement 4.8.1.1.2.a.5 which includes running the diesel generators at 1400 KW, will demonstrate operability and availability without subjecting diesel generators to operating stresses which can occur by testing at the qualified load of 3300 KW. This requirement will also reduce the amount of wear associated with running diesel generators at no or low loads. Each diesel generator has a test schedule based on its individual performance in previous surveillance tests. Test schedules will now be determined by the number of failures per 20 consecutive tests in addition to the 100 consecutive tests originally identified (Table 4.8.1.1.2-1). The proposed tech spec changes are consistent with the guidelines of Generic Letter 84-15. They will serve to reduce the number of diesel starts and runs, thereby reducing wear and tear and ultimately degradation and failure. The proposed changes should improve overall safety.

Based upon the above considerations and analyses, LILCO has determined that this proposed change does not involve a significant hazards consideration.

The staff reviewed the licensee's determination that the proposed license amendment involves no significant hazards consideration and agrees with the licensee's analyses. Accordingly, the staff proposes to determine that the proposed license amendment does not involve a significant hazards consideration.

Local Public Document Room location: Shoreham-Wading River Public Library, Route 25A, Shoreham, New York 11786-9697

Attorney for licensee: W. Taylor Reveley, III, Esq., Hunton and Williams, P.O. Box 1535, Richmond, Virginia 23212

NRC Project Director: Walter R. Butler

Louisiana Power and Light Company, Docket No. 50-382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: September 20, 1988 and November 28, 1988

Description of amendment request: The proposed amendment would revise License Condition 2.C.9 of the license issued March 6, 1985, would remove fire protection Technical Specifications 3/4.3.3.8, 3/4.7.10.1 through 3/4.7.10.5, 3/4.7.11, and 6.2.2.e, and the corresponding Section 3/4 Bases, and revise Technical Specification 6.5.1.6 of Appendix A of that license. Generic Letters 86-10, dated April 24, 1986, and 88-12, dated August 2, 1988, from the NRC provided guidance to licensees to request removal of the fire protection Technical Specifications. The licensee's proposed amendment is in response to these Generic Letters.

Basis for proposed no significant hazards consideration determination:

The staff has evaluated this proposed amendment and determined that it involves no significant hazards considerations. According to 10 CFR 50.92(c), a proposed amendment to an operating license involves no significant hazards considerations if 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.

The proposed revision to the License Condition is in accordance with the guidance provided in Generic Letter 86-10 for licensees requesting removal of fire protection Technical Specifications (TS). The incorporation of the NRC-approved Fire Protection Program, and the former TS requirements by reference to the procedures implementing these requirements into the Final Safety Analysis Report (FSAR) and the use of the standard License Condition on fire protection will ensure that the Fire Protection Program, including the systems, the administrative and technical controls, the organization, and the other plant features associated with fire protection will be on a consistent status with other plant features described in the FSAR. Also, the provisions of 10 CFR 50.59 would then apply directly for changes the licensee desires to make in the Fire Protection Program. In this context, the determination of the involvement of an unreviewed safety question defined in 50.59(a)(2) would be made based on the "accident...previously evaluated" being the postulated fire in the fire hazards analysis for the fire area affected by the change. Hence, the proposed License Condition establishes an adequate basis for defining the scope of changes to the Fire Protection Program which can be made without prior Commission approval, i.e., without introduction of an unreviewed safety question. The revised License Condition or the removal of the existing TS requirements on fire protection does not create the possibility of a new or different kind of accident from those previously evaluated. They also do not involve a significant reduction in the margin of safety since the License Condition does not alter the requirement that an evaluation be performed for the identification of an unreviewed safety question for each proposed change to the Fire Protection Program. Consequently, the proposed License Condition or the removal of the fire protection requirements do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed modification of the Administrative Control Section 6 of the Technical Specifications includes the review of the Fire Protection Program and implementing procedures and the submittal of recommended changes to the Safety Review Committee as one of the responsibilities of the Plant Operations Review Committee under TS 6.5.1.6. In this manner, the Fire Protection Program will be addressed by administrative control requirements that are consistent with other programs addressed by License Conditions. These changes are administrative in nature and do not impact the operation of the facility in a manner that involves significant hazards considerations.

The proposed amendment includes the removal of fire protection Technical Specifications in four areas: (1) fire detection systems, (2) fire suppression systems, (3) fire barriers, and (4) fire brigade staffing requirements. While it is recognized that a comprehensive Fire Protection Program is essential to plant safety, many details of this program that are currently addressed in Technical Specifications can be modified without affecting nuclear safety. With the removal of these requirements from the Technical Specifications, they have been incorporated into the Fire Protection Program implementing procedures. Hence, with the additions to the existing administrative control requirements that are applicable to the Fire Protection Program and the revised License Condition, there are suitable administrative controls to ensure that licensee initiated changes to these requirements, that have been removed from the Technical Specifications, will receive careful review by competent individuals. Again, these changes are administrative in nature and do not impact the operation of the facility in a manner that involves significant hazards considerations.

Based on the review and the above discussions, the staff proposes to determine that the proposed changes do not involve a significant hazards consideration.

Local Public Document Room Location: University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, Louisiana 70122

Attorney for licensee: Bruce W. Churchill, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N St., NW., Washington, DC 20037

NRC Project Director: Jose A. Calvo

Philadelphia Electric Company, Public Service Electric and Gas Company, Delmarva Power and Light Company, and Atlantic City Electric Company, Dockets Nos. 50-277 and 50-278, Peach Bottom Atomic Power Station, Units Nos. 2 and 3, York County, Pennsylvania

Date of application for amendments: August 26, 1988

Description of amendment request: The proposed changes to Technical Specification pages 240g and 240q reflect a modification to permit the removal of that portion of the carbon dioxide fire suppression system (CARDOX) that serves the control room. The change is proposed to eliminate a safety hazard to personnel in the control room as would occur if inadvertently pressurized carbon dioxide hoses failed inside the control room. The licensee's concerns arise from observations of inadvertently pressurized hoses in the turbine building and the control room and observations of blistered hoses and a ruptured hose in the turbine building. The licensee proposes that the nine existing portable 14 pound Class 2A halon extinguishers in the control room and the two water hose reels located outside the entrance to the control room provide sufficient fire suppression capability. The proposed changes do not affect the CARDOX system's use for other areas such as the Turbine Building, Cable Spreading Room, Computer Room, High Pressure Coolant Injection System Pump Rooms and the Diesel Generator Rooms. The effect of this proposed amendment is to delete the Control Room from the list, on pages 240g and 240q, of those areas of the plant that are served by the CARDOX system.

Basis for proposed no significant hazards consideration determination: The Commission has provided standards for determining whether a significant hazards consideration exists (10 CFR 50.92(c)). A proposed amendment to an operating license for a facility involves no significant hazards consideration if 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. The licensee has provided a discussion of the proposed changes as they relate to these standards; the discussion is presented below.

Standard 1 - The proposed changes do not involve a significant increase in the

probability or consequences of an accident previously evaluated.

The proposed changes involve the removal of a redundant fire suppression system from the Control Room. The probability of a fire in the Control Room is not increased by removing the CO_2 hose reels of the CO_2 Fire Protection System. The consequences of a fire in the Control Room are not increased because the Control Room operators are adequately equipped to handle a fire in the Control Room by means of portable halon extinguishers and shutdown if the fire requires the Operators to leave the water hose stations adjacent to the Control Room. The Control Room is continuously manned, automatic fire detection is provided, and alternative shutdown panels outside the Control Room will allow the plant to be safely Control Room or if damage results to safe shutdown equipment. Thus, the proposed changes do not involve a significant increase in the probability or consequences of an accident as previously evaluated in Chapter 14 of the PBAPS Updated Final Safety Analysis Report.

Standard 2 - The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The elimination of the redundant CO_2 Fire Protection System from the Control Room does not create the possibility of a new or different type of accident. Sufficient fire suppression capability is maintained even without the use of the CO_2 Fire Protection System by halon extinguishers and water hose reels located outside the entrance to the Control Room. Alternative shutdown panels outside the Control Room will allow the plant to be safely shutdown if the fire forces the operators to leave the Control Room or if damage results to safe shutdown equipment.

Standard 3 - The proposed revisions do not involve a significant reduction in a margin of safety.

Fire suppression capability is maintained by means of portable halon extinguishers and hose stations adjacent to the Control Room which would provide the Control Room personnel with adequate fire suppression capability. As determined by the Control Room habitability study, the continued presence of the CO_2 hose reels in the Control Room does present a safety hazard to Control Room personnel and jeopardizes Control Room habitability. For these reasons, the change will enhance the margin of safety.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis.

Accordingly, the Commission has proposed to determine that the above changes do not involve a significant hazards consideration.

Local Public Document Room location: Government Publications Section, State Library of Pennsylvania, Education Building, Commonwealth and Walnut Streets, Harrisburg, Pennsylvania 17126

Attorney for Licensee: Troy B. Conner, Jr., 1747 Pennsylvania Avenue, NW., Washington, DC 20006

NRC Project Director: Walter R. Butler

Philadelphia Electric Company, Public Service Electric and Gas Company, Delmarva Power and Light Company, and Atlantic City Electric Company, Dockets Nos. 50-277 and 50-278, Peach Bottom Atomic Power Station, Units Nos. 2 and 3, York County, Pennsylvania

Date of application for amendments: October 21, 1988

Description of amendment request: The proposed change to Technical Specification pages iv, 103, 103a and 110 would revise the minimum count rate required on the source range monitors for the withdrawal of control rods for startup. This change affects startup only and does not extend to refueling activities. The current Technical Specification requiring a minimum count rate of three counts per second (cps) would be revised, for startup only, to specify the minimum count rate as a function of the signal-to-noise (S/N) ratio below a count rate of 3 cps. This relationship between count rate and the S/N ratio is defined by an added Figure 3.3.1. The specification is also revised such that when the reduced count rate is being utilized, at least three of the SRM channels must indicate on or above the curve provided in Figure 3.3.1. Several other administrative changes are also proposed to correct previous inadvertent omissions and misspellings.

The source range monitoring (SRM) system consists of four identical neutron detection channels that provide neutron flux information during reactor startup and low flux level operations until overlap with the intermediate range monitoring (IRM) system is achieved. The SRM system is not required to ensure that the safety design bases are maintained, and, accordingly, no credit is taken for action by the system in the Final Safety Analysis Report (FSAR) accident analyses. The only events related to the proposed change are those that potentially could occur during startup; a continuous rod withdrawal, which is an anticipated operational transient, and the control rod drop accident. As indicated in the FSAR, the worst case rod withdrawal event analysis does not take credit for the rod block that would be initiated by the rod block monitoring (RBM) system based on the input from the SRM. Therefore, the analysis progresses until scram signals are generated by the IRM and average power range monitoring system to prevent fuel damage. As also indicated in the FSAR, the control rod drop analysis (CRDA) does not take credit for information provided by the source range monitoring system as the rod drive is withdrawn; the scram signal is assumed by the analysis to be generated by the IRM. An input assumption for several of the CRDA cases is that they are initiated from power levels of at least ten-to-the-minus-eight of rated power. As indicated in the licensee's application, the proposed change in the minimum SRM count rate (the SRM downscale setpoint) will continue to ensure that the applicable CRDA case would also be initiated from at least ten-to-the-minus-eight of the rated power level. Therefore, the input to the CRDA analysis remains valid.

The proposed change is needed because both units have been shut down since March 1987 and it appears likely that the SRM count rate may not be above the minimum value of three cps on at least two channels when the units are expected to be restarted. Therefore, the count rate specification is proposed to be revised to include values down to 0.7 cps with an associated S/N ratio. The augmentation of the count rate below three cps with an S/N specification ensures that the statistical neutron monitoring confidence level of 95% is maintained at the lower count rates.

Basis for proposed no significant hazards consideration determination: The Commission has provided standards for determining whether a significant hazards consideration exists (10 CFR 50.92(c)). A proposed amendment to an operating license for a facility involves no significant hazards consideration if 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.

Standard 1 - The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The events that would likely involve the SRM in their response would be the control rod drop accident (CRDA) and the continuous rod withdrawal error. The CRDA is more limiting and the design basis accident analysis for it does not give credit for SRM response. The analysis for this event utilizes the trip provided by the IRM. No hardware changes are proposed for the SRM or other systems.

Several of the CRDA analysis cases are assumed to start from ten-to-the-minus-eight of rated power. The

proposed lower limit of 0.7 cps, which corresponds to approximately ten-to-the-minus-eight of rated power and the specification of a S/N ratio to ensure the same statistical neutron monitoring confidence level supports the continuing validity of this analysis assumption.

Therefore, it is concluded that the proposed changes do not significantly affect the probability of initiating the CRDA or rod withdrawal event and since the SRMs are not given credit in the analyses for responding to these events the proposed SRM changes do not affect the design basis analysis consequences of these events.

Standard 2 - The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

No hardware modifications or other changes which would initiate new or different kinds of accidents are involved. The proposed changes have been shown to be within the bounds of previously existing design basis safety analyses.

Standard 3 - The proposed changes do not involve a significant reduction in a margin of safety.

The only effect of these changes is to permit withdrawal of control rods at a lower SRM count rate while maintaining the previously established statistical neutron monitoring confidence level of 95% and the assurance that any event would initiate from at least ten-to-the-minus-eight of rated power. The SRMs are not required to ensure the safety margins of mitigative actions in the design basis safety analyses.

On the bases discussed above, the Commission has proposed to determine that the above changes do not involve a significant hazards consideration.

The licensee has also proposed several administrative changes to correct Technical Specification (TS) 4.3.C.1 of the Unit 2 TS to state that scram time testing may be accomplished during operational hydrostatic testing or during startup. This would restore a phrase that was inadvertently omitted in an earlier amendment application and would make the Unit 2 TS identical to the current Unit 3 TS in this regard. The licensee also proposes to correct the abbreviation for the Rod Block Monitor in TS 3.3.B.5.a.

The Commission has provided guidance for the application of the criteria for no significant hazards consideration determination by providing examples of amendments that are considered not likely to involve significant hazards considerations (51 FR 7751). These examples include: Example (i) "A purely administrative change to technical specifications: for example, a change to achieve consistency throughout the technical specification, corrections of an error, or a change in nomenclature." The proposed change, to restore previously inadvertently omitted information and to correct the spelling of an acronym, is an example of such an administrative change. Since this proposed change is encompassed by an example for which no significant hazard exists, the staff has made a proposed determination that it involves no significant hazards consideration.

Local Public Document Room location: Government Publications Section, State Library of Pennsylvania, Education Building, Commonwealth and Walnut Streets, Harrisburg, Pennsylvania 17126

Attorney for Licensee: Troy B. Conner, Jr., 1747 Pennsylvania Avenue, NW., Washington, DC 20006

NRC Project Director: Walter R. Butler

Power Authority of the State of New York, Docket No. 50-333, James A. FitzPatrick Nuclear Power Plant, Oswego, New York

Dates of amendment request: December 1, 1986, November 19, 1987, and March 7, 1988.

Description of amendment request: In accordance with the requirements of 10 CFR 73.55, the licensee submitted revisions to the James A. FitzPatrick Nuclear Power Plant Physical Security Plan to reflect recent changes to that regulation. The proposed amendment would modify paragraph 2.D of Facility Operating License No. DPR-59 to require compliance with the revised Plan.

Basis for proposed no significant hazards consideration determination: On August 4, 1986 (51 FR 27817 and 27822), the Nuclear Regulatory Commission amended Part 73 of its regulations, "Physical Protection of Plants and Materials," to clarify plant safety. The amended regulations required that each nuclear power reactor licensee submit proposed amendments to its security plan to implement the revised provisions of 10 CFR 73.55. The licensee submitted its revised plan on December 1, 1986, November 19, 1987, and March 7, 1988, to satisfy the requirements of the amended regulations. The Commission proposes to amend the license to reference the revised Plan.

In the Supplementary Materials accompanying the amended regulations, the Commission indicated that it was amending its regulations "to provide a more safety conscious safeguards system while maintaining the current levels of protection" and the "Commission believes that the clarification and refinement of requirements as reflected in these amendments is appropriate because they afford an increased assurance of plant safety."

The Commission has provided guidance concerning the application of the criteria for determining whether a significant hazards consideration exists by providing certain examples of actions involving no significant hazards considerations and examples of actions involving significant hazards considerations (51 FR 7750). One of these examples of actions involving no significant hazards considerations is example (vii), "a change to conform a license to changes in the regulations, where the license change results in very minor changes to facility operations clearly in keeping with the regulations." The changes in this case fall within the scope of the example. For the foregoing reasons, the Commission proposes to determine that the proposed amendment involves no significant hazards consideration.

Local Public Document Room location: State University of New York, Penfield Library, Reference and Documents Department, Oswego, New York 13126.

Attorney for licensee: Mr. Charles M. Pratt, 10 Columbus Circle, New York, New York 10019.

NRC Project Director: Robert A. Capra, Director

Public Service Electric & Gas Company, Docket No. 50-354, Hope Creek Generating Station, Salem County, New Jersey

Date of amendment request: November 28, 1988

Description of amendment request: The proposed amendment would revise the emergency diesel generator fuel oil sampling requirements presently stated in Technical Specifications Surveillance Requirement 4.8.1.1.2.f, Electric Power Systems, A. C. Sources to comply with the latest ASTM test standard for obtaining a test sample.

Basis for proposed no significant hazards consideration determination: The Commission has provided guidance concerning the application of criteria for determining whether a significant hazards consideration exists by providing certain examples of action involving no significant hazards considerations and examples of action involving significant hazards considerations (51 FR 7751). One of the examples of actions involving no significant hazards considerations is example (i) "a purely administrative

change to technical specifications: for example, a change to achieve consistency throughout the technical specifications, correction of an error, or a change in nomenclature." The proposed change conforms to this example since it merely updates a test standard.

Therefore, the Commission proposes to determine that the proposed amendment does not involve significant hazards considerations.

Local Public Document Room location: Pennsville Public library, 190 S. Broadway, Pennsville, New Jersey 08070

Attorney for licensee: Troy B. Conner, Jr., Esquire, Conner and Wetterhahn, 1747 Pennsylvania Avenue, NW., Washington, DC 20006

NRC Project Director: Walter R. Butler

Southern California Edison Company, et al., Docket No. 50-206, San Onofre Nuclear Generating Station, Unit No. 1, San Diego County, California

Date of amendment request: October 27, 1988

Description of amendment request: The proposed change would require the reactor coolant system overpressure protection system to be operable whenever the residual heat removal system is in operation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis about the issue of no significant hazards consideration which is quoted below:

As required by 10 CFR 50.91(a)(1), this analysis is provided to demonstrate that a proposed license amendment to revise the LCOs for the overpressure protection systems for SONGS 1 represents a no significant hazards consideration. In accordance with the three factor test of 10 CFR 50.92(c), implementation of the proposed amendment was analyzed and found not to: 1) involve a significant increase in the probability or consequences for 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.

The RHR system has a design pressure of 500 psig. Requiring the overpressure protection systems to be operable during RHR system operation will assure that the design pressure of the RHR system is not exceeded. Maintenance of the RHR boundary is essential to assurance of continued, reliable RHR system operation and, consequently, safety of the reactor core which is cooled by the RHR system.

Analysis

Conformance of the proposed amendments to the standards for a determination of no significant hazard as defined in 10 CFR 50.92 (three factor test) is shown in the following:

1. Will operation of the facility in accordance with this proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No

The use of the overpressure protection systems to protect the RHR system do not affect accident probabilities, as the overpressure event occurs by some mechanism external to either of these systems. However, the overpressure protection of the RHR system is important to provide assurance that, in the event of an overpressurization incident, the RHR system will not be damaged. The continued operation of the RHR system is necessary to maintain the reactor core in a cooled, shutdown configuration. Therefore, it is concluded that operation of the facility in accordance with this proposed change will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Will operation of the facility in accordance with this proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No

The revisions proposed herein require that an existing system, the overpressure protection system, be operable when the RHR system is in operation. Both the RHR system and the overpressure protection system are designed to be operated in the configuration. Therefore, it is concluded that operation of the facility in accordance with this proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Will operation of the facility in accordance with this proposed change involve a significant reduction in a margin of safety?

Response: No

The revisions proposed herein assure continued compliance with a previously reviewed margin of safety. The NRC concluded, in their review of an SEP Topic associated with the RHR system, overpressure protection for the RHR system is necessary to assure the design margin of safety for the RHR system. Therefore, it is concluded that operation of the facility in accordance with this proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the analysis and, based on that review, it appears that the three criteria are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: General Library, University of California, P.O. Box 19557, Irvine, California 92713.

Attorney for licensee: Charles R. Kocher, Assistant General Counsel, and James Beoletto, Esquire, Southern California Edison Company, P.O. Box 800, Rosemead, California 91770.

NRC Project Director: George W. Knighton

Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of amendment requests: December 2, 1988 (TS 88-14)

Description of amendment requests: The Tennessee Valley Authority (TVA) proposes to modify the Sequoyah Nuclear Plant (SQN) Units 1 and 2 Technical Specifications (TS). The changes are to revise Table 3.3.-12, "Radioactive Liquid Effluent Monitoring Instrumentation." These changes will clearly state the minimum radiation monitor channels required to be operable for each header for the essential raw cooling water (ERCW) effluent.

Basis for proposed no significant hazards consideration determination: TVA provided the following in its submittal to support its proposed changes to the TS:

TVA is requesting this change to avoid future misinterpretation of limiting condition for operation (LCO) 3.3.3.9, table 3.3-12, the minimum radiation monitor channels required operable for the ERCW effluent headers. On June 5, 1988, noncompliance of technical specifications resulted from an incorrect interpretation of the minimum radiation monitor channels required for the ERCW effluent line as stated in licensee event report 327/88-002. Table 3.3-12 lists the instrument as ERCW effluent line and gives the minimum radiation monitor channels required operable as one. Because there are "A" and "B" trains of ERCW, each with two radiation monitors for each discharge header, one monitor for each train must be operable.

The Commission has provided Standards for determining whether a significant hazards determination exists as stated in 10 CFR 50.92(c). 10 CFR 50.91 requires that at the time a licensee requests an amendment, it must provide to the Commission its analyses, using the standards in Section 50.92, on the issue of no significant hazards consideration. Therefore, in accordance with 10 CFR 50.91 and 10 CFR 50.92, the licensee has provided the following analysis:

TVA has evaluated the proposed technical specification change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated. This technical specification change involves only clarification to the original effluent release radiation monitoring configuration of the LCO [3.3.3.9] in accordance with GDC [General Design Criterion] 64 [of Appendix A to 10 CFR Part 50] and RG [Regulatory Guide] 1.21 for SQN.

(2) Create the possibility of a new or different kind of accident from any previously analyzed. There has not been any change in plant hardware or configuration to the ERCW radiation monitoring system that could result in an accident because of this technical specification [change].

(3) Involve a significant reduction in a margin of safety. The present radiation monitoring limitations for the ERCW effluent remain the same. This technical specification change can only enhance SQN's margin of safety to the environment.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the application for the amendments involves no significant hazards considerations.

Local Public Document Room location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

NRC Assistant Director: Suzanne Black

Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of amendment requests: December 2, 1988 (TS 88-25)

Description of amendment requests: The Tennessee Valley Authority (TVA) proposes to modify the Sequoyah Nuclear Plant Units 1 and 2 Technical Specifications (TS). The proposed change is to revise the action statements of limiting conditions for operation (LCO) 3.4.3.2 for the pressurizer power-operated relief valves (PORVs) and their associated block valves. The proposed change will require different actions based on the cause of valve inoperability. With one or more PORVs inoperable but capable of reactor coolant system (RCS) pressure control, power operation may continue, provided the associated block valve is closed (power does not have to be removed from the closed block valve). With one or more PORVs or block valves inoperable and incapable of RCS pressure control, reactor shutdown will be required.

Basis for proposed no significant hazards consideration determination: TVA provided the following information in its submittal to support the proposed change to the TS:

The Final Safety Analysis Report (FSAR) accident analysis for a steam generator tube rupture (SGTR), section 15.4.3, assumes that with a loss of offsite power, RCS pressure is reduced to 1,100 pounds per square inch absolute by using the pressurizer PORVs. This pressure reduction is required to minimize the amount of reactor coolant transferred to the secondary side and eventually terminate RCS break flow.

The current action statement for an inoperable PORV requires the associated block valve be closed and its power removed. Once the block valve is closed and power removed, there is no time limit to return the PORV to operable status because the action was only intended to ensure that a leaking PORV could not be a source of uncontrolled RCS leakage. This action does not ensure availability of at least one PORV for RCS depressurization following a postulated SGTR accident coincident with a loss of offsite power and a single failure. For example, the normal pressurizer spray system is not available during a loss of offsite power, and a single failure of a battery board would render one PORV inoperable.

The Commission has provided Standards for determining whether a significant hazards determination exists as stated in 10 CFR 50.92(c). 10 CFR 50.91 requires that at the time a licensee requests an amendment, it must provide to the Commission its analyses, using the standards in Section 50.92, on the issue of no significant hazards consideration. Therefore, in accordance with 10 CFR 50.91 and 10 CFR 50.92, the licensee has provided the following analysis:

TVA has evaluated the proposed technical specification change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated. The pressurizer PORVs are designed to limit pressurizer pressure and prevent the undesirable opening of the safety valves. The PORVs are also used for automatic and manual pressure control. The FSAR analysis for overpressurization protection during modes 1, 2, and 3 assumes that the PORVs do not actuate. The pressurizer safety valves provide the required pressure relief. However, the FSAR accident analysis for an SGTR does take credit for pressure reduction using the PORVs. The proposed change ensures PORV operability for this purpose. If the PORV is incapable of RCS pressure control, then reactor shutdown is required. Thus, the proposed change ensures the assumptions made in the FSAR are valid and the resulting consequences of the SGTR accident remain within conservative limits.

(2) Create the possibility of a new or different kind of accident from any previously analyzed. The change to the action statements does not require any hardware changes nor any changes to the operating procedures. The change simply places more restrictive limitations on continued power operations when a PORV is inoperable and incapable of RCS pressure control. Thus, the possibility of a new or different kind of accident is not created.

(3) Involve a significant reduction in a margin of safety. The intended design and operation of the PORVs have not been changed. The valve function to provide overpressure protection is the same, while valve availability for pressure control has increased. The more stringent action statements prevent operation in an unanalyzed condition and therefore improve the margin of safety.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the application for the amendments involves no significant hazards considerations.

Local Public Document Room location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

NRC Assistant Director: Suzanne Black

Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of amendment requests: December 2, 1988 (TS 88-32)

Description of amendment requests: The Tennessee Valley Authority (TVA) proposes to modify the Sequoyah Nuclear Plant (SQN) Units 1 and 2 Technical Specificatons (TS). The changes are to revise surveillance requirement (SR) 4.6.1.2 and Bases 3/4.6.1.2 to permit the use of an alternative method for calculating containment leakage rates known as the mass point method.

Basis for proposed no significant hazards consideration determination: TVA stated the following in its submittal to support its proposed change to the TS:

This [mass point] test methodology was incorporated into American National Standards Institute (ANSI)/American Nuclear Society (ANS) 56.8-1981 (revised 1987) and is accepted by NRC staff as an improved method. The current 10 CFR 50, Appendix J, paragraph III.A.3, references type A test methods from ANSI N45.4-1972, "Leakage Rate Testing of Containment Structures for Nuclear Reactors." This standard accepts two techniques for evaluating [containment leakage rate] test results: the total-time method and the point-to-point method. The proposed change to the SQN TS provides for the use of the newer, more accurate mass point method as referenced in ANSI/ANS 56.8-1987. No changes to the other provisions in ANSI N45.4-1972 are requested.

The Commission has provided Standards for determining whether a

significant hazards determination exists as stated in 10 CFR 50.92(c). 10 CFR 50.91 requires that at the time a licensee requests an amendment, it must provide to the Commission its analyses, using the standards in Section 50.92, on the issue of no significant hazards consideration. Therefore, in accordance with 10 CFR 50.91 and 10 CFR 50.92, the licensee has performed and provided the following analysis:

TVA has evaluated the proposed TS change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated. The mass point technique for calculation of the containment leakage rate is a newer, more accurate and NRC staff-endorsed method. It, or any other calculational method used to determine containment leakage rates during testing, is not considered to be an initiator of any accident previously evaluated. The mass point technique is judged to be a superior method for calculating containment leakage rates and thereby a better method of verifying that leakage from the containment is maintained within allowable limits. By employing a more reliable calculational technique, the assessment of containment integrity, through integrated leak rate testing, is enhanced. As such, the consequences of previously evaluated accidents are not impacted.

(2) Create the possibility of a new or different kind of accident from any previously analyzed. The proposed amendment provides for the use of a newer, more accurate technique for calculation of the leakage rate during a containment integrated leak rate test. No possibility of a new or different kind of accident is created because the technique used to calculate leak rates in itself is not considered to be an initiator of any accident, transient, incident, or event.

(3) Involve a significant reduction in a margin of safety. The proposed amendment allows the use of the mass point method to calculate the leakage rate from the containment when performing a containment integrated leak rate test. The mass point method is a newer, more accurate method, which has been endorsed by the NRC staff. By adopting this technique, TVA will be able to make more reliable determinations of containment leakage during an integrated leak rate test. As such, the degree of confidence in containment integrity would be enhanced. Therefore, this proposed revision does not impact the margin of safety.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the application for amendments involves no significant hazards considerations.

Local Public Document Room location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

NRC Assistant Director: Suzanne Black

Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of amendment requests: December 2, 1988 (TS 88-42)

Description of amendment requests: The Tennessee Valley Authority (TVA) proposes to modify the Sequoyah Nuclear Plant (SQN) Units 1 and 2 Technical Specifications (TS). The changes are to revise the trip setpoint and allowable value units for the intermediate-range (IR) nuclear flux detector and to revise the applicability requirements for the source range (SR) nuclear flux detector.

Basis for proposed no significant hazards consideration determination: TVA stated the following in its submittal to support its proposed changes to the TS:

TVA is replacing the SR and IR neutron [flux] monitors as part of the equipment upgrade to comply with Regulatory Guide 1.97 as required by SQN license conditions 2.C.24 (unit 1) and 2.C.14 (unit 2). The new SR/IR monitor is a fission chamber design manufactured by Gamma Metrics. This design does not require high-voltage deenergization as part of the normal SR detector operation. Consequently, the applicability table 3.3-1 is being revised to delete an unnecessary note involving high-voltage deenergization. The new IR monitor uses a signal that is in units of relative power. Consequently, the trip setpoint and allowable value are being changed in table 2.2-1. The bases to section 2.2 are also being revised to delete references to IR detector current signals that are proportional to power levels. The changes to unit 1 also have appropriate footnotes added to indicate that the changes become effective for unit 1 after installation of the new detectors during the unit 1 cycle 4 refueling outage. The unit 2 detectors will be installed during the unit 2 cycle 3 refueling outage, and the change will be effective at the time of startup following the outage.

The Commission has provided Standards for determining whether a significant hazards determination exists as stated in 10 CFR 50.92(c). 10 CFR 50.91 requires that at the time a licensee requests an amendment, it must provide to the Commission its analyses, using the standards in Section 50.92, on the issue of no significant hazards consideration. Therefore, in accordance with 10 CFR 50.91 and 10 CFR 50.92, the licensee has provided the following analysis:

TVA has evaluated the proposed technical specification change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequence[s] of an accident previously evaluated. The three administrative changes are proposed to support the installation of the Gamma Metrics source range (SR) and intermediate range (IR) detector assemblies. The first involves the deletion of a table note that is not applicable to the design of the new SR detectors. The second involves a change in engineering units for the P-6 setpoint that results from the difference in output signals from the IR detectors. The third involves the addition of a certain footnote to enable the review and approval of the unit 1 change to proceed independently of the unit 1 installation schedule. The new SR/IR detectors are class-1E equipment that is seismically and environmentally qualified and compatible with the present design requirements. Because the new hardware is compatible with the present design requirements and the proposed technical specification changes are administrative in nature, the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) Create the possibility of a new or different kind of accident from any previously analyzed. The three administrative changes are proposed to support the installation of the Gamma Metrics SR and IR detector assemblies. The first involves the deletion of a table note that is not applicable to the design of the new SR detectors. The second involves a change in engineering units for the P-6 setpoint that results from the difference in output signals from the IR detectors. The third involves the addition of a certain footnote to enable the review and approval of the unit 1 change to proceed independently of the unit 1 installation schedule. The new SR/IR detectors are class-1E equipment that is seismically and environmentally qualified and compatible with the present design requirements. Because the new hardware is compatible with the present design requirements and the proposed technical specification changes are administrative in nature, the proposed amendment will not create the possibility of a new or different kind of accident from any previously analyzed.

(3) Involve a significant reduction in a margin of safety. The three administrative changes are proposed to support the installation of the Gamma Metrics SR and IR detector assemblies. The first involves the deletion of a table note that is not applicable to the design of the new SR detectors. The second involves a change in engineering units for the P-6 setpoint that results from the difference in output signals from the IR detectors. The third involves the addition of a certain footnote to enable the review and approval of the unit 1 change to proceed

independently of the unit 1 installation schedule. The new SR/IR detectors are class-1E equipment that is seismically and environmentally qualified and compatible with the present design requirements. Because the new hardware is compatible with the present design requirements and the proposed technical specification changes are administrative in nature, the proposed amendment will not involve a significant reduction in a margin of safety.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the application for the amendments involves no significant hazards considerations.

Local Public Document Room location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

NRC Assistant Director: Suzanne Black

Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of amendment requests: December 5, 1988 (TS 88-06)

Description of amendment requests: The Tennessee Valley Authority (TVA) proposes to modify the Sequoyah Nuclear Plant, Units 1 and 2 Technical Specifications (TS). The proposed changes are to provide relaxation in the test frequency for the containment purge supply and exhaust isolation valves. Surveillance Requirement (SR) 4.6.3.4 currently states that each containment purge isolation valve be demonstrated operable within 24 hours after each closing of the valve except when the valve is being used for multiple cyclings. Any purge valve that has undergone multiple cyclings is required to be tested at least once every 72 hours. Operability is demonstrated by performance of a Type C leak test of Appendix J to 10 CFR Part 50. This test is to verify that the measured leakage rate from each purge valve, when added to the leakage rates for all other Type B and Type C penetrations, does not exceed 60 percent of the maximum containment leakage rate (La).

In lieu of SR 4.6.3.4, TVA proposes to add a new surveillance requirement under Containment Ventilation System Specification 3.6.1.9. The new SR 4.6.1.9.3 would relax the 24/72-hour test requirement to include a 3-month test interval and would establish a specific maximum leakage rate of 0.05 La for each purge valve. An action statement from Revision 5 of the NRC Standard Technical Specifications (STS) is included to address operability requirements for leakage in excess of 0.05 La to be consistent with the revised surveillance requirement. These changes are patterned after Revision 5 of the NRC STS.

Basis for proposed no significant hazards consideration determination: TVA provided the following information in its submittal to support the proposed changes:

The proposed change requests a relaxation from the current 24/72-hour test interval for SQN's purge system containment isolation valves. Relaxation of the test interval to once per three months would provide significant benefits and savings to TVA in the areas of ALARA (as low as reasonably achievable), cost, and plant safety.

Under SQN's current surveillance requirement, test personnel are required to enter the annulus at least three times each week for a minimum test duration of one hour. This places test personnel in areas of low to intermediate radiation for prolonged periods of time, resulting in additional exposure. By reducing the number of times test personnel enter the annulus (252 entries versus 8 entries) over 1-year time period, the annual saving in net exposure is estimated to be 3 man-rem.

Under the current 24/72-hour test frequency, at least 252 tests are performed each year for both units. Considering that each complete test requires three technicians for a minimum of three hours at an average cost of $40 per technician, the annual cost to TVA in testing alone equals $181,000 for both units. Additional overhead costs needed to support each test, such as planning, scheduling, issuing, and reviewing test packages, are approximately $300,000 annually. The proposed 3-month test interval would reduce the total number of tests to eight times per year, resulting in an annual saving to TVA of $290,000. The net saving projected over SQN's remaining operational life would therefore be very significant.

During the Type C leak test of SQN's purge system containment isolation valves, a test connection valve is opened between the inboard and outboard purge isolation valves creating a containment leak path. While the test valve is open, the plant must enter a 1-hour limiting condition for operation (LCO 3.6.1.1). The frequent entering and exiting of an LCO to performance surveillances place an undesirable burden on the Operations staff to record and status each entry. Relaxing the test interval to once every three months would alleviate placing the plant into frequenct LCOs and would provide more freedom to the operators for monitoring plant conditions.

The Commission has provided Standards for determining whether a significant hazards determination exists as stated in 10 CFR 50.92(c). 10 CFR 50.91 requires that at the time a licensee requests an amendment, it must provide to the Commission its analyses, using the standards in Section 50.92, on the issue of no significant hazards consideration. Therefore, in accordance with 10 CFR 50.91 and 10 CFR 50.92, the licensee has performed and provided the following analysis:

TVA has evaluated the proposed technical specification change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated. The proposed change conforms to the current NRC STSs for establishing a specific maximum leakage limit (0.05 La) and associated action statements for each containment purge supply and exhaust isolation valve. This leakage limit is a conservative limit with regard to the overall leakage limit of 0.60 La. TVA has evaluated the leakage characteristics of the subject purge valves under normal operation and under worst-case postaccident operation to ensure that the proposed relaxation in leak-test frequency from the current 24/72 hours to 90 days would not reduce valve reliability for containment isolation between tests. No new hardware or operating practices are introduced by these changes. Consequently, the probability or consequences of accidents previously evaluated are unchanged.

(2) Create the possibility of a new or different kind of accident from any previously analyzed. The proposed change establishes a specific maximum leakage rate of 0.05 La and associated action statements for SQN's containment purge supply and exhaust isolation valves, which is consistent with the NRC STSs and NRC requirements for maintaining specific leakage paths. TVA conducted an environmental material degradation analysis of the soft-seat material within these valves to ensure the seating material would not degrade under normal operation or worst-case accident conditions. Based on TVA's analysis, the valve seats would continue to function properly (remain resilient); and, therefore, the proposed relaxation in test frequency from 24/72 hours to 90 days would not reduce the valve's ability to seal for containment isolation. The proposed changes does not physically affect these valves or their design; consequently, the possibility of a new or different kind of accident from any previously analyzed is not created.

(3) Involve a significant reduction in a margin of safety. The proposed change deletes the existing SR (SR 4.6.3.4) and functionally groups it under the containment ventilation system specification as a new SR (SR 4.6.1.9.3). An action statement from revision 5 of the NRC STS was included to address operability requirements for leakage in excess of 0.05 La to be consistent with the revised surveillance requirement. Because the new SR conforms to the current NRC STSs and establishes a specific maximum leakage rate for the SQN containment purge supply and exhaust isolation valves, the proposed change is considered to be a technical specification improvement. TVA's evaluation

indicates that the soft-seat material within SQN's purge valves would remain resilient under normal or postaccident operating conditions and that the service life of this seat material is well above the 40-year design life of SQN. Based on TVA's analysis, the proposed change to relax the leak-test frequency from 24/72 hours to the proposed 90-day frequency would not reduce the valve's ability to seal for containment isolation nor would the valve undergo catastrophic failure between tests. Consequently, the proposed change will not significantly reduce the margin of safety.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the application for amendments involves no significant hazards considerations.

Local Public Document Room location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

NRC Assistant Director: Suzanne Black

Tennessee Valley Authority, Docket No. 50-328, Sequoyah Nuclear Plant, Unit 2, Hamilton County, Tennessee

Date of amendment request: December 2, 1988 (TS 88-33)

Description of amendment request: The Tennessee Valley Authority (TVA) proposes to modify the Sequoyah Nuclear Plant (SQN) Unit 2 Technical Specifications (TS). The changes are to revise (1) the upper head injection (UHI) accumulator level switch setpoint and tolerances of surveillance requirement (SR) 4.5.1.2.c.1 and (2) the heat flux hot channel factor ($F_Q(z)$) of limiting condition for operation (LCO) 3.2.2 and SR 4.2.2.2.

Basis for proposed no significant hazards consideration determination: TVA stated the following in its submittal to support its proposed changes in the TS:

This proposed revision to the SQN Unit 2 UHI technical specifications is consistent with the SQN Unit 1 technical specification proposed change 88-20 (submitted August 15, 1988; and supplemented by letter dated September 21, 1988; which NRC approved by letter dated October 14, 1988) and [proposed change] 88-28 (submitted September 21, 1988).

Condition adverse to quality report (CAQR) SQP871644 documents that the level switches and setpoints that were used previously could allow more than the analytical limit of 1,130.5 cubic feet of UHI water to be injected during a postulated accident. Two changes in the design and configuration of the UHI system were pursued to correct this potential problem. First, the minimum delivered UHI water volume was reduced from 900 cubic feet to 850 cubic feet. This change is supported by Westinghouse Electric Corporation (W) evaluations described in a September 14, 1988 letter to TVA (included as attachment 1 [to TVA's submittal]). Second, a new model of level switch is being installed in the UHI system. These new switches are essentially the same as those presently used, except for their span. Because of the span differences, the switches also have different accuracy characteristics. Demonstrated Accuracy Calculation 1-LS-87-21 determined a new setpoint and tolerances based on the new instrument characteristics. These new values are being incorporated into SR 4.5.1.2.c.1 to ensure that the delivered UHI water volumes are bounded by the volumes assumed in the large-break, loss of coolant accident (LOCA) analyses. This in turn ensures that the offsite doses from a postulated LOCA are bounded by the analyses of the [SQN] Final Safety Analysis Report (FSAR), section 15.5.

The Commission has provided Standards for determining whether a significant hazards determination exists as stated in 10 CFR 50.92(c). 10 CFR 50.91 requires that at the time a licensee requests an amendment, it must provide to the Commission its analyses, using the standards in Section 50.92, on the issue of no significant hazards consideration. Therefore, in accordance with 10 CFR 50.91 and 10 CFR 50.92, the licensee has provided the following analysis:

TVA has evaluated the proposed technical specification change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated. The UHI system is designed to supply additional [water] inventory to the reactor core during the blowdown phase of a LOCA. UHI flow to the core is terminated by automatic hydraulic isolation valves. These valves are actuated by level switches on the UHI water accumulator. The proposed change reflects a new actuation setpoint and the associated instrument tolerances for the level switches. As such, the change does not increase the probability of a previously evaluated accident. The new setpoint and tolerances were calculated based on a new level switch accuracy characteristic and a broadened UHI-delivered water volume band. Broadening the delivered water volume band did result in increased PCTs [peak cladding temperatures] for the limiting cases. In all cases, however, the PCT remained below the 10 CFR 50.46 limit of 2,200 degrees F. This in turn ensures that offsite doses remain bounded by the analyses of [the] FSAR, section 15.5. Because the proposed setpoint ensures that the delivered water volume remains bounded by the new analytical limits, the proposed change does not increase the consequences of any previously evaluated accident.

$F_Q(z)$ is defined as the maximum local heat flux on the surface of a fuel rod divided by the core average heat flux. $F_Q(z)$ is used to limit the magnitude of hot spots and is used as a bounding input for accident analyses. $F_Q(z)$ is not postulated as being the initiating event for any accident scenario. Therefore, the proposed change does not affect the probability of any accident previously evaluated. The proposed reduction in $F_Q(z)$ from 2.237 to 2.15 is conservative in nature in that it results in reduced PCTs during a postulated accident. (The $F_Q(z)$ reduction serves as an operational restriction to ensure that PCTs remain below the 10 CFR 50.46 limit of 2,200 degrees F.) Because of the reduction in calculated PCT, the proposed change will not increase the consequences of a previously evaluated accident.

(2) Create the possibility of a new or different kind of accident from any previously analyzed. The proposed change to the actuation setpoint and tolerances represents no modification to the UHI design or operation, which could create a new accident.

The change only affects the performance of UHI for accident scenarios in which it is already assumed to function.

As stated ...[above] $F_Q(z)$ is not assumed to be the initiating event for any accident scenario. The proposed change to $F_Q(z)$ provides additional PCT margin to ensure that the 2,200-degree-F limit is not exceeded. The presence of additional margin will not create the possibility of a new or different kind of accident.

(3) Involve a significant reduction in a margin of safety. The proposed change to SR 4.5.1.2.c.1 represents a new setpoint and accuracies for the combination of new level switches and a broadened, delivered water volume band. The setpoint ensures that the delivered water volume remains between 850 and 1,130.5 cubic feet. W analyses have indicated that delivered water volumes between these limits ensure that PCT remains below 2,200 degrees F. Therefore, the margin of safety is not reduced by this proposed change.

The proposed reduction in $F_Q(z)$ is conservative in nature because it lowers the calculated PCT for the limiting LOCA analysis case. As calculated by W, the proposed reduction in $F_Q(z)$ from 2.237 to 2.15 lowers the calculated PCT by 87 degrees F for the limiting imperfect mixing case and by 96 degrees F for the limiting perfect mixing case. These reductions, combined with PCT margin obtained by administratively limiting [steam generator tubes plugged] SGTP to 5 percent, result in calculated PCTs of 2,089 degrees F for the limiting imperfect mixing case and 2,067 degrees F for the limiting perfect mixing case. Because the calculated PCT remains below the 2,200-degree-F limit of 10 CFR 50.46, there is no reduction in the margin of safety to cladding failure; and additional margin is being added.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the

application for the amendment involves no significant hazards considerations.

Local Public Document Room location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

NRC Assistant Director: Suzanne Black

Toledo Edison Company and The Cleveland Electric Illuminating Company, Docket No. 50-346, Davis-Besse Nuclear Power Station, Unit No. 1, Ottawa County, Ohio

Date of amendment request: December 1, 1986 as supplemented January 29, 1988; and January 12, 1988.

Description of amendment request: In accordance with the requirements of 10 CFR 73.55, the licensees submitted an amendment to the Physical Security Plan for the Davis-Besse Nuclear Power Station, Unit No. 1, to reflect recent changes to that regulation. The proposed amendment would modify paragraph 2.D of Facility Operating License No. NPF-3 to require compliance with the revised Plan.

The licensee's January 12, 1988 submittal requested deletion of the Type 1 Vital Area designation for the Davis-Besse Containment Vessel and, with that, the deletion of the Two-Man Rule.

Basis for proposed no significant hazards consideration determination: On August 4, 1986 (51 FR 27817 and 27822), the Nuclear Regulatory Commission amended Part 73 of its regulations, "Physical Protection of Plants and Materials," to clarify plant security requirements to afford an increased assurance of plant safety. The amended regulations required that each nuclear power reactor licensee submit proposed amendments to its security plan to implement the revised provisions of 10 CFR 73.55. The licensee submitted its revised plan on December 1, 1986 and January 29, 1988, to satisfy the requirements of the amended regulations. The Commission proposes to amend the license to reference the revised plan.

In the Supplementary Materials accompanying the amended regulations, the Commission indicated that it was amending its regulations "to provide a more safety conscious safeguards system while maintaining the current levels of protection" and that the "Commission believes that the clarification and refinement of requirements as reflected in these amendments is appropriate because they afford an increased assurance of plant safety."

The Commission has provided guidance concerning the application of the criteria for determining whether a significant hazards consideration exists by providing certain examples of actions involving no significant hazards considerations and examples of actions involving significant hazards considerations (51 FR 7750). One of these examples of actions involving no significant hazards considerations is example (vii), "a change to conform a license to changes in the regulations, where the license change results in very minor changes to facility operations clearly in keeping with the regulations." The changes in this case fall within the scope of the example. For the foregoing reasons, the Commission proposes to determine that the proposed amendment involves no significant hazards consideration.

The Commission has evaluated the January 12, 1988 request and proposes to determine that these changes would not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated because the consequences of any accident produced by the acts of a single person would not exceed those produced by two persons and the probability of such acts is not increased because compensating requirements more stringent than those when the Two Man Rule was instituted now are in place;

2. Create the possibility of a new or different kind of accident from any accident previously evaluated because the Vital Area designation does not create an accident initiation scenario which has not been previously evaluated. The redesignation is justified based on accident initiation evaluations and access into these areas will be properly controlled based on existing security requirements for similarly designated areas.

3. Involve a significant reduction in a margin of safety because all Vital Areas have the same security requirements, thereby maintaining the margin of safety assumed in the analysis.

Based on the above evaluation, the Commission proposes to determine that the deletion of the Type 1 Vital Area designation for the Containment Vessel and the deletion of the Two-Man Rule would not involve significant hazards considerations.

Local Public Document Room location: University of Toledo Library, Documents Department, 2801 Bancroft Avenue, Toledo, Ohio 43606.

Attorney for licensee: Gerald Charnoff, Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Project Director: John N. Hannon

Union Electric Company, Docket No. 50-483, Callaway Plant, Unit 1, Callaway County, Missouri

Date of amendment request: October 25, 1988

Description of amendment request: The proposed amendment involves a core reload and would revise the Technical Specifications (TS) to include increased peaking factors (nuclear enthalpy rise hot channel factor and heat flux hot channel factor), a positive moderator temperature coefficient (PMTC), increased refueling water storage tank (RWST)/accumulator boron concentrations, and increased spray additive tank (SAT) sodium hydroxide concentration. The reload core is projected to have 88 new Vantage 5 (V-5) fuel assemblies, with 9 Optimized Fuel Assemblies (OFA's) and 96 V-5 assemblies carried over from Cycle 3.

Basis for proposed no significant hazards consideration determination: The Commission has provided guidance concerning the application of the standards in 10 CFR 50.92 by providing certain examples (51 FR 7751) of actions not likely to involve a significant hazards consideration. Example (iii) of this guidance states: "For a nuclear power reactor, a change resulting from a nuclear reactor core reloading, if no fuel assemblies significantly different from those found previously acceptable to the NRC for a previous core at the facility in question are involved. This assumes that no significant changes are made to the acceptance criteria for the technical specifications, that the analytical methods used to demonstrate conformance with the technical specifications and regulations are not significantly changed, and that NRC has previously found such methods acceptable."

The proposed license amendment is directly related to the above example in that the core reload uses V-5 fuel which is not significantly different from previous cores at Callaway, the changes to the technical specifications are needed to allow more flexibility in fuel management schemes and not because of any significant change made to the acceptance criteria for technical specifications, and the analytical methods used by the licensee in the required reload analyses have been previously found acceptable by the NRC.

Therefore, based on the above, the staff proposes to determine that the

proposed technical specification changes do not involve a significant hazards consideration.

Local Public Document Room location: Callaway County Public Library, 710 Court Street, Fulton, Missouri 65251 and the John M. Olin Library, Washington University, Skinker and Lindell Boulevards, St. Louis, Missouri 63130.

Attorney for licensee: Gerald Charnoff, Esq., Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Project Director: John N. Hannon.

Virginia Electric and Power Company, Docket No. 50-338, North Anna Power Station, Unit No. 1, Louisa County, Virginia

Date of amendment request: November 30, 1988

Description of amendment request: The proposed change would revise heatup and cooldown curves valid to 10 effective full power years (EFPY). The revised curves are less restrictive than the curves currently specified in the NA-1 TS for low temperatures. To support the proposed change, the licensee performed a 10 CFR Part 50 Appendix G analysis using the results from Capsule U which was removed at the end of Cycle 6. The data obtained from Capsule U indicates that the heatup and the cooldown curves for NA-1 can be shifted to allow higher operating pressures relative to the current curves specified in TS Figures 3.4.2 and 3.4.3. The reason for this curve shift is that the Capsule U analysis shows the reactor vessel has been exposed to a lower fast neutron fluence than previously assumed. The current TS curves are based on an assumed design basis neutron fluence through 10 EFPY.

The measured fast neutron (E greater than 1.0 Mev) fluence data shows that Capsule U was exposed to 8.28×10^{18} n/cm^2 at 5.90 EFPY. The measured fluences are significantly lower than the design values due to the implementation of low leakage fuel management at the North Anna Power Station. Using the measured fluence at 5.90 EFPY to estimate the fluence at 10.0 EFPY results in a lower fluence than used to generate the current NA-1 TS curves. NRC Regulatory Guide 1.99, Revision 2 allows the use of surveillance data to adjust original design values after two or more credible surveillance data sets become available. Capsule U is the second capsule removed from NA-1. Capsule V was removed after 1.13 EFPY.

Heatup and cooldown curves provide an upper pressure and temperature limit and Reactor Coolant Pump (RCP) operation limits the lower operation pressure. The PORV low temperature overpressurization protection (LTOP) setpoints prevent inadvertent operation at pressures which would exceed the allowable Appendix G curve. The licensee's evaluation in support of the proposed change summarizes the analyses performed to determine revised heatup and cooldown curves, and LTOP setpoints.

The heatup and cooldown curves required by Appendix G of 10 CFR Part 50 were extrapolated to 10 EFPY by including the effects of the incremental radiation exposure on the reactor vessel beltline region. These results were referenced to the analysis of Capsule U from NA-1. The revised curves allow higher PORV setpoints than the current setpoints for the LTOP. The revised Appendix G curves were prepared using standard Westinghouse methodology, including Regulatory Guide 1.99, Rev. 2. The new heatup and cooldown curves are valid until 10 EFPY of operation. The next reactor vessel surveillance capsule, Capsule X, is scheduled to be removed from NA-1 after the ninth fuel cycle which allows sufficient time for analysis prior to exceeding 10 EFPY.

The heatup and cooldown curves prepared by Westinghouse were determined in a conventional manner according to Section III of the ASME Code as required by 10 CFR Part 50 Appendix G. Both steady-state and transient thermal conditions were considered in order to bound the possible combinations of pressure (i.e., membrane) and thermal stresses, and Westinghouse curves were revised to include plant specific instrument loop uncertainties.

The revised NA-1 pressurizer PORV low temperature overpressurization lift settings should be less than or equal to 450 psig, whenever any RCS cold leg temperature is less than or equal to 247° F, and less than or equal to 390 psig whenever any RCS cold leg temperature is less than 150° F.

The PTS evaluations were made for the limiting beltline locations. The current value of the limiting RT_{PTS} parameter was updated using the calculated fluences contained in the capsule report, and no significant change was observed.

Basis for proposed no significant hazards consideration determination: The Commission has provided standards for determining whether a significant hazards consideration exists (10 CFR 50.92(c)). A proposed amendment to an operating license for a facility involves no significant hazards considerations if 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.

The licensee has evaluated the change request against the standards provided above and has determined that the proposed change does not involve a significant hazards consideration for the following reasons:

1. The proposed amendment does not involve an increase in the probability or consequence of an accident previously evaluated. The proposed change revises the operating restrictions presently in place to prevent non-ductile pressurization or overstressing the reactor vessel based on the most recent surveillance capsule and specific instrument uncertainties. The probability of non-ductile vessel failure has not been increased by virtue of the refined analysis techniques that were implemented based on specific unit information. The consequences of violating an Appendix G curve or actuating the LTOP system are not increased.

2. The proposed amendment does not create the possibility of a new or different kind of accident [from any accident previously evaluated] and was evaluated in light of the unit specific information that has been derived from the recent evaluations and analyses.

3. The proposed amendment does not involve a significant reduction in the margin of safety. The safety factors defined in the ASME Code and the requirements of 10 CFR [Part] 50 Appendix G provide the basis for the safety margins utilized. The plant-specific information utilized to evaluate the proposed change provides more explicit information and confirms that the safety margins are not reduced.

The NRC staff has made a preliminary review of the licensee's analyses of the proposed change and agrees with the licensee's conclusion that the three standards in 10 CFR 50.92(c) are met. Therefore, the staff proposes to determine that the proposed amendments do not involve a significant hazards consideration.

Local Public Document Room location: The Alderman Library, Manuscripts Department, University of Virginia, Charlottesville, Virginia 22901.

Attorney for licensee: Michael W. Maupin, Esq., Hunton and Williams, P.O. Box 1535, Richmond, Virginia 23212.

NRC Project Director: Herbert N. Berkow

Wolf Creek Nuclear Operating Corporation, Kansas Gas and Electric Company, Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Docket No. 50-482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: November 21, 1988

Description of amendment request: This amendment would revise Wolf Creek Generating Station (WCGS), Unit No. 1, Technical Specification Section 6.5.1.2, Plant Safety Review Committee Composition, to add the Manager Nuclear Plant Engineering Wolf Creek as a committee member. The proposed change provides additional design engineering expertise on the Plant Safety Review Committee (PSRC).

Basis for proposed no significant hazards consideration determination: The Commission has provided standards in 10 CFR 50.92(c) for determining whether a significant hazards consideration exists. A proposed amendment to an Operating License for a facility involves no significant hazards consideration if 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, (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. The Wolf Creek Nuclear Operating Corporation reviewed the proposed change and determined that:

(1) This license amendment request adds the Manager Nuclear Plant Engineering Wolf Creek as a Plant Safety Review Committee (PSRC) member. This change will provide additional design engineering expertise available to the PSRC. This change does not involve any modifications to plant equipment or procedures. Therefore, this license amendment request does not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) This license amendment request does not introduce any new methods of plant operation or involve the physical alteration of the plant or any plant equipment. Therefore, this license amendment request does not create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) The addition of the Manager Nuclear Plant Engineering Wolf Creek to the PSRC membership constitutes an administrative change which enhances the PSRC. This change will not effect any existing design limits or safety criteria. Therefore, this change does not reduce the margin of safety.

Based on the previous discussion, the licensee concluded that the proposed amendment request does not involve a significant increase in the probability of a new or different kind of accident from any accident previously evaluated; nor involve a significant reduction in the required margin of safety. The NRC staff has reviewed the licensee's no significant hazards considerations determination and agrees with the licensee's analysis. The staff has, therefore, made a proposed determination that the licensee's request does not involve a significant hazards consideration.

Local Public Document Room Location: Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801 and Washburn University School of Law Library, Topeka, Kansas 66621

Attorney for licensee: Jay Silberg, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037

NRC Project Director: Jose A. Calvo

PREVIOUSLY PUBLISHED NOTICES OF CONSIDERATION OF ISSUANCE OF AMENDMENTS TO OPERATING LICENSES AND PROPOSED NO SIGNIFICANT HAZARDS CONSIDERATION DETERMINATION AND OPPORTUNITY FOR HEARING

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

Houston Lighting & Power Company, City Public Service Board of San Antonio, Central Power and Light Company, City of Austin, Texas, Docket No. 50-498 South Texas Project, Unit 1, Matagorda County, Texas

Date of amendment request: November 7, 1988

Brief description of amendment request: The proposed amendment would revise the Unit 1 Technical Specifications to the Combined Technical Specifications for Units 1 and 2, add placing the positive displacement pump in a lock-out condition during cold overpressurization, add a reactor coolant pump seal isolation charging header pressure interlock and modify the administrative section of the Technical Specification.

Date of publication of individual notice in **Federal Register:** November 22, 1988 (53 FR 47283).

Expiration date of individual notice: December 22, 1988.

Local Public Document Room location: Wharton County Junior College, J.M. Hodges Learning Center, 911 Boling Highway, Wharton, Texas 77488 and Austin Public Library, 810 Guadalupe Street, Austin, Texas 78701.

Pacific Gas and Electric Company, Docket Nos. 50-275 Diablo Canyon Nuclear Power Plant, Unit 1 San Luis Obispo County, California

Date of amendment request: November 10, 1988

Description of amendment request: The proposed amendment would be an exemption from the required frequency interval identified in the Technical Specification 4.3.1.1, Table 4.3-1, for performance of the operational test for the Unit 1 seismic trip actuation device. The present surveillance requirement requires the seismic trip actuating device operational test to be conducted semiannually. The proposed change would allow the test to be performed no later than the next refueling outage (currently targeted for October 1989).

Date of publication of individual notice in **Federal Register:** November 28, 1988 (53 FR 47886)

Expiration date of individual notice: December 28, 1988.

Local Public Document Room location: California Polytechnic State University Library, Government Documents and Maps Department, San Luis Obispo, California 93407.

NOTICE OF ISSUANCE OF AMENDMENT TO FACILITY OPERATING LICENSE

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing in

connection with these actions was published in the Federal Register as indicated. No request for a hearing or petition for leave to intervene was filed following this notice.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendments, (2) the amendments, and (3) the Commission's related letters, Safety Evaluations and/or Environmental Assessments as indicated. All of these items are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document rooms for the particular facilities involved. A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects.

Arkansas Power & Light Company , Docket Nos. 50-313 and 50-368, Arkansas Nuclear One, Units 1 and 2, Pope County, Arkansas

Date of application for amendment: December 2, 1986, as supplemented on Feburary 24, 1988.

Brief description of amendment: The amendments modify paragraphs 2.C.(4) and 2.D. of the Facility Operating License Nos. DPR-51 and NPF-6, respectively, to require compliance with the licensee's Physical Security Plan. The Plan was amended to conform to the requirements of 10 CFR 73.55. Consistent with the provisions of 10 CFR 73.55, search requirement must be implemented within 60 days and miscellaneous amendments within 180 days from the effective date of the amendments.

Date of issuance: December 6, 1988

Effective date: December 6, 1988

Amendment Nos.: 114 and 88

Facility Operating License Nos. DPR-51 and NPF-6: Amendments revised the licenses.

Date of initial notice in Federal Register: April 20, 1988 (53 FR 13011). The Commission's related evaluation of the amendments is contained in a Safeguards Evaluation Report dated December 6, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Tomlinson Library, Arkansas Tech University, Russellville, Arkansas 72801

The Cleveland Electric Illuminating Company, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, Toledo Edison Company, Docket No. 50-440, Perry Nuclear Power Plant, Unit No. 1, Lake County, Ohio

Date of application for amendment: February 10, 1988 as supplemented March 3, 1988.

Brief description of amendment: The amendment provided a one-time extension for the dissembly and inspection of the turbine control, turbine stop, low pressure turbine intercept and low pressure turbine intermediate stop valves until the first refueling outage.

Date of issuance: December 8, 1988

Effective date: December 8, 1988

Amendment No.: 18

Facility Operating License No. NPF-58. This amendment revised the Technical Specifications.

Date of initial notice in Federal Register: May 4, 1988 (53 FR 15905 and 15917). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 8, 1988.

No significant hazards consideration comments received: No

Local Public Document Room location: Perry Public Library, 3753 Main Street, Perry, Ohio 44081

Connecticut Yankee Atomic Power Company, Docket No. 50-213, Haddam Neck Plant, Middlesex County, Connecticut

Date of application for amendment: September 13, 1988

Brief description of amendment: The amendment revises Table 3.22-2, "Fire Detection Instruments," by reducing the number of smoke detectors available in the containment from 23 to 22 and incorporates a new section of sprinkler protection in the turbine building into Technical Specification Section 3.22G., "Spray and/or Sprinkler Systems."

Date of Issuance: December 6, 1988

Effective date: December 6, 1988

Amendment No.: 109

Facility Operating License No. DPR-61. Amendment revised the Technical Specifications.

Date of initial notice in Federal Register: October 19, 1988 (53 FR 40983). The Commission's related evaluation of this amendment is contained in a Safety Evaluation dated December 6, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Russell Library, 123 Broad Street, Middletown, Connecticut 06457.

Consumers Power Company, Docket No 50-255, Palisades Plant, Van Buren County, Michigan

Date of application for amendment: October 7, 1988.

Brief description of amendment: This amendment deletes the steam generator differential pressure limit from the Technical Specifications.

Date of issuance: December 12, 1988

Effective date: December 12, 1988

Amendment No.: 119

Provisional Operating License No. DPR-20. The amendment revises the Technical Specifications.

Date of initial notice in Federal Register: November 2, 1988 (53 FR 44250). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 12, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Van Zoeren Library, Hope College, Holland, Michigan 49423.

Detroit Edison Company, Docket No. 50-341, Fermi-2, Monroe County, Michigan

Date of application for amendment: January 26, 1988 (NRC-87-0202)

Brief description of amendment: This amendment revises the Fermi-2 Technical Specifications to clarify the limiting condition for operation of the 480v MCC 72CF swing bus.

Date of issuance: December 25, 1988

Effective date: December 15, 1988

Amendment No.: 29

Facility Operating License No. NPF-43. The amendment revises the Technical Specifications

Date of initial notice in Federal Register: May 18, 1988 (53 FR 17787). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 15, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Monroe County Library System, 3700 South Custer Road, Monroe, Michigan 48161.

Florida Power and Light Company, et al., Docket No. 50-389, St. Lucie Plant, Unit No. 2, St. Lucie County, Florida

Date of application for amendment: September 7, 1988

Brief description of amendment: The amendment changed the value of Pa in Technical Specification Section 3/4.6.1 entitled "Containment Systems." Pa is defined in Appendix J (Primary Reactor Containment Leakage Testing For Water-Cooled Power Reactors) to 10 CFR Part 50 as the calculated peak containment pressure related to the design basis accident. The value of Pa was changed from 43.4 psig to 41.8 psig. The value of 41.8 psig represents the postulated Loss of Coolant Accident peak containment internal pressure.

Date of Issuance: December 16, 1988

Effective Date: December 16, 1988

Amendment No.: 36

Facility Operating License No. NPF-16: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** October 19, 1988 (53 FR 40986). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 16, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Indian River Junior College Library, 3209 Virgina Avenue, Ft. Pierce, Florida.

GPU Nuclear Corporation, et al., Docket No. 50-289, Three Mile Island Nuclear Station, Unit No. 1, Dauphin County, Pennsylvania

Date of application for amendment: December 10, 1986

Brief description of amendment: Incorporates operability and surveillance requirements for the Reactor Coolant Inventory Trending System.

Date of Issuance: December 13, 1988

Effective date: December 13, 1988

Amendment No.: 147

Facility Operating License No. DPR-50. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** January 4, 1987 (52 FR 1555). The Commission's related evaluation of this amendment is contained in a Safety Evaluation dated December 13, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Government Publications Section, State Library of Pennsylvania, Walnut Street and Commonwealth Avenue, Box 1601, Harrisburg, Pennsylvania 17105.

Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket No. 50-424, Vogtle Electric Generating Plant, Unit 1, Burke County, Georgia

Date of application for amendment: August 12, 1988

Brief description of amendment: The amendment modified the Techncial Specifications to clarify that residual heat removal cold leg injection valves may be closed in Mode 3 during check valve leak testing.

Date of issuance: December 5, 1988

Effective date: December 5, 1988

Amendment No.: 14

Facility Operating License No. NPF-68: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** October 19, 1988 (53 FR 40989). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 5, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Burke County Library, 412 Fourth Street, Waynesboro, Georgia 30830

Iowa Electric Light and Power Company, Docket No. 50-331, Duane Arnold Energy, Center, Linn County, Iowa

Date of application for amendment: August 29, 1988

Brief description of amendment: The amendment revised the Technical Specifications by changing the setpoints for the Uninterruptible AC and Instrument AC systems undervoltage relays. These changes reflect modifications to the systems' power supplies that will be made to conform to the guidance of Regulatory Guide 1.97. Related administrative changes were also made for improved clarity and consistency.

Date of issuance: December 7, 1988

Effective date: December 7, 1988

Amendment No.: 156

Facility Operating License No. DPR-49. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** October 19, 1988 (53 FR 40991). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 7, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Cedar Rapids Public Library, 500 First Street, S. E., Cedar Rapids, Iowa 52401.

Long Island Lighting Company, Docket No. 50-322, Shoreham Nuclear Power Station, Suffolk County, New York

Date of application for amendment: September 4, 1987 as supplemented November 19, 1987.

Brief description of amendment: This amendment changed the definition of core alteration in the Technical Specifications (TSs) to include certain exceptions and changed footnotes in the TSs to be consistent with the new definitions.

Date of issuance: November 30, 1988

Effective date: November 30, 1988

Amendment No.: 10

Facility Operating License No. NPF-36. This amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** December 16, 1987 (52 FR 47785). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 30, 1988.

No significant hazards consideration comments received: No

Local Public Document Room location: Shoreham-Wading River Public Library, Route 25A, Shoreham, New York 11786-9697.

Louisiana Power and Light Company, Docket No. 50-382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: June 7, 1988 as supplemented on August 8, 1988.

Brief description of amendment: The amendment revised the Technical Specifications for the Reactor Coolant Flow-Low trip to allow the operator to bypass the trip below 10 % of Rated Thermal Power.

Date of issuance: December 2, 1988

Effective date: December 2, 1988

Amendment No.: 46

Facility Operating License No. NPF-38. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** July 13, 1988 (53 FR 26526). The August 8, 1988 submittal provided additional clarifying information and did not change the finding of the initial notice. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 2, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, Louisiana 70122.

Louisiana Power and Light Company, Docket No. 50-382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: May 4, 1988

Brief description of amendment: The amendment changed the Technical Specifications on Engineered Safety Features Actuation System Instrumentation as it relates to actions required for loss of one and loss of more than one channel that protects against loss of voltage and/or degraded voltage on the 4.16kV Emergency Bus and 480V Emergency Bus undervoltage circuits.

Date of issuance: December 14, 1988

Effective date: December 14, 1988

Amendment No.: 47

Facility Operating License No. NPF-38. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** July 13, 1988 (53 FR 26525). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 14, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, Louisiana 70122.

Louisiana Power and Light Company, Docket No. 50-382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: March 25, 1988 as supplemented August 3, 1988.

Brief description of amendment: The amendment revised the Technical Specifications on boron dilution by adding mode 4 requirements, clarifying the surveillance to verify systems isolation only when the system is to be isolated, make surveillances consistent with the mode 4 and 5 limited conditions for operation, and revise the frequencies for backup boron dilution detection.

Date of issuance: December 14, 1988

Effective date: December 14, 1988

Amendment No.: 48

Facility Operating License No. NPF-38. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** September 7, 1988 (53 FR 34607). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 14, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, Louisiana 70122.

Northeast Nuclear Energy Company, Docket No. 50-245, Millstone Nuclear Power Station, Unit No. 1, New London County, Connecticut

Date of application for amendment: April 22, 1988

Brief description of amendment: The technical specification change would remove the requirement to monitor temperature at the reactor vessel bottom head drain during heatup/cooldown and during operation with the core critical. Also, a provision has been added to the technical specification to allow for up to 48 hours without recording of the reactor vessel shell or fluid temperature to conduct maintenance in the recording equipment, provided that no heatup/cooldown evolution is in progress.

Date of issuance: December 15, 1988

Effective date: December 15, 1988

Amendment No.: 26

Facility Operating License No. DPR-21. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** July 13, 1988 (53 FR 26527). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 15, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Waterford Public Library, 49 Rope Ferry Road, Waterford, Connecticut 06385.

Northeast Nuclear Energy Company, et al., Docket No. 50-336, Millstone Nuclear Power Station, Unit No. 2, New London County, Connecticut

Date of application for amendment: August 2, 1988

Brief description of amendment: The amendment revises Technical Specification (TS) 4.7.8.c "Snubbers," for Millstone Unit 2. The change to the TS decreases the sample size, for subsequent tests of snubbers, from 10% to 5% of the snubber test population.

Date of issuance: December 6, 1988

Effective date: December 6, 1988

Amendment No.: 135

Facility Operating License No. DPR-65. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** September 21, 1988 (53 FR 36671). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 6, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Waterford Public Library, 49 Rope Ferry Road, Waterford, Connecticut 06385.

Northern States Power Company, Docket No. 50-263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of application for amendment: November 24, 1986, September 8, 1987, and November 30, 1987

Brief description of amendment: The amendment modified paragraph 2.C.3 of the license to require compliance with the amended Physical Security Plan. This Plan was amended to conform to the requirements of 10 CFR 73.55. Consistent with the provisions of 10 CFR 73.55, search requirements must be implemented within 60 days and miscellaneous amendments within 180 days from the effective date of this amendment.

Date of issuance: December 13, 1988

Effective date: December 13, 1988

Amendment No.: 58

Facility Operating License No. DPR-22. This amendment revised the license.

Date of initial notice in **Federal Register:** April 6, 1988 (53 FR 11374). The Commission's related evaluation of the amendment is contained in a letter to Northern States Power Company dated December 13, 1988, and a Safeguards Evaluation Report dated December 13, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Technology and Science Department, Minneapolis Public Library, 300 Nicollet Mall, Minneapolis, Minnesota 55401.

Omaha Public Power District, Docket No. 50-285, Fort Calhoun Station, Unit No. 1, Washington County, Nebraska

Date of amendment request: September 2, 1988.

Brief description of amendment: This amendment modifies the Technical Specifications to reflect changes necessary to support Cycle 12 operation.

Date of issuance: December 14, 1988

Effective date: December 14, 1988

Amendment No.: 117

Facility Operating License No. DPR-40. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** October 5, 1988 (53 FR 39175). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 14, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: W. Dale Clark Library, 215 South 15th Street, Omaha, Nebraska 68102

Philadelphia Electric Company, Docket No. 50-352, Limerick Generating Station, Unit 1, Montgomery County, Pennsylvania

Date of application for amendment: July 7, 1988

Brief description of amendment: The amendment revised the Technical Specifications to delete reference to the cooldown mode of operation for the Reactor Enclosure Recirculation System and the common plant Standby Gas Treatment System.

Date of issuance: December 7, 1988

Effective date: December 7, 1988

Amendment No.: 12

Facility Operating License No. NPF-39. This amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** November 2, 1988 (53 FR 44254). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 7, 1988.

No significant hazards consideration comments received: No

Local Public Document Room location: Pottstown Public Library, 500 High Street, Pottstown, Pennsylvania 19464.

Tennessee Valley Authority, Dockets Nos. 50-259, 50-260 and 50-296, Browns Ferry Nuclear Plant, Units 1, 2 and 3, Limestone County, Alabama

Date of application for amendments: October 14, 1988 (TS 260/261-T)

Brief description of amendments: The amendments modify the Limiting Condition for Operation (LCO) in order to specify conditions needing to be met when work involving the reactor vessel is being performed.

Date of issuance: December 15, 1988

Effective date: December 15, 1988, and shall be implemented within 60 days

Amendments Nos.: 161, 158, 132

Facility Operating Licenses Nos. DPR-33, DPR-52 and DPR-68: Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** October 27, 1988 (53 FR 43495). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 15, 1988.

No significant hazards consideration comments received: No

Local Public Document Room location: Athens Public Library, South Street, Athens, Alabama 35611.

Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of application for amendments: September 16, 1987 (TS 87-41)

Brief description of amendments: These amendments revise Section 3/4.9.7, Crane Travel - Spent Fuel Pit Area, of the Sequoyah, Units 1 and 2 Technical Specifications (TS). The revisions are to (1) revise the maximum load that may be transported over the fuel assemblies in the spent fuel storage pool from 2,000 pounds to 2,100 pounds and (2) allow for the fuel pool divider gate and the fuel transfer canal gate, which are each about 4,800 pounds, to be transported over fuel assemblies in the storage pool when following safe paths.

Date of issuance: December 5, 1988

Effective date: December 5, 1988

Amendment Nos.: 91, 81

Facility Operating Licenses Nos. DPR-77 and DPR-79. Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** April 20, 1988 (53 FR 13022). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 5, 1988.

No significant hazards consideration comments received: No

Local Public Document Room location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

Toledo Edison Company and The Cleveland Electric Illuminating Company, Docket No. 50-346, Davis-Besse Nuclear Power Station, Unit No. 1, Ottawa County, Ohio

Date of application for amendment: December 7, 1988

Brief description of amendment: This amendment revised the TS's relating to Steam and Feedwater Rupture Control System (SFRCS), Turbine Stop Valve (TSV) response times and the associated Bases Sections.

Date of issuance: December 7, 1988

Effective date: December 7, 1988

Amendment No.: 125

Facility Operating License No. NPF-3. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** June 17, 1987 (52 FR 23108). The Commission's related evaluation of the amendment is contained in a in a letter dated December 7, 1988.

No significant hazards consideration comments received: No

Local Public Document Room location: University of Toledo Library, Documents Department, 2801 Bancroft Avenue, Toledo, Ohio 43606.

Union Electric Company, Docket No. 50-483, Callaway Plant, Unit 1, Callaway County, Missouri

Date of application for amendment: July 12, 1988

Brief description of amendment: The amendment revised Technical Specification 3.5.1, Accumulators, to allow the plant to remain in Hot Standby with reactor coolant system pressure less than or equal to 1,000 psig with one accumulator inoperable, and allows closing one accumulator isolation valve for up to 2 hours to perform leakage testing of system check valves.

Date of issuance: December 5, 1988

Effective date: December 5, 1988

Amendment No.: 40

Facility Operating License No. NPF-30. Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** August 24, 1988 (53 FR 32299). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 5, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Callaway County Public Library, 710 Court Street, Fulton, Missouri 65251 and the John M. Olin Library, Washington University, Skinker and Lindell Boulevards, St. Louis, Missouri 63130.

Virginia Electric and Power Company, et al., Docket Nos. 50-338 and 50-339, North Anna Power Station, Units No. 1 and No. 2, Louisa County, Virginia

Date of application for amendments: November 6, 1986, as supplemented February 24 and March 12, 1987, and March 8 and June 10, 1988.

Brief description of amendments: The amendments permit the redesign of the NA-1&2 reactor coolant pump and steam generator supports since the dynamic effects of postulated primary loop pipe ruptures would be eliminated from the design basis using fracture mechanics "leak-before-break" technology as permitted by the revised General Design Criterion 4 of Appendix A, 10 CFR Part 50.

Date of issuance: December 5, 1988

Effective date: December 5, 1988

Amendment Nos.: 107 and 93

Facility Operating License Nos. NPF-4 and NPF-7. Amendments revised the License.

Date of initial notice in **Federal Register:** September 7, 1988 (53 FR 34615). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 5, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: The Alderman Library, Manuscripts Department, University of Virginia, Charlottesville, Virginia 22901.

Virginia Electric and Power Company, et al., Docket Nos. 50-338 and 50-339, North Anna Power Station, Units No. 1 and No. 2, Louisa County, Virginia

Date of application for amendments: May 26, 1988

Brief description of amendments: The amendments modified the NA-1&2 Section 3/4.6, "Containment Systems" to reflect the use of the Mass Point method for calculating containment leakage rates, which is described in ANSI/ANS 56.8-1987, "Containment System Leakage Testing Requirements." Also, the Bases section reflects the use of the ANSI/ANS 56.8-1987 standard.

Date of issuance: December 7, 1988

Effective date: December 7, 1988

Amendment Nos.: 108 and 94

Facility Operating License Nos. NPF-4 and NPF-7. Amendments revised the Technical Specifications.

Date of initial notice in Federal Register: September 7, 1988 (53 FR 34615). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 7, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: The Alderman Library, Manuscripts Department, University of Virginia, Charlottesville, Virginia 22901.

Virginia Electric and Power Company, et al., Docket Nos. 50-338 and 50-339, North Anna Power Station, Units No. 1 and No. 2, Louisa County, Virginia

Date of application for amendments: December 4, 1987

Brief description of amendments: The amendments implement more stringent primary-to-secondary coolant systems leakage limits and establish surveillance requirements to assure operability of the existing and new N-16 instrumentation necessary to assure compliance with the revised leakage limits.

Date of issuance: December 12, 1988

Effective date: December 12, 1988

Amendment Nos.: 109 and 95

Facility Operating License Nos. NPF-4 and NPF-7. Amendments revised the Technical Specifications.

Date of initial notice in Federal Register: December 30, 1987 (52 FR 49234). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 12, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: The Alderman Library, Manuscripts Department, University of Virginia, Charlottesville, Virginia 22901.

Wolf Creek Nuclear Operating Corporation, Kansas Gas and Electric Company, Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Docket No. 50-482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: June 24, 1988

Brief description of amendment: The amendment revised the Technical Specifications and corresponding Bases necessary for Cycle 4 operation. These changes included increased boron concentration in the refueling water storage tank and accumulators, a revised part power multiplier and changes resulting from revised reactor coolant temperature measurement uncertainties.

Date of Issuance: December 5, 1988

Effective date: December 5, 1988

Amendment No.: 23

Facility Operating License No. NPF-42. Amendment revised the Technical Specifications.

Date of initial notice in Federal Register: August 24, 1988 (53 FR 32302). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 5, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room Location: Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801 and Washburn University School of Law Library, Topeka, Kansas 66621

Yankee Atomic Electric Company, Docket No. 50-029, Yankee Nuclear Power Station, Franklin County, Massachusetts

Date of application for amendment: March 25, 1988

Brief description of amendment: The Amendment revises the Technical Specifications related to the containment isolation barriers including blank flanges, expansion joints and valves.

Date of issuance: December 7, 1988

Effective date: December 7, 1988

Amendment No.: 121

Facility Operating License No. DPR-36. Amendment revised the Technical Specifications.

Date of initial notice in Federal Register: May 4, 1988 (53 FR 5922). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 7, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Greenfield Community College, 1 College Drive, Greenfield, Massachusetts 01301.

Dated at Rockville, Maryland, this 20th day of December, 1988.

For the Nuclear Regulatory Commission

Steven A. Varga,

Director, Division of Reactor Projects-I/II, Office of Nuclear Reactor Regulation

[Doc. 88-29606 Filed 12-29-88; 8:45 am]

BILLING CODE 7590-01-D

PENSION BENEFIT GUARANTY CORPORATION

Request for OMB Extension of Approval for Information Collection; Employer Liability for Withdrawals from and Terminations of Single-Employer Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for OMB approval of extension.

SUMMARY: The Pension Benefit Guaranty Corporation has requested an extension by the Office of Management and Budget of the expiration date of a currently approved information collection requirement (1212–0017) without any change in substance or in the method of collection. The information collection, which is scheduled to expire on March 31, 1989, is contained in the PBGC's regulation on Employer Liability for Withdrawals from and Terminations of Single-Employer Plans, 29 CFR Part 2622. This notice advises the public of the PBGC's request for an extension of OMB approval for this collection of information.

ADDRESSES: Written comments (at least three copies) should be addressed to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Pension Benefit Guaranty Corporation, 3208 New Executive Office Building, Washington, DC 20503. Requests for information and copies of the proposed collection of information and supporting documentation, should be addressed to the Communications and Public Affairs Department (Code 38000), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006. The request for extension will be available for public inspection, and copying, at the PBGC Communications and Public Affairs Department in Suite 7100, at the above address, between the hours of 9:00 a.m. and 4:00 p.m.

FOR FURTHER INFORMATION CONTACT: Renae R. Hubbard, Special Counsel, Office of the General Counsel (Code 22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW.,

Washington, DC 20006; telephone 202–778–8851 (202–778–8859 for TTY and TDD). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: The Pension Benefit Guaranty Corporation ("PBGC") is requesting that the Office of Management and Budget extend for three years the approval of the collection of information contained in the PBGC's regulation on Employer Liability for Withdrawals from and Terminations of Single-Employer Plans, 29 CFR Part 2622. Section 4062 of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1362 ("ERISA"), provides that the contributing sponsor of a single-employer pension plan and members of the sponsor's controlled group ("the employer") incur employer liability if the plan terminates with assets insufficient to pay benefit liabilities (or, with respect to terminations initiated before December 18, 1987, benefit commitments) under the plan. However, the amount of employer liability for pre-December 18, 1987 cases, the payment terms for employer liability, and the PBGC's statutory lien for employer liability are all affected by whether and to what extent the unadjusted liability exceeds 30 percent of the employer's net worth. Section 2622.3 of the employer liability regulation requires that an employer submit information that will enable the PBGC to determine the employer's net worth. If this information is not provided to the PBGC, it would be significantly hindered in the performance of its statutory duty to calculate and collect employer liability.

The PBGC has approximately 100 pension plan terminations per year that percent a net worth issue. Based on its recent experience concerning the number of plans maintained and terminated by each employer (ranging from one per employer to ten per employer), the PBGC estimates that only 60 employers per year will be affected by this information collection. Normally, only one submission of net worth information for an employer is required, regardless of the number of plans being terminated.

The PBGC estimates that the time required to comply with this information collection ranges from one hour to several weeks, with the mean being three days. In has been PBGC's experience that there is great diversity in the character of the employers involved and the effort required to submit the data. In most instances, only copying and transmission of existing data is needed. In some, new net worth data may have to be compiled. Based on the mean time of three days (24 hours) and the estimated number of responses (60), the annual burden is estimated at 1440 hours.

Issued at Washington, DC, this 23rd day of December 1988.

Kathleen P. Utgoff,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 88–30106 Filed 12–29–88; 8:45 am]

BILLING CODE 7708–01–M

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review

AGENCY: Railroad Retirement Board.

ACTION: In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

Summary of Proposal(s)

(1) *Collection title:* Repayment of Debt.

(2) *Form(s) submitted:* ID–22, ID–22f, ID–22g, ID–22l, ID–22s, ID–22t, and ID–22u.

(3) *OMB Number:* N/A.

(4) *Expiration date of current OMB clearance:* N/A.

(5) *Type of request:* New collection.

(6) *Frequency of response:* On occasion.

(7) *Respondents:* Individuals or households.

(8) *Estimated annual number of respondents:* 550.

(9) *Total annual responses:* 2,285.

(10) *Average time per response:* .0503 minutes.

(11) *Total annual reporting hours:* 115.

(12) *Collection description:* Section 2 of the Railroad Unemployment Insurance Act provides unemployment and sickness benefits for qualified railroad workers. When the RRB determines that an overpayment of RUIA benefits has accurred, it initiates prompt action to notify the claimant of the overpayment and to recover the amount owed the RRB. The collection obtains information needed by the RRB to allow for the repayment of amount owed by the claimant by means of a credit card, and in addition to the customary form of payment by check or money order.

Additional Information or Comments

Copies of the proposed forms and supporting documents can be obtained from Pauline Lohens, the agency clearance officer (313–751–4692). Comments regarding the information collection should be addressed to Pauline Lohens, Railroad Retirement Board, 844 Rush Street, Chicago, Illionois 60611 and the OBM reviewer, Justin Kopca (202–395–7316), Office of Management and Budget, Room 3002, New Executive Office Building, Washington, DC 20503.

Pauline Lohens,

Director of Information Resources Management.

[FR Doc. 88–30045 Filed 12–29–88; 8:45 am]

BILLING CODE 7905–01–M

Agency Forms Submitted for OMB Review

AGENCY: Railroad Retirement Board.

ACTION: In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C Chapter 35), the Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

Summary of Proposal(s)

(1) *Collection title:* Certification Regarding Rights to Unemployment.

(2) *Form(s) submitted:* UI–45, UI–32.

(3) *OMB Number:* 3220–0079.

(4) *Expiration date of current OMB clearance:* 3–31–89.

(5) *Type of request:* Revision of a currently approved collection.

(6) *Frequency of response:* On occasion.

(7) *Respondents:* Individuals or households, Businesses or other for-profit.

(8) *Estimated annual number of respondents:* 3,350.

(9) *Total annual responses:* 8,050.

(10) *Average time per response:* .1564 minutes.

(11) *Total annual reporting hours:* 1,259.

(12) *Collection description:* In administering the disqualification for the voluntary leaving work provision of Section 4, of the Railroad Retirement Insurance Act, the Railroad Retirement Board investigates an unemployment claim indicating the claimant left work voluntarily. The certification obtains information needed to determine whether the leaving was with good cause.

Additional Information or Comments

Copies of the proposed forms and supporting documents can be obtained from Pauline Lohens, the agency clearance officer (312–751–4692). Comments regarding the information collection should be addressed to

Pauline Lohens, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611 and the OMB reviewer, Justin Kopca (202–395–7316), Office of Management and Budget, Room 3002, New Executive Office Building, Washington, DC 20503.

Pauline Lohens,

Director of Information Resources Management.

[FR Doc. 88–30046 Filed 12–29–88; 8:45 am]

BILLING CODE 7905–01–M

Agency Forms Submitted for OMB Review

AGENCY: Railroad Retirement Board.

ACTION: In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

Summary of Proposal(s):

(1) *Collection title:* Investigation of Claim for Possible Days of Employment or State Benefits Received.

(2) *Form(s) submitted:* ID–5i, ID–5R(SUP), ID–49R, ID–49S, UI–48 and UI–54.

(3) *OMB Number:* 3220–0049.

(4) *Expiration date of current OMB clearance:* 7–31–89.

(5) *Type of request:* Revision of a currently approved collection.

(6) *Frequency of response:* On occasion.

(7) *Respondents:* Individuals or households, State or local governments, Businesses or other for-profit, Small businesses or organizations.

(8) *Estimated annual number of respondents:* 11,250.

(9) *Total annual responses:* 19,100.

(10) *Average time per response:* .18194 minutes.

(11) *Total annual reporting hours:* 3,475.

(12) *Collection description:* Under the RUIA, unemployment or sickness benefits are not payable for any day in which remuneration is payable or accrues to the claimant. The collection obtains information from the claimant, claim agent, railroad and non-railroad employers and state agencies about work performed and/or benefits received during the same period as unemployment benefits are claimed.

Additional Information or Comments

Copies of the proposed forms and supporting documents can be obtained from Pauline Lohens, the agency clearance officer (312–751–4692). Comments regarding the information collection should be addressed to Pauline Lohens, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611 and the OMB reviewer, Justin Kopca (202–395–7316), Office of Management and Budget, Room 3002, New Executive Office Building, Washington, DC 20503.

Pauline Lohens,

Director of Information Resources Management.

[FR Doc. 88–30047 Filed 12–29–88; 8:45 am]

BILLING CODE 7905–01–M

Agency Forms Submitted for OMB Review

AGENCY: Railroad Retirement Board.

ACTION: In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

Summary of Proposal(s)

(1) *Collection title:* Availability for work.

(2) *Form(s) submitted:* UI–38, UI–38S and ID–8K.

(3) *OMB Number:* N.A.

(4) *Expiration date of current OMB clearance:* N.A.

(5) *Type of request:* New collection.

(6) *Frequency of response:* On occasion.

(7) *Respondents:* Individuals or households, Non-profit institutions.

(8) *Estimated annual number of respondents:* 15,000.

(9) *Total annual responses:* 24,000.

(10) *Average time per response:* .13025 minutes.

(11) *Total annual reporting hours:* 3,126.

(12) *Collection description:* Under Section l(k) of the Railroad Unemployment Insurance Act, unemployment benefits are not payable for any day for which the claimant is not available for work. The collection obtains information needed by the RRB to determine whether a claimant is willing and ready to work.

Additional Information or Comments

Copies of the proposed forms and supporting documents can be obtained from Pauline Lohens, the agency clearance officer (312–751–4692). Comments regarding the information collection should be addressed to Pauline Lohens, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611 and the OMB reviewer, Justine Kopca (202–395–7316), Office of Management and Budget, Room 3002, New Executive Office Building, Washington, DC 20503.

Pauline Lohens,

Director of Information Resources Management.

[FR Doc. 88–30048 Filed 12–29–88; 8:45 am]

BILLING CODE 7905–01–M

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

White House Science Council (WHSC); Meetings

The White House Science Council, the purpose of which is to advise the Director, Office of Science and Technology Policy (OSTP), will meet on January 12 and 13, 1989 in Room 5104, New Executive Office Building, Washington, DC. The meeting will begin at 6:00 p.m. on January 12, recess and reconvene at 8:00 a.m. on January 13, 1989. Following is the proposed agenda for the meeting:

(1) Briefing of the council, by the Assistant Directors of OSTP, on the current activities of OSTP.

(2) Briefing of the Council by OSTP personnel and personnel of other agencies on proposed, ongoing, and completed panel studies.

(3) Discussion of composition of panels to conduct studies.

The January 12 and 13 meetings will be closed to the public.

The briefings on the current activities of OSTP necessarily will involve discussion of material that is formally and properly classified in accordance with the provisions of Executive Order 12356 in the interest of national defense or for foreign policy reasons. This is also true for the briefing on panel studies. As well, a portion of both of these briefings will require discussion of internal personnel procedures of the Executive Office of the President and information which, if prematurely disclosed, would significantly frustrate the implementation of decisions made requring agency action. These portions of the meeting will be closed to the public pursuant to 5 U.S.C. 552 b.(c)(1), (2), and (9)(B).

A portion of the discussion of panel composition will necessitate the disclosure of information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Accordingly, this portion of the meeting

will also be closed to the public, pursuant to 5 U.S.C. 552b.(c)(6).

Barbara J. Diering,

Special Assistant, Office of Science and Technology Policy.

December 27, 1988.

[FR Doc. 30134 Filed 12-27-88; 4:35 pm]

BILLING CODE 3170-01-M

SECURITIES AND EXCHANGE COMMISSION

Forms Under Review by Office of Management and Budget

Agency Clearance Officer: Kenneth A. Fogash (202) 272-2142.

Upon Written Request, Copy Available From: Securities and Exchange Commission, Office of Consumer Affairs, 450 Fifth Street, NW., Washington, DC 20549.

Extension

Rule 23c-1
File No. 270-253

Form N-5
File No. 270-172

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq*), the Securities and Exchange Commission has submitted for extension of OMB approval Rule 23c-1 and Form N-5 under the Investment Company Act of 1940.

Rule 23c-1 sets forth conditions for the repurchase, by a registered closed-end investment company, of its own securities. There are 345 active registered closed-end investment companies, all of which could use the rule. Estimated annual compliance time per registrant is 2.5 hours.

Form N-5 is the registration statement for small business investment companies under the Securities Act of 1933 and the Investment Company Act of 1940. Approximately 2 registration statements on Form N-5 are filed annually, with an estimated compliance time of 350.

The estimated average burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules and forms.

Direct general comments to Gary Waxman at the address below. Direct any comments concerning the accuracy of the estimated average burden hours for compliance with SEC rules and forms to Kenneth A Fogash, Deputy Executive Director, Securities and Exchange Commission, 450 fifth Street, NW., Washington, DC 20549-6004, and Gary Waxman, Clearance Officer, Office of Information and Regulatory Affairs, Office of Management and Budget (Paperwork Reduction Projects 3235-0260 and 3235-0169), Room 3228 NEOB, Washington, DC 20503.

Jonathan G. Katz,

Secretary.

December 21, 1988.

[FR Doc. 88-30099 Filed 12-29-88; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-26390; File No. SR-NYSE-88-40]

Self-Regulatory Organization; Proposed Rule Change by New York Stock Exchange, Inc., Relating to the Meaning, Administration or Enforcement of Rule 19c-4

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on December 19, 1988, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

This proposed rule change consists of a stated policy or interpretation of Rule 19c-4 [1] (the "Rule") under the Securities Exchange Act of 1934 (the "Act") that would propose an exception from paragraph (c)(3) of the Rule. This proposed rule change reads as follows:

Notwithstanding the provisions of Rule 19c-4(c)(3), the Exchange may determine that it will not proceed to delist the equity securities of a company because that company has issued or proposes to issue, in an exchange offer for outstanding shares of its common stock, units and their constituent securities which have no vote or a lesser vote than its outstanding common stock where the Exchange, after considering all the surrounding circumstances, including other action that may have been taken or is proposed to be taken by the company, determines that the exchange offer does not (or did not) give rise to the collective action problems discussed in the Release of the SEC that accompanied the adoption of Rule 19c-4, is not (or was not) coercive in nature and does not (or did not) have the effect of disenfranchising outstanding common stock holders. For example, if the Exchange determines that the exchange offer,

- does not depend on a shareholder vote but is available for the individual choice of all outstanding common stock holders in a fair and non-discriminatory manner,
- is accompanied by a prospectus under the Securities Act of 1933 (or a comparable disclosure document) that describes the exchange offer and the securities being offered,
- is not considered to give rise to the creation of an insider group, or a control group, of common stock holders or to enhance the standing of any such group, and is not an exchange offer, either alone or in the aggregate with prior similar exchange offers, for more than 25% of the outstanding common stock of the company as of the date of the first such offer, and
- does not adversely affect the voting rights of the holders of outstanding common stock that do not accept the exchange,
- then the Exchange may conclude that the exchange offer is not inconsistent with Rule 19c-4.

The term 'units' as used herein shall mean unbundled stock units [2] or securities with substantially similar characteristics [3] issued by a corporation which consist of, and are separable into, two or more constituent securities, which, in the aggregate, are designed to replicate the economic characteristics typically associated with ownership of the corporation's common stock and have a term in excess of three years. The term 'constituent securities' as used herein shall mean the two or more constituent securities which together make up the unit.[4]

II. Self-Regulatory Organization's Statement of the Statutory Basis for the Proposed Rule Change

A. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under section 6(b)(5) that the rules of the Exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to,

[1] *See*, Securities Exchange Act Release No. 34-25891 (July 7, 1988), 53 FR 26376 (July 12, 1988) ("Adopting Release").

[2] The Commission notes that four companies have filed form S-4 registration statements with the Commission under the Securities Act of 1933, each with respect to the issuance of unbundled stock units ("USUS") in exchange for common stock of the issuer.

[3] With regard to the four S-4 registration statements for unbundled stock units filed thus far with the Commission, each registration statement provides that in a third party tender offer for the company's common stock each holder of a constituent security may convert such unit into common stock. Similarly, in an issuer tender offer for at least 20% of the outstanding shares of each class of the company's common stock, the company is required to make an offer to acquire or invite tenders of at least the same percentage of the outstanding Incremental Dividend Preferred Stock and the Equity Appreciation Certificates.

[4] *See also* SR-NYSE-88-39 which proposes listing standards for constituent securities of common stock.

and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purpose of the Act or the administration of the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

This proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. By providing a basis upon which the presumption stated in paragraph (c)(3) of the Rule may be overcome, this proposed rule change will result in the elimination of a burden on competition that would otherwise prevail.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the proposal. In particular, the Commission solicits comments on whether it is appropriate for the NYSE, based on the factors cited in the proposal, to except from Rule 19(c)(4)'s presumption against exchange offers certain exchange offers of common stock for units. In addition, the Commission specifically solicits comments on whether the tender offer protection afforded shareholders in the proposals to issue unbundled stock units make the exchange of these units for common stock sufficiently neutral in regard to potential contests for corporate control so as to address the Rule's concerns that exchange offers of disparate voting rights stock are used to disenfranchise shareholders of their voting rights.[5] Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by January 23, 1989.

For the Commisison, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

Date: December 22, 1988.

[FR Doc. 88-30098 Filed 12-29-88; 8:45 am]

BILLING CODE 8010-01-M

[5] *See supra* note 3.

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

ACTION: Notice of reporting requirements submitted for review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATE: Comments should be submitted on or before January 30, 1989. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

Copies: Request for clearance (S.F. 83), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer. Submit comments to the Agency Clearance Officer and the OMB Reviewer.

FOR FURTHER INFORMATION CONTACT:

Agency Clearance Officer: William Cline, Small Business Administration, 1441 L Street, NW., Room 200, Washington, DC 20416, Telephone: (202) 653-8538.

OMB Reviewer: Gary Waxman, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Telephone: (202) 395-7340.

Title: Application for Certificate of Competency

Form No.: 74, 74A, 74B, 183

Frequency: On occasion

Description of respondents: Applicants are presenting their financial and other capabilities in order for SBA to determine their ability to perform a specific government contract.

Annual responses: 19,000

Annual burden hours: 5700

William A. Cline,

Chief, Administrative Information Branch.

[FR Doc. 88-30128 Filed 12-29-88; 8:45 am]

BILLING CODE 8025-01-M

TENNESSEE VALLEY AUTHORITY

Information Collection Under Review by the Office of Management and Budget (OMB)

AGENCY: Tennessee Valley Authority.

ACTION: Information Collection Under Review by the Office of Management and Budget (OMB).

SUMMARY: The Tennessee Valley Authority (TVA) has sent to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), as amended by Pub. L. 99-591.

Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer whose name, address, and telephone number appear below. Questions or comments should be directed to the Agency Clearance Officer and also to the Desk Officer for the Tennessee Valley Authority, Office of Information and Regulatory Affairs, Office of

Management and Budget, Washington, DC 20503; Telephone: (202) 395–3084.

Agency Clearance Officer: Mark R. Winter, Tennessee Valley Authority, 100 Lupton Building, Chattanooga, TN 37401; (615) 751–2523.

Type of Request: Regular submission.

Title of Information Collection: Residential Energy Services Home Insulation Program (Energy Package).

Frequency of Use: On occasion.

Type of Affected Public: Individuals or households.

Small Businesses or Organizations Affected: No.

Federal Budget Functional Category Code: 271.

Estimated Number of Annual Responses: 10,000.

Estimated Total Annual Burden Hours: 3,000.

Estimated Average Burden Hours Per Response: .3.

Need For and Use of Information: This information is needed to determine applicable energy improvements in the TVA region. Data will be used to establish standards for various residential programs and to provide information to consumers about methods and actions for the wise and efficient use of electrical energy.

John W. Thompson,

Vice President, Services Senior Agency Official.

[FR Doc. 88–30050 Filed 12–29–88; 8:45 am]

BILLING CODE 8120–01–M

Information Collection Under Review by the Office of Management and Budget (OMB)

AGENCY: Tennessee Valley Authority.

ACTION: Information Collection Under Review by the Office of Management and Budget (OMB).

SUMMARY: The Tennessee Valley Authority (TVA) has sent to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), as amended by Pub. L. 99–591.

Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer whose name, address, and telephone number appear below. Questions or comments should be directed to the Agency Clearance Officer and also to the Desk Officer for the Tennessee Valley Authority, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503; Telephone: (202) 3084.

Agency Clearance Officer: Mark R. Winter, Tennessee Valley Authority, 100 Lupton Building, Chattanooga, TN 37401; (615) 751–2523.

Type of Request: Regular submission.

Title of Information Collection: Land Between The Lakes Turkey Hunter Survey.

Frequency of Use: Annually.

Type of Affected Public: Individuals.

Small Businesses or Organizations Affected: No.

Federal Budget Functional Category Code: 452.

Estimated Number of Annual Responses: 4000.

Estimated Total Annual Burden Hours: 200.

Estimated Average Burden Hours Per Response: .05.

Need For and Use of Information: In order to manage the turkey population and help ensure hunter safety at Land Between The Lakes, quantitative information on the number of hunters, the number of days they hunt, and their impact on the turkey population is needed.

John W. Thompson,

Vice President, Services Senior Agency Official.

[FR Doc. 88–30066 Filed 12–29–88; 8:45 am]

BILLING CODE 8120–01–M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. 301–62]

Determination To Impose Increased Duties on Certain Products of the European Community

SUMMARY: Pursuant to authority delegated by the President to the United States Trade Representative in Proclamation No. 5759 of December 24, 1987, the United States Trade Representative hereby partially terminates the suspension of the application of increased duties on imports of certain products of the European Community proclaimed in Proclamation No. 5759, and hereby modifies the list of affected products as set forth herein.

EFFECTIVE DATE: 12:01 a.m. January 1, 1989.

FOR FURTHER INFORMATION CONTACT: Laura Anderson, (202) 395–3074, or Les Glad, (202) 395–3077 (for technical and policy information), or Richard Parker, (202) 395–6800 (for legal issues).

SUPPLEMENTARY INFORMATION: On December 24, 1987, the President determined, pursuant to section 301(a) of the Trade Act of 1974, as amended (19 U.S.C. 2411), that the "Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action" (the Directive) adopted in December 1985 by the European Community (EC) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, a trade agreement; or is unjustifiable or unreasonable and constitutes a burden or restriction on United States commerce (52 FR 49131).

The Directive, which has not yet been applied to EC meat imports, will prohibit imports into the European Community of any meat produced from animals treated with growth hormones, effective January 1, 1989, thereby severely disrupting exports of United States meat to the EC. The need for the EC prohibition is not supported by valid scientific evidence. Accordingly, the United States considers that the EC Directive constitutes a disguised restriction on international trade. In response, the President proclaimed increases in United States customs duties on certain articles the product of the European Community, as described in both the Tariff Schedules of the United States and the Harmonized Tariff Schedule of the United States, and set forth in Annexes A and B to Proclamation No. 5759. At the same time the President suspended the application of the increased duties for so long as the European Community member states continued the import practices then in effect with respect to United States exports of relevant meat products. At the time, the member states of the European Community were not yet applying the Directive to meat imports. The President also proclaimed in part that "the United States Trade Representative is authorized to suspend, modify, terminate, or terminate the suspension of the increased duties imposed by this Proclamation, upon publication in the **Federal Register** of his determination that such action is in the interest of the United States."

The member states of the European Community are now planning to apply the Directive to meat imports effective January 1, 1989. Therefore, on December 22, 1988, I determined that it is in the interest of the United States to partially terminate the suspension of the increased duties imposed by Proclamation No. 5759, and to modify it as set forth in this determination, to take effect at 12:01 a.m. on January 1, 1989.

Since the Harmonized Tariff of the United States (HTS) is effective January 1, 1989, the modifications effected by this determination are expressed only in terms of the HTS.

Partial Termination of Suspension

Pursuant to the authority granted to me in Proclamation No. 5759, I am hereby terminating the suspension of the increased duties imposed by that Proclamation on all enumerated products except those of subheading 9903.23.10, "Intestines, weasands, bladders, tendons and integuments, not specially provided for (except sheep, lamb and goat), prepared for use as sausage casings (provided for in subheading 0504.00.00)". I have determined that it is in the interest of the United States to exclude that subheading from the termination of the suspension, in order to make this action substantially equivalent in value to the effect of the application of the Directive to EC meat imports. Specifically, I am reducing the level of responsive action in response to the derogation from the Directive that the European Community will continue to apply to imports of meat products used in the manufacture of pet foods. Accordingly, U.S. note 6 to subchapter III of chapter 99 of the HTS is modified by striking out "subheadings 9903.23.00 through 9903.23.35, inclusive," and by inserting in lieu thereof "subheading 9903.23.10.".

Modifications

Annex B to Proclamation 5759 contained typographical errors, which are corrected herein. For subheading 9903.23.15, the description in that Annex referred to "Tomatoes, prepared or preserved otherwise than by the processes specified in chapters 7 or 11 or in heading 2201 (provided for in subheadings 2002.10.00, 2002.29.00, nad [sic] 2103.20.40)". The correct heading is "2001", and the correct subheadings are "2002.10.00, 2002.90.00, or 2103.20.40". For subheading 9903.23.30, the description referred to "Fruit juices not specially provided for, concentrated or not concentrated, whether or not sweetened, not mixed and not containing over 0.5 percent of ethyl alcohol by volume (provided for in subheading 2209.80.60.)". The correct subheading is "2009.80.60".

Subheading 9903.23.15 is modified by inserting "(except paste)" in the article description after "preserved".

The Harmonized Tariff Schedule of the United States is hereby modified accordingly. The modifications to the HTS made by this determination are effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. January 1, 1989.

This determination shall be published in the **Federal Register.**

Clayton Yeutter,

United States Trade Representative.

The following list illustrates the effect of the above action taken by the United States Trade Representative, imposing increased duties on certain products of the European Community.

HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, CHAPTER 99, SUBCHAPTER III

Heading/ subheading	Article description	Rates of duty 1 general	Rates of duty 2
	Articles the product of the European Community (Belgium, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom):		
9903.23.00	Beef, without bone (except offal), fresh, chilled, or frozen (provided for in subheading 0201.30.60 or 0202.30.60)	100% ad val	No change.
9903.23.05	Pork hams and shoulders (except those that have been boned and cooked and packed in airtight containers), processed or otherwise prepared or preserved (provided for in subheadings 0210.11, 1602.41.90 or 1602.42.40).	100% ad val	No change.
9903.23.15	Tomatoes, prepared or preserved (except paste) otherwise than by the processes specified in chapter 7 or 11 or in heading 2001 (provided for in subheading 2002.10, 2002.90 or 2103.20.40).	100% ad val	No change.
9903.23.20	Soluble or instant coffee extracts, essences and concentrates (containing no admixture of sugar, cereal, or other additive) (provided or in subheading 2101.10.20).	100% ad val	No change.
9903.23.25	Other fermented alcoholic beverages, containing less than 7 percent alcohol by volume (provided for in subheading 2206.00.90).	100% ad val	No change.
9903.23.30	Fruit juices not specially provided for, concentrated or not concentrated, whether or not sweetened, not mixed and not containing over 0.5 percent of ethyl alcohol by volume (provided for in subheading 2009.80.60).	100% ad val	No change.
9903.23.35	Pet food packaged for retail sale, of byproducts obtained from the milling of grains, mixed feeds, and mixed-feed ingredients (provided for in subheading 2309.10).	100% ad val	No change.

[FR Doc. 88-30143 Filed 12-29-88; 8:45 am]
BILLING CODE 3190-01-M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement; Ellis County, TX

AGENCY: Federal Highway Administration (FEWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an Environmental Impact Statement will be prepared for a proposed highway project in Ellis County, Texas.

FOR FURTHER INFORMATION CONTACT: W.L. Hall, Jr., P.E., District Engineer, Federal Highway Administration, 826 Federal Building, Austin, Texas 78701, (512) 482-5988.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Texas State Department of Highways and Public Transportation DHT, intends to prepare an Environmental Impact Statement (EIS) on a proposal to upgrade a portion of U.S. 287 in Ellis County, Texas, to a four-lane divided, non-controlled access facility. Because of difficulty in predicting availability of funds, the DHT has not yet decided whether to use State or Federal funds to finance construction of this project.

The highway section under study passes through the City of Midlothian (1982 Population 9,447). The corridor study begins approximately 5.0 miles west of Midlothian and ends at a point near the town of Sardis, approximately 6.1 miles east of Midlothian. This portion of U.S. 287 is the only portion of the facility whose preliminary plans are yet to be completed. Planning for improvements of this facility around Ennis and Waxahachie has been completed.

The existing facility is, for the most part, a two-lane roadway with a four-lane roadway existing through the central business district of Midlothian. U.S. 287 has become a major link for truck traffic from the Dallas/Ft. Worth area to the Houston/Galveston area. Truck traffic ranges in the neighborhood of 26 to 28 percent of the average daily traffic on the facility. The existing facility through the central business district (CBD) of Midlothian is unable to handle the present traffic. Higher volumes of traffic are expected in the

future with the present growth predicted to continue. Truck traffic is expected to increase along with the continued rate of increase in traffic. Truck traffic creates a problem in the central business district with it's narrow streets and minimum building setbacks.

This proposed project in conjunction with the construction around Ennis and Waxahachie will provide fast, direct, safe and efficient transportation service from the Dallas/Fort Worth metropolitan area to a direct connection with I.H. 45 to the Houston/Galveston area. Separation of the intra-city traffic from through traffic will reduce congestion in the city and better serve local traffic. By separation of short local trips from thru trips, access to local housing, businesses, schools and churches will be improved. The proposed improvement will benefit through traffic by eliminating the usual delays and interruptions associated with city travel.

Six alternatives will be considered for this proposed action, five of which are possible bypass routes. One alternative will be along the existing facility with signalization improvements and other traffic flow improvements in the CBD considered. The "no-build" alternative will also be considered.

There are currently no plans to hold formal scoping meetings for this proposal. A public meeting was held on June 6, 1985 for the proposed action. A public hearing will be held at a later date. Adequate notice will be given through the news media concerning the time and location of the 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 at the address provided above.

Issued on December 23, 1988.

W.L. Hall, Jr.,

District Engineer, Austin, Texas.

[FR Doc. 88-30044 Filed 12-29-88; 8:45 am]

BILLING CODE 4910-22-M

Environmental Impact Statement: San Diego County, CA

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 will be prepared for a proposed highway project in San Diego County, California.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Klekar, District Engineer, Federal Highway Administration, P.O. Box 1915, Sacramento, California 95812-1915. Telephone: (916) 551-1307.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the California Department of Transportation, will prepare an Environmental Impact Statement (EIS) on a proposal to construct approximately 11.2 miles of State Route 125 on new location between proposed Interstate Route 905 (formerly Route 117) near the United States/Mexico Border Crossing and adopted Route 54. Route 125 is expected to be a multi-lane freeway with the ultimate design being eight lanes. Alternatives for this project consist of "no build" and several potential alignment alternatives. A public meeting in San Diego County is scheduled to solicit citizen input. Scoping meetings will also be arranged with responsible/cooperating agencies and special interest groups upon request. In addition, a public hearing will be held. Public notice will be given as to the time and place of the 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 at the address previously provided.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The Regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal Programs and activities apply to this program.)

Issued on: December 23, 1988.

Susan E. Klekar,

District Engineer, Sacramento, California.

[FR Doc. 88-30053 Filed 12-29-88; 8:45 am]

BILLING CODE 4910-22-M

DEPARTMENT OF THE TREASURY

Fiscal Service

Renegotiation Board Interest Rate; Prompt Payment Interest Rate; Contracts Disputes Act

Although the Renegotiation Board is no longer in existence, other Federal Agencies are required to use interest rates computed under the criteria established by the Renegotiation Act of 1971 (Pub. L. 92-41). For example, the Contracts Disputes Act of 1978 (Pub. L. 95-563) and the Prompt Payment Act (Pub. L. 97-177) are required to calculate interest due on claims "* * * at a rate established by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97) for the Renegotiation Board."

Therefore, notice is hereby given that, pursuant to the above mentioned sections, the Secretary of the Treasury has determined that the rate of interest applicable for the purpose of said sections, for the period beginning January 1, 1989 and ending on June 30, 1989, is 9¾ per centum per annum.

Dated: December 20, 1988.

Gerald Murphy,

Fiscal Assistant Secretary.

[FR Doc. 88-30068 Filed 12-29-88; 8:45 am]

BILLING CODE 4810-35-M

VETERANS ADMINISTRATION

Agency Information Collection Under OMB Review

AGENCY: Veterans Administration.

ACTION: Notice.

The Veterans Administration has submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This document lists the following information: (1) The responsible department or staff office; (2) the title of the collection(s); (3) the agency form number(s), if applicable; (4) a description of the need and its use; (5) how often the information collection must be completed, if applicable; (6) who will be required or asked to report; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to respond; and (9) an indication of whether section 3504(h) of Pub. L. 96-511 applies.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from John Turner, Department of Veterans Benefits (203C), Veterans Administration, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233-2744.

Comments and questions about the items on the list should be directed to the VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503, (202) 395-7316.

DATES: Comments on the information collection should be directed to the OMB Desk Officer within 30 days of this notice.

Dated: December 20, 1988.

By direction of the Administrator.

Amar J. Singh,

Acting Director, Office of Information Management and Statistics.

Extension

1. Department of Veterans Benefits.
2. Veterans Application for Assistance in Acquiring Special Housing Adaptations.
3. VA Form 26–4555d.
4. The form is completed by certain disabled veterans in applying for benefits as authorized by law for the acquisition of adaptations to veterans' homes.
5. On occasion.
6. Individuals or households.
7. 75 responses.
8. 25 hours.
9. Not applicable.

Extension

1. Department of Veterans Benefits.
2. Request for Confidential Verification of Birth.
3. VA Form 21–4504.
4. The form is used to secure verification of birth from the registrar of Vital Statistics in order to establish age or relationship.
5. On occasion.
6. State or local governments.
7. 1575 responses.
8. 788 hours.
9. Not applicable.

[FR Doc. 88–30035 Filed 12–29–88; 8:45 am]

BILLING CODE 8320-01-M

Agency Information Collection Under OMB Review

AGENCY: Veterans Administration.

ACTION: Notice.

The Veterans Administration has submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This document lists the following information: (1) The responsible department or staff office; (2) the title of the collection(s); (3) the agency form number(s), if applicable; (4) a description of the need and its use; (5) how often the form(s) must be filled out, if applicable; (6) who will be required or asked to report; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to fill out the form, if applicable; and (9) an indication of whether section 3504(h) of Pub. L. 96–511 applies.

ADDRESSES: Copies of the forms and supporting documents may be obtained from Patti Viers, VA Clearance Officer (732), Veterans Administration, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233–3172.

Comments and questions about the items on the list should be directed to the VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503, (202) 395–7316.

DATES: Comments on the information collection should be directed to the OMB Desk Officer within 30 days of this notice.

Dated: December 19, 1988.

By direction of the Administrator.

Frank E. Lalley,

Director, Office of Information Management and Statistics.

Extension

1. Office of Information Management and Statistics.
2. Certification of Inability to Pay Transportation Costs.
3. VA Form 70–2323.
4. This form will be used by veteran claimants to provide income information which will form the basis for a determination as to the claimant's eligibility for reimbursement of travel costs incurred to obtain VA benefits.
5. Annually.
6. Individuals or households.
7. 450,000 responses.
8. 60,000 hours.
9. Not applicable.

[FR Doc. 88–30036 Filed 12–29–88; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register
Vol. 53, No. 251
Friday, December 30, 1988

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: 10:00 a.m., Thursday, December 29, 1988.

LOCATION: Room 556, Westwood Towers, 5401 Westbard Avenue, Bethesda, Maryland.

STATUS:

MATTERS TO BE CONSIDERED:

Part Open/Part Closed to the Public

1. Delegations of Authority

The Commission will consider issues related to Commission Delegations of Authority.

Open to the Public

2. Voluntary Standards Policy: Final Amendments

The Commission will consider amendments to the Commission's regulations (16 CFR 1031 and 1032) concerning staff participation in voluntary standard activities.

Closed to the Public

3. Compliance Status Report

The staff will brief the Commission on the status of various compliance matters.

FOR A RECORDED MESSAGE CONTAINING THE LATEST AGENDA INFORMATION, CALL: 301–492–5709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, Md. 20207 301–492–6800.

Sheldon D. Butts,

Deputy Secretary.

December 23, 1988.

[FR Doc. 88–30139 Filed 12–27–88; 4:39 pm]

BILLING CODE 6355–01–M

NATIONAL TRANSPORTATION SAFETY BOARD

TIME AND DATE: 9:30 a.m. Friday, January 6, 1989.

PLACE: The Board Room, Eighth Floor, 800 Independence Avenue, SW., Washington, DC 20594.

STATUS: The first two items are open to the public. The last item is closed under Exemption 10 of the Government in Sunshine Act.

MATTERS TO BE CONSIDERED:

4809A
Railroad Accident Report: Collision of Amtrak Train 66 with Maintenance-of-Way Equipment, Chester, Pennsylvania, January 29, 1988.
NTSB Response to FAA re Safety Recommendation A–88–59 and A–88–60 related to the issuance of medical certificates (Mail Control 88–0736).

5003
Opinion and Order: Administrator v. McCament and Carmen, Dockets SE–7726 and 7723; disposition of the appeals of Carmen and Administrator.

FOR MORE INFORMATION CONTACT: Bea Hardesty, (202) 382–6525.

December 28, 1988.

Bea Hardesty,

Federal Register Liaison Officer.

[FR Doc. 88–30187 Filed 12–28–88; 8:45 am]

BILLING CODE 7533–01–M

SECURITIES AND EXCHANGE COMMISSION

Agency Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of January 3, 1989.

A closed meeting will be held on Wednesday, January 4, 1989, at 2:30 p.m. An open meeting will be held on Thursday, January 5, 1989, at 10:00 a.m.

The Commissioners, Counsel to the Commissioners, the Secretary of the Commission, and recording secretaries will attend the closed meeting. Certain staff members who are responsible for the calendared matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at a closed meeting.

Commissioner Cox, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the closed meeting scheduled for Wednesday, January 4, 1989, at 2:30 p.m., will be:

Formal order of investigation.
Institution of injunctive actions.
Settlement of injunctive action.
Settlement of administrative proceedings of an enforcement nature.
Institution of administrative proceedings of an enforcement nature.
Opinions.

The subject matter of the open meeting scheduled for Thursday, January 5, 1989, at 10:00 a.m., will be:

1. Consideration of an application of Delta Government Options Corp. for registration as a clearing agency under section 17a of the Securities Exchange Act of 1934. For further information, please contact Richard Konrath at (202) 272–2775.

2. Consideration of whether to issue a release proposing a rule (Rule 15c2–10) to govern the operation of proprietary trading systems that are not operated as facilities of national securities exchanges or associations and a conforming amendment to Rule 3a12–7 under the Securities Exchange Act of 1934. For further information, please contact Gordon K. Fuller at (202) 272–2414, or Eugene Lopez at (202) 272–2828.

3. Consideration of the recommendation with respect to the request of RMJ Securities Corporation ("RMJ Securities") and its subsidiary, RMJ Options Trading Corporation, that the staff issue a no-action letter with respect to the non-registration of RMJ Securities' options trading system as a national securities exchange under sections 3(a)(1) and 6 of the Securities Exchange Act of 1934. For further information, please contact Gordon K. Fuller at (202) 272–2414, or Eugene Lopez at (202) 272–2828.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Patrick Daugherty at (202) 272–2200.

Jonathan G. Katz,

Secretary.

December 27, 1988.

[FR Doc. 88–30230 Filed 12–28–88; 4:00 pm]

BILLING CODE 8010–01–M

Corrections

Federal Register
Vol. 53, No. 251
Friday, December 30, 1988

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs Not Subject to Certification; Diethylcarbamazine Plus Oxibendazole Chewable Tablets

Correction

In rule document 88-26209 appearing on page 45759 in the issue of Monday, November 14, 1988, make the following correction:

In the second column, in the heading for Part 520, in the first line, "From" should read "Form".

BILLING CODE 1505-01-D

LEGAL SERVICES CORPORATION

45 CFR Part 1609

Fee-Generating Cases

Correction

In proposed rule document 88-29142 beginning on page 50982 in the issue of Monday, December 19, 1988, make the following correction:

On page 50983, in the 2nd column, in the 2nd complete paragraph, in the 18th line, "order the" should read "order to".

BILLING CODE 1505-01-D

federal register

Friday
December 30, 1988

Part II

Department of the Treasury

Internal Revenue Service

26 CFR Part 1 and 602

Treatment of Partnership Liabilities; Allocations Attributable to Nonrecourse Liabilities; Final and Temporary Regulations and Notice of Proposed Rulemaking

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[T.D. 8237]

Treatment of Partnership Liabilities; Allocations Attributable to Nonrecourse Liabilities

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations concerning the treatment of partnership liabilities and the allocation of deductions attributable to nonrecourse debt. The temporary regulations reflect changes to the applicable tax law made by section 79 of the Tax Reform Act of 1984. The text of the temporary regulations set forth in this document also serves as the text of the proposed regulations cross-referenced in the notice of proposed rulemaking in the Proposed Rules section of this issue of the **Federal Register**.

DATES: Sections 1.752–0T through 1.752–4T, section 1.704–1T, and the amendments to sections 1.704–1 and 602.101 are effective as of December 29, 1988.

The temporary regulations under section 752 are generally applicable to any partnership liability incurred on or after January 30, 1989, although the temporary regulations apply as of March 1, 1984 to certain liabilities for which a partner bears the economic risk of loss. Section 1.704–1T is generally applicable for partnership taxable years beginning after December 29, 1988, unless the partnership elects to apply the provisions of that section to the first taxable year of such partnership ending after December 29, 1988. Additional guidance on the applicability of the temporary regulations under sections 752 and 704 is contained in §§ 1.752–4T and 1.704–1T(b)(4)(iv)(*m*).

FOR FURTHER INFORMATION CONTACT: Robert E. Shaw, 202–343–8459, or Mary Munday, 202–377–9470 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collections of information contained in §§ 1.752–4T(c) and 1.704–1T(b)(4)(iv)(*m*)(*2*) have been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget (OMB) under control number 1545–1090. The estimated annual burden per respondent varies from 3 minutes to 8 minutes, depending on individual circumstances, with an estimated average of 5 minutes.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require greater or less time, depending on their particular circumstances.

For further information concerning these collections of information, and where to submit comments on these collections of information, the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referenced notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**.

BACKGROUND

This document adds new temporary regulations §§ 1.752–0T, –1T, –2T, –3T, and –4T. The temporary regulations under section 752 reflect changes to the applicable tax law made by section 79 of the Tax Reform Act of 1984 (Pub. L. 98–369), which overruled the decision in *Raphan v. United States*, 3 Cl. Ct. 457 (1983), and directed the Treasury Department to prescribe regulations under section 752 relating to the treatment of guarantees, assumptions, indemnity agreements, and similar arrangements.

This document also adds new temporary regulation § 1.704–1T and amends § 1.704–1 to make conforming changes. The temporary regulation under section 704(b) reflects amendments to the rules governing the allocation of deductions attributable to nonrecourse debt that coordinate those rules with the temporary regulations under section 752, modify the treatment of minimum gain, and take account of comments that have been submitted to the Service.

Explanation of Provisions of Temporary Regulations Under Section 752

Overview

Under section 752, a partner's share of the liabilities of the partnership is reflected in the adjusted basis of the partner's interest in the partnership by treating any increase in the partner's share of those liabilities as a contribution of money to the partnership by the partner and any decrease in the partner's share of those liabilities as a distribution of money to the partner by the partnership. Section 752 also treats the assumption of a partnership liability by a partner as a contribution of cash by the partner, and the assumption of a partner's liability by the partnership as a distribution of cash to the partner. Under the regulations in effect under section 752 prior to the amendments made by this document (the "existing regulations"), the partners generally share recourse liabilities of the partnership in accordance with the ratios in which the partners share partnership losses, while the partners share nonrecourse liabilities of the partnership in accordance with the ratios in which they share partnership profits. The existing regulations define a nonrecourse liability as any liability with respect to which "none of the partners have any personal liability."

In *Raphan* v. *United States*, 3 Cl. Ct. 457 (1983), *rev'd*, 759 F. 2d 879 (Fed. Cir. 1985), the United States Claims Court held that a guarantee by a general partner of an otherwise nonrecourse debt of the partnership did not require the partner to be treated as personally liable for that debt. The Tax Reform Act of 1984 (the "1984 Act") specifically provided that the decision in *Raphan* is not to be followed in applying section 752 and the regulations thereunder. In addition, Congress directed Treasury to revise and update its regulations under section 752 to take account of current commercial practices and arrangements, such as assumptions, guarantees, and indemnities. See section 79(b) of the 1984 Act; see also H.R. Rep. No. 861, 98th Cong., 2d Sess. 869 (1984). The legislative history indicated that the revisions to the section 752 regulations should be based on the manner in which the partners, and persons related to the partners, share the economic risk of loss for a partnership liability (other than a bona fide nonrecourse liability). H.R. Rep. No. 861, 98th Cong., 2d Sess. 869 (1984).

In accordance with the legislative history of the 1984 Act, the temporary regulations under section 752 employ an economic risk of loss analysis (1) to determine whether a partnership liability is a recourse or nonrecourse liability, and (2) to determine the partners' shares of any recourse liability of the partnership. In recognition of the diversity of current lending practices and financing techniques, the temporary regulations have been designed to take account of the wide variety of commercial practices by which the partners may share the economic risk of loss for a partnership liability, including

guarantees, assumptions and indemnities.

Sharing Recourse Liabilities—Economic Risk of Loss

Under the temporary regulation, a partnership liability is a recourse liability to the extent that any partner bears the economic risk of loss for that liability, and a partner's share of any recourse liability of the partnership equals the portion, if any, of the economic risk of loss for such liability that is borne by such partner. Generally, a partner bears the economic risk of loss for a partnership liability to the extent that the partner (or a person related to the partner) would be obligated to make a payment to the creditor or a contribution to the partnership with respect to a partnership liability (and would not be entitled to be reimbursed for such payment or contribution by another partner, a person related to another partner, or the partnership) if (1) all of the partnership's assets (including money) were worthless, (2) all of the partnership's liabilities were due and payable in full, (3) the partnership disposed of all of its assets in a fully taxable transaction for no consideration (other than relief from certain liabilities), and (4) the partnership allocated its items of income, gain, loss, deduction, and credit for the year among the partners and liquidated the partners' interests in the partnership. The temporary regulations provide that a person is related to a partner if such person and the partner bear a relationship to each other that is specified in section 267(b) or 707(b)(1), with the following modifications: (1) "80 percent or more" is substituted for "more than 50 percent" each place it appears in those sections; (2) brothers and sisters are excluded from the members of a person's family; and (3) section 267(f)(1)(A) is disregarded.

Under the approach taken by the temporary regulations, a partner bears the economic risk of loss for a partnership liability to the extent that the partner (or a person related to the partner) would bear the economic burden of discharging the obligation represented by that liability if the partnership were unable to do so. For example, equal partners in a general partnership will share the economic risk of loss for any partnership recourse debt equally because they will share any economic burden corresponding to that debt equally. Similarly, in the case of a limited partnership, a limited partner generally will not bear the economic risk of loss for any partnership liability because a limited partner generally has no obligation to contribute additional capital to the partnership. However, if a partner (or a person related to the partner)—whether such partner is a limited partner or a general partner—could be required to make a payment to a creditor or a contribution to the partnership in order to discharge a partnership liability, the partner may be considered to bear the economic risk of loss for such liability.

Thus, the determination of whether a partner bears the economic risk of loss for a partnership liability takes into account the manner in which the partners have agreed to share economic losses relating to the liabilities of the partnership under all the arrangements among the partners, persons related to the partners, and the partnership. For example, even though a partnership creditor may be entitled to seek repayment only from the general partner of a limited partnership, the limited partners, and not the general partner, may bear the economic risk of loss for the liability to the extent that the limited partners are obligated under the partnership agreement or otherwise to discharge the partnership's obligation to the creditor. Also, if the partnership maintains capital accounts for its partners in accordance with § 1.704–1(b)(2)(iv) and the partners are obligated to restore any deficit balances in their capital accounts (as set forth in § 1.704–1(b)(2)(ii)(3)), the manner in which the partners will share the economic risk of loss for any partnership liability will be affected by their capital account balances.

In determining the amount of any obligation of a partner to make a payment to a creditor or a contribution to the partnership with respect to a partnership liability, the temporary regulations reduce the partner's obligation by the amount of any reimbursement that the partner would be entitled to receive from another partner, a person related to another partner, or the partnership. The Service is continuing to study whether a right to be reimbursed for a payment or contribution by an unrelated person (*e.g.*, pursuant to an indemnification agreement from a third party) should be taken into account in the same manner and solicits comment on this issue.

The temporary regulations also include the following special rules regarding the determination of whether a partner bears the economic risk of loss for a partnership liability:

(1) A partner who contributes (or otherwise provides) property to the partnership that is used solely as security for a partnership liability will bear the economic risk of loss for the partnership liability (to the extent of the value of such property).

(2) A partner who does not have a direct obligation to make a payment to a creditor or a contribution to the partnership with respect to a partnership liability may be considered to bear the economic risk of loss for the liability if the partner undertakes other obligations that are tantamount to guaranteeing the obligation.

(3) A partner who (directly or indirectly) guarantees the payment of interest on an otherwise nonrecourse liability will, in certain circumstances, be considered to bear the economic risk of loss for the liability.

In addition, the temporary regulations provide that if a partner (or a person related to the partner) makes a nonrecourse loan to the partnership, such partner shall be considered to bear the economic risk of loss for that liability unless (1) the partner's interest (including the interest of any person related to such partner) in each item of partnership income, gain, loss, deduction, or credit is 10 percent or less, and (2) the loan constitutes qualified nonrecourse financing within the meaning of section 465(b)(6).

The economic risk of loss analysis employed in the temporary regulations generally corresponds to, and further develops, the economic risk of loss analysis employed in the regulations under section 704(b). The coordination of these two sections reflects the fact that one of the principal purposes for including partnership liabilities in the bases of the partners' interests in the partnership is to support the deductions that will be claimed by the partners for the items attributable to those liabilities.

The allocation of partnership liabilities among the partners serves to equalize the partnership's basis in its assets ("inside basis") with the partners' bases in their partnership interests ("outside basis"). The provision of additional basis to a partner for the partner's partnership interest will permit the partner to receive distributions of the proceeds of partnership liabilities without recognizing gain under section 731, and to take deductions attributable to partnership liabilities without limitation under section 704(d) (which limits the losses that a partner may claim to the basis of the partner's interest in the partnership). By equalizing inside and outside basis, section 752 simulates the tax consequences that the partners would realize if they owned undivided interests in the partnership's assets, thereby treating the partnership as an aggregate of its partners. Of course, this

goal can only be achieved if the partners that are allocated the deductions attributable to a partnership liability are allocated the basis for that liability.

Accordingly, the coordination of the economic risk of loss analysis employed in sections 704(b) and 752 generally requires that the basis for a partnership liability be allocated to the partner that will be allocated the deductions attributable of that liability. Since the economic risk of loss analysis employed under section 752 applies without regard to whether the partnership satisfies the substantial economic effect safe harbor set forth in § 1.704–1(b)(2), the temporary regulations provide additional guidance on the determination of the partners' interests in the partnership under section 704(b). See § 1.704–1(b)(3).

Taxpayers should draw no inferences from the economic risk of loss analysis employed by the temporary regulations under section 752 regarding the application of section 465.

Sharing Nonrecourse Liabilities

If no partner bears the economic risk of loss for a partnership liability, the liability is a nonrecourse liability of the partnership. The legislative history of the 1984 Act indicates that Congress did not expect the revisions to the regulations under section 752 to make major changes in the manner in which the partners share nonrecourse liabilities, although the regulations could attempt to provide more certainty than presently exists. H.R. Rep. No. 861, 98th Cong., 2d Sess. 869 (1984).

Under the temporary regulations, as in the existing regulations, the partners generally share nonrecourse liabilities in accordance with their interests in partnership profits. The temporary regulations do, however, require that the nonrecourse liabilities of a partnership be allocated among the partners first to reflect the partners' shares of (1) any partnership minimum gain (within the meaning of § 1.704–1T(b)(4)(iv)(*f*), and (2) any tax gain that would be allocated to the partners under section 704(c) (or in the same manner as under section 704(c) to reflect a revaluation of partnership property under § 1.704–1(b)(2)(iv) (*f*) or (*r*)) if the partnership disposed of (in a taxable transaction) all partnership property subject to one or more nonrecourse liabilities of the partnership in full satisfaction of such liabilities and for no other consideration ("section 704(c) minimum gain"). To the extent that partnership nonrecourse liabilities exceed the portion of such liabilities allocated to the partners in the manner described in the preceding sentence, such excess nonrecourse liabilities are allocated among the partners in accordance with the general rule, that is, in proportion to the partners' interest in partnership profits. For this purpose, the partnership agreement may specify the partners' interests in partnership profits as long as the interests so specified are reasonably consistent with allocations (which have substantial economic effect) of some significant item of partnership income or gain among the partners. In any case in which all items of partnership income, gain, loss, and deduction are allocated equally between the partners, they will share the nonrecourse liabilities of the partnership equally (unless there is section 704(c) minimum gain) because they will share partnership profits and partnership minimum gain equally.

The allocation of nonrecourse liabilities among the partners in accordance with their shares of partnership minimum gain and section 704(c) minimum gain coordinates the treatment of nonrecourse liabilities under section 752 with the treatment of nonrecourse liabilities under the section 704(b) regulations. As in the case of recourse liabilities, this reflects the fact that one of the principal purposes for including partnership liabilities in the bases of the partners' interests in the partnership is to support the deductions that will be claimed by the partners for the items attributable to those liabilities. The modifications made by the temporary regulations to the rules governing the allocation of nonrecourse liabilities have also been designed (1) to reflect more accurately the manner in which the partners will share the partnership income that is used to discharge nonrecourse liabilities, and (2) to provide more certainty regarding the application of section 752 to nonrecourse debt.

Amendments to Rules Governing the Allocation of Deductions Attributable to Nonrecourse Debt Under Section 704(b)

This document amends and restates as new temporary regulation § 1.704–1T the rules governing the allocation of deductions attributable to nonrecourse debt (the "nonrecourse debt regulations"), and makes certain conforming changes to the existing regulations under section 704(b). The temporary regulation adopts the same definition of nonrecourse liability for purposes of section 704(b) as is included in the temporary regulations under section 752. In so doing, the regulation determines whether a partner bears the economic risk of loss for an otherwise nonrecourse liability in accordance with the temporary regulations under section 752. Among other consequences, the temporary regulation thereby extends the special rules under section 704(b) applicable to nonrecourse loans for which a partner bears the economic risk of loss to nonrecourse loans for which a person related to a partner bears the economic risk of loss.

The temporary regulation also modifies the treatment of partnership minimum gain by requiring that items of income and gain be allocated to the partners at any time there is a net decrease in partnership minimum gain allocable to the disposition of partnership property subject to one or more nonrecourse liabilities of the partnership. In contrast to the rule in the existing regulations, the minimum gain chargeback set forth in the temporary regulation is mandatory—that is, the rule applies whether or not the partnership agreement includes a minimum gain chargeback provision or a deficit restoration obligation. The modifications to the minimum gain chargeback rules are considered necessary to take account of the fact that an allocation of minimum gain (like an allocation of nonrecourse deductions) cannot have economic effect because no partner can receive an economic benefit corresponding to such gain.

In addition, the Service has received comments recommending, among other things, that (1) the partners' shares of partnership minimum gain take into account distributions of proceeds of nonrecourse loans to the extent that such nonrecourse loans have caused an increase in partnership minimum gain, (2) the Service provide additional guidance on the application of the nonrecourse debt regulations to tiered partnerships, and (3) the Service provide additional guidance regarding the rules applicable to nonrecourse loans for which a partner bears the economic risk of loss. The amendments made by this document to the nonrecourse debt regulations adopt provisions responding to these comments.

Thus, under the temporary regulation, minimum gain attributable to proceeds of a nonrecourse borrowing that are distributed to the partners is allocated to the partners who received those distributions. With respect to tiered partnerships, the temporary regulation contains rules describing how increases and decreases in the partnership minimum gain of the lower-tier (or subsidiary) partnership will be taken into account in determining the increases and decreases in the partnership minimum gain of the upper-tier (or parent) partnership. These rules

generally are designed to produce the same consequences for the upper-tier partnership as would have resulted if it had held a direct interest in the lower-tier partnership's assets and liabilities.

In the case of nonrecourse loans for which a partner bears the economic risk of loss ("partner nonrecourse debts"), the temporary regulation includes a series of rules clarifying the treatment of such loans. In general, any item of loss, deduction, or section 705(a)(2)(B) expenditure that is attributable to a partner nonrecourse debt (as determined under rules similar to those governing nonrecourse deductions) must be allocated to the partner who bears the economic risk of loss for that debt. Correspondingly, any decrease in the minimum gain attributable to a partner nonrecourse debt may require items of income and gain to be allocated to the lending partner in accordance with rules similar to the general nonrecourse liability minimum gain chargeback rules.

The Service is continuing to consider other comments submitted on the nonrecourse debt regulations and solicits comment on the appropriateness of the amendments to those regulations made by this document and the need for additional changes.

Special Analyses

These rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. A general notice of proposed rulemaking is not required by 5 U.S.C. 553 for interpretative regulations. Therefore, these rules do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6) and a Regulatory Flexibility Analysis is not required.

List of Subjects

26 CFR 1.701–1 through 1.771–1

Income taxes, Partnerships.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Parts 1 and 602 are amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1986

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

Authority: 26 U.S.C. 7805. * * *

§ 1.752–1 [Removed]

Par. 2. Section 1.752–1 is removed.

Par. 3. Sections 1.752–0T, 1.752–1T, 1.752–2T, 1.752–3T, and 1.752–4T are added in the appropriate place to read as follows:

§ 1.752–0T Table of contents (temporary).

This section lists the captions that appear in the temporary regulations under section 752.

§ 1.752–1T Treatment of partnership liabilities—General rules (temporary).

(a) General principles.
(1) Recourse liabilities.
(2) Nonrecourse liabilities.
(b) Increase in partner's share of liabilities.
(c) Decrease in partner's share of liabilities.
(d) Partner's share of recourse liabilities.
(1) In general.
(2) Recourse liability defined.
(3) Economic risk of loss.
(i) In general.
(ii) Obligation to make payment or contribution in connection with constructive liquidation.
(A) Obligation to make net payment to creditor or other person with respect to partnership liability.
(*1*) In general.
(*2*) Obligation to make payment.
(*i*) In general.
(*ii*) Providing money or other property for use as security for partnership liability.
(B) Obligation to make net contribution with respect to partnership liability.
(*1*) In general.
(*2*) Obligation to contribute.
(*3*) Net contribution defined.
(*4*) Outstanding partnership indebtedness with respect to partnership liability.
(*i*) In general.
(*ii*) Liability for which creditor's right to repayment is limited.
(C) Reimbursement.
(D) Obligations recognized for purposes of this paragraph (d)(3).
(*1*) In general.
(*2*) Deemed satisfaction.
(*3*) Exception where plan to circumvent or avoid obligation exists.
(E) Time of satisfaction.
(*1*) In general.
(*2*) Obligations that are not required to be satisfied within prescribed time period.
(*i*) In general.
(*ii*) Value of obligation.
(*3*) Liquidation of partner's interest.
(*i*) In general.
(*ii*) Delayed liquidations.
(*iii*) Partnership liquidation defined.
(*4*) Satisfaction of obligation with promissory note.
(*5*) Obligations imposed by law.
(F) Obligations limited to value of property.
(*1*) In general.
(*2*) Partnership interests.
(*3*) Promissory notes.
(G) Meaning of certain terms.
(iii) Constructive liquidation.
(A) In general.
(B) Partnership assets.
(iv) Arrangements tantamount to a guarantee.
(v) Nonrecourse debt with respect to which a partner has assumed an obligation to pay interest.
(A) In general.
(B) Present value.
(vi) Tiered partnerships.
(vii) De minimis rule.
(e) Partner's share of nonrecourse liabilities.
(1) In general.
(2) Nonrecourse liability defined.
(3) Meaning of certain terms.
(i) Partner's share of partnership minimum gain.
(ii) Partner's proportionate share of excess nonrecourse liabilities.
(A) In general.
(B) Excess nonrecourse liabilities.
(C) Interest in partnership profits.
(f) Assumption of liability.
(1) In general.
(2) Effect of assumption.
(i) Assumption by partnership.
(ii) Assumption by partner.
(g) Liability defined.
(h) Related person.
(1) In general.
(2) Modifications to sections 267(b) and 707(b)(1).
(3) Person related to more than one partner.
(i) In general.
(ii) Percentage of related ownership.
(4) Related partners.
(i) [Reserved.]
(j) Special rules.
(1) Tiered partnerships.
(2) Liabilities which are part recourse and part nonrecourse.
(3) Increase and decrease in share of liabilities resulting from same transaction.
(4) Time of determination.
(5) Limitation.
(k) Examples.

§ 1.752–2T Liabilities to which contributed or distributed property is subject (temporary).

(a) In general.
(b) Examples.

§ 1.752–3T Sale or exchange of partnership interest (temporary).

§ 1.752–4T Effective dates and transition rules (temporary).

(a) In general.
(b) Partner loans and guarantees.
(c) Election.
(d) Coordination with amendments to section 704(b) regulations.
(e) Cross reference.

§ 1.752–1T Treatment of partnership liabilities—General rules (temporary).

(a) *General principles.* Under section 752, a partner's share of the liabilities of the partnership is reflected in the adjusted basis of the partner's interest in the partnership by treating any increase in the partner's share of those liabilities as a contribution of money to the partnership by the partner and any decrease in the partner's share of those liabilities as a distribution of money to the partner by the partnership. Section 752 also treats the assumption of a partnership liability by a partner as a contribution of cash by the partner, and

the assumption of a partner's liability by the partnership as a distribution of cash to the partner. This section provides general rules governing the application of section 752, including rules for determining a partner's share of the liabilities of the partnership. See paragraph (g) of this section for the definition of liability. The determination of a partner's share of a partnership liability under the rules of this section depends on whether that liability is a recourse or nonrecourse liability.

(1) *Recourse liabilities.* (i) Under this section, a partnership liability is a recourse liability to the extent that any partner bears the economic risk of loss for that liability, and a partner's share of any recourse liability of the partnership equals the portion, if any, of the economic risk of loss for such liability that is borne by such partner. See paragraph (d) (1) and (2) of this section for rules relating to recourse liabilities of a partnership and paragraph (d)(3) of this section for the meaning of economic risk of loss.

(ii) Generally, a partner bears the economic risk of loss for a partnership liability to the extent that the partner (or person related to the partner) would be obligated to make a payment to the creditor or a contribution to the partnership with respect to a partnership liability (and would not be entitled to be reimbursed for such contribution or payment by another partner, a person related to another partner, or the partnership) if all of the partnership's liabilities were due and payable in full, all of the partnership's assets (including money) were worthless, the partnership disposed of all of its assets in a fully taxable transaction for no consideration (other than relief from certain liabilities), and the partnership allocated its items of income, gain, loss, deduction, and credit for the year among the partners and liquidated the partners' interests in the partnership. See paragraph (d)(3)(iii) of this section (relating to the meaning of the term "constructive liquidation") for the events that are deemed to occur for purposes of determining whether a partner bears the economic risk of loss for a partnership liability, paragraph (d)(3) (iv), (v), (vi), and (vii) for special rules relating to the definition of economic risk of loss, and paragraph (h) of this section for the definition of related person.

(iii) Under this approach, a partner bears the economic risk of loss for a partnership liability to the extent that the partner (or a person related to the partner) would bear the economic burden of discharging the obligation represented by that liability if the partnership were unable to do so. For example, equal partners in a general partnership will share the economic risk of loss for any partnership recourse debt equally because they will share any economic burden corresponding to that debt equally. Similarly, in the case of a limited partnership, a limited partner generally will not bear the economic risk of loss for any partnership liability because a limited a partner generally has no obligation to contribute additional capital to the partnership. However, if a partner (or a person related to the partner)—whether such partner is a limited partner or a general partner—could be required to make a contribution to the partnership or a payment to the creditor in order to discharge a partnership liability (or to reimburse another partner (or a person related to another partner) for any such contribution or payment), the partner may be considered to bear the economic risk of loss for such liability under paragraph (d)(3) of this section. Thus, the determination of whether a partner bears the economic risk of loss for a partnership liability takes into account the manner in which the partners have agreed to share economic losses relating to the liabilities of the partnership under all the arrangements among the partners, persons related to the partners, and the partnership. For example, even though a partnership creditor may be entitled to seek repayment only from the general partner of a limited partnership, the limited partners, and not the general partner, may bear the economic risk of loss for the liability to the extent that the limited partners are obligated under the partnership agreement or otherwise to discharge the partnership's obligation to the creditor. Also, if the partnership maintains capital accounts for its partners in accordance with § 1.704–1(b)(2)(iv) and the partners are obligated to restore any deficit balances in their capital accounts (as set forth in § 1.704–1(b)(2)(ii)(*3*)), the manner in which the partners will share the economic risk of loss for any partnership liability will be affected by their capital account balances.

(iv) The economic risk of loss analysis employed in this section generally corresponds to, and further develops the economic risk of loss analysis employed in the regulations under section 704(b). The coordination of these two sections reflects the fact that one of the principal purposes for including partnership liabilities in the bases of the partners' interests in the partnership is to support the deductions that will be claimed by the partners for the items attributable to those liabilities.

(2) *Nonrecourse liabilities.* (i) If no partner bears the economic risk of loss for a partnership liability, the liability is a nonrecourse liability of the partnership. See paragraph (e) of this section for rules relating to nonrecourse liabilities of a partnership. Under this section, the partners generally share nonrecourse liabilities in accordance with their interests in partnership profits. This section does, however, require that the nonrecourse liabilities of a partnership be allocated among the partners first to reflect the partners' shares of any partnership minimum gain (within the meaning of § 1.704–1T(b)(4)(iv)(*f*)) and any tax gain that would be allocated to the partners under section 704(c) (or in the same manner as under section 704(c) to reflect a revaluation of partnership property under § 1.704–1(b)(2)(iv) (*f*) or (*r*)) if the partnership disposed of (in a taxable transaction) all partnership property subject to one or more nonrecourse liabilities of the partnership in full satisfaction of such liabilities and for no other consideration ("section 704(c) minimum gain"). To the extent that partnership nonrecourse liabilities exceed the portion of such liabilities allocated to the partners in the manner described in the preceding sentence, such excess nonrecourse liabilities are allocated among the partners in accordance with the general rule, that is, in proportion to the partners' interests in partnership profits. For this purpose, the partnership agreement may specify the partners' interests in partnership profits as long as the interests so specified are reasonably consistent with allocations (which have substantial economic effect) of some significant item of partnership income or gain among the partners. In any case in which all items of partnership income, gain, loss, and deduction are allocated equally among the partners, they will share the nonrecourse liabilities of the partnership equally (unless there is section 704(c) minimum gain) because they will share partnership profits and partnership minimum gain equally.

(ii) The allocation of nonrecourse liabilities among the partners in accordance with their shares of partnership minimum gain and section 704(c) minimum gain coordinates the treatment of nonrecourse liabilities under this section with the treatment of nonrecourse liabilities under the section 704(b) regulations. As in the case of recourse liabilities, this reflects the fact that one of the principal purposes for including partnership liabilities in the

bases of the partners' interests in the partnership is to support the deductions that will be claimed by the partners for the items attributable to those liabilities.

(iii) The following example illustrates the application of the rules of this section to nonrecourse liabilities:

Example. The AB partnership purchases depreciable property for a $1,000 nonrecourse purchase money note that is a nonrecourse liability under the rules of this section. Assume that this is the only nonrecourse liability of the partnership, and that no principal payments are due on the purchase money note for a year. The partnership agreement allocates all depreciation deductions for such property to A. In addition, the partnership agreement provides that, for purposes of allocating the nonrecourse liability between the partners under the rules of this section, the partners' interests in partnership profits shall equal 50 percent each, which is reasonably consistent with allocations (which have substantial economic effect) of some significant item of partnership income and gain. Immediately after purchasing the depreciable property, the partners share the nonrecourse liability equally because they are treated as though they have equal interests in partnership profits. Under paragraph (b) of this section, A and B are each treated as if they contributed $500 to the partnership to reflect each partner's increase in his or her share of partnership liabilities (from $0 to $500). The minimum gain with respect to an item of partnership property subject to a nonrecourse liability equals the amount of gain that would be recognized if the partnership disposed of the property in full satisfaction of the nonrecourse liability and for no other consideration. Therefore, if the partnership claims a depreciation deduction of $200 for the depreciable property in the year it acquires that property, partnership minimum gain for the year will increase by $200 (the excess of the $1,000 nonrecourse liability over the $800 adjusted tax basis of the property). See § 1.704–1T(b)(4)(iv)(*c*). Assuming that the allocation of all of the $200 depreciation deduction to A is valid under section 704 (b), A will have a $200 share of partnership minimum gain at the end of that year because the depreciation deduction is treated as a nonrecourse deduction. See § 1.704–1T(b)(4)(iv) (b) and (*f*). Accordingly, at the end of that year, A will be allocated $200 of the nonrecourse liability to match A's share of partnership minimum gain and the remaining $800 of the nonrecourse liability will be allocated equally between A and B ($400 each). As a result, A's share of partnership liabilities increases by $100 (from $500 to $600) and B's share of partnership liabilities decreases by $100 (from $500 to $400). Consequently, A is treated under paragraph (b) of this section as if A contributed an additional $100 to the partnership, and B is treated under paragraph (c) of this section as if B received a distribution of $100 from the partnership.

(b) *Increase in partner's share of liabilities.* Any increase in a partner's share of the liabilities of the partnership, or any increase in a partner's individual liabilities by reason of the partner's assumption of liabilities of the partnership, shall be treated as a contribution of money by that partner to the partnership. See example (1) of paragraph (k) of this section.

(c) *Decrease in partner's share of liabilities.* Any decrease in a partner's share of the liabilities of the partnership, or any decrease in a partner's individual liabilities by reason of the assumption by the partnership of the individual liabilities of such partner, shall be treated as a distribution of money by the partnership to that partner. See example (1) of paragraph (k) of this section.

(d) *Partner's share of recourse liabilities*—(1) *In general.* A partner's share of the recourse liabilities of the partnership equals that portion of the recourse liabilities of the partnership for which such partner bears the economic risk of loss (within the meaning of paragraph (d)(3) of this section).

(2) *Recourse liability defined.* For purposes of this section, a partnership liability is a recourse liability of the partnership to the extent, but only to the extent, that one or more partners bear the economic risk of loss (within the meaning of paragraph (d)(3) of this section) for such liability.

(3) *Economic risk of loss*—(i) *In general.* Except as otherwise provided in this paragraph (d)(3), a partner bears the economic risk of loss for a liability of the partnership at any time to the extent, but only to the extent, that either—

(A) The partner would be obligated to make—

(*1*) A net payment to a creditor or other person with respect to such liability; or

(*2*) A net contribution to the partnership with respect to such liability;

if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) at that time; or

(B) The partner (or a person related to such partner) is the creditor with respect to such liability (*i.e.*, the liability represents a debt owed to such partner or related person) and, but for this paragraph (d)(3)(i)(B), such liability would be a nonrecourse liability of the partnership (within the meaning of paragraph (e)(2) of this section).

See examples (3) through (18) of paragraph (k) of this section. See paragraph (d)(3)(ii) of this section for rules regarding the determination of a partner's obligation to make a net payment to a creditor or other person or a net contribution to the partnership with respect to a partnership liability. For purposes of subdivision (B) of this paragraph (d)(3)(i), if a liability of the partnership that is owed to a partner or a person related to a partner includes or reflects an obligation owed to another person to which property owned by the partnership is subject (generally known as a "wrapped indebtedness"), then such other person, and not such partner or related person, shall be treated as the person to whom the portion of the partnership liability corresponding to the wrapped indebtedness is owed. See example (19) of paragraph (k) of this section. If the aggregate amount of the economic risk of loss that all partners are determined to bear with respect to a partnership liability (or portion thereof) under the first sentence of this paragraph (d)(3)(i) exceeds the amount of such liability (or portion thereof), then the economic risk of loss borne by each partner with respect to such liability shall equal the amount determined by multiplying the amount of such liability (or portion thereof) by the fraction obtained by dividing the amount of the economic risk of loss that such partner is determined to bear with respect to that liability (or portion thereof) under the first sentence of this paragraph (d)(3)(i) by the sum of such amounts for all partners. See example (9)(iv) of paragraph (k) of this section.

(ii) *Obligation to make payment or contribution in connection with constructive liquidation*—(A) *Obligation to make net payment to creditor or other person with respect to partnership liability*—(*1*) *In general.* Except as otherwise provided in this paragraph (d)(3)(ii), the net payment that a partner would be obligated to make to a creditor or other person with respect to a partnership liability if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) equals the excess (if any) of—

(*i*) The sum of the payments that such partner and any persons related to such partner would be obligated to make to a creditor or other person with respect to such liability at the time of such liquidation; over

(*ii*) The amount of any reimbursements (within the meaning of paragraph (d)(3)(ii)(C) of this section) that such partner and any persons related to such partner would be entitled to receive with respect to any such payments.

See examples (4), (9)(iii), (11), (12) (ii) and (iii), (14), (17), and (18)(ii) of paragraph (k) of this section.

(*2*) *Obligation to make payment*—(*i*) *In general.* For purposes of this paragraph (d)(3), a partner, a person related to a partner, or the partnership has an obligation to make a payment to

a creditor or other person with respect to a partnership liability at any time to the extent, but only to the extent, that the partnership, such partner, or such related person is obligated (whether by agreement or operation of law) at such time to make—

(*A*) A payment to the creditor in full or partial satisfaction of such liability; or

(*B*) A payment to another partner, a person related to another partner, or the partnership with respect to any payment made by any such other person pursuant to an obligation of such other person to make a payment described in subdivision (*A*) or (*B*) of this paragraph (d)(3)(ii)(A)(*2*)(*i*).

Any obligation of a partner that constitutes an obligation to make a contribution to the partnership (within the meaning of paragraph (d)(3)(ii)(B)(*2*) of this section) shall not be treated as an obligation to make a payment to a creditor or other person with respect to a partnership liability. See paragraph (d)(3)(ii)(E) of this section for rules regarding the time in which an obligation to make a payment to a creditor or other person must be satisfied.

(*ii*) *Providing money or other property for use as security for partnership liability.* For purposes of this paragraph (d)(3), if—

(*A*) A partner contributes or otherwise provides money or other property (other than a promissory note of which such partner is the maker that is not readily tradeable on an established securities market) to the partnership; and

(*B*) Such money or other property is used in the partnership's activities solely to secure the payment of a partnership liability;

then the partnership's obligation to use such money or other property to discharge such liability shall be treated as an obligation of such partner to make a payment to a creditor or other person with respect to that liability. For purposes of the preceding sentence, money or other property contributed to the partnership that is described in subdivision (*A*) of this paragraph (d)(3)(ii)(A)(*2*)(*ii*) and that is used to secure the payment of a partnership liability is presumed to be used in the partnership's activities solely to secure the payment of a partnership liability if substantially all of the items of income, gain, loss, and deduction attributable to such money or other property are allocated to the contributing partner and the portion of such items allocated to the contributing partner is greater than such partner's share of any other significant item of partnership income, gain, loss, or deduction. In addition, if a partner contributes or otherwise provides money or other property to the partnership and the partnership uses such money or other property to acquire other property that is used solely in the partnership's activities to secure the payment of a partnership liability, such other property shall be treated as property contributed or otherwise provided to the partnership by such partner for purposes of this paragraph (d)(3)(ii)(A)(*2*)(*ii*). For example, if a partner with a 50 percent interest in partnership income, gain, loss, and deduction contributes money to the partnership, such money is used to purchase government securities that are pledged to secure the payment of a partnership liability, and such partner is allocated 99 percent of the income from such securities, then the partnership's obligation to use the securities to discharge a partnership liability is treated as an obligation of such partner to make a payment to a creditor or other person with respect to that liability. See example (12)(ii) of paragraph (k) of this section.

(B) *Obligation to make net contribution with respect to partnership liability*—(*1*) *In general.* Except as otherwise provided in this paragraph (d)(3)(ii), the net contribution that a partner would be obligated to make to the partnership with respect to a partnership liability if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) equals the amount determined by multiplying the net contribution that such partner would be obligated to make to the partnership at the time of such liquidation (within the meaning of paragraph (d)(3)(ii)(B)(*3*) of this section) by the fraction obtained by dividing—

(*i*) The outstanding partnership indebtedness (within the meaning of paragraph (d)(3)(ii)(B)(*4*) of this section) with respect to that liability at the time of such liquidation; by

(*ii*) The sum of the net contributions that all partners would be obligated to make to the partnership at the time of such liquidation.

See examples (6), (7), (8), (9) (ii) and (iii), (10)(ii), (12)(iv), (13) (ii) and (iii), and (15)(iv) of paragraph (k) of this section.

(*2*) *Obligation to contribute.* Except as otherwise provided in this paragraph (d)(3), a partner has an obligation to make a contribution to the partnership at any time to the extent, but only to the extent, of the sum of—

(*i*) The outstanding principal balance of any promissory note of which such partner is the maker that is owned by the partnership and was contributed to the partnership by such partner (other than a promissory note that is readily tradeable on an established securities market at the time of contribution);

(*ii*) The amount of any obligation of such partner that arises under the partnership agreement or by operation of law to make subsequent contributions of money or other property to the partnership (other than pursuant to a promissory note of which such partner is the maker); and

(*iii*) The amount of any obligation of such partner or a person related to such partner to reimburse any partner for a contribution to the partnership that is described in this paragraph (d)(3)(ii)(B)(*2*).

For purposes of this paragraph (d)(3)(ii), if a partner contributes a promissory note to the partnership during a partnership taxable year beginning after December 29, 1988 and the maker of such note is a person related to such partner (within the meaning of paragraph (h) of this section, but without regard to subdivision (4) of that paragraph), then such promissory note shall be treated as a promissory note of which such partner is the maker. See paragraph (d)(3)(ii)(E) of this section for rules regarding the time in which an obligation to make a contribution to the partnership must be satisfied.

(*3*) *Net contribution defined.* For purposes of paragraph (d)(3)(ii)(B)(*1*) of this section, the net contribution that a partner would be obligated to make to the partnership at the time of a constructive liquidation of the partnership equals the aggregate amount of the contributions that such partner would be obligated to make to the partnership if the partnership constructively liquidated at that time, reduced by the aggregate amount of the reimbursements (within the meaning of paragraph (d)(3)(ii)(C) of this section) that such partner or a person related to such partner would be entitled to receive with respect to such contributions. See examples (3)(iii),(5), (6)(iii), (7), and (9)(iii) of paragraph (k) of this section.

(*4*) *Outstanding partnership indebtedness with respect to partnership liability*—(*i*) *In general.* For purposes of paragraph (d)(3)(ii)(B)(*1*) of this section, the outstanding partnership indebtedness with respect to a partnership liability equals the amount of such liability reduced by the sum of—

(*A*) The portion, if any, of such liability that constitutes a liability for which the creditor's right to repayment from the partnership is limited to one or more assets of the partnership (within the meaning of subdivision (*ii*) of this paragraph (d)(3)(ii)(B)(*4*)); and

(*B*) The excess of the sum of the amounts, if any, that are treated under paragraph (d)(3)(ii)(A)(*2*)(*ii*) of this section as obligations of the partners to make payments to a creditor or other person with respect to such liability, over any reimbursements that such partners would be entitled to receive (directly or indirectly) from the partnership with respect to payments made pursuant to those obligations.

The amount described in subdivision (*B*) of this paragraph (d)(3)(ii)(B)(*4*)(*i*) shall not include any amount attributable to any portion of a liability that is described in subdivision (*A*) of this paragraph (d)(3)(ii)(B)(*4*)(*i*). See examples (9)(iii), (12)(iv), and 13(iii) of paragraph (k) of this section.

(*ii*) *Liability for which creditor's right to repayment is limited.* A partnership liability is a liability with respect to which the creditor's right to repayment is limited to one or more assets of the partnership to the extent, but only to the extent, that the outstanding balance of such liability exceeds the aggregate amount that the partners would be obligated to contribute to the partnership to discharge that liability if—

(*A*) The partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section, except that subdivision (A) of that paragraph shall be applied as if all of the partnership's assets (including any money or other property that is described in paragraph (d)(3)(ii)(A)(*2*)(*ii*) of this section) were worthless); and

(*B*) The partners did not discharge their obligations, if any, to make payments to a creditor or other person with respect to such liability (within the meaning of paragraph (d)(3)(ii)(A)(*2*) of this section).

See example (13)(ii) of paragraph (k) of this section. For example, if an entity that is treated as a partnership for federal income tax purposes is organized and operated under a local law which provides that none of the members of that entity is liable for its debts and other obligations, then all the liabilities of that entity will generally constitute liabilities for which the creditor's right to repayment is limited to one or more assets of the partnership because the members of that entity are not required to make contributions to the entity to discharge its liabilities.

(C) *Reimbursement.* Except as otherwise provided in this paragraph (d)(3)(ii), if a partner or a person related to a partner is obligated to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership, such partner or related person is entitled to be reimbursed for any payment or contribution made pursuant to such obligation to the extent, but only to the extent, that—

(*1*) Another partner, a person related to another partner, or the partnership would be obligated to make a payment to such partner or related person in the event that such partner or related person makes a payment or contribution pursuant to such obligation; and

(*2*) The reimbursing payment that such other person would be obligated to make is recognized under this paragraph (d)(3)(ii) as an obligation to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership (or in the case of an obligation of the partnership to reimburse a partner for a contribution to the partnership, such obligation would be recognized as an obligation to make a contribution to the partnership if the partnership were a partner).

See examples (4), (7), (11), and (15)(iv) of paragraph (k) of this section.

(D) *Obligations recognized for purposes of this paragraph (d)(3)*—(*1*) *In general.* For purposes of this paragraph (d)(3)(ii)—

(*i*) A partner, person related to a partner, or the partnership has an obligation to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership to the extent that any person has a legally enforceable right to require such partner, related person, or partnership to make such payment or contribution;

(*ii*) The determination of whether a partner, person related to a partner, or the partnership would have an obligation to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership if the partnership constructively liquidated shall be based on all the facts and circumstances at the time of such determination; and

(*iii*) Any obligation to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership that would arise if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) shall be recognized only to the extent that the existence and amount of such obligation would be determinable with reasonable certainty and such obligation would not otherwise be subject to contingencies that would make it unlikely that the obligation would ever be discharged.

(*2*) *Deemed satisfaction.* Except to the extent that an obligation is not recognized under this paragraph (d)(3)(ii), the rules of this paragraph (d)(3)(ii) shall be applied by assuming that any partner, person related to a partner, or partnership that would be obligated to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership if the partnership constructively liquidated actually discharges such obligation at the time of the constructive liquidation. See examples (6)(iii), (10)(iii), (11), and (15)(iii) of paragraph (k) of this section. Thus, for example, a partner is generally assumed to discharge an obligation to make a contribution to the partnership even if such partner's net worth is less than the amount of the obligation. To the extent that the obligation of a partner to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership is not recognized under this paragraph (d)(3)(ii), this paragraph (d)(3)(ii) shall be applied as if such obligation did not exist. See example (11)(ii) and (15)(iv) of paragraph (k) of this section.

(*3*) *Exception where plan to circumvent or avoid obligation exists.* An obligation of a partner to make a net payment to a creditor or other person or a net contribution to the partnership with respect to a partnership liability shall not be recognized for purposes of this section to the extent that the facts and circumstances indicate a plan to circumvent or avoid such obligation. See examples (7), (9) (iv) and (v), and (11) of paragraph (k) of this section.

(E) *Time of satisfaction*—(*1*) *In general.* Except as otherwise provided in paragraph (d)(3)(ii)(E)(*2*) of this section—

(*i*) An obligation to make a payment to a creditor or other person with respect to a partnership liability shall be recognized for purposes of applying this paragraph (d)(3)(ii) only to the extent that such obligation is required to be satisfied within a reasonable period of time after such partnership liability becomes due and payable; and

(*ii*) An obligation to make a contribution to the partnership shall be recognized for purposes of this paragraph (d)(3)(ii) only to the extent that such obligation must be satisfied by the later of—

(*A*) The end of the partnership taxable year in which the partner's interest in the partnership is liquidated; or

(*B*) 90 days after the date of such liquidation.

(*2*) *Obligations that are not required to be satisfied within prescribed time period*—(*i*) *In general.* Any obligation of a partner, a person related to a partner,

or the partnership to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership that does not meet the requirements of paragraph (d)(3)(ii)(E)(*1*) of this section shall be recognized under this paragraph (d)(3)(ii) for purposes of determining the consequences of a constructive liquidation of the partnership (within the meaning of paragraph (d)(3)(iii) of this section) only to the extent of the value that such obligation would have if the partnership constructively liquidated at the time of such determination.

(*ii*) *Value of obligation.* For purposes of subdivision (*i*) of this paragraph (d)(3)(ii)(E)(*2*), the value of an obligation equals—

(*A*) The outstanding principal balance of such obligation if such obligation bears interest for the period commencing on the date that the partnership liability to which such obligation relates is due and payable (in the case of an obligation that does not meet the requirements of paragraph (d)(3)(ii)(E)(*1*)(*i*) of this section) or the date of the liquidation of the partner's interest in the partnership (in the case of an obligation that does not meet the requirements of paragraph (d)(3)(ii)(E)(*1*)(*ii*) of this section) and ending on the date that the obligation is satisfied, and the rate of interest that such obligation bears (appropriately adjusted for the period of compounding) is equal to or greater than the applicable Federal rate (within the meaning of section 1274(d)) at the time of valuation; or

(*B*) If subdivision (*A*) of this paragraph (d)(3)(ii)(E)(*2*)(*ii*) does not apply to such obligation, the imputed principal amount that such obligation would have under section 1274(b) if the partnership constructively liquidated at the time of valuation.

For purposes of the preceding sentence, the imputed principal amount of an obligation is determined by treating such obligation as a debt instrument to which section 1274 applies (without regard to section 1274(b)(3) and section 1274A) and by assuming for purposes of applying section 1274 that the sale or exchange of property in which such debt instrument was given as consideration occurred at the time of valuation. See examples (13) (ii) and (iii) and (15)(iii) of paragraph (k) of this section.

(*3*) *Liquidation of partner's interest*—(*i*) *In general.* For purposes of this paragraph (d)(3)(ii)(E), the liquidation of a partner's interest in the partnership occurs on the earlier of—

(*A*) The date on which the partnership is liquidated; or

(*B*) The date on which the partner's interest in the partnership is liquidated under § 1.761–1(d).

(*ii*) *Delayed liquidations.* If—

(*A*) A partner's interest in the partnership is not liquidated after the partnership's primary business activities have been discontinued; and

(*B*) The principal purpose for delaying the liquidation of such partner's interest in the partnership is to delay the time at which the partner will be required to satisfy an obligation to make a contribution to the partnership;

any obligation of such partner to make a contribution to the partnership shall be considered to fail the requirements of subdivision (*1*) of this paragraph (d)(3)(ii)(E) and shall be recognized under this paragraph (d)(3)(ii) only to the extent of its value as determined in accordance with subdivision (*2*) of this paragraph (d)(3)(ii)(E).

(*iii*) *Partnership liquidation defined.* For purposes of this paragraph (d)(3)(ii)(E), the liquidation of a partnership occurs on the earlier of (*A*) the date on which the partnership terminates under section 708(b)(1) (A) or (*B*) the date on which the partnership ceases to be a going concern even though the partnership may continue in existence for the purpose of winding up its affairs, paying its debts, and distributing any remaining assets to its partners.

(*4*) *Satisfaction of obligation with promissory note.* For purposes of this paragraph (d)(3)(ii)(E), an obligation is not satisfied by the transfer to the obligee of a promissory note (other than a note that is readily tradeable on an established securities market) of which the obligor (or a person related to the obligor) is the maker.

(*5*) *Obligations imposed by law.* Any obligation imposed on a partner or a person related to a partner by state or local law is deemed to satisfy the requirements of subdivision (*1*) of this paragraph (d)(3)(ii)(E). For example, if a partner would be obligated under state law to make a net contribution to the partnership with respect to a partnership liability if the partnership constructively liquidated, such partner is deemed to be obligated to satisfy such obligation within the time period set forth in subdivision (*1*) of this paragraph (d)(3)(ii)(E).

(F) *Obligations limited to value of property*—(*1*) *In general.* If the obligation of a partner or a person related to a partner to make a payment to a creditor or other person with respect to a partnership liability or the obligation of a partner to make a contribution to the partnership is limited to the fair market value of any property, then the amount of such obligation is determined, for purposes of this paragraph (d)(3)(ii), on the basis of the fair market value of such property as of—

(*i*) The time that the amount of such obligation is determined for purposes of this paragraph (d)(3)(ii) if the fair market value of such property is readily ascertainable (*e.g.*, marketable securities) or such property is property of a type that by its terms increases or decreases in value (*e.g.*, a debt instrument on which principal payments are made during its term); or

(*ii*) If the property is not described in subdivision (*i*) of this paragraph (d)(3)(ii)(F)(*1*), the latest of the time that the liability is incurred, the time that the liability is assumed, or the time of the most recent valuation of such property that is made in connection with such liability.

For example, if a partner pledges marketable securities to a partnership creditor to guarantee the payment of a partnership liability and the partner does not assume any personal liability under the guarantee, then the amount that the partner is considered obligated to pay the creditor for purposes of determining the manner in which the partners share the economic risk of loss for the liability equals the fair market value of the marketable securities at the time of any such determination. Alternatively, if the partner had given the creditor a lien on real property, the amount of the obligation would equal the fair market value of such property as of the latest of the time the liability is incurred, the guarantee is made, or the most recent valuation of such property made in connection with the guarantee (*e.g.*, to assure the creditor that the property continues to represent adequate security for the partnership liability).

(*2*) *Partnership interests.* For purposes of this paragraph (d)(3)(ii), in the case of any obligation to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership, any interest in such partnership shall be deemed to have a fair market value of zero. For example, if a partner pledges such partner's interest in the partnership to a partnership creditor to guarantee the payment of a partnership liability and the partner does not assume any personal liability under the guarantee, the partner is not considered to have any obligation to make a payment to the creditor under the guarantee for purposes of this paragraph (d)(3)(ii) because the partnership interest is deemed to have a fair market value of zero.

(3) *Promissory notes.* For purposes of applying this paragraph (d)(3)(ii)(F) to a partner or a person related to a partner, the term "property" does not include a promissory note (other than a note that is readily tradeable on an established securities market) of which such partner or such related person is the maker.

(G) *Meaning of certain terms.* For purposes of this section, the term "creditor" means the person to whom any liability is owed, and the term "partnership agreement" has the meaning set forth in § 1.761–1 (c).

(iii) *Constructive liquidation*—(A) *In general.* For purposes of this section, if a partnership is deemed to constructively liquidate, the following events are deemed to occur—

(*1*) All of the assets of the partnership (other than property that is described in paragraph (d)(3)(ii)(A)(*2*)(*ii*) of this section) become worthless;

(*2*) All of the liabilities of the partnership (including any wrapped indebtedness described in paragraph (d)(3)(i) of this section) become due and payable in full because of the partnership's failure to make the payments required with respect to such liabilities;

(*3*) The partnership (*i*) transfers in a fully taxable exchange any property described in paragraph (d)(3)(ii)(A)(*2*)(*ii*) of this section to the owner of any liability to which such property is subject in full or partial satisfaction of such liability and (*ii*) disposes of all of its remaining assets in a fully taxable exchange (involving the transfer of any partnership asset subject to a liability to the owner of that liability) for no consideration (other than relief from any liability for which the creditor's right to repayment is limited to one or more assets of the partnership (within the meaning of paragraph (d)(3)(ii)(B)(*4*)(*ii*) of this section), after taking into account the reduction in any such liability that would result from any transfer described in subdivision (*i*) of this paragraph (d)(3)(iii)(A)(*3*)); and

(*4*) The partnership allocates its items of income, gain, loss, deduction, and credit for the partnership taxable year ending on the date of the liquidation among the partners in accordance with the partnership agreement and liquidates the partners' interests in the partnership.

See examples (3)(iii), (5)(ii), (12)(ii), (13)(ii), (16)(ii), (17)(ii), and (18)(ii) of paragraph (k) of this section. For purposes of determining the amount of any liability that is deemed satisfied in connection with any constructive liquidation as a result of a transfer of property that is described in paragraph (d)(3)(iii)(A)(*3*)(*i*) of this section, such property shall be considered to have a value equal to the amount of the obligation to make a payment to a creditor or other person that arises under paragraph (d)(3)(ii)(A)(*2*)(*ii*) of this section with respect to such property, provided that such obligation shall be taken into account only to the extent that it is recognized for purposes of applying paragraph (d)(3)(ii) of this section to such constructive liquidation.

(B) *Partnership assets.* For purposes of this paragraph (d)(3)(iii), the assets of the partnership include all of the money and other property (including contractual rights such as insurance policies) owned by the partnership other than (*1*) the obligation of any partner or person related to any partner to make a contribution to the partnership (within the meaning of paragraph (d)(3)(ii)(B)(*2*) of this section), and (*2*) the obligation of any partner or person related to any partner to make a payment described in paragraph (d)(3)(ii)(A)(*2*)(*i*) of this section to the partnership.

(iv) *Arrangements tantamount to a guarantee.* If one or more partners or persons related to such partners—

(A) Undertake one or more contractural obligations in order to acquire a loan;

(B) Such obligations eliminate substantially all of the risk to the creditor that the partnership will not satisfy its obligations under that loan (assuming that such partners or related persons satisfy their obligations); and

(C) One of the principal purposes of the arrangement is to permit partners other than such partners to include a portion of such liability in the basis of their partnership interests;

then such partners shall be considered to bear the economic risk of loss with respect to such liability in a manner that reflects their relative economic burdens with respect to that liability pursuant to such contractual obligations and no other partner shall be considered to bear the economic risk of loss with respect to such liability. See example (20) of paragraph (k) of this section.

(v) *Nonrecourse debt with respect to which a partner has assumed an obligation to pay interest*—(A) *In general.* For purposes of this section, if one or more partners (or persons related to such partners) would be obligated (whether pursuant to the partnership agreement, by operation of law, or otherwise) to pay more than 20 percent of the total interest that will accrue on any nonrecourse liability of the partnership during the term of such liability (or if the liability has an indefinite term, the expected term of such liability) if the partnership fails to pay such interest, then each such partner's economic risk of loss for such liability shall be increased by an amount equal to the sum of the present values of the remaining interest payments that such partner (or any person related to such partner) would be obligated to make if the partnership fails to make those payments (taking into account any payment that such partner or related person may be required to make pursuant to that obligation only to the extent that such partner or related person would not be entitled to be reimbursed (within the meaning of paragraph (d)(3)(ii)(C) of this section) for such payment). See example (21) of paragraph (k) of this section. An obligation of a partner to pay any portion of the interest that will accrue on a nonrecourse liability of the partnership shall not be treated as an obligation to pay such interest for purposes of this paragraph (d)(3)(v) unless it is reasonable to expect, based on all the facts and circumstances, that the partner would be required to pay substantially all of the interest subject to that obligation if the partnership failed to pay such interest. For example, if a partner guarantees the payment of all of the interest due on an otherwise nonrecourse liability but the lender can only enforce that guarantee by first foreclosing on the property subject to such liability, it generally will not be reasonable to expect that the partner would be required to pay substantially all of the interest subject to that guarantee if the partnership failed to pay such interest unless substantially all of the interest due on such liability is payable at the end of the term of the liability (*e.g.* a liability on which no payments of principal or interest are due until maturity). A partnership liability is a nonrecourse liability of the partnership for purposes of this paragraph (d)(3)(v) only to the extent that such liability would, but for this paragraph (d)(3)(v), be a nonrecourse liability (within the meaning of paragraph (e) of this section) of the partnership.

(B) *Present value.* For purposes of this paragraph (d)(3)(v), the present value of any interest payment with respect to a partnership liability is determined by assuming that such payment will be made when due and by using a discount rate equal to—

(*1*) The rate at which such interest payment accrues on the liability; or

(*2*) The applicable Federal rate, compounded semiannually, if the liability is (*A*) a debt instrument to which section 483 applies and there is

total unstated interest on such debt instrument, or (*B*) a debt instrument to which section 1274 applies and the issue price of such debt instrument is equal to the imputed principal amount of such debt instrument.

(vi) *Tiered partnerships.* For purposes of this section, if a partnership (the "upper-tier partnership") owns (directly or indirectly through one or more partnerships) an interest in another partnership (the "subsidiary partnership"), the upper-tier partnership bears the economic risk of loss for any liability of the subsidiary partnership to the extent of the sum of—

(A) The economic risk of loss (within the meaning of this paragraph (d)(3), but without regard to this subdivision (vi) of that paragraph) that the upper-tier partnership bears with respect to such liability; and

(B) The amount of the economic risk of loss (within the meaning of this paragraph (d)(3)) that the upper-tier partnership's partners would bear for any portion of such liability with respect to which the upper-tier partnership does not otherwise bear the economic risk of loss if the subsidiary partnership's liabilities constituted liabilities of the upper-tier partnership.

(vii) *De minimis rule.* If a partner would, but for this paragraph (d)(3)(vii), bear the economic risk of loss under paragraph (d)(3)(i)(B) of this section for a partnership liability for a loan from such partner or a person related to such partner, then such partner shall not be considered to bear the economic risk of loss for that liability if—

(A) The partner's interest (including the interest of any person related to such partner) in each item of partnership income, gain, loss deduction, or credit is 10 percent or less; and

(B) Such loan constitutes qualified nonrecourse financing within the meaning of section 465(b)(6).

(e) *Partner's share of nonrecourse liabilities*—(1) *In general.* A partner's share of the nonrecourse liabilities of a partnership shall equal the sum of—

(i) The partner's share of partnership minimum gain (within the meaning of paragraph (e)(3)(i) of this section);

(ii) The amount of any taxable gain that would be allocated to the partner under section 704(c), or in the same manner as under section 704(c) in connection with a revaluation of partnership property pursuant to § 1.704–1(b)(2)(iv) (*f*) or (*r*) (see §§ 1.704–1(b)(2)(iv)(*f*)(*4*), 1.704–1(b)(4)(i)), if the partnership disposed of (in a taxable transaction) all partnership property subject to one or more nonrecourse liabilities of the partnership in full satisfaction of such liabilities and for no other consideration; and

(iii) The partner's proportionate share of the excess nonrecourse liabilities of the partnership (within the meaning of paragraph (e)(3)(ii) of this section).

See examples (13)(iv), (16)(ii), (17)(iii), (19)(ii), (22) and (23) of paragraph (k) of this section. For purposes of subdivision (ii) of this paragraph (e)(1), the amount of taxable gain that would be recognized by the partnership if it disposed of an item of partnership property subject to one or more nonrecourse liabilities of the partnership in full satisfaction of such liabilities shall be computed by taking into account only the portion of the adjusted tax basis of such property that is allocated to nonrecourse liabilities of the partnership under the principles of § 1.704–1T(b)(4)(iv)(*c*) (*1*) and (*2*).

(2) *Nonrecourse liability defined.* For purposes of this section, a liability of a partnership is a nonrecourse liability of the partnership to the extent, but only to the extent, that no partner bears the economic risk of loss (within the meaning of paragraph (d)(3) of this section) for such liability.

(3) *Meaning of certain terms*—(i) *Partner's share of partnership minimum gain.* A partner's share of partnership minimum gain shall be determined in accordance with the rules of § 1.704–1T(b)(4)(iv)(*f*), except that at any time it is necessary to determine a partner's share of partnership liabilities, such partner's share of partnership minimum gain shall be computed as if the partnership taxable year had ended immediately prior to such determination. For purposes of section 752 and the regulations thereunder, any increase in a partner's share of partnership minimum gain shall be deemed to occur immediately before the event that caused such increase.

(ii) *Partner's proportionate share of excess nonrecourse liabilities*—(A) *In general.* A partner's proportionate share of the excess nonrecourse liabilities of the partnership equals the amount determined by multiplying the partner's percentage interest in partnership profits by the excess nonrecourse liabilities of the partnership.

(B) *Excess nonrecourse liabilities.* The excess nonrecourse liabilities of the partnership equal the excess of—

(*1*) The aggregate amount of the nonrecourse liabilities of the partnership; over

(*2*) The aggregate amount of the nonrecourse liabilities of the partnership that are allocable to the partners under paragraph (e)(1) (i) and (ii) of this section.

(C) *Interest in partnership profits.* For purposes of this paragraph (e), the partners' interests in partnership profits shall be determined by taking into account all facts and circumstances relating to the economic arrangement of the partners. However, if—

(*1*) The partnership agreement specifies the partners' interests in partnership profits for purposes of determining such partners' shares of the nonrecourse liabilities of the partnership; and

(*2*) The partners' interests in partnership profits (as specified in the partnership agreement) are reasonably consistent with allocations (which have substantial economic effect under § 1.704–1(b)) of some significant item of partnership income or gain among such partners;

then the partners' interests in partnership profits shall, for the purposes of this paragraph (e), be deemed to be as specified in the partnership agreement. See example (22) (iii) of paragraph (k) of this section.

(f) *Assumption of liability*—(1) *In general.* Except as otherwise provided in § 1.752–2T, for purposes of section 752 and the regulations thereunder, a person is considered to assume a liability to the extent, but only to the extent, that as a result of the assumption—

(i) The assuming person is subjected to personal liability with respect to such liability; and

(ii) In the case of any assumption of a partnership liability by a partner, the person to whom such liability is owed is aware of the assumption and can directly enforce the partner's obligation with respect to such liability, and no other partner or person related to another partner would bear the economic risk of loss for such liability (within the meaning of paragraph (d)(3) of this section) immediately after the assumption if such liability were treated as a partnership liability.

(2) *Effect of assumption*—(i) *Assumption by partnership.* If a partnership assumes a liability of a partner, such liability shall thereafter be treated as a liability of the partnership, and not the partner, for purposes of section 752 and the regulations thereunder.

(ii) *Assumption by partner.* If a partner assumes a liability of the partnership, such liability shall thereafter be treated as a liability of the partner, and not the partnership, for purposes of section 752 and the regulations thereunder.

(g) *Liability defined.* Except as otherwise provided in the regulations under section 752, an obligation is a

liability of the obligor for purposes of section 752 and the regulations thereunder to the extent, but only to the extent, that incurring or holding such obligation gives rise to—

(1) The creation of, or an increase in, the basis of any property owned by the obligor (including cash attributable to borrowings);

(2) A deduction that is taken into account in computing the taxable income of the obligor; or

(3) An expenditure that is not deductible in computing the obligor's taxable income and is not properly chargeable to capital.

See examples (2) and (3)(ii) of paragraph (k) of this section.

(h) *Related person*—(1) *In general.* Except as otherwise provided in this paragraph (h), a person is related to a partner for purposes of this section if and only if such person and the partner bear a relationship to each other that is specified in section 267(b) (without modification by section 267(e)(1)) or section 707(b)(1), taking into account the modifications made by paragraph (h)(2) of this section.

(2) *Modifications to sections 267(b) and 707(b)(1).* For purposes of this section, sections 267(b) and 707(b)(1) shall be applied by—

(i) Substituting "80 percent or more" for "more than 50 percent" each place it appears in such sections;

(ii) Excluding brothers and sisters from the members of a person's family; and

(iii) Disregarding section 267(f)(1)(A).

(3) *Person related to more than one partner*—(i) *In general.* For purposes of this section, if a person is related to more than one partner—

(A) Any obligation of such person to make a payment to a creditor or other person with respect to a partnership liability (within the meaning of paragraph (d)(3)(ii)(A)(*2*) of this section), any obligation of such person to make a contribution to the partnership (within the meaning of paragraph (d)(3)(ii)(B)(*2*)(*iii*) of this section), and any reimbursement that such person is entitled to receive with respect to such payment or contribution (within the meaning of paragraph (d)(3)(ii)(C) of this section) shall be allocated to the related partner with the greatest percentage of related ownership with respect to such person; and

(B) Any partnership liability owed to such related person that, but for paragraph (d)(3)(i)(B) of this section, would be a nonrecourse liability of the partnership shall be treated as a liability that is owed to a person related to the partner with the greatest percentage of related ownership with respect to such related person.

If more than one partner holds the same percentage of related ownership with respect to such person and no partner holds a greater percentage, any such obligation, right to reimbursement, or liability shall be allocated equally among such partners unless the facts and circumstances establish that the partners would share any economic burden or benefit corresponding to any such obligation, right to reimbursement, or liability in a different manner.

(ii) *Percentage of related ownership.* The percentage of related ownership of a partner with respect to a related person equals the greater of—

(A) The percentage ownership of the related person by the partner; or

(B) The percentage ownership of the partner by the related person.

In determining the percentage of related ownership of a partner with respect to a related person, the constructive ownership or attribution rules applicable under sections 267(b) and 707(b)(1) (as modified by paragraph (h)(2) of this section) must be taken into account, and if a partner is related to a person under more than one of the relationships set forth under sections 267(b) and 707(b)(1) (as so modified), then the relationship establishing the highest percentage of related ownership must be used. For purposes of this section, natural persons shall be deemed to have a zero percentage of related ownership with respect to each other. For example, if a person that is related to more than one partner is obligated to make a payment to a creditor with respect to a partnership liability, and such person and such partners are related because they are members of the same family, then that obligation must, for purposes of determining the economic risk of loss borne by each partner with respect to such liability, be divided equally among such partners (unless the facts and circumstances establish that the partners would share any economic burden corresponding to such obligation in a different manner) under this paragraph (h)(3) because they have the same percentage of related ownership (zero).

(4) *Related partners.* Except as otherwise provided in this section, if related persons (within the meaning of this paragraph (h)) own (directly or indirectly) interests in the same partnership, then such persons shall not be treated as related persons for purposes of determining the economic risk of loss borne by each of them for the liabilities of such partnership.

(i) [Reserved.]

(j) *Special rules*—(1) *Tiered partnerships.* If a partnership (the "upper-tier partnership") is a partner in another partnership (the "subsidiary partnership"), the upper-tier partnership's share of the liabilities of the subsidiary patnership (other than any liability of the subsidiary partnership that is owed to the upper-tier partnership) shall be treated as liabilities of the upper-tier partnership for purposes of applying section 752 and the regulations thereunder to the partners of the upper-tier partnership.

(2) *Liabilities which are part recourse and part nonrecourse.* If one or more partners bears the economic risk of loss (within the meaning of paragraph (d)(3) of this section) for only a portion of a partnership liability, such liability shall be treated as a recourse liability of the partnership to the extent that the partners bear the economic risk of loss for such liability and as a nonrecourse liability of the partnership in an amount equal to the excess. See examples (13)(iv) and (19)(ii) of paragraph (k) of this section.

(3) *Increase and decrease in share of liabilities resulting from same transaction.* For purposes of section 752 and the regulations thereunder, if as a result of a single transaction (for example, a contribution by a partner to the partnership of property subject to a liability or the termination of the partnership under section 708(b)) a partner incurs both an increase (or decrease) in the partner's share of the liabilities of the partnership and a decrease (or increase) in the partner's individual liabilities—

(i) Such increase and decrease must be offset against each other prior to the application of paragraph (b) or (c) of this section; and

(ii) Only the amount of the net increase or decrease, if any, in the sum of the partner's share of the liabilities of the partnership and the partner's individual liabilities resulting from such transaction shall be treated as a contribution of money by the partner to the partnership or a distribution of money by the partnership to the partner, respectively, under paragraph (b) or (c) of this section.

See § 1.752–2T (b) (examples (1) and (2)).

(4) *Time of determination.* A partner's share of the liabilities of the partnership must be determined whenever such determination is necessary in order to determine the tax liability of the partner or any other person. See § 1.705–1 (a) for rules regarding when the adjusted basis of a partner's interest in the partnership must be determined.

(5) *Limitation.* For purposes of section 752 and the regulations thereunder, the amount of an indebtedness shall be taken into account only once, even though a partner (in addition to his liability for such indebtedness as a partner) may be separately liable therefor in a capacity other than as a partner.

(k) *Examples.* The following examples illustrate the application of the rules of this section. Except as otherwise provided, these examples assume that (1) the partnerships discussed therein are formed under state laws corresponding to the Uniform Partnership Act or the Revised Uniform Limited Partnership Act, whichever is appropriate, (2) partnership indebtedness constitutes debt for federal income tax purposes, and (3) any debt instrument given in consideration for the sales or exchange of property bears adequate stated interest (within the meaning of section 1274 (c)).

Example (1). A and B are equal partners in a general partnership. The partnership borrows $1,000. A and B, as equal partners, share the partnership liability for that obligation equally under the rules of this section. The resulting $500 increase in each partner's share of the liabilities of the partnership is treated as a contribution of $500 by that partner to the partnership. See paragraph (b) of this section. Each time the partnership pays a portion of the outstanding balance of the $1,000 loan, each partner's share of the liabilities of the partnership is decreased by one-half of the payment, and the decrease in each partner's share of partnership liabilities is treated as a distribution of that amount by the partnership to that partner. See paragraph (c) of this section.

Example (2). (i) C and D are partners in a general partnership that uses the cash method of accounting. At the close of its taxable year, the partnership has accrued interest expense of $1,000 and accounts payable of $500 for services performed on behalf of the partnership.

(ii) Under its method of accounting, the partnership's accrued interest expense and accounts payable are not deductible until paid. Also, the partnership obligations represented by those items have not created or increased the basis of any partnership property or given rise to a nondeductible expenditure of the partnership that is not properly chargeable to capital account. As provided by paragraph (g) of this section, an obligation that constitutes a debt for federal income tax purposes is a liability of the obligor only to the extent that incurring or holding such obligation gives rise to (1) the creation of, or an increase in, the basis of any property owned by the obligor, (2) a deduction that is taken into account in computing the taxable income of the obligor, or (3) an expenditure that is not deductible in computing the obligor's taxable income and is not properly chargeable to capital. Therefore, the partnership obligations for accrued but unpaid interest expense and accounts payable are not partnership liabilities for purposes of section 752.

Example (3). (i) E and F form a general partnership with cash contributions of $20,000 each. The partnership agreement provides that E and F will share all partnership profits and losses equally. The partnership purchases depreciable personal property for $40,000 in cash and a recourse purchase money note for $60,000.

(ii) The indebtedness represented by the purchase money note is a partnership liability because incurring that obligation creates an additional $60,000 of basis in the partnership's depreciable personal property. See paragraph (g) of this section. Under paragraph (d) of this section, the partnership liability for the purchase money note constitutes a recourse liability of the partnership to the extent, but only to the extent, that one or more partners bears the economic risk of loss for such liability, and each partner's share of the recourse liabilities of the partnership equals the portion of those liabilities for which such partner bears the economic risk of loss. To the extent that no partner bears the economic risk of loss for the liability represented by the purchase money note, that liability constitutes a nonrecourse liability of the partnership. See paragraph (e)(2) of this section. Under paragraph (d)(3)(i) of this section, a partner bears the economic risk of loss for a partnership liability to the extent that such partner would be obligated to make a net payment to a creditor or other person or a net contribution to the partnership with respect to such liability if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section).

(iii) In a constructive liquidation of the partnership, all partnership assets are assumed to become worthless and all partnership liabilities are assumed to become due and payable in full. See paragraph (d)(3)(iii)(A) (*1*) and (*2*) of this section. Thus, if the partnership constructively liquidated, the purchase money note would be due and payable, but the partnership would lack the assets needed to discharge the note. As a result, E and F, as equal general partners, would each be obligated by operation of law to make a net contribution of $30,000 to the partnership with respect to the partnership liability for the purchase money note. See paragraph (d)(3)(ii)(B) of this section. Therefore, under paragraph (d)(3)(i) of this section, E and F each bear the economic risk of loss for $30,000 of that liability. Accordingly, the $60,000 partnership liability for the purchase money note is a recourse liability, and E and F share that liability equally.

Example (4). (i) The facts are the same as in example (3), except that F is a limited partner, who guarantees the purchase money note and has no obligation to make additional capital contributions to the partnership. Under the guarantee, if the partnership defaults on the purchase money note, F is obligated to pay the outstanding balance of the note. In addition, F is subrogated to the seller's rights against the partnership under the purchase money note for any payments made by F pursuant to the guarantee.

(ii) Under F's guarantee, if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section), F would be obligated to make a $60,000 payment to the seller with respect to the partnership liability for the purchase money note. F would, however, be entitled to be reimbursed (within the meaning of paragraph (d)(3)(ii)(C) of this section) by the partnership for any payment made under the guarantee pursuant F's right to subrogation. As a result, F would not be obligated to make a net payment to a creditor or other person with respect to the liability for the purchase money note. See paragraph (d)(3)(ii)(A) of this section. E, as the sole general partner, however, would be obligated to make a net contribution of $60,000 to the partnership with respect to the partnership liability for the purchase money note in order to provide the partnership with the funds needed to pay the outstanding balance of the note that is owed to F, as subrogee. See paragraph (d)(3)(ii)(B) of the section. Thus, E bears the economic risk of loss for the entire $60,000 partnership liability. Accordingly, under paragraph (d) of this section, the liability is a recourse liability, and E's share of that liability is $60,000.

Example (5). (i) The facts are the same as in example (3), except that the partnership agreement provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704–1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) are to be made in accordance with the partners' positive capital account balances (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*2*)), and any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*3*)). At the time it incurs the liability for the purchase money note, the partnership has no income, gain, loss, deduction, or credit for the taxable year.

(ii) To determine the economic risk of loss that each partner bears with respect to the partnership liability for the purchase money note, the partnership must be deemed to constructively liquidate (within the meaning of paragraph (d)(3)(iii) of this section). This requires, among other things, that the partnership be treated as if it disposed of all its assets in a fully taxable exchange for no consideration, allocated partnership items of income, gain, loss, deduction, and credit to the partners for the partnership taxable year ending on the date of the liquidation, and liquidated the partner's interests in the partnership. See paragraph (d)(3)(iii)(A) (*3*) and (*4*) of this section. If the partnership constructively liquidated immediately after incurring the purchase money note, the partnership would recognize a taxable loss of $100,000 (which equals the adjusted tax basis of the property) on the disposition of its depreciable personal property for no consideration. Thus, the partnership would have a taxable loss of $100,000 for the hypothetical partnership taxable year ending on the date of the constructive liquidation. The partnership agreement would allocate this loss between E and F as follows:

	E	F
Capital account on formation	$20,000	$20,000
Less: loss	(50,000)	(50,000)
Capital account after constructive liquidation	($30,000)	($30,000)

Thus, in order to restore the deficit balances in their capital accounts, E and F would each be obligated to make a net contribution of $30,000 to the partnership with respect to the partnership liability for the purchase money note if the partnership constructively liquidated immediately after it incurred that liability. See paragraph (d)(3)(ii)(B) of this section. Therefore, as in example (3) E and F each bears $30,000 of the economic risk of loss for the partnership liability under paragraph (d)(3)(i) of this section.

Example (6). (i) The facts are the same as in example (5), except that the partnership agreement provides that 90 percent of partnership net taxable loss will be allocated to E and 10 percent to F.

(ii) As in example (5), if the partnership constructively liquidated immediately after incurring the purchase money note, the partnership would recognize a taxable loss of $100,000 on the disposition of its depreciable personal property for no consideration, and the partnership would have a net taxable loss of $100,000 for the hypothetical partnership taxable year ending on the date of the constructive liquidation. The partnership agreement would allocate 90 percent of this net taxable loss to E and 10 percent to F.

	E	F
Capital account on formation	$20,000	$20,000
Less: loss	(90,000)	(10,000)
Capital account after constructive liquidation	$70,000	$10,000

Thus, E would be obligated to make a net contribution of $70,000 to the partnership at the time of the constructive liquidation (within the meaning of paragraph (d)(3)(ii)(B)(*3*) of this section) in order to restore the deficit balance in E's capital account. F, on the other hand, would not be obligated to make a contribution to the partnership, but would be entitled to receive a $10,000 distribution from the partnership.

(iii) Under paragraph (d)(3)(ii)(B)(*1*) of this section, $60,000 of the $70,000 net contribution that E would be obligated to make to the partnership constitutes an obligation to make a net contribution with respect to the partnership liability for the purchase money note (E's net contribution ($70,000) multiplied by the fraction obtained by dividing the outstanding partnership indebtedness with respect to that liability ($60,000) by the sum of the partners' net contributions ($70,000)). The other $10,000 of E's net contribution would fund the distribution to F. While the holder of the purchase money note could attempt to recover the balance due on the note from F as a general partner, E and F have agreed under the partnership agreement that, as between them, E will bear the risk of loss for that liability, and the rules of this section assume that E actually discharges E's obligation to make a net contribution to the partnership at the time of the constructive liquidation. See paragraph (d)(3)(ii)(D)(*2*) of this section. Under paragraph (d)(3)(i) of this section, E bears the economic risk loss for the full amount of the partnership liability for the purchase money note. Therefore, the partnership liability for the note is a recourse liability that is allocated entirely to E. See paragraph (d) (1) and (2) of this section.

Example (7). (i) The facts are the same as in example (6), except that F contributes a promissory note (of which F is the maker) with a principal balance of $60,000 to the partnership. The promissory note is not readily tradeable on an established securities market. F's promissory note is payable in five years; however, F's obligation to discharge the note will be accelerated if, prior to that time, the partnership is liquidated.

(ii) F's promissory note constitutes an obligation to make a contribution to the partnership (within the meaning of paragraph (d)(3)(ii)(B)(*2*) of this section). If F contributed the $60,000 principal balance of the promissory note to the partnership immediately after the constructive liquidation, F's capital account would increase by $60,000, giving F a positive capital account balance of $70,000 and the right to the distribution of an additional $60,000 from the partnership.

F's capital account after constructive liquidation	$10,000
Plus: contribution pursuant to promissory note	60,000
Total	$70,000

Because F would be entitled to be reimbursed for a contribution made pursuant to the promissory note, F would not be obligated to make a net contribution to the partnership upon a constructive liquidation. See paragraph (d)(3)(ii)(B)(*3*) and (C) of this section. After F's payment of the $60,000 balance due on the promissory note, the partnership would have only $60,000 in cash to satisfy the $60,000 partnership liability and F's $70,000 positive capital account balance. E would, however, be obligated to make a net contribution of $70,000 to the partnership to restore the deficit balance in E's capital account. As in example (6), $60,000 of this net contribution constitutes a net contribution with respect to the partnership liability and $10,000 is attributable to the partnership's obligation to satisfy F's positive capital account balance. Therefore, as in example (6), E bears the economic risk of loss for the full amount of the partnership liability for the purchase money note unless F's contribution of the promissory note to the partnership constitutes part of a plan to circumvent or avoid E's deficit restoration obligation. See paragraph (d)(3)(ii)(D)(*3*) of this section regarding the existence of a plan to circumvent or avoid an obligation.

Example (8). (i) G and H form a general partnership to invest in stocks, securities, and other income producing liquid assets. G, the managing partner, contributes $5,000 in cash to the partnership, and H, an investor, contributes $15,000 in cash to the partnership. Immediately after its formation, the partnership obtains a $10,000 recourse loan from a commercial bank and purchases $15,000 of corporate stock, $10,000 of government securities, and a $3,000 certificate of deposit. At the end of its first day of business, the partnership owns the following assets:

	Adjusted basis
Cash	$2,000
Corporate stock	15,000
Government securities	10,000
Certificate of deposit	3,000
Total	$30,000

The partnership agreement provides that the partners will share partnership taxable income and loss equally. The partnership agreement also provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704–1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) will be made in accordance with the partner's positive capital account balances (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*2*)), and any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*3*)).

(ii) The indebtedness represented by the loan is a partnership liability. See paragraph (g) of this section. The partners will share that liability according to the economic risk of loss borne by each partner with respect to such liability. See paragraph (d)(3)(i) of this section. The determination of the economic risk of loss that each partner bears with respect to the liability for the loan is, in turn, governed by the impact that a constructive liquidation of the partnership would have on the partners' obligation with respect to that liability. If a partnership is deemed to constructively liquidate, all partnership assets, including cash and other financial assets, are deemed to be worthless, and the partnership is treated as if it disposed of those assets in a fully taxable exchange for no consideration. On the deemed disposition of its cash, corporate stock, government securities, and certificate of deposit for no consideration at the end of its first day of business, the partnership would recognize a $30,000 taxable loss. This loss would be allocated equally between the partners.

	G	H
Capital accounts on formation	$5,000	$15,000
Less: loss	(15,000)	(15,000)
Capital accounts after constructive liquidation	($10,000)	$0

Consequently, if the partnership constructively liquidated at the end of its first

day of business, G would be obligated to make a net contribution of $10,000 to the partnership to restore the deficit balance in G's capital account. See paragraph (d)(3)(ii)(B)(*3*) of this section. Under paragraph (d)(3)(ii)(B)(*1*) of this section, G's deficit restoration obligation would be treated as an obligation to make a net contribution of $10,000 to the partnership with respect to the partnership liability for the loan. Therefore, under paragraph (d)(3)(i) of this section, G bears the economic risk of loss for the full amount of the partnership liability for the loan. As a result, the liability is a recourse liability that is allocated entirely to G. See paragraph (d) (1) and (2) of this section.

Example (9). (i) I and J form a limited partnership. I, the general partner, contributes $10,000 to the partnership, and J, the limited partner, contributes $90,000 to the partnership. The partnership purchases depreciable personal property 1 for $110,000, paid by the delivery of $40,000 in cash and a recourse purchase money note in the principal amount of $70,000 ("note 1"). The partnership also purchases depreciable property 2 for $270,000, paid by the delivery of $60,000 in cash and a recourse purchase money note in the principal amount of $210,000 ("note 2"). J and the seller of property 2 enter into an indemnification agreement whereby J agrees to pay the seller the outstanding balance of note 2 if the partnership fails to make the payments required pursuant to that note. Under the indemnification agreement, if the partnership defaults, the seller may collect the balance due on note 2 directly from J without pursuing its legal remedies against the partnership. The seller may also attempt to collect the balance due on note 2 from the partnership before it proceeds against J under the indemnification agreement. The partnership agreement does not give J any right to seek repayment from the partnership or I for any amount that J pays to the seller pursuant to the indemnification agreement. Similarly, neither the partnership nor I are beneficiaries of the indemnification agreement. The partnership agreement provides that partnership taxable income and loss will be allocated 10 percent to I and 90 percent to J, except that all partnership taxable loss will be allocated to I after the partners' capital accounts are reduced to zero and partnership taxable income must first be allocated to eliminate any deficit balances in the partners' capital accounts. The partnership agreement also provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704–1(b)(2)(iv) and distributions in liquidation of the partnership (or any partner's interest) are to be made in accordance with the partner's positive capital account balances (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*2*)). The partners are not obligated to restore any deficit balances in their capital accounts following the liquidation of their interests in the partnership. The partnership has no income, gain, loss, deduction, or credit for the period prior to the acquisition of properties 1 and 2.

(ii) The partnership obligations represented by notes 1 and 2 constitute partnership liabilities ("liabilities 1 and 2", respectively). See paragraph (g) of this section. If the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) immediately after incurring liabilities 1 and 2, the partnership would recognize a taxable loss of $380,000 from the disposition of properties 1 and 2 for no consideration. See paragraph (d)(3)(iii)(A)(*3*) of this section. Thus, for the hypothetical taxable year ending on the date of the constructive liquidation, the partnership would have a taxable loss of $380,000. This loss would be allocated between the partners as follows:

	I	J
Capital accounts on formation	$10,000	$90,000
Less: loss	(290,000)	(90,000)
Capital accounts after constructive liquidation	($280,000)	$0

After the constructive liquidation, I, as the sole general partner, would be obligated by operation of law to contribute $280,000 to the partnership to discharge the partnership's obligations under notes 1 and 2. J, on the other hand, would be obligated pursuant to the indemnification agreement to pay the outstanding balance of note 2 ($210,000) to the seller of property 2 because of the partnership's failure to make the payments due on that note. See paragraph (d)(3)(iii)(A)(*2*) of this section.

(iii) I's obligation to contribute $280,000 to the partnership constitutes an obligation to make a net contribution to the partnership. See paragraph (d)(3)(ii)(B)(*3*) of this section. Under paragraph (d)(3)(ii)(B)(*1*) of this section, the net contribution that I would be obligated to make to the partnership at the time of the constructive liquidation is allocated among the partnership liabilities to determine the net contribution that I would be obligated to make with respect to each liability. The amount of I's obligation to make a net contribution to the partnership that will be allocated to each partnership liability is determined by multiplying the amount of that obligation by the fraction obtained by dividing the outstanding partnership indebtedness with respect to that liability at the time of the constructive liquidation by the sum of the net contributions that all partners would be obligated to make to the partnership as a result of the liquidation. Under paragraph (d)(3)(ii)(B)(*4*) of this section, the outstanding partnership indebtedness with respect to liabilities 1 and 2 at the time of the constructive liquidation equals the outstanding balances of those liabilities—$70,000 and $210,000, respectively. The sum of the net contributions that the partners would be obligated to make to the partnership at the time of the constructive liquidation equals $280,000 because I is the only partner that would be obligated to make a net contribution to the partnership. Therefore, if the partnership constructively liquidated immediately after incurring liabilities 1 and 2, I would be obligated to make net contributions with respect to liabilities 1 and 2 of 70,000 ($280,000 multiplied by $70,000/$280,000) and $210,000 ($280,000 multiplied by $210,000/$280,000), respectively. In addition, assuming that J has no right under applicable state law to be reimbursed for any payment made pursuant to the indemnification agreement, J would be obligated to make a net payment of $210,000 to a creditor or other person with respect to liability 2. See paragraph (d)(3)(ii)(A) of this section.

(iv) Under paragraph (d)(3)(i)(A) of this section, the economic risk of loss borne by a partner with respect to any partnership liability generally equals the sum of (1) the net payment that such partner would be obligated to make to a creditor or other person and (2) the net contribution that such partner would be obligated to make to the partnership with respect to such liability if the partnership constructively liquidated. If the aggregate amount of the economic risk of loss that all partners would otherwise be determined to bear with respect to a partnership liability exceeds the amount of such liability, however, then the economic risk of loss borne by each partner with respect to such liability shall equal the amount determined by multiplying such liability by the fraction obtained by dividing the economic risk of loss that the partner would otherwise be considered to bear with respect to such liability by the sum of such amounts for all partners. See the next to the last sentence of paragraph (d)(3)(i) of this section. Under the general rule of paragraph (d)(3)(i)(A) of this section, I and J would each bear the economic risk of loss for the full amount of liability 2. I and J each bear the economic risk of loss for the full amount of liability 2 under the general rule because the arrangements between the partners fail to satisfactorily address the manner in which they will share the risk of loss attributable to that liability. In such a case, the facts must be closely scrutinized to determine whether the failure to resolve the manner in which the partners will share the risk of loss attributable to a partnership liability is part of a plan to circumvent or avoid the obligation of any partner to make a net payment to a creditor or other person or a net contribution to the partnership with respect to such liability. See paragraph (2)(3)(ii)(D)(*3*) of this section regarding the existence of a plan to circumvent or avoid an obligation. Assuming that there is not a plan to circumvent or avoid either partner's obligation with respect to liability 2, I and J each bear the economic risk of loss of $105,000 of liability 2 under the next to the last sentence of paragraph (d)(3)(i) of this section. Also, I bears the economic risk of loss for the full amount of liability 1 because I would be obligated to make a net contribution to the partnership of $70,000 with respect to liability 1 if the partnership constructively liquidated immediately after incurring that liability. Accordingly, liabilities 1 and 2 are recourse liabilities of the partnership, I and J share liability 2 equally, and I is allocated the entire amount of liability 1. See paragraph (d) (1) and (2) of this section.

Example (10). (i) K and L form a limited partnership. K, the general partner, and L, the limited partner, contribute $20,000 and

$80,000, respectively, in cash to the partnership. The partnership purchases depreciable personal property for $250,000 using the $100,000 in cash contributed by the partners and a $150,000 recourse loan from a commercial bank. To provide additional security for the loan, the bank obtains an indemnification from L. Under the indemnification agreement, if the partnership defaults on the loan, L has agreed to pay the bank the portion, if any, of the outstanding balance of the loan that it is unable to recover from the partnership. L has no obligation, however, to make any payment pursuant to the indemnification agreement until the bank has exhausted its legal remedies against the partnership. The partnership agreement provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704–1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) are to be made in accordance with the partners' positive capital account balances (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*2*)), and K is obligated to restore to the partnership any deficit balance in K's capital account following the liquidation of K's interest (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*3*)). L has no obligation to contribute additional capital to the partnership. The partnership agreement also provides that partnership taxable income and loss will be allocated 20 percent to K and 80 percent to L, except that partnership taxable loss will be allocated solely to K after the partners' captial accounts are reduced to zero and partnership taxable income must be allocated first to eliminate any deficit balances in the partner's capital accounts.

(ii) The indebtedness represented by the loan obtained by the partnership to purchase the depreciable personal property is a partnership liability. See paragraph (g) of this section. If the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section), K, as the only partner that has any obligation to contribute additional capital to the partnership, would be obligated to make a contribution to the partnership of the funds needed to pay the outstanding balance of the loan, and K would not be entitled to seek reimbursement for this contribution from L (K is not a beneficiary of the indemnification agreement). Consequently, K would be obligated to make a net contribution of $150,000 with respect to the partnership liability for the loan if the partnership constructively liquidated. See paragraph (d)(3)(ii)(B) of this section. Therefore, under paragraph (c) of this section, K bears the economic risk of loss for the full amount of the partnership liability for the loan, and that liability is a recourse liability that is allocated entirely to K.

(iii) Under the indemnification agreement, L's obligation to make a payment to the bank arises only if the bank cannot recover its loan from the partnership. Consequently, if the partnership constructively liquidated, L would not be obligated to make a payment to the bank under the indemnification agreement unless K failed to discharge K's obligation to contribute additional capital to the partnership. Under paragraph (d)(3)(ii)(D)(*2*) of this section, however, the partners are generally treated as if they actually discharge their obligations to make contributions to the partnership or payments to a creditor or other person for purposes of applying paragraph (d)(3)(ii) of this section. Therefore, since K is asssumed to satisfy K's obligation to contribute additional capital to the partnership, L is not considered to have an obligation to make a payment to the bank under the indemnification agreement.

Example (11). (i) the facts are the same as in example (10), except that K is a corporation that is a member of an affiliated group of corporations filing a consolidated return. K was formed by the parent of the consolidated group, P corporation, solely to acquire and hold its general partner interest. P corporation formed K to acquire an interest in the partnership both for investment purposes and for the tax losses it expected the partnership's property to generate. To limit its monetary exposure, however, P capitalized K only with the funds K needed to acquire its general partner interest.

(ii) These facts and circumstances, when considered together with L's indemnification agreement, indicate a plan to circumvent or avoid K's obligation to make a net contribution to the partnership. Therefore, under paragraph (d)(3)(ii)(D)(*3*) of this section, K's obligation to make a net contribution to the partnership is not recognized for purposes of applying the rules of paragraph (d)(3) this section, and the rules of this section must be applied as if that obligation did not exist. See paragraph (d)(3)(ii)(D)(*2*) of this section. Accordingly, if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section), the bank would not be able to recover any part its loan from the partnership, and L would be obligated pursuant to the indemnification agreement to pay the bank the outstanding balance of the loan. Under paragraph (d)(3)(i) of this section, L bears the economic risk of loss for the full amount of the partnership liability for the loan. Therefore, the partnership liability for the loan is a recourse liability that is allocated entirely to L. See paragraph (d) (1) and (2) of this section.

Example (12). (i) M and N form a general partnership to purchase an office building, each contributing $15,000 to the partnership. The partnership purchases an office building for $100,000 with the cash contributed by the partners and a $70,000 recourse loan from a commercial bank. In connection with the purchase of the building, M contributes an additional $45,000 to the partnership. These funds are deposited in a special escrow account of the partnership that is to be used solely for purposes of making payments on the loan. The partnership pledges the escrow account to the bank as security for the loan. The partnership agreement provides that the partners will share partnership taxable income and loss equally, except that interest income from the escrow account is to be allocated 95 percent to M and 5 percent to N. The partnership agreement also provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704–1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) are to be made in accordance with the partners' positive capital account balances (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*2*)), and any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*3*)). The partnership has no income, gain, loss, deduction, or credit for the period prior to the acquisition of the building.

(ii) The indebtedness represented by the loan obtained by the partnership to purchase the office building is a partnership liability. See paragraph (g) of this section. If the partnership is deemed to constructively liquidate (within the meaning of paragraph (d)(3)(iii) of this section) immediately after purchasing the building, the partnership is treated as if the building became worthless, the loan became due and payable in full, and the partnership disposed of the building in a fully taxable exchange for no consideration. In addition, the partnership is deemed to transfer the funds held in escrow to the bank in partial satisfaction of the loan. The escrowed funds are not deemed to be worthless because those funds, which were contributed to the partnership by M, are used in the partnership's activities solely to secure the payment of the loan from the bank. See paragraph (d)(3)(iii)(A)(*1*) and (d)(3)(ii)(A)(*2*)(*ii*) of this section. Under paragraph (d)(3)(ii)(A)(*2*)(*ii*) of this section, the partnership's obligation to use the escrowed funds that M contributed to the partnership to discharge the loan is treated as an obligation of M to make a payment to a creditor or other person with respect to the partnership liability for the loan.

(iii) On the disposition of its office building for no consideration, the partnership would incur a taxable loss of $100,000, which would be allocated equally between the partners. Thus, if the partnership constructively liquidated immediately after purchasing the building, the partners' capital accounts would appear as follows:

	M	N
Capital accounts on formation	$60,000	$15,000
Less: loss	(50,000)	(50,000)
Capital accounts after constructive liquidation	$10,000	($35,000)

M's positive capital account balance would entitle M to a $10,000 distribution from the partnership. Because M would not have been entitled to any distribution from the partnership if M had not provided the escrowed funds to the partnership, M's right to this distribution constitutes a right to be reimbursed by the partnership for the escrowed funds that M is considered obligated to pay to the bank under paragraph (d)(3)(ii)(A)(*2*)(*ii*) of this section. Thus, under paragraph (d)(3)(ii)(A) of this section, M would be obligated to make a net payment of $35,000 ($45,000 less $10,000) to a creditor or other person with respect to the partnership liability for the loan if the partnership constructively liquidated.

(iv) N's $35,000 deficit capital account balance constitutes an obligation to make a net contribution to the partnership. Under paragraph (d)(3)(ii)(B)(*1*) of this section, this obligation will be allocated to the partnership liability for the loan only to the extent that it does not exceed the outstanding partnership indebtedness with respect to that liability. Under paragraph (d)(3)(ii)(B)(*4*) of this section, the outstanding partnership indebtedness with respect to that liability equals $35,000 (the amount of such liability ($70,000), reduced by the excess of (1) the amount M's obligation to make a payment to a creditor or other person with respect to such liability ($45,000) over (2) the reimbursement that M is entitled to receive from the partnership with respect to that liability ($10,000)). Therefore, if the partnership constructively liquidated, N would be obligated to make a net contribution of $35,000 to the partnership with respect to the partnership liability for the loan.

(v) Under paragraph (d)(3)(i) of this section, M and N each bear the economic risk of loss for $35,000 of the partnership liability for the loan. Accordingly, the liability is a recourse liability that M and N share equally.

Example (13). (i) O and P contribute $125,000 and $25,000 in cash, respectively, to form a calendar year general partnership on December 31, 1988. P also contributes a promissory note for $100,000 to the partnership. The promissory note is payable on the fifth anniversary of the partnership's formation and bears interest at a rate of 12 percent, compounded annually. On the date of its formation, the partnership purchases improved real property for its $150,000 of capital and a $850,000 nonrecourse loan from a commercial bank. The nonrecourse loan is secured by a mortgage on the real property and a pledge of P's promissory note. The partnership agreement provides that the partners will share partnership taxable income and loss equally. The partnership agreement also provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704–1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) are to be made in accordance with the partners' positive capital account balances (as set forth in § 1.704–1(b)(2)(ii)(*b*)(2)), and any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership (as set forth in § 1.704–1(b)(2)(ii)(*b*)(3)), except that P is not obligated to restore the first $100,000 of any deficit balance in P's capital account prior to the maturity of P's promissory note. For 1988, the partnership has no income, gain, loss, deduction, or credit. Assume that the Federal mid-term rate for December 1988 is 10 percent, compounded semiannually.

(ii) The indebtedness represented by the nonrecourse loan obtained by the partnership to purchase the improved real property is a partnership liability. See paragraph (g) of this section. To determine whether any partner bears the economic risk of loss for that liability at the end of 1988, the partnership must be treated as if it constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) at that time. If the partnership is deemed to constructively liquidate at the end of 1988, the following events are deemed to occur: (1) the partnership's improved real property becomes worthless, (2) the nonrecourse loan becomes due and payable, (3) the partnership disposes of its improved real property in a fully taxable exchange (involving the transfer of that property to the bank), and (4) the partnership allocates its taxable income or loss to the partners for the partnership taxable year ending on the date of the constructive liquidation and liquidates the partners' interests. In the constructive liquidation, the partnership is treated as if it received consideration in the form of relief from liability upon the hypothetical disposition of its improved real property to the extent that the nonrecourse loan is a liability for which the creditor's right to repayment is limited to one or more assets of the partnership. See paragraph (d)(3)(iii)(A)(*3*) of this section. Under paragraph (d)(3)(ii)(B)(*4*)(*ii*) of this section, the nonrecourse loan constitutes a liability for which the creditor's right to repayment is limited to one or more assets of the partnership to the extent, but only to the extent, that the outstanding balance of the loan exceeds the aggregate amount of the contributions that the partners would be obligated to make to the partnership to discharge that loan if the partnership constructively liquidated. P's promissory note (as a result of the pledge of that note to the bank to secure the nonrecourse loan) constitutes the only obligation that the partners have to make a contribution to the partnership in order to discharge the nonrecourse loan. Under paragraph (d)(3)(ii)(E) of this section, P's obligation to make a contribution to the partnership pursuant to the promissory note is recognized only to the extent of the value of that note because the note is not required to be paid by the later of (1) the end of the partnership taxable year in which N's interest is liquidated or (2) within 90 days after the date of such liquidation. At the time of the constructive liquidation (*i.e.*, at end of 1988), however, P's promissory note is deemed to have a value equal to the outstanding balance of the note at that time ($100,000) because the promissory note bears interest at a rate that equals or exceeds the applicable Federal rate at that time (i.e., the Federal mid-term rate for December 1988). See paragraph (d)(3)(ii)(E)(*2*) of this section. Accordingly, $750,000 of the nonrecourse loan ($850,000 less $100,000) constitutes a liability for which the creditor's right to repayment is limited to one or more assets of the partnership, and the partnership is deemed to receive consideration of $750,000 in relief from such liability upon the hypothetical disposition of its improved real property. Because the adjusted basis of the partnership's real property equals $1,000,000 at the end of 1988, the partnership would recognize a taxable loss of $250,000 on this disposition ($1,000,000 less $750,000 of consideration). This loss would be allocated equally between the partners for the partnership taxable year ending on the date of the constructive liquidation.

	O	P
Capital accounts on formation	$125,000	$25,000
Less: loss	(125,000)	(125,000)
Capital accounts after constructive liquidation	$0	($100,000)

(iii) P's obligation to restore the $100,000 deficit balance in P's capital account is governed by the terms of P's promissory note. As stated above, P's obligation to make a contribution to the partnership pursuant to the promissory note is recognized to the extent of the outstanding balance of that note at the time of the constructive liquidation because the note bears interest at a rate that equals or exceeds the applicable Federal rate at that time. Thus, P would be obligated to make a net contribution to the partnership of $100,000 as a result of the constructive liquidation. Under paragraph (d)(3)(ii)(B)(*1*) of this section, the net contributions that the partners would be obligated to make to the partnership if the partnership constructively liquidated can be allocated to a partnership liability only to the extent of the outstanding partnership indebtedness with respect to that liability. The outstanding partnership indebtedness with respect to the liability for the nonrecourse loan equals $100,000 (the amount of such liability ($850,000) reduced by the portion of such liability for which the creditor's right to repayment from the partnership is limited to one or more assets of the partnership ($750,000)). See paragraph (d)(3)(ii)(B)(*4*) of this section. Thus, under paragraph (d) (3)(ii)(B)(*1*) of this section, the full amount of the $100,000 net contribution that P would be obligated to make to the partnership if it constructively liquidated at the end of 1988 will be allocated to the partnership liability for the nonrecourse loan.

(iv) At the end of 1988, P bears the economic risk of loss for $100,000 of the partnership liability for the nonrecourse loan, and no partner bears the economic risk of loss for the other $750,000 of that liability. See paragraph (d)(3)(i) of this section. Accordingly, the liability is treated as a recourse liability to the extent that P bears the economic risk of loss for such liability and as a nonrecourse liability to the extent of the excess. See paragraph (j)(2) of this section. Under paragraph (d)(1) of this section, all $100,000 of the recourse liability is allocated to P. Under paragraph (e)(1)(iii) of this section, the nonrecourse liability is allocated between the partners in proportion to their equal interests in partnership profits. At the end of 1988, O and P are thus each allocated $375,000 of the nonrecourse liability of the partnership.

Example (14). (i) Q, the general partner, and R, the limited partner, form a limited partnership with cash contributions of $10,000 each. Q and R share partnership profits and losses equally. The partnership purchases residential rental property for its $20,000 of capital and an $80,000 nonrecourse loan from a commercial bank. The nonrecourse loan is secured by a mortgage on the rental property. Q also provides the bank

with a guarantee that the loan will be repaid. If the partnership defaults on the loan, Q is liable to the bank for the difference between the value of the property and the outstanding balance of the loan. In connection with Q's guarantee, Q and R enter into an indemnification agreement whereby R agrees to reimburse Q for 50 percent of any payment that Q is required to make pursuant to the guarantee.

(ii) The indebtedness represented by nonrecourse loan obtained by the partnership to purchase the residential rental property is a partnership liability. See paragraph (g) of this section. Upon a constructive liquidation (within the meaning of paragraph (d)(3)(iii) of this section), the partnership is treated as if its residential rental property becomes worthless and the nonrecourse loan becomes due and payable because of the partnership's failure to make the required payments on the loan. If these events occurred, Q would be obligated to pay the outstanding balance of the nonrecourse loan to the bank under the guarantee. Under the indemnification agreement, however, Q would be entitled to be reimbursed by R for 50 percent of any payment made to the bank pursuant to the guarantee. Thus, Q and R would each be obligated to make a net payment to a creditor or other person of 50 percent of the liability for the nonrecourse loan if the partnership constructively liquidated. See paragraph (d)(3)(ii)(A) of this section. Under paragraph (d)(3)(i) of this section, Q and R each bear the economic risk of loss for 50 percent of the partnership liability for the nonrecourse loan. Accordingly, the liability is a recourse liability that the partners share equally. See paragraph (d) (1) and (2) of this section.

Example (15). (i) S and T form a limited partnership at the beginning of 1989 solely to acquire and lease depreciable personal property. S, the general partner, and T, the limited partner, each contribute $10,000 in cash to the partnership. In 1989, the partnership purchases depreciable personal property for $20,000 in cash and a recourse purchase money note for $80,000. For 1989, the partnership has a taxable loss of $10,000, consisting of $17,000 gross rental income, $7,000 of interest expense, and a depreciation deduction of $20,000. The partnership agreement provides that the partners will share the taxable income and loss of the partnership equally. In addition, the partnership agreement provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704–1 (b)(2)(iv) and distributions in liquidation of the partnership (or any partner's interest) will be made in accordance with the partners' positive capital account balances (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*2*)). The partnership agreement also provides that any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership. While S is required to restore any deficit balance in S's capital account following the liquidation of S's interest within 90 days of such liquidation, T is not required to restore any deficit balance in T's capital account following the liquidation of T's interest for 2 years following the date of such liquidation (and any deficit balance in T's capital account at the time of any such liquidation will not bear interest during that two-year period). The partnership makes $10,000 of principal payments on the promissory note during 1989, and the outstanding balance of the promissory note at the end of 1989 is $70,000. Assume that the Federal short-term rate for December 1989 is 10 percent, compounded semiannually.

(ii) The indebtedness represented by the purchase money note is a partnership liability. See paragraph (g) of this section. Under paragraph (d)(3)(i) of this section, the partners bear the economic risk of loss for that liability at the end of 1989 to the extent that they would be obligated to make a net payment to a creditor or other person or a net contribution to the partnership with respect to such liability if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) at that time. If the partnership constructively liquidated at the end of 1989, the partnership would recognize a taxable loss of $80,000 on the disposition of its depreciable property for no consideration. This would result in a partnership net taxable loss of $90,000 for the partnership taxable year ending on the date of the constructive liquidation ($80,000 loss on the deemed disposition plus a $10,000 operating loss). This loss would be allocated to the partners as follows:

	S	T
Capital accounts on formation	$10,000	$10,000
Less: loss	($45,000)	($45,000)
Capital accounts after constructive liquidation	($35,000)	($35,000)

Accordingly, if the partnership constructively liquidated at the end of 1989, S and T would each be obligated to make a net contribution of $35,000 to the partnership to restore the deficit balances in their capital accounts following the liquidation of their partnership interests. Under paragraph (d)(3)(ii)(E) of this section, however, T's obligation to make a contribution to the partnership pursuant to T's deficit restoration obligation is recognized only to the extent of the fair market value of that obligation at the time of the constructive liquidation because T is not required to satisfy that obligation by the later of (1) the end of the partnership taxable year in which T's interest is liquidated or (2) within 90 days after the date of such liquidation.

(iii) Because T's obligation to restore the deficit balance in T's capital account does not bear interest, the fair market value of the deficit restoration obligation that T would have if the partnership constructively liquidated is deemed to equal the imputed principal amount of that obligation under section 1274(b). See paragraph (d)(3)(ii)(E)(*2*)(*ii*)(*B*) of this section. The imputed principal amount of T's deficit restoration obligation is computed by treating that obligation as a debt instrument to which section 1274 applies and by assuming that the sale or exchange in which such debt instrument was given as consideration occurred at the time of the constructive liquidation. Under section 1274(b), the imputed principal amount of a debt instrument equals the present values of all payments due under the debt instrument. The present value of a payment is determined as of the date of the sale or exchange by using a discount rate equal to the applicable Federal rate (within the meaning of section 1274(d)), compounded semiannually. The applicable Federal rate with respect to T's deficit restoration obligation is 10 percent, compounded semiannually (*i.e.*, the Federal short-term rate for December 1989). Using this discount rate, the present value of the $35,000 payment that T would be required to make two years after the constructive liquidation to restore the deficit balance in T's capital account equals $28,795. Thus, under paragraph (d)(3)(ii)(B)(*1*) of this section, T would be obligated to make a net contribution of $28,795 to the partnership with respect to the partnership liability for the purchase money note if the partnership constructively liquidated at the end of 1989. Under paragraph (d)(3)(ii)(D)(*2*) of this section, T is treated as if T actually discharges that obligation at the time of the constructive liquidation.

(iv) To the extent that T's deficit restoration obligation is not recognized, paragraph (d)(3)(ii) of this section is applied by assuming that T's obligation to make a contribution to the partnership did not exist. See paragraph (d)(3)(ii)(D)(*2*) of this section. In that case, S, as the sole general partner, would be obligated by operation of law to contribute an additional $6,205 of capital to the partnership to make up the shortfall. Accordingly, if the partnership constructively liquidated at the end of 1989, S would be obligated to make a net contribution of $41,205 ($35,000 plus $6,205) to the partnership with respect to the partnership liability for the purchase money note. See paragraph (d)(3)(ii)(B) of this section.

(v) At the end of 1989, S and T bear the economic risk of loss for $41,205 and $28,795, respectively, of the partnership liability for the purchase money note. See paragraph (d)(3)(i) of this section. Therefore, that liability is a recourse liability that the partners share according to the economic risk of loss borne by each of them. See paragraph (d) (1) and (2) of this section.

Example (16). (i) U and V form a general partnership with cash contributions of $25,000 each. U and V share partnership profits and losses equally. The partnership purchases an apartment building for its $50,000 of capital and a $200,000 nonrecourse loan from a commercial bank. The nonrecourse loan is secured by a mortgage on the building. The loan documents provide that the partnership will be liable for the outstanding balance of the loan on a recourse basis to the extent of any decrease in the value of the apartment building resulting from the partnership's failure to properly maintain the property.

(ii) The indebtedness represented by the nonrecourse loan obtained by the partnership to purchase the apartment building is a partnership liability. See paragraph (g) of this section. If the partnership constructively

liquidated (within the meaning of paragraph (d)(3)(iii) of this section), the apartment building would become worthless, the nonrecourse loan would become due and payable because of the partnership's failure to make the required payments on the loan, and the partnership would dispose of the apartment building in a fully taxable exchange involving the transfer of the building to the bank. Since under this example there are no facts that establish with reasonable certainty the existence of any liability on the part of the partnership (and its partners) for damages resulting from the partnership's failure to properly maintain the building, the obligations of the partnership with respect to the nonrecourse loan would be extinguished on the transfer of the apartment building to the bank, and the partners would not have any obligation to contribute additional funds to the partnership to discharge the liability for the nonrecourse loan. See paragraph (d)(3)(ii)(D)(*1*) of this section. In addition, neither U nor V would be obligated to make a payment to a creditor or other person with respect to that liability if the partnership constructively liquidated. Therefore, under paragraph (d)(3)(i) of this section, no partner bears the economic risk of loss for the partnership liability for the nonrecourse loan, and the liability constitutes a nonrecourse liability within the meaning of paragraph (e)(2) of this section. Under paragraph (e)(1) of this section, the partners share this nonrecourse liability equally because they share all partnership profits and losses equally.

Example (17). (i) W and X form a general partnership with cash contributions of $50,000 each. The partners share all partnership profits and losses equally. On January 1, 1990, the partnership purchases raw land for $100,000 on which it plans to construct an office building. The partnership obtains a nonrecourse construction loan commitment of $900,000 from a commercial bank to finance the construction of the office building. The construction loan is secured by a mortgage on the property and a completion guarantee from W. Under the completion guarantee, W agrees to provide the funds necessary to complete the construction of building to the extent construction costs exceed $900,000. At the end of 1990, the partnership has borrowed $500,000 under the construction loan commitment.

(ii) The indebtedness represented by the outstanding balance of the construction loan is a partnership liability. See paragraph (g) of this section. Under paragraph (d)(3)(i) of this section, no partner bears the economic risk of loss for that liability because no partner would be obligated to make a contribution to the partnership or a payment to a creditor or other person with respect to the partnership liability for the construction loan if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section). See paragraph (d)(3)(ii) (A) and (B) of this section. Upon a constructive liquidation of the partnership, the construction loan is deemed to be due and payable in full because of the partnership's failure to make the required payments on the loan. See paragraph (d)(3)(iii)(A)(*2*) of this section. Under the completion guarantee, W would not be obligated to make any payments in satisfaction of the construction loan as a result of the partnership's default because W's liability under the completion guarantee is limited to bearing cost overruns.

(iii) Under paragraph (e)(2) of this section, the construction loan is a nonrecourse liability of the partnership because no partner bears the economic risk of loss for that plan. Under paragraph (e)(1) of this section, the partners share this nonrecourse liability equally because they share all partnership profits and losses equally.

Example (18). (i) Y and Z, a corporation, each contribute $100,000 to form a general partnership to acquire a hotel. The partners agree to share partnership profits and losses equally. The partnership purchases a hotel for its $200,000 of capital and a nonrecourse loan of $1,800,000 from VW, a commercial bank that is a wholly-owned subsidiary of Z. To secure its loan, VW takes a mortgage on the hotel and obtains a guarantee from Y. Under the guarantee, Y agrees to pay VW an amount equal to 50 percent of any loss that VW incurs on the loan. Y has no right to seek reimbursement from the partnership or Z for any amount that it pays to VW under the guarantee.

(ii) The indebtedness represented by the loan obtained by the partnership to purchase the hotel is a partnership liability. See paragraph (g) of this section. If the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section), VW would incur a loss equal to the outstanding balance of its loan to the partnership, and Y would be liable for 50 percent of that loss pursuant to the guarantee. Thus, Y bears the economic risk of loss for 50 percent of the partnership liability for the loan from VW. See paragraph (d)(3)(i) of this section.

(iii) Z and VW are related persons (within the meaning of paragraph (h) of this section). Under paragraph (d)(3)(i)(B) of this section, a partner bears the economic risk of loss with respect to a partnership liability to the extent that the partner (or a person related to such partner) is the owner of the liability, and but for that paragraph, the liability would be treated as a nonrecourse liability under paragraph (e)(2) of this section. If this section were applied without regard to paragraph (d)(3)(i)(B) of this section, 50 percent of the partnership liability for the loan from VW would be a nonrecourse liability because no partner would bear the economic risk of loss for that portion of the liability. Accordingly, since Z and VW are related persons, Z bears the economic risk of loss for 50 percent of the liability for the loan from VW under paragraph (d)(3)(i)(B) of this section. Because Z owns a one-half interest in the partnership, the de minimis rule set forth in paragraph (d)(3)(vii) of this section is inapplicable

(iv) Under paragraph (d) of this section, the partnership liability for the loan from VW is a recourse liability, and the partners share that liability equally.

Example (19). (i) AB and CD form a general partnership with cash contributions of $30,000 each. AB and CD share all partnership profits and losses equally. The partnership purchases an apartment building from AB for its $60,000 in cash and a nonrecourse purchase money note for $240,000 that is secured by the building. The purchase money note given to AB by the partnership "wraps around" a $200,000 underlying nonrecourse note issued by AB to an unrelated person in connection with AB's acquisition of the building. The underlying nonrecourse note is also secured by the building.

(ii) The indebtedness represented by the purchase money note is a partnership liability. See paragraph (g) of this section. Under paragraph (d)(3)(i)(B) of this section, AB bears the economic risk of loss for only $40,000 of the liability for the purchase money note because AB is not considered to be the creditor with respect to that liability to the extent it reflects the debt on the underlying nonrecourse note. See the fourth sentence of paragraph (d)(3)(i) of this section. Therefore, under paragraph (d) of this section, $40,000 of the partnership liability for the purchase money note is a recourse liability that is allocated to AB. The remaining portion of the partnership liability is a nonrecourse liability because no partner bears the economic risk of loss for that liability. See paragraphs (e)(2) and (j)(2) of this section. Under paragraph (e)(1) of this section, AB's and CD's shares of the nonrecourse liability are $100,000 each because they share all partnership profits and losses equally.

Example (20). (i) EF and GH, a widely held corporation, form a limited partnership to purchase and lease computer equipment. EF, the general partner, contributes $200,000 to the partnership and GH, the limited partner contributes $800,000 to the partnership. The partnership agreement provides that partnership profits and losses will be allocated 20 percent to EF and 80 percent to GH. GH invests in the partnership, in part, to obtain significant tax losses that EF has indicated would be available from an investment in the partnership. The partnership purchases computer equipment subject to a two-year lease for $10,000,000. To purchase the equipment, the partnership obtained a $9,000,000 nonrecourse loan, with a five-year term, from a commercial bank. Upon making the loan, the bank acquired a security interest in the computer equipment. Furthermore, in order to induce the bank to make a nonrecourse loan to the partnership, EF agreed to lease the computer equipment from the partnership under a master lease. The master lease is pledged to the bank as additional security. The rental payments due under the master lease will provide the partnership with sufficient cash flow to make the principal and interest payments due on the loan. EF's obligation to make the rental payments required under the master lease is unconditional. EF must make those payments even if it is unable to sublease the equipment (after the existing two-year lease expires) or the equipment is damaged or destroyed. EF is also responsible for all costs associated with maintaining the equipment. Unless the loan that the partnership used to purchase the computer equipment is treated as a nonrecourse liability for purposes of section 752 and the regulations thereunder, GH will not be able to claim the tax losses that EF

indicated would be available from an investment in the partnership.

(ii) The indebtedness represented by the nonrecourse loan the partnership obtained to purchase the computer equipment is a partnership liability. See paragraph (g) of this section. Under the general rule of paragraph (d)(3)(i) of this section, no partner bears the economic risk of loss for that liability. If no partner bears the economic risk of loss for the partnership liability, the liability will be treated as nonrecourse liability that EF and GH will share in accordance with their general profit sharing ratios. See paragraph (e) of this section. Paragraph (d)(3)(iv) of this section, however, provides that if one or more partners (or persons related to such partners) (1) undertake contractual obligations in order to acquire a loan, (2) those obligations eliminate substantially all the risk that the partnership will not satisfy its obligations under the loan (assuming that such partners (or related persons) satisfy their obligations), and (3) one of the principal purposes of the arrangement is to permit other partners to include a portion of such liability in the basis of their partnership interests, the partners that undertake such contractual obligations are considered to bear the economic risk of loss for that liability. Under the facts of this example, it must be concluded that one of the principal purposes for the master lease was to permit GH to include a portion of the nonrecourse loan in the basis of GH's partnership interest. Therefore, under paragraph (d)(3)(iv) of this section, EF bears the economic risk of loss for the partnership liability for the nonrecourse loan. Accordingly, for purposes of this section, the liability is a recourse liability that is allocated entirely to EF. See paragraph (d) (1) and (2) of this section.

Example (21). (i) KL and MN form a general partnership to purchase a shopping center. The partners each contribute $500,000 to the partnership and agree to share partnership profits and losses equally. On January 1, 1991, the partnership obtains a $4,000,000 nonrecourse loan, and purchases the shopping center for $5,000,000. The nonrecourse loan is secured by a mortgage on the shopping center. The interest on the nonrecourse loan accrues at a 15 percent annual rate and is payable on December 31 of each year. The principal amount of the nonrecourse loan is payable in a lump sum on December 31, 2005. MN guarantees the payment of all interest due on the nonrecourse loan. Under the guarantee, MN is unconditionally obligated to pay the nonrecourse lender any interest payment that the partnership fails to make in a timely manner. MN is not entitled to be reimbursed for any payments made to the lender pursuant to the guarantee.

(ii) The indebtedness represented by the nonrecourse loan obtained by the partnership to acquire the shopping center is a partnership liability. See paragraph (g) of this section. Under paragraph (d)(3)(i) of this section, no partner bears the economic risk of loss for that liability because the constructive liquidation of the partnership would not obligate any partner to make a payment to a creditor or other person or a net contribution to the partnership with respect to the liability for the nonrecourse loan. Under paragraph (d)(3)(v) of this section, however, MN's economic risk of loss for that liability must be increased by an amount equal to the sum of the present values of the remaining interest payments on the nonrecourse loan that MN would be obligated to make pursuant to the guarantee if the partnership does not make those payments. The present value of each interest payment due on the nonrecourse loan is computed by using a discount rate equal to the rate at which interest accrues on the loan (15 percent, compounded annually). At the time the partnership obtains the nonrecourse loan, the sum of the present values of all interest payments due on the loan equals $3,508,422, and MN therefore bears the economic risk of loss for $3,508,422 of the partnership liability for the $4,000,000 loan. Accordingly, at the time the partnership obtains the nonrecourse loan, $3,508,422 of the partnership liability for that loan constitutes a recourse liability that must be allocated entirely to MN. See paragraph (d) (1) and (2) of this section. Only $491,578 of the $4,000,000 loan constitutes a nonrecourse liability that will be allocated equaliy between the partners under paragraph (e) of this section.

Example (22). (i) OP and QR form a limited partnership to acquire and operate a commercial office building. OP, the general partner, contributes $20,000, and QR, the limited partner, contributes $180,000 to the partnership. The partnership obtains an $800,000 nonrecourse loan and purchases the building on leased land for $1,000,000. The nonrecourse loan is secured only by the building, and no principal payments are due for five years. The partnership agreement provides that the partners' capital accounts will be determined and maintained in accordance with § 1.704–1(b)(2)(iv), distributions in liquidation of the partnership (or only partner's interest) will be made in accordance with partners' positive capital account balances (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*2*)), and any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*3*)). The partnership agreement also contains a minimum gain chargeback (in accordance with § 1.704–1T(b)(4)(iv)(*e*)). The partnership agreement provides that, except as otherwise required by its minimum gain chargeback provision, (1) all partnership items will be allocated 10 percent to OP and 90 percent to QR until the partnership has recognized items of income and gain that exceed the items of loss and deduction it has recognized over its life, and (2) all further partnership items will be allocated equally between OP and QR. Finally, the partnership agreement specifies that OP and QR have equal interests in partnership profits for purposes of determining the partners' shares of the nonrecourse liabilities of the partnership (which is consistent with the equal division of all partnership income and gain that is required after the partnership has recognized items of income and gain that exceed the items of loss and deduction that it has recognized over its life). At the time the partnership agreement is entered into, there is a reasonable likelihood that over the partnership's life it will recognize amounts of income and gain (the allocation of which will have substantial economic effect) significantly in excess of the amounts of loss and deduction allowed to the partnership.

(ii) In each of the partnership's first 2 taxable years, it generates rental income of $95,000, operating expenses (including land lease payments) of $10,000, interest expense of $80,000, and a depreciation deduction of $90,000, resulting in a taxable loss of $85,000 in each of those years. The partnership agreement allocates 10 percent of these losses to OP and 90 percent to QR, and this allocation has substantial economic effect. If the partnership were to dispose of the building in full satisfaction of the nonrecourse loan at the end of year 1 or 2, the partnership would not realize any gain because the adjusted basis of the building exceeds the outstanding balance of the nonrecourse loan at the end of each of those years. Thus, at the end of years 1 and 2, there is no partnership minimum gain. See § 1.704–1T(b)(4)(iv)(*c*). In its third taxable year, the partnership again generates rental income of $95,000, operating expenses of $10,000, interest expense of $80,000, and a depreciation deduction of $90,000, resulting in a taxable loss of $85,000. If the partnership were to dispose of the building in full satisfaction of the nonrecourse loan at the end of that year, it would realize $70,000 of gain ($800,000 amount realized less $730,000 adjusted tax basis). Because the amount of partnership minimum gain at the end of that year (and the net increase in partnership minimum gain during the year) is $70,000, the amount of partnership nonrecourse deductions for the year is $70,000, consisting of depreciation deductions allowable with respect to the building of $70,000. See § 1.704–1T(b)(4)(iv)(*b*) and (*c*). Pursuant to the partnership agreement, all partnership items comprising the taxable loss of $85,000, including the $70,000 of nonrecourse deductions, are allocated 10 percent to OP and 90 percent to QR. The allocation of these items, other than the nonrecourse deductions, has substantial economic effect.

	OP	QR
Capital account on formation	$20,000	$180,000
Less: Loss in years 1 and 2	(17,000)	(153,000)
Less: Loss in year 3 (without nonrecourse deductions)	(1,500)	(13,500)
Less: Nonrecourse deductions in year 3	(7,000)	(63,000)
Capital account at end of year 3	($5,500)	($49,500)

This allocation of the $70,000 of nonrecourse deductions 10 percent to OP and 90 percent to QR is deemed to be made in accordance with the partners' interest in the partnership under § 1.704–1T(b)(4)(iv)(*d*). See § 1.704–1T(b)(5) (example 20(i)). At the end of the partnership's third taxable year, OP's and QR's shares of partnership minimum gain are

$7,000 and $63,000, respectively. See § 1.704–1T(b)(4)(iv)(*f*).

(iii) The indebtedness represented by the nonrecourse loan obtained by the partnership to purchase the office building is a partnership liability. See paragraph (g) of this section. Under paragraph (d)(3)(i) of this section, no partner bears the economic risk of loss for that liability. Therefore, under paragraph (e)(2) of this section, the liability is a nonrecourse liability that the partners will share in the manner prescribed under paragraph (e)(1) of this section. At the end of years 1 and 2, the nonrecourse liability is allocated equally between the partners under paragraph (e)(1)(iii) of this section. The partners share the nonrecourse liability equally because the partnership agreement specifies that, for purposes of determining the partners' shares of the nonrecourse liabilities of the partnership, each partner has a 50 percent interest in partnership profits, which is consistent with allocations (which have substantial economic effect) of some significant item of partnership income or gain. See paragraph (e)(3)(ii)(C) of this section. Thus, at the end of years 1 and 2, each partner's share of the nonrecourse liability is $400,000.

(iv) At the end of year 3, there is partnership minimum gain, and OP's and QR's shares of partnership minimum gain are $7,000 and $63,000, respectively. Under paragraph (e)(1)(i) of this section, the nonrecourse liability is allocated to the partners first according to their shares of partnership minimum gain, and any excess is allocated equally between the partners under paragraph (e)(1)(iii) of this section. See paragraph (e)(3)(ii) (A) and (B) of this section. Therefore, at the end of year 3, OP's and QR's shares of the nonrecourse liability are $372,000 ($7,000 share of partnership minimum gain plus $365,000 share of the excess) and $428,000 ($63,000 share of partnership minimum gain plus $365,000 share of the excess), respectively.

Example (23). (i) ST and UV form a general partnership to own and operate residential rental property. UV contributes $500,000 to the partnership that it uses to purchase residential rental property. ST contributes an apartment building with a $1,200,000 fair market value and $520,000 adjusted tax basis. The apartment building contributed by ST is subject to a $700,000 nonrecourse loan. ST and UV share all partnership profits and losses equally.

(ii) The indebtedness represented by the nonrecourse loan is a partnership liability. See § 1.752–2T regarding the treatment of liabilities to which contributed or distributed property is subject. Under paragraph (e)(2) of this section, this liability is a nonrecourse liability because no partner bears the economic risk of loss for such liability. See paragraph (d)(3)(i) of this section. Under paragraph (e)(1)(ii) of this section, ST is allocated $180,000 of the partnership liability for the nonrecourse loan because ST would be allocated taxable gain of $180,000 under section 704(c) if the partnership disposed of (in a taxable transaction) the apartment building in full satisfaction of the nonrecourse liability. The remainder of the nonrecourse liability is allocated between the partners in proportion to their equal interests in partnership profits. See paragraph (e)(1)(iii) of this section. Accordingly, ST's and UV's shares of the nonrecourse liability are $440,000 ($180,000 share of section 704(c) minimum gain and $260,000 share of the excess of the nonrecourse liability over the section 704(c) minimum gain) and $260,000 (which equals UV's $260,000 share of the excess of the nonrecourse liability over the section 704(c) minimum gain), respectively.

§ 1.752–2T Liabilities to which contributed or distributed property is subject (temporary).

(a) *In general.* For purposes of section 752 and the regulations thereunder, if property is contributed by a partner to the partnership or distributed by the partnership to a partner and such property is subject to a liability of the transferor (within the meaning of § 1.752–1T(f)(2), (g), and (j)(1)), the transferee shall be considered to have assumed such liability to the extent of the amount of such liability that does not exceed the fair market value of the property at the time of the contribution or distribution. See section 752(c).

(b) *Examples.* The following examples illustrate the application of the rules of this section:

Example (1). A contributes property with an adjusted basis of $1,000 to a general partnership in exchange for a one-third interest in partnership. At the time of contribution, the property is subject to recourse debt of $150 and has a fair market value in excess of $150. The recourse debt to which the property is subject is a liability of A within the meaning of § 1.752–1T(g). Under this section, the partnership is considered to have assumed the liability to which the property is subject upon A's contribution of the property to the partnership (without regard to whether the partnership assumes such liability within the meaning of § 1.752–1T(f)). As a result of this assumption, A's individual liabilities decrease by $150. At the same time, however, A's share of the liabilities of the partnership increases by $150, assuming that, after the contribution, A bears the economic risk of loss (within the meaning of § 1.752–1T(d)(3)) for the entire amount of such liability because A remains personally liable to the creditor. Only the net increase or decrease in the sum of A's share of the liabilities of the partnership and A's individual liabilities is taken into account in applying section 752. See § 1.752–1T(j)(3) (relating to increase and decrease in share of liabilities resulting from same transaction). Accordingly, since there is no net change in the sum of A's share of the liabilities of the partnership and A's individual liabilities, A will not be considered to have made a contribution of money to the partnership or to have received a distribution of money from the partnership under § 1.752–1T (b) or (c). Therefore, A's basis for A's partnership interest is $1,000 (A's basis for the contributed property of $1,000).

Example (2). B contributes property with an adjusted basis of $1,000 to partnership AB in exchange for a one-half interest in the partnership. At the time of contribution, the property is subject to nonrecourse debt of $2,500 and has a fair market value in excess of $2,500. The nonrecourse debt to which the property is subject is a liability of B within the meaning of § 1.752–1T(g). In addition, to the extent that the liability is assumed by the partnership, the liability will be treated as a nonrecourse liability of the partnership under § 1.752–1T(e)(2) because no partner will bear the economic risk of loss for such liability. Under this section, the partnership is considered to have assumed the liability to which the property is subject upon B's contribution of the property to the partnership. As a result of this assumption, B's individual liabilities decrease by $2,500. At the same time, however, B's share of the liabilities of the partnership increases by $2,000 (the $1,500 of gain that would be allocated to B under section 704(c) if the partnership disposed of the property (in a taxable transaction) in full satisfaction of the nonrecourse debt encumbering such property, and B's $500 (one-half) share of the amount by which the nonrecourse liability exceeds that gain). See § 1.752–1T(e)(1) (relating to a partner's share of nonrecourse liabilities). Only the net decrease of $500 in the sum of B's share of the liabilities of the partnership and B's individual liabilities is taken into account in applying section 752. See § 1.752–1T(j)(3) (relating to increase and decrease in share of liabilities resulting from same transaction). Therefore, under § 1.752–1T(c), B will be treated as receiving a distribution of money in the amount of $500. Because the basis of B's partnership interest is $1,000 (the basis of the property contributed by him), the distribution to B of $500 does not result in the realization of any gain under section 731(a). B's basis for B's partnership interest is $500 (B's basis for the contributed property of $1,000 reduced by $500, the amount of the distribution under § 1.752–1T(c)).

§ 1.752–3T Sale or exchange of partnership interest (temporary).

For purposes of determining the amount of any gain or loss realized on a sale, exchange, or other disposition of an interest in a partnership, liabilities shall be treated in the same manner as liabilities in connection with the sale, exchange, or other disposition of property not associated with partnerships. For example, if a partner whose share of partnership liabilities is $250 sells the partner's interest in the partnership for $750 cash and at the same time transfers to the purchaser the partner's $250 share of partnership liabilities, the amount realized by the selling partner on the sale is $1,000.

§ 1.752–4T Effective dates and transition rules (temporary).

(a) *In general.* Except as otherwise provided in this section, §§ 1.752–1T, –2T, and –3T shall apply to any liability incurred or assumed by a partnership on or after January 30, 1989, unless such

liability is incurred or assumed by the partnership pursuant to a written binding contract in effect prior to December 29, 1988 and at all times thereafter.

(b) *Partner loans and guarantees.* If at any time on or after March 1, 1984, a partner bears the economic risk of loss (within the meaning of § 1.752–1T(d)(3)) for a partnership liability that is nonrecourse for purposes of § 1.1001–2 as a result of guaranteeing the payment of all or part of such liability or holding an interest in such liability as a creditor, the rules of §§ 1.752–1T, –2T, and –3T shall apply to such liability beginning on the later of—

(1) March 1, 1984; or

(2) The first date on which such partner bears the economic risk of loss with respect to the liability as a result of such guarantee or as a result of holding an interest in such liability as a creditor.

A guarantee made, or an interest in a liability as a creditor acquired, pursuant to a written binding contract in effect prior to March 1, 1984, and at all times thereafter, shall be disregarded for purposes of the preceding sentence. For purposes of this paragraph (b), the determination of whether a partner bears the economic risk of loss with respect to a partnership liability shall be made in accordance with the rules of § 1.752–1T(d)(3).

(c) *Election*—(1) *In general.* Notwithstanding anything in this section, a partnership may elect to apply the provisions of §§ 1.752–1T, –2T, and –3T to all of its liabilities as of the beginning of the first taxable year of such partnership ending after December 29, 1988.

(2) *Time and manner of election.* An election under this paragraph (c) is made by attaching a written statement to the partnership return for the first taxable year of such partnership ending after December 29, 1988. A written statement required pursuant to this paragraph (c)(2) must include the name, address, and taxpayer identification number of the partnership making such statement and contain a declaration that an election is being made under this paragraph (c).

(d) *Coordination with amendments to section 704(b) regulations.* If all or part of a partnership liability is treated as one or more partner nonrecourse debts under § 1.704–1T(b)(4)(iv)(*h*) and, but for this paragraph (d), §§ 1.752–1T, –2T, and –3T would not apply to such liability, then the partnership may treat such liability as a liability to which §§ 1.752–1T, –2T, and –3T apply to the extent of the partners' shares (if any) of the minimum gain attributable to any such partner nonrecourse debts (within the meaning of § 1.704–1T(b)(4)(iv)(*h*)(*5*)). If both § 1.704–1(b)(4)(iv) and §§ 1.752–1T, –2T, and –3T apply to a taxable year of a partnership, any reference included in §§ 1.752–1T, –2T, and –3T to § 1.704–1T(b)(4)(iv) shall be treated as a reference to the appropriate provision of § 1.704–1(b)(4)(iv) for purposes of applying §§ 1.752–1T, –2T, and –3T to such partnership for such taxable year. See §§ 1.704–1(b)(4)(iv)(*h*) and 1.704–1T(b)(4)(iv)(*m*) for rules regarding the effective dates of §§ 1.704–1(b)(4)(iv) and 1.704–1T(b)(4)(iv).

(e) *Cross reference.* For the rules applicable to liabilities of a partnership that are not subject to §§ 1.752–1T, –2T, and –3T, see 26 CFR 1.752–1.

Par. 4. A new § 1.704–1T is added to read as follows:

§ 1.704–1T Partner's distributive share.

(a) [Reserved.]

(b) *Determination of a partner's distributive share*—(0) *Cross-references.*

Heading	Section
Cross-references	1.704–1T(b)(0).
[Reserved.]	1.704–1T(b)(1).
[Reserved.]	1.704–1T(b)(2).
[Reserved.]	1.704–1T(b)(3).
Special rules	1.704–1T(b)(4).
[Reserved.]	1.704–1T(b)(4)(i).
[Reserved.]	1.704–1T(b)(4)(ii).
[Reserved.]	1.704–1T(b)(4)(iii).
Allocations attributable to nonrecourse liabilities.	1.704–1T(b)(4)(iv).
In general	1.704–1T(b)(4)(iv)(*a*).
Allocation of nonrecourse deductions.	1.704–1T(b)(4)(iv)(*a*)(*1*).
Allocation of minimum gain	1.704–1T(b)(4)(iv)(*a*)(*2*).
Determination of nonrecourse deductions.	1.704–1T(b)(4)(iv)(*b*).
Partnership minimum gain	1.704–1T(b)(4)(iv)(*c*).
Requirements to be satisfied.	1.704–1T(b)(4)(iv)(*d*).
Minimum gain chargeback	1.704–1T(b)(4)(iv)(*e*).
In general	1.704–1T(b)(4)(iv)(*e*)(*1*).
Allocations required pursuant to minimum gain chargeback.	1.704–1T(b)(4)(iv)(*e*)(*2*).
Coordination with paragraph (b)(2)(ii) of this section.	1.704–1T(b)(4)(iv)(*e*)(*3*).
Partner's share of partnership minimum gain.	1.704–1T(b)(4)(iv)(*f*).
Distribution of nonrecourse liability proceeds allocable to an increase in minimum gain.	1.704–1T(b)(4)(iv)(*g*).
In general	1.704–1T(b)(4)(iv)(*g*)(*1*).
Allocation of net increase in partnership minimum gain.	1.704–1T(b)(4)(iv)(*g*)(*2*).
Carryover to immediately succeeding taxable year.	1.704–1T(b)(4)(iv)(*g*)(*3*).
Distribution allocable to proceeds of nonrecourse liability.	1.704–1T–(b)(4)(iv)(*g*)(*4*).
Nonrecourse debt of the partnership where a partner bears the economic risk of loss.	1.704–1T(b)(4)(iv)(*h*).
In general	1.704–1T(b)(4)(iv)(*h*)(*1*).
Allocation of losses, deductions, and expenditures attributable to partner nonrecourse debt.	1.704–1T(b)(4)(iv)(*h*)(*2*).
Determination of partner nonrecourse deductions.	1.704–1T(b)(4)(iv)(*h*)(*3*).
Chargeback of items of income and gain.	1.704–1T(b)(4)(iv)(*h*)(*4*).
Partner's share of minimum gain attributable to partner nonrecourse debt.	1.704–1T(b)(4)(iv)(*h*)(*5*).
Net increase (or decrease) in minimum gain attributable to partner nonrecourse debt.	1.704–1T(b)(4)(iv)(*h*)(*6*).
Distribution of proceeds of partner nonrecourse debt allocable to increase in minimum gain attributable to such debt.	1.704–1T(b)(4)(iv)(*h*)(*7*).
Debt for which more than one partner bears the economic risk of loss.	1.704–1T(b)(4)(iv)(*h*)(*8*).
[Reserved.]	1.704–1T(b)(4)(iv)(*i*).
Tiered partnerships	1.704–1T(b)(4)(iv)(*j*).
Meaning of certain terms	1.704–1T(b)(4)(iv)(*k*).
Economic risk of loss	1.704–1T(b)(4)(iv)(*k*)(*1*).
Nonrecourse debt	1.704–1T(b)(4)(iv)(*k*)(*2*).
Nonrecourse liability	1.704–1T(b)(4)(iv)(*k*)(*3*).
Partner nonrecourse debt	1.704–1T(b)(4)(iv)(*k*)(*4*).
[Reserved.]	1.704–1T(b)(4)(iv)(*l*).
Effective dates	1.704–1T(b)(4)(iv)(*m*).
In general	1.704–1T(b)(4)(iv)(*m*)(*1*).
Election	1.704–1T(b)(4)(iv)(*m*)(*2*).
Examples	1.704–1T(b)(5).

(1) [Reserved.]

(2) [Reserved.]

(3) [Reserved.]

(4) *Special rules*—(i) [Reserved.]

(ii) [Reserved.]

(iii) [Reserved.]

(iv) *Allocations attributable to nonrecourse liabilities*—(*a*) *In general*—(*1*) *Allocation of nonrecourse deductions.* An allocation of an item of loss, deduction, or section 705(a)(2)(B) expenditure attributable to nonrecourse liabilities of the partnership ("nonrecourse deduction") cannot have economic effect because, in the event there is an economic burden that corresponds to such an allocation, the creditor alone bears that burden. Thus, nonrecourse deductions must be allocated in accordance with the partners' interests in the partnership. Paragraph (b)(4)(iv)(*d*) of this section, however, provides a test under which certain allocations of nonrecourse deductions will be deemed to be in accordance with the partners' interests in the partnership. If that test is not satisfied, the partners' distributive shares of nonrecourse deductions will

be determined, under § 1.704–1(b)(3), according to the partners' overall economic interests in the partnership. See also paragraph (b)(4)(iv)(*h*) of this section for special rules regarding the allocation of deductions attributable to nonrecourse debt with respect to which a partner bears the economic risk of loss.

(*2*) *Allocation of minimum gain.* To the extent that the amount of a nonrecourse liability encumbering an item of partnership property exceeds the adjusted tax basis of such property (or book value of such property if the property is properly reflected on the books of the partnership at a value that differs from its adjusted tax basis), a disposition of such property will generate gain in an amount that is at least equal to such excess ("partnership minimum gain"). See paragraph (b)(4)(iv)(*c*) of this section for rules regarding the computation of partnership minimum gain. An increase in partnership minimum gain may be attributable to items of partnership loss, deduction, or section 705(a)(2)(B) expenditure that decrease the adjusted tax basis (or book value) of property subject to a nonrecourse liability of the partnership or a nonrecourse borrowing by the partnership that exceeds the adjusted tax basis (or book value) of the partnership property encumbered by such liability. To the extent that an increase in partnership minimum gain is attributable to items of partnership loss, deduction, or section 705(a)(2)(B) expenditure, such items are treated as nonrecourse deductions under paragraph (b)(4)(iv)(*b*) of this section. Although an allocation of nonrecourse deductions cannot have economic effect, the amount of nonrecourse deductions allocated to any partner decreases such partner's capital account. Similarly, although the allocation to a partner of partnership minimum gain that is attributable to nonrecourse deductions claimed by the partnership increases the partner's capital account, the allocation cannot have economic effect because the minimum gain merely offsets nonrecourse deductions previously claimed by the partnership and does not necessarily bear any relationship to the value of partnership property. Thus, minimum gain that is attributable to nonrecourse deductions claimed by the partnership must be allocated to the partners that were allocated such nonrecourse deductions to prevent such gain from impairing the economic effect of other partnership allocations. In addition, if an increase in partnership minimum gain is attributable to a nonrecourse borrowing that is used to make a distribution to the partners, then such minimum gain represents the unrecognized gain of which the distributee-partners have effectively reaped the economic benefits through the use of nonrecourse debt. An allocation of such minimum gain can have economic effect only if the allocation is made to the partners that received the economic benefit of that gain. Accordingly, under paragraph (b)(4)(iv)(*e*) of this section, minimum gain attributable to nonrecourse deductions claimed by the partnership or the proceeds of a nonrecourse liability distributed to the partners by the partnership must be allocated to the partners that were allocated such deductions or received such distributions.

(*b*) *Determination of nonrecourse deductions.* The amount of nonrecourse deductions for a partnership taxable year equals the excess, if any, of the net increase in the amount of partnership minimum gain during such year, over the aggregate amount of any distributions during such year of proceeds of a nonrecourse liability that are allocable to an increase in partnership minimum gain. See examples (20) (i) and (vi), (21), and (22) of paragraph (b)(5) of this section. The nonrecourse deductions for a partnership taxable year shall consist first of depreciation or cost recovery deductions with respect to items of partnership property subject to one or more nonrecourse liabilities of the partnership to the extent of the increase in minimum gain attributable to the nonrecourse liabilities to which each such item of property is subject (or if such depreciation or cost recovery deductions exceed the amount of nonrecourse deductions for the year, then a proportionate share of each such deduction shall constitute a nonrecourse deduction), and the remainder of such nonrecourse deductions, if any, shall consist of a pro rata portion of other items of partnership loss, deduction, and section 705(a)(2)(B) expenditure for that year. See example (23) of paragraph (b)(5) of this section. In addition, if the amount of nonrecourse deductions for a partnership taxable year exceeds the total amount of the items of partnership loss, deduction, and section 705(a)(2)(B) expenditure for such year, then an amount of the net increase in partnership minimum gain for such year equal to that excess shall, for purposes of this paragraph (b)(4)(iv), be treated as an increase in partnership minimum gain for the immediately succeeding partnership taxable year for purposes of determining whether there is a net increase or a net decrease in partnership minimum gain during such taxable year. For example, if a partnership encumbers partnership property with a nonrecourse liability that results in a net increase in partnership minimum gain for the taxable year, but the partnership does not distribute any proceeds of the liability during the year and the amount of such net increase in minimum gain exceeds the partnership's losses, deductions, and section 705(a)(2)(B) expenditures for such a year, then the partnership will have a net increase in partnership minimum gain for the taxable year that cannot be allocated either to distributions or to losses, deductions, or section 705(a)(2)(B) expenditures, thereby leaving the partnership with excess nonrecourse deductions for the year. See example (20)(vi) of paragraph (b)(5) of this section. For purposes of this paragraph (b)(4)(iv)(*b*), the items of partnership loss, deduction, and section 705(a)(2)(B) expenditure for a partnership taxable year are determined without regard to any item that is treated as a partner nonrecourse deduction under paragraph (b)(4)(iv)(*h*)(*3*) of this section.

(*c*) *Partnership minimum gain.* The amount of partnership minimum gain is determined by computing, with respect to each nonrecourse liability of the partnership, the amount of gain (of whatever character), if any, that would be realized by the partnership if it disposed of (in a taxable transaction) the partnership property subject to such liability in full satisfaction thereof (and for no other consideration), and by then aggregating the amounts so computed. See examples (20) (i) and (iv), (21), and (22) of paragraph (b)(5) of this section. For purposes of determining the amount of such gain, (*1*) the adjusted tax basis of partnership property subject to two or more liabilities of equal priority shall be allocated among such liabilities in proportion to the respective outstanding balances of such liabilities, and (*2*) the adjusted tax basis of partnership property subject to two or more liabilities of unequal priority shall be allocated to the liabilities of an inferior priority (in accordance with subdivision (*1*) of this paragraph (b)(4)(iv)(*c*)) only to the extent of the excess, if any, of the adjusted tax basis of such property over the aggregate outstanding balance of the liabilities of superior priority. Only the portion of the property's adjusted tax basis that is allocated to nonrecourse liabilities of the partnership shall be used in computing minimum gain. See example (20) (v) and (vii) of paragraph (b)(5) of this section. If partnership property subject to one or more nonrecourse liabilities of the partnership

is, under § 1.704–1(b)(2)(iv)(*d*), (*f*), or (*r*), properly reflected on the books of the partnership at a book value that differs from the adjusted tax basis of such property, then the determinations under this paragraph (b)(4)(iv) shall be made with reference to such book value. See example (22) of paragraph (b)(5) of this section. For purposes of this paragraph (b)(4)(iv), in determining the net increase or decrease in partnership minimum gain during any partnership taxable year in which the capital accounts of the partners are increased pursuant to § 1.704–1(b)(2)(iv) (*f*) or (*r*) to reflect a revaluation of partnership property subject to one or more nonrecourse liabilities of the partnership, any decrease in partnership minimum gain attributable to each such revaluation shall be added back to the net decrease or increase otherwise determined. See example (22)(iii) of paragraph (b)(5) of this section.

(*d*) *Requirements to be satisfied.* Allocations of nonrecourse deductions are deemed to be made in accordance with the partners' interests in the partnership if and only if—

(*1*) Throughout the full term of the partnership, requirements (*1*) and (*2*) of § 1.704–1(b)(2)(ii)(*b*) are satisfied;

(*2*) Beginning in the first taxable year in which there are nonrecourse deductions and thereafter throughout the full term of the partnership, the partnership agreement provides for allocations of nonrecourse deductions among the partners in a manner that is reasonably consistent with allocations, which have substantial economic effect, of some other significant partnership item attributable to the property securing nonrecourse liabilities of the partnership;

(*3*) Beginning in the first taxable year of the partnership in which the partnership has nonrecourse deductions or makes a distribution of proceeds of a nonrecourse liability that are allocable to an increase in minimum gain and thereafter throughout the full term of the partnership, the partnership agreement contains a provision that complies with the requirements of paragraph (b)(4)(iv)(*e*) of this section ("minimum gain chargeback"); and

(*4*) All other material allocations and capital account adjustments under the partnership agreement are recognized under § 1.704–1(b) (without regard to whether allocations of adjusted tax basis and amount realized under section 613A(c)(7)(D) are recognized under § 1.704–1(b)(4)(v)).

(*e*) *Minimum gain chargeback.—(1) In general.* If there is a net decrease in partnership minimum gain for a partnership taxable year, the partners must be allocated items of partnership income and gain in accordance with this paragraph (b)(4)(iv)(*e*) ("minimum gain chargeback").

(*2*) *Allocations required pursuant to minimum gain chargeback.* If a minimum gain chargeback is required for a partnership taxable year, then each partner must be allocated items of income and gain for such year (and, if necessary, for subsequent years) in proportion to, and to the extent of, an amount equal to the greater of—

(*i*) The portion of such partner's share of the net decrease in partnership minimum gain during such year that is allocable to the disposition of partnership property subject to one or more nonrecourse liabilities of the partnership; or

(*ii*) The deficit balance in such partner's capital account at the end of such year (determined before any allocation of partnership income, gain, loss, deduction, or section 705(a)(2)(B) expenditure for such year and excluding from such deficit capital account balance any amount that such partner is obligated to restore under § 1.704–1(b)(2)(ii)(*c*), as well as any addition thereto pursuant to the next to last sentences of paragraph (b)(4)(iv) (*f*) and (*h*)(*5*) of this section after taking into account thereunder, any changes during such year in partnership minimum gain and in the minimum gain attributable to any partner nonrecourse debt), provided that if requirements (*1*) and (*2*) of § 1.704–1(b)(2)(ii)(*b*) have not been satisfied throughout the full term of the partnership, the amount determined under this paragraph (b)(4)(iv)(*e*)(*2*)(*ii*) shall equal zero and the amount of any allocation in addition to that required under paragraph (b)(4)(iv)(*e*)(*2*)(*i*) of this section that must be made to such partner in connection with the net decrease in partnership minimum gain during such year shall be determined in accordance with the partner's interest in the partnership under § 1.704–1(b)(3).

See examples (20)(i) and (22)(v) of paragraph (b)(5) of this section. For purposes of this paragraph (b)(4)(iv)(*e*)(*2*), the partners' capital accounts shall be reduced by the items described in § 1.704–1(b)(2)(ii)(*d*) (*4*), (*5*), and (*6*). See paragraph (b)(4)(iv)(*f*) of this section for rules regarding the determination of a partner's share of a net decrease in partnership minimum gain. The portion of a partner's share of any net decrease in partnership minimum gain for a partnership taxable year that is allocable to the disposition of partnership property subject to one or more nonrecourse liabilities of the partnership equals the amount determined by multiplying the partner's share of the net decrease in partnership minimum gain for the year by a fraction, the numerator of which is the portion of the net decrease in partnership minimum gain for the year that is allocable to the disposition of partnership property subject to one or more nonrecourse liabilities of the partnership and the denominator of which is the net decrease in partnership minimum gain for the year. For purposes of the preceding sentence, a net decrease in partnership minimum gain for a partnership taxable year is allocable to the disposition of partnership property subject to one or more nonrecourse liabilities of the partnership to the extent of any decrease in partnership minimum gain during such year that resulted from the disposition of any such property. Any minimum gain chargeback required for a partnership taxable year shall consist first of gains recognized from the disposition of items of partnership property subject to one or more nonrecourse liabilities of the partnership to the extent of the decrease in minimum gain attributable to the disposition of such items of property (or if such gains exceed the amount of the minimum gain chargeback required for such taxable year, the minimum gain chargeback shall consist of a proportionate share of each such gain), and the remainder of such minimum gain chargeback shall consist of a pro rata portion of the other items of partnership income and gain for that year. An allocation of items of income or gain required for a partnership taxable year pursuant to a minimum gain chargeback shall be deemed to be in accordance with the partners' interests in the partnership and shall be made before any other allocation of partnership items is made under section 704(b) for such year.

(*3*) *Coordination with § 1.704–1(b)(2)(ii).* For purposes of § 1.704–1(b)(2)(ii)(*d*)(*6*), offsetting increases to a partner's capital account taken into account under that paragraph do not include items of partnership income and gain that are expected to be allocated to that partner pursuant to this paragraph (b)(4)(iv)(*e*), provided that any subsequent distributions that are expected to be made to such partner of proceeds of a nonrecourse liability that are allocable to an increase in partnership minimum gain shall be deemed to be offset by increases to the partner's capital account for purposes of that section.

(*f*) *Partner's share of partnership minimum gain.* A partner's share of partnership minimum gain at the end of

any partnership taxable year equals the excess (if any) of—

(*1*) The sum of the nonrecourse deductions allocated to such partner (and such partner's predecessors in interest) up to that time and the aggregate distributions to such partner (and such partner's predecessors in interest) up to that time of proceeds of a nonrecourse liability that are allocable to an increase in partnership minimum gain; over

(*2*) The sum of such partner's (and such partner's predecessors in interest) aggregate share of the net decreases in partnership minimum gain up to that time and such partner's (and such partner's predecessors in interest) aggregate share of the decreases up to that time in partnership minimum gain resulting from revaluations of partnership property subject to one or more nonrecourse liabilities of the partnership.

A partner's share of the net decrease in partnership minimum gain during a partnership taxable year equals an amount that bears the same relation to the net decrease in partnership minimum gain during such year as such partner's share of partnership minimum gain at the end of the immediately preceding taxable year of the partnership (or, if later, the time immediately following the last time that the capital accounts of the partners are increased pursuant to § 1.704–1(b)(2)(iv)(*f*) or (*r*) to reflect a revaluation of partnership property subject to one or more nonrecourse liabilities of the partnership) bears to the amount of partnership minimum gain at the end of such preceding taxable year (or such later date). See examples (20) (i) and (iv) and (21) of paragraph (b)(5) of this section. A partner's share of any decrease in partnership minimum gain resulting from a revaluation of partnership property equals the amount of the increase in such partner's capital account attributable to such revaluation to the extent of the reduction in minimum gain caused by such revaluation. See example (22)(ii) of paragraph (b)(5) of this section. For purposes of § 1.704–1(b)(2)(ii)(*d*), the amount of a partner's share of partnership minimum gain shall be added to the limited dollar amount, if any, of the deficit balance in such partner's capital account that such partner is obligated to restore. See examples (20)(i) and (22)(i) of paragraph (b)(5) of this section.

(*g*) *Distribution of nonrecourse liability proceeds allocable to an increase in minimum gain*—(*1*) *In general.* If during a partnership taxable year a partnership makes a distribution to the partners that is allocable to the proceeds of any nonrecourse liability of the partnership, such distribution is allocable to an increase in partnership minimum gain to the extent of the amount of the net increase, if any, in partnership minimum gain for such taxable year that is allocated to such nonrecourse liability under paragraph (b)(4)(iv)(*g*)(*2*) of this section.

(*2*) *Allocation of net increase in partnership minimum gain.* A net increase in partnership minimum gain for a taxable year is allocated to a nonrecourse liability of the partnership under this paragraph (b)(4)(iv)(*g*)(*2*) to the extent of the amount of any increase in partnership minimum gain for such year that arose as a result of incurring such nonrecourse liability (that is, the amount of any increase in partnership minimum gain for such year that arose as a result of encumbering partnership property with a nonrecourse liability that exceeds its adjusted tax basis or book value, as the case may be). See example (20)(vi) of paragraph (b)(5) of this section. If an amount of the net increase in partnership minimum gain for a partnership taxable year is allocated to more than one nonrecourse liability of the partnership pursuant to the first sentence of this paragraph (b)(4)(iv)(*g*)(*2*) and the sum of the amounts so allocated exceeds the total amount of such net increase, then the amount of such net increase that shall be allocated to each such liability equals the amount determined by multiplying the total amount of such net increase by the fraction obtained by dividing—

(*i*) The amount of such net increase that would be allocated to such liability under the first sentence of this paragraph (b)(4)(iv)(*g*)(*2*); by

(*ii*) The sum of the amounts of such net increase that would be allocated to all such liabilities under the first sentence of this paragraph (b)(4)(iv)(*g*)(*2*).

(3) *Carryover to immediately succeeding taxable year.* If the amount of the net increase in partnership minimum gain for a taxable year of the partnership that is allocated to a nonrecourse liability of the partnership under paragraph (b)(4)(iv)(*g*)(*2*) of this section exceeds the aggregate amount of the distributions to the partners during such year that are allocable to the proceeds of such liability ("excess allocable amount") and all or part of the net increase in partnership minimum gain for such year is treated as an increase in partnership minimum gain during the immediately succeeding taxable year under paragraph (b)(4)(iv)(*b*) of this section, then an amount of such deemed increase in partnership minimum gain equal to such excess allocable amount (or, if less, the amount of such deemed increase) shall be treated as an increase in partnership minimum gain that arose as a result of incurring the nonrecourse liability to which such excess allocable amount is attributable for purposes of applying paragraph (b)(4)(iv)(*g*)(*2*) of this section in such succeeding taxable year. See example (20)(vi) of paragraph (b)(5) of this section. If for a partnership taxable year there is an excess allocable amount with respect to more than one nonrecourse liability of the partnership and the sum of such excess allocable amounts exceeds the amount of the net increase in partnership minimum gain for such year that is treated as an increase in partnership minimum gain during the immediately succeeding taxable year, then the amount of such deemed increase in partnership minimum gain which is treated as an increase in partnership minimum gain that arose as a result of incurring any such nonrecourse liability shall equal the amount determined by multiplying the amount of such deemed increase by the fraction obtained by dividing—

(*i*) The excess allocable amount for such year with respect to such nonrecourse liability; by

(*ii*) The sum of the excess allocable amounts for such year with respect to all nonrecourse liabilities.

(*4*) *Distribution allocable to proceeds of nonrecourse liability.* The determination of whether a distribution by the partnership to one or more partners is allocable to proceeds of a nonrecourse liability may be made under any reasonable method. For purposes of the preceding sentence, the rules prescribed under § 1.163–8T for allocating debt proceeds among expenditures (applying those rules to the partnership as if it were an individual) constitutes a reasonable method for determining (*i*) whether the proceeds of a nonrecourse liability have been distributed to the partners and (*ii*) the partners to whom such proceeds have been distributed.

(*h*) *Nonrecourse debt of the partnership where a partner bears economic risk of loss*—(*1*) *In general.* The rationale for the special rule contained in this paragraph (b)(4)(iv) is that, in the event there is an economic burden that corresponds to the nonrecourse deductions, none of the partners will bear that burden. Accordingly, for purposes of this paragraph (b)(4)(iv)—

(*i*) A nonrecourse liability of the partnership is a liability of the partnership (or portion thereof) for which no partner bears the economic risk of loss (within the meaning of paragraph (b)(4)(iv)(*k*)(*1*) of this section); and

(*ii*) The rules of this paragraph (*h*) govern the allocation of items of partnership income, gain, loss, deduction, or section 705(a)(2)(B) expenditure that must be made (and are considered in accordance with the partners' interests in the partnership) in connection with any nonrecourse debt (within the meaning of paragraph(b)(4)(iv)(*k*)(*2*) of this section) of the partnership for which any partner bears the economic risk of loss ("partner nonrecourse debt").

(*2*) *Allocation of losses, deductions, and expenditures attributable to partner nonrecourse debt.* Any item of partnership loss, deduction, or section 705(a)(2)(B) expenditure that is attributable to a partner nonrecourse debt ("partner nonrecourse deduction") must be allocated to the partner that bears the economic risk of loss for such debt. If more than one partner bears the economic risk of loss for a partner nonrecourse debt, any partner nonrecourse deduction attributable to such debt must be allocated among such partners in accordance with the ratios in which the partners share the economic risk of loss for such partner nonrecourse debt.

(*3*) *Determination of partner nonrecourse deductions.* For any partnership taxable year, the amount of partner nonrecourse deductions with respect to a partner nonrecourse debt equals the excess, if any, of the amount of the net increase during such year in the amount of minimum gain attributable to such partner nonrecourse debt, over the aggregate amount of any distributions during such year to the partner that bears the economic risk of loss for such debt of proceeds of such debt that are allocable to an increase in the minimum gain attributable to such debt. See example (20)(viii) and (ix) of paragraph (b)(5) of this section. The determination of which items of partnership loss, deduction, and section 705(a)(2)(B) expenditure constitute the partner nonrecourse deductions with respect to a partner nonrecourse debt for a partnership taxable year must be made in a manner that is consistent with the principles of paragraph (b)(4)(iv)(*b*) of this section. If the amount of partner nonrecourse deductions with respect to a partner nonrecourse debt for a partnership taxable year exceeds the total amount of items of partnership loss, deduction, and section 705(a)(2)(B) expenditure for such year that are treated as partner nonrecourse deductions with respect to such debt, then an amount of the net increase during such year in the minimum gain attributable to such partner nonrecourse debt equal to that excess shall be treated as an increase during the immediately succeeding partnership taxable year in the minimum gain attributable to such debt for purposes of determining the net increase or decrease during such succeeding taxable year in the minimum gain attributable to such debt. The determination of which items of partnership loss, deduction, and section 705(a)(2)(B) expenditure constitute partner nonrecourse deductions for a partnership taxable year must be made before the determination of which items constitute nonrecourse deductions for the taxable year under paragraph (b)(4)(iv)(*b*) of this section.

(*4*) *Chargeback of items of income and gain.* If there is a net decrease during a partnership taxable year in the minimum gain attributable to a partner nonrecourse debt, then any partner with a share of the minimum gain attributable to such debt at the beginning of such year must be allocated items of partnership income and gain for such year (and, if necessary, for subsequent years) in proportion to, and to the extent of, an amount equal to the greater of—

(*i*) The portion of such partner's share of the net decrease in the minimum gain attributable to such partner nonrecourse debt that is allocable to the disposition of partnership property subject to such debt; or

(*ii*) The deficit balance in such partner's capital account at the end of such year (determined before any allocation of partnership income, gain, loss, deduction, or section 705(a)(2)(B) expenditure for such year and excluding from such deficit capital account balance any amount that such partner is obligated to restore under § 1.704–1(b)(2)(ii)(*c*), as well as any addition thereto pursuant to the next to last sentences of paragraph (b)(4)(iv) (*f*) and (*h*)(*5*) of this section after taking into account thereunder any changes during such year in partnership minimum gain and in the minimum gain attributable to any partner nonrecourse debt), provided that if requirements (*1*) and (*2*) of § 1.704–1(b)(2)(ii)(*b*) have not been satisfied throughout the full term of the partnership, the amount determined under this paragraph (b)(4)(iv)(*h*)(*4*)(*ii*) shall equal zero and the amount of any allocation in addition to that required under paragraph (b)(4)(iv)(*h*)(*4*)(*i*) of this section that must be made to such partner in connection with the net decrease during such year in the minimum gain attributable to such partner nonrecourse debt shall be determined in accordance with the partner's interest in the partnership under § 1.704–1(b)(3).

See paragraph (b)(4)(iv)(*h*)(*5*) of this section for rules regarding the determination of a partner's share of a net decrease in the minimum gain attributable to a partner nonrecourse debt. For purposes of this paragraph (b)(4)(iv)(*h*)(*4*), the determination of whether the partners have deficit balances in their capital accounts shall be made by reducing the partner's capital accounts by the items described in § 1.704–1(b)(2)(ii)(*d*) (*4*), (*5*), and (*6*). The portion of a partner's share of any net decrease during a partnership taxable year in the minimum gain attributable to a partner nonrecourse debt that is allocable to the disposition of partnership property subject to such debt equals the amount determined by multiplying the partner's share of the net decrease in the minimum gain attributable to such debt for the year by a fraction, the numerator of which is the portion of the net decrease in the minimum gain attributable to such debt for the year that is allocable to the disposition of partnership property subject to such debt and the denominator of which is the net decrease in the minimum gain attributable to such debt for the year. For purposes of the preceding sentence, a net decrease during a partnership taxable year in the minimum gain attributable to a partner nonrecourse debt is allocable to the disposition of partnership property subject to such debt to the extent of any decrease during such year in the minimum gain attributable to such debt that resulted from the disposition of any such property. The determination of which items of partnership income and gain must be allocated pursuant to this paragraph (b)(4)(iv)(*h*)(*4*) for any partnership taxable year shall be made in a manner that is consistent with the principles of paragraph (b)(4)(iv)(*e*)(*2*) of this section. For purposes of this paragraph (b)(4)(iv)(*h*)(*4*), the items of partnership income and gain for a partnership taxable year do not include any item of income or gain that is allocated pursuant to a minimum gain chargeback for such year under paragraph (b)(4)(iv)(*e*) of this section. Any allocation of items of partnership income and gain required to be made pursuant to this paragraph (b)(4)(iv)(*h*)(*4*) for a partnership taxable

year must be made before any other allocation (other than a minimum gain chargeback pursuant to paragraph (b)(4)(iv)(*e*) of this section) of partnership items is made under section 704(b) for such year. For purposes of § 1.704–1(b)(2)(ii)(*d*)(*6*), offsetting increases in a partner's capital account taken into account under that paragraph do not include items of partnership income and gain that are expected to be allocated to that partner under this paragraph (b)(4)(iv)(*h*)(*4*), provided that any subsequent distributions that are expected to be made to such partner of proceeds of any partner nonrecourse debt (with respect to which such partner will bear the economic risk of loss at the time of distribution) that are allocable to an increase in the minimum gain attributable to such debt shall be deemed to be offset by increases to the partner's capital account for purposes of that section.

(*5*) *Partner's share of minimum gain attributable to partner nonrecourse debt.* For purposes of this paragraph (b)(4)(iv)(*h*), a partner's share of the minimum gain attributable to a partner nonrecourse debt at the end of any partnership taxable year equals the excess (if any) of—

(*i*) The sum of the partner nonrecourse deductions attributable to such debt that have been allocated to such partner (and such partner's predecessors in interest) up to that time and the aggregate amount of distributions made to such partner (and such partner's predecessors in interest) up to that time of proceeds of such debt that are allocable to an increase in the minimum gain attributable to such debt (but only if such partner (or such partner's predecessor in interest) bears the economic risk of loss for that debt at the time of any such distribution); over

(*ii*) The sum of such partner's (and such partners predecessors in interest) aggregate share of the net decreases in the minimum gain attributable to such partner nonrecourse debt up to that time and such partner's (and such partner's predecessors in interest) aggregate share of the decreases up to that time in the minimum gain attributable to such partner nonrecourse debt resulting from revaluations of partnership property subject to such debt.

A partner's share of the net decrease in the minimum gain attributable to a partner nonrecourse debt for a partnership taxable year equals an amount that bears the same relation to the net decrease in the minimum gain attributable to such debt for such year as such partner's share of the minimum gain attributable to such debt at the end of the immediately preceding taxable year of the partnership (or, if later, the time immediately following the last time that the capital accounts of the partners are increased pursuant to § 1.704–1(b)(2)(iv) (*f*) or (*r*) to reflect a revaluation of partnership property subject to such partner nonrecourse debt) bears to the amount of minimum gain attributable to such debt at the end of such preceding taxable year (or such later date). A partner's share of a decrease in the minimum gain attributable to a partner nonrecourse debt resulting from a revaluation of partnership property subject to such debt equals the amount of the increase in such partner's capital account that is attributable to such revaluation to the extent of the reduction in the minimum gain attributable to such debt caused by such revaluation. See paragraph (b)(4)(iv)(*f*) of this section for similar rules relating to partnership minimum gain. For purposes of § 1.704–1(b)(2)(ii)(*d*), the amount of a partner's share of the minimum gain attributable to any partner nonrecourse debt shall be added to the limited dollar amount, if any, of the deficit balance in such partner's capital account that such partner is obligated to restore, and a partner shall not otherwise be considered to have an obligation to restore a deficit balance in such partner's capital account as a result of bearing the economic risk of loss for any partner nonrecourse debt. See example (20)(viii) of paragraph (b)(5) of this section.

(*6*) *Net increase (or decrease) in minimum gain attributable to partner nonrecourse debt.* For purposes of this paragraph (b)(4)(iv)(*h*), the net increase (or decrease) in the minimum gain for a partnership taxable year that is attributable to a partner nonrecourse debt equals the sum of—

(*i*) Any increase (or decrease) in the net increase in partnership minimum gain during such year that would result if such partner nonrecourse debt were treated as a nonrecourse liability of the partnership; and

(*ii*) Any decrease (or increase) in the net decrease in partnership minimum gain during such year that would result if such partner nonrecourse debt were treated as a nonrecourse liability of the partnership.

In addition, for purposes of this paragraph (b)(4)(iv)(*h*), the amount of a decrease in the minimum gain attributable to a partner nonrecourse debt resulting from a revaluation of partnership property subject to such debt equals the excess of the aggregate amount of gain that would be realized by the partnership immediately prior to such revaluation, over the aggregate amount of gain that would be realized by the partnership immediately after such revaluation if the partnership had, at each such time, disposed of (in a taxable transaction) the partnership property subject to such debt in full satisfaction thereof (and for no other consideration). Only the portion of the adjusted tax basis or book value, as the case may be, of the partnership property subject to such debt that is allocable to such debt under the principles of paragraph (b)(4)(iv)(*c*) (*1*) and (*2*) of this section shall be used in computing such gain.

(*7*) *Distribution of proceeds of partner nonrecourse debt allocable to an increase in the minimum gain attributable to such debt.* If a partnership makes a distribution to the partners during a partnership taxable year that is allocable to the proceeds of a partner nonrecourse debt, the amount of such distribution that is allocable to an increase in the minimum gain attributable to such debt equals the amount of the net increase during such year in the minimum gain attributable to such debt that arose as a result of incurring such debt or distributing proceeds of such debt. The rules of this paragraph (b)(4)(iv)(*h*)(*7*) shall be applied in a manner that is consistent with the principles of paragraph (b)(4)(iv)(*g*) of this section.

(*8*) *Debt with respect to which more than one partner bears the economic risk of loss.* If more than one partner bears the economic risk of a loss for different portions of a nonrecourse debt of the partnership, then each such portion shall be treated as a separate partner nonrecourse debt for purposes of this paragraph (b)(4)(iv).

(*i*) [Reserved.]

(*j*) *Tiered partnerships.* If a partnership (the "upper-tier partnership") is a partner in another partnership (the "subsidiary partnership"), then for purposes of applying this paragraph (b)(4)(iv) to the upper-tier partnership for any taxable year of the upper-tier partnership—

(*1*) The sum of—

(*i*) Any nonrecourse deductions of the subsidiary partnership allocated to the upper-tier partnership for such taxable year; and

(*ii*) Any distributions made during such taxable year to the upper-tier partnership by the subsidiary partnership of proceeds of a nonrecourse liability that are allocable to an increase to the partnership minimum gain of the subsidiary partnership;

shall be treated as an increase in the minimum gain of the upper-tier partnership that shall be taken into account in computing the net increase or decrease, as the case may be, in the partnership minimum gain of the upper-tier partnership for such taxable year;

(2) The upper-tier partnership's share for such taxable year of any net decrease in the partnership minimum gain of the subsidiary partnership shall be treated as a decrease in the minimum gain of the upper-tier partnership that shall be taken into account in computing the net increase or decrease, as the case may be, in the partnership minimum gain of the upper-tier partnership for such taxable year;

(3) The portion of the upper-tier partnership's share for such taxable year of any net decrease in the partnership minimum gain of the subsidiary partnership that is allocable to the disposition of property of the subsidiary partnership subject to one or more nonrecourse liabilities of the subsidiary partnership shall, for purposes of paragraph (b)(4)(iv)(*e*) of this section, be treated as a decrease during such year in the partnership minimum gain of the upper-tier partnership that resulted from the disposition of property of the upper-tier partnership that is subject to one or more nonrecourse liabilities of the upper-tier partnership;

(4) Any distributions made during such taxable year to the upper-tier partnership by the subsidiary partnership of proceeds of a nonrecourse liability that are allocable to an increase in the partnership minimum gain of the subsidiary partnership shall be treated as proceeds of a nonrecourse liability of the upper-tier partnership, and the increase in the minimum gain of the upper-tier partnership under paragraph (b)(4)(iv)(*j*)(*1*) of this section that is attributable to the receipt of such distributions shall, for purposes of paragraph (b)(4)(iv)(*g*) of this section, be treated as an increase in the minimum gain of the upper-tier partnership that arose as a result of encumbering property of the upper-tier partnership with such nonrecourse liability of the upper-tier partnership;

(5) Any nonrecourse deductions allocated to the upper-tier partnership by the subsidiary partnership for such taxable year shall, for purposes of paragraph (b)(4)(iv)(*b*) of this section, be treated as depreciation or cost recovery deductions with respect to an item of property of the upper-tier partnership subject to a nonrecourse liability of such partnership with respect to which the minimum gain increased during such year by the amount of such nonrecourse deductions; and

(6) Any liability of the subsidiary partnership (within the meaning of the regulations under section 752) that is treated as a liability of the upper-tier partnership under § 1.752–1T(j)(1) shall be treated as a liability of the upper-tier partnership for purposes of applying paragraph (b)(4)(iv)(*h*) of this section, and rules incorporating the principles of subdivisions (*1*) through (*5*) of this paragraph (b)(4)(iv)(*j*) shall, to the extent appropriate, be applied to determine the allocations that the upper-tier partnership must make under paragraph (b)(4)(iv)(*h*) of this section with respect to any such liability that constitutes a nonrecourse debt for which one or more partners of the upper-tier partnership bear the economic risk of loss.

(*k*) *Meaning of certain terms.* For purposes of this paragraph (b)(4)(iv), the following terms have the meanings set forth below:

(*1*) *Economic risk of loss.* The determination of whether a partner bears the economic risk of loss with respect to any partnership liability shall be made in accordance with § 1.752–1T(d)(3) (without regard to whether that section applies to such liability).

(*2*) *Nonrecourse debt.* The term "nonrecourse debt" means any partnership liability that is considered nonrecourse for purposes of § 1.1001–2 (without regard to whether such liability is a recourse liability under § 1.752–1T(d)(2)) and any partnership liability for which the creditor's right to repayment is limited to one or more assets of the partnership (within the meaning of § 1.752–1T(d)(3)(ii)(B)(*4*)(*ii*)).

(*3*) *Nonrecourse liability.* The term "nonrecourse liability" means any partnership liability (or portion thereof) for which no partner bears the economic risk of loss.

(*4*) *Partner nonrecourse debt.* The term "partner nonrecourse debt" means any nonrecourse debt of the partnership for which any partner bears the economic risk of loss.

(l) [Reserved.]

(*m*) *Effective dates*—(*1*) *In general.* Except as otherwise provided in this paragraph (b)(4)(iv)(*m*), this paragraph (b)(4)(iv) shall apply for partnership taxable years beginning after December 29, 1988. For the rules applicable to taxable years beginning on or before December 29, 1988, see § 1.704–1(b)(4)(iv). If a partnership agreement entered into on or before December 29, 1988, complied with the provisions of § 1.704–1(b)(4)(iv)(*d*) on or before that date, the provisions of § 1.704–1(b)(4)(iv)(*a*) through (*f*) shall continue to apply to such partnership for any taxable year beginning after that date (unless the partnership makes an election under paragraph (b)(4)(iv)(*m*)(*2*) of this section) and ending before any subsequent material modification to the partnership agreement.

(*2*) *Election.* A partnership may elect to apply the provisions of this paragraph (b)(4)(iv) to the first taxable year of such partnership ending after December 29, 1988. An election under this paragraph (b)(4)(iv)(*m*) is made by attaching a written statement to the partnership return for the first taxable year of such partnership ending after December 29, 1988. A written statement required pursuant to this paragraph (b)(4)(iv)(*m*)(*2*) must include the name, address, and taxpayer identification number of the partnership making such statement and contain a declaration that an election is being made under this paragraph (b)(4)(iv)(*m*).

(5) *Examples.* The operation of the rules of this paragraph is illustrated by the following examples:

Examples (1) through (19). [Reserved.]

Example (20). (i) RM and HB form a limited partnership to acquire and operate a commercial office building. RM, the limited partner, contributes $180,000, and HB, the general partner, contributes $20,000 to the partnership, which obtains an $800,000 nonrecourse loan and purchases the building (on leased land) for $1,000,000. The nonrecourse loan is secured only by the building, and no principal payments are due for 5 years. The partnership agreement provides that the partners' capital accounts will be determined and maintained in accordance with § 1.704–1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) will be made in accordance with partners' positive capital account balances (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*2*)), HB will be required to restore any deficit balance in HB's capital account following the liquidation of HB's interest (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*3*)), and RM will not be required to restore any deficit balance in RM's capital account following the liquidation of RM's interest. The partnership agreement contains a qualified income offset (as defined in § 1.704–1(b)(2)(ii)(*d*)), and, as of the end of each partnership taxable year discussed herein, the items described in § 1.704–1(b)(2)(ii)(*d*) (*4*), (*5*), and (*6*) are not reasonably expected to cause or increase a deficit balance in RM's capital account. In addition, the agreement contains a minimum gain chargeback (in accordance with paragraph (b)(4)(iv)(*e*) of this section). The partnership agreement provides that, except as otherwise required by its qualified income offset and minimum gain chargeback provisions, (a) all partnership items will be allocated 90 percent to RM and 10 percent to HB until the first time when the partnership has recognized items of income and gain that exceed the items of loss and deduction it has recognized over its life, and (b) all further

partnership items will be allocated equally between RM and HB. Finally, the partnership agreement provides that all distributions, other than distributions in liquidation of the partnership or of a partner's interest in the partnership, will be made 90 percent to RM and 10 percent to HB until a total of $200,000 has been distributed, and thereafter all such distributions will be made equally to RM and HB. In each of the partnership's first 2 taxable years, it generates rental income of $95,000, operating expenses (including land lease payments) of $10,000, interest expense of $80,000, and a cost recovery deduction of $90,000, resulting in a net taxable loss of $85,000 in each of those years. The allocations of these losses 90 percent to RM and 10 percent to HB have substantial economic effect.

	RM	HB
Capital account on formation	$180,000	$20,000
Less: Net loss in years 1 and 2	(153,000)	(17,000)
Capital account at end of year 2	27,000	3,000

In the partnership's third taxable year, it again generates rental income of $95,000, operating expense of $10,000, interest expenses of $80,000, and a cost recovery deduction of $90,000, resulting in a net taxable loss of $85,000. If the partnership were to dispose of the building in full satisfaction of the nonrecourse liability at the end of that year, it would realize $70,000 of gain ($800,000 amount realized less $730,000 adjusted tax basis). Since the amount of partnership minimum gain at the end of that year (and the net increase in partnership minimum gain during the year) is $70,000 and the partnership did not distribute any proceeds of a nonrecourse liability that are allocable to an increase in partnership minimum gain, the amount of partnership nonrecourse deductions for that year is $70,000, consisting of cost recovery deductions allowable with respect to the building of $70,000. Pursuant to the partnership agreement all partnership items comprising the net taxable loss of $85,000, including the $70,000 nonrecourse deduction, are allocated 90 percent to RM and 10 percent to HB. The allocation of these items, other than the nonrecourse deductions, has substantial economic effect.

	RM	HB
Capital account at end of year 2	$27,000	$3,000
Less: Net loss in year 3 (without nonrecourse deduction)	(13,500)	(1,500)
Less: Nonrecourse deduction in year 3	(63,000)	(7,000)
Capital account at end of year 3	($49,500)	($5,500)

This allocation of the $70,000 nonrecourse deduction, 90 percent to RM and 10 percent to HB, satisfies requirement (2) of paragraph (b)(4)(iv)(*d*) of this section because the allocation is consistent with allocations, which have substantial economic effect, of other significant partnership items attributable to the building. Since the remaining requirements of paragraph (b)(4)(iv)(*d*) of this section are satisfied, the allocation of nonrecourse deductions is deemed to be made in accordance with the partners' interests in the partnership. At the end of the partnership's third taxable year, RM's and HB's shares of partnership minimum gain are $63,000 and $7,000, respectively. Therefore, pursuant to the next to last sentence in paragraph (b)(4)(iv)(*f*) of this section, RM is treated as obligated to restore a deficit balance in RM's capital account of $63,000, so that in the succeeding year RM could be allocated up to an additional $13,500 of partnership deductions, losses, and section 705(a)(2)(B) expenditures that are not nonrecourse deductions, and that allocation would be considered to have economic effect under the alternate economic effect test contained in § 1.704–1(b)(2)(ii)(*d*) even though such an allocation would increase a deficit capital account balance. If the partnership were to dispose of the building in full satisfaction of the nonrecourse liability at the beginning of the partnership's fourth taxable year (and had no other economic activity in that year), the partnership minimum gain would be decreased from $70,000 to zero. RM's and HB's shares of that net decrease would be $63,000 and $7,000, respectively. Upon such a disposition, the minimum gain chargeback would require (before any other allocation is made under section 704(b) with respect to partnership items for the partnership's fourth taxable year) that RM and HB be allocated $63,000 and $7,000 respectively, of the gain from that disposition.

(ii) Assume the same facts as originally stated in (i) except that the partnership agreement provides that all nonrecourse deductions of the partnership will be allocated equally between RM and HB. Furthermore, at the time the partnership agreement is entered into, there is a reasonable likelihood that over the partnership's life it will recognize amounts of income and gain significantly in excess of amounts of loss and deduction (other than nonrecourse deductions. The allocation of such excess equally between the partners pursuant to the partnership agreement will have substantial economic effect. The allocation of all items, other than the nonrecourse deductions, 90 percent to RM and 10 percent to HB, has substantial economic effect.

	RM	HB
Capital account on formation	$180,000	$20,000
Less: Net loss in years 1 and 2	(153,000)	(17,000)
Capital account at end of year 2	27,000	3,000
Less: Net loss in year 3 (without nonrecourse deduction)	(13,500)	(1,500)
Less: nonrecourse deduction in year 3	(35,000)	(35,000)
Capital account at end of year 3	($21,500)	($33,000)

The allocation of the $70,000 nonrecourse deduction equally between RM and HB satisfies requirement (2) of paragraph (b)(4)(iv)(*d*) of this section because the allocation is consistent with allocations, which will have substantial economic effect, of other significant partnership items attributable to the building. Since the remaining requirements of paragraph (b)(4)(iv)(*d*) of this section are satisfied, the allocation of nonrecourse deductions is deemed to be made in accordance with the partners' interests in the partnership. The allocation of the nonrecourse deductions 75 percent to RM and 25 percent to HB (or in any other ratio between 90 percent to RM/10 percent to HB and 50 percent to RM/50 percent to HB) also would satisfy requirement (2) of paragraph (b)(4)(iv)(*d*) of this section.

(iii) Assume the same facts as originally stated in (i) except that the partnership agreement provides that RM will be allocated 99 percent, and HB 1 percent, of all nonrecourse deductions of the partnership. This allocation of the $70,000 nonrecourse deduction does not satisfy requirement (2) of paragraph (b)(4)(iv)(*d*) because it is not reasonably consistent with allocations, which have substantial economic effect, of any other significant partnership item attributable to the building. Therefore, the allocation of nonrecourse deductions will be disregarded, and the nonrecourse deductions of the partnership will be reallocated according to the partners' overall economic interests in the partnership, determined with reference to the factors set forth in § 1.704–1(b)(3)(ii).

(iv) Assume the same facts as originally stated in (i) except that, at the beginning of the partnership's fourth taxable year, RM contributes $144,000 and HB contributes $16,000 of additional capital to the partnership, which the partnership uses to reduce the amount of its nonrecourse liability from $800,000 to $640,000. In addition, in the partnership's fourth taxable year, it again generates rental income of $95,000, operating expenses of $10,000, interest expense of $80,000, and a cost recovery deduction of $90,000, resulting in net taxable loss of $85,000. If the partnership were to dispose of the building in full satisfaction of the nonrecourse liability at the end of that year, it would realize no gain ($640,000 amount realized less $640,000 adjusted tax basis). Therefore, the amount of partnership minimum gain at the end of the year is zero, which represents a net decrease in partnership minimum gain of $70,000 during the year. RM's and HB's shares of this net decrease are $63,000 and $7,000 respectively, so that at the end of the partnership's fourth taxable year, RM's and HB's shares of partnership minimum gain are zero. Therefore, pursuant to the next to last sentence in paragraph (b)(4)(iv)(*f*) of this section, RM is no longer treated as being obligated to restore any deficit balance in

RM's capital account. Assuming the sum of the reductions to RM's capital account described in § 1.704–1(b)(2)(ii)(*d*) (*4*), (*5*), and (*6*) does not exceed $94,500, the minimum gain chargeback does not require that either RM or HB be allocated items of income and gain in the partnership's fourth taxable year even though there is a net decrease in partnership minimum gain during that year. This is true because (1) none of the net decrease in partnership minimum gain for the partnership's fourth taxable year is allocable to the disposition of partnership property subject to nonrecourse liabilities of the partnership, (2) RM's capital account balance at the end of that year (before any allocation is made under section 704(b) to RM for such year) is $94,500 (RM's capital account balance at the end of the partnership's third taxable year increased by RM's $144,000 capital contribution), and (3) HB has a full deficit makeup obligation.

	RM	HB
Capitol account at end of year 3	($49,500)	($5,500)
Plus: Contribution	144,000	16,000
Less: Net loss in year 4	(76,500)	(8,500)
Capital account at end of year 4	18,000	2,000

(v) Assume the same facts as originally stated in (i) except that the partnership incurred only a $700,000 nonrecourse loan and, in addition, incurred a $100,000 recourse loan, subordinate in priority to the nonrecourse loan, to which the partnership's building is also subject. Under paragraph (b)(4)(iv)(*c*) of this section, $700,000 of the adjusted basis of the building at the end of the partnership's third taxable year is allocated to the nonrecourse liability (with the remaining $30,000 allocated to the recourse liability) so that if the partnership disposed of the building in full satisfaction of the nonrecourse liability at the end of that year, it would realize no gain ($700,000 amount realized less $700,000 adjusted tax basis). Therefore, there is no minimum gain at the end of the partnership's third taxable year (and no increase in partnership minimum gain in such year). If, however, the $700,000 nonrecourse loan were subordinate in priority to the $100,000 recourse loan, under paragraph (b)(4)(iv)(*c*) of this section, only $630,000 of the adjusted basis of the building would be allocated to the $700,000 nonrecourse loan (the excess of the $730,000 adjusted tax basis of the building at the end of the partnership's third taxable year over the balance of the superior $100,000 recourse liability). In that case, the balance of the $700,000 nonrecourse liability would exceed the adjusted tax basis of the building so allocated by $70,000 so that there would be $70,000 of minimum gain (and a $70,000 increase in partnership minimum gain) in the partnership's third taxable year.

(vi) Assume the same facts as originally stated in (i) except that the partnership obtains a nonrecourse loan of $200,000 at the end of its fourth taxable year, which is secured by a second mortgage on the building, and distributes this cash to its partners at the beginning of its fifth taxable year. In addition, in its fourth and fifth taxable years, the partnership again generates rental income of $95,000, operating expenses of $10,000, interest expense of $80,000, and a cost recovery deduction of $90,000, resulting in a net taxable loss of $85,000. Also assume that the partnership has distributed its $5,000 of operating cash flow for each year ($95,000 of rental income less $10,000 of operating expense and $80,000 of interest expense) to RM and HB at the end of each such year. If the partnership were to dispose of the building in full satisfaction of the nonrecourse liabilities at the end of its fourth taxable year, the partnership would realize $360,000 of gain ($1,000,000 amount realized less $640,000 adjusted tax basis). Thus, the net increase in partnership minimum gain during the partnership's fourth taxable year is $290,000 ($360,000 of minimum gain at the end of the fourth year less $70,000 of minimum gain at the end of the third year). Because the partnership did not distribute any of the proceeds of the loan it obtained in its fourth year during that year, the amount of partnership nonrecourse deductions for that year is $290,000. Under paragraph (b)(4)(iv)(*b*) of this section, if the partnership had distributed the proceeds of that loan to its partners at the end of its fourth year, the partnership's nonrecourse deductions for that year would have been reduced by the amount of that distribution because the proceeds of that loan are allocable to an increase in partnership minimum gain under paragraph (b)(4)(iv)(*g*) of this section. Since the nonrecourse deductions for the partnership's fourth taxable year exceed its actual deductions for that year, all $180,000 of the partnership's deductions for that year are treated as nonrecourse deductions, and the $110,000 excess nonrecourse deductions will be treated as an increase in minimum gain in the partnership's fifth taxable year under paragraph (b)(4)(iv)(*b*) of this section.

	RM	HB
Capital account at end of year 3 (including cash flow distributions)	($63,000)	($7,000)
Plus: Rental income in year 4	85,500	9,500
Less: Nonrecourse deduction in year 4	(162,000)	(18,000)
Less: Cash flow distributions in year 4	(4,500)	(500)
Capital account at end of year 4	($144,000)	($16,000)

At the end of the partnership's fourth taxable year, RM's and HB's shares of partnership minimum gain are $225,000 and $25,000, respectively, and RM is deemed to be obligated to restore a deficit balance of $225,000 in RM's capital account at the end of that year. If the partnership were to dispose of the building in full satisfaction of the nonrecourse liabilities at the end of its fifth taxable year, the partnership would realize $450,000 of gain ($1,000,000 amount realized less $550,000 adjusted tax basis). Therefore, the net increase in partnership minimum gain during the partnership's fifth taxable year is $200,000 ($110,000 deemed increase plus the $90,000 by which minimum gain at the end of the fifth year exceeds minimum gain at the end of the fourth year ($450,000 less $360,000)). At the beginning of its fifth year, the partnership distributed the $200,000 of loan proceeds. Under paragraph (b)(4)(iv)(*g*)(*3*) of this section, the first $110,000 of this distribution (an amount equal to the deemed increase in partnership minimum gain for the year) is considered allocable to an increase in partnership minimum gain for such year. As a result, the amount of nonrecourse deductions for the partnership's fifth taxable year is $90,000 ($200,000 net increase in minimum gain less $110,000 distribution of nonrecourse liability proceeds that are allocable to an increase in minimum gain), and such nonrecourse deductions consist solely of the $90,000 cost recovery deduction allowable with respect to the building. As a result of the distributions during the partnership's fifth taxable year, the total distributions to the partners over the partnership's life will equal $225,000. Therefore, the last $25,000 distributed to the partners during the fifth year will be divided equally between them under the partnership agreement. Thus, out of the $200,000 distribution of loan proceeds at the beginning of the partnership's fifth taxable year, the first $180,000 is distributed 90 percent to RM and 10 percent to HB, and the last $20,000 is divided equally between them.

	RM	HB
Capital account at end of year 4	($144,000)	($16,000)
Plus: Net income in year 5 (without nonrecourse deduction)	4,500	500
Less: Nonrecourse deduction in year 5	(81,000)	(9,000)
Less: Distribution of loan proceeds	(172,000)	(28,000)
Less: Cash flow distribution in year 5	(2,500)	(2,500)
Capital account at end of year 5	($395,000)	($55,000)

At the end of the partnership's fifth taxable year, RM's share of partnership minimum gain is $405,000 ($225,000 share of minimum gain at the end of the fourth year plus $81,000 of nonrecourse deductions for the fifth year and a $99,000 distribution of nonrecourse liability proceeds that are allocable to an increase in minimum gain) and HB's share of partnership minimum gain is $45,000 ($25,000 share of minimum gain at the end of the fourth year plus $9,000 of nonrecourse deductions for the fifth year and an $11,000 distribution of nonrecourse liability proceeds that are allocable to an increase in minimum gain). Accordingly, RM is considered obligated to restore a deficit balance of $405,000 in RM's capital account at the end of that year.

(vii) Assume the same facts as originally stated in (i) except that RM and HB personally guarantee the "first" $100,000 of the $800,000 nonrecourse loan (*i.e.*, only if the building is worth less than $100,000 will they be called upon to make up any deficiency).

Under paragraph (b)(4)(iv)(c) of this section, only $630,000 of the adjusted tax basis of the building is allocated to the $700,000 nonrecourse portion of the loan because the collateral will be applied first to satisfy the $100,000 guaranteed portion, in effect making it superior in priority to the remainder of the loan. On the other hand, if RM and HB were to guarantee the "last" $100,000 (i.e., if the building is worth less than $800,000, they will be called upon to make up the deficiency up to $100,000), $700,000 of the adjusted tax basis of the building would be allocated to the $700,000 nonrecourse portion of the loan because the guaranteed portion in effect would be inferior in priority to it.

(viii) Assume the same facts as originally stated in (i) except that the $800,000 loan is made by RM, the limited partner. Under paragraph (b)(4)(iv)(h) of this section, the $800,000 obligation does not constitute a nonrecourse liability of the partnership for purposes of this paragraph (b)(4)(iv) because RM, a partner, bears the economic risk of loss for that loan within the meaning of § 1.752–1T(c)(3). The $800,000 loan does, however, constitute a partner nonrecourse debt since that obligation is a nonrecourse debt (within the meaning of paragraph (b)(4)(iv)(*k*)(*2*) of this section) for which a partner bears the economic risk of loss. In the partnership's third taxable year, partnership minimum gain would have increased by $70,000 if such debt were a nonrecourse liability of the partnership. Thus, under paragraph (b)(4)(iv)(*h*)(*6*) of this section, there is a net increase of $70,000 in the minimum gain attributable to the $800,000 partner nonrecourse debt for the partnership's third taxable year, and $70,000 of the $90,000 cost recovery deduction from the building for the partnership's third taxable year constitutes a partner nonrecourse deduction with respect to such debt. See paragraph (b)(4)(iv)(*h*)(*3*) of this section. Under paragraph (b)(4)(iv)(*h*)(*2*) of this section, this partner nonrecourse deduction must be allocated to RM, the partner that bears the economic risk of loss for that liability, and RM will, as a result of this allocation, be considered obligated to restore a deficit balance in RM's capital account of $70,000. See paragraph (b)(4)(iv)(*h*)(*5*) of this section.

(ix) Assume the same facts as in (viii) except that the $800,000 loan from RM to the partnership is a purchase money loan that "wraps around" a $700,000 underlying nonrecourse note (also secured by the building) issued by RM to an unrelated person in connection with RM's acquisition of the building. Under these circumstances, RM bears the economic risk of loss with respect to only $100,000 of the liability within the meaning of § 1.752–1T(c)(3). See § 1.752–1T(j) (example (18)). Therefore, for purposes of paragraph (b)(4)(iv) of this section, the $800,000 liability will be treated as a $700,000 nonrecourse liability of the partnership and a $100,000 partner nonrecourse debt (inferior in priority to the $700,000 liability) of the partnership for which RM bears the economic risk of loss. Under paragraph (b)(4)(iv)(*h*) of this section, $70,000 of the $90,000 cost recovery deduction realized in the partnership's third taxable year constitutes a partner nonrecourse deduction that must be allocated to RM.

Example (21). (i) RD and PK form a general partnership to acquire and operate residential real properties. Each partner contributes $150,000 to the partnership. The partnership obtains a $1,500,000 nonrecourse loan and purchases 3 apartment buildings (on leased land) for $720,000 ("Property A"), $540,000 ("Property B"), and $540,000 ("Property C"), respectively. The nonrecourse loan is secured only by the 3 buildings, and no principal payments are due for 5 years. In each of the partnership's first 3 taxable years, it generates rental income of $225,000, operating expenses (including land lease payments) of $50,000, interest expense of $175,000, and cost recovery deductions on the 3 properties of $150,000 ($60,000 on Property A, $45,000 on Property B, and $45,000 on Property C), resulting in a net taxable loss of $150,000 in each of those years. If the partnership were to dispose of the 3 apartment buildings in full satisfaction of its nonrecourse liability at the end of its third taxable year, it would realize $150,000 of gain ($1,500,000 amount realized less $1,350,000 adjusted tax basis). Since the amount of partnership minimum gain at the end of that year (and the net increase in partnership minimum gain during that year) is $150,000 and the partnership did not distribute any proceeds of a nonrecourse liability that are allocable to an increase in partnership minimum gain, the amount of partnership nonrecourse deductions for that year is $150,000, consisting of cost recovery deductions allowable with respect to the 3 apartment buildings of $150,000. The result would be the same if the partnership obtained 3 separate nonrecourse loans that were "cross-collateralized" (*i.e.*, if each separate loan were secured by all 3 of the apartment buildings).

(ii) Assume the same facts as originally stated in (i) and that at the beginning of the partnership's fourth taxable year, the partnership (with the permission of the nonrecourse lender) disposes of Property A for $835,000 and uses a portion of the proceeds to repay $600,000 of the nonrecourse liability, reducing the balance to $900,000. As a result of the disposition, the partnership recognizes gain of $295,000 ($835,000 amount realized less $540,000 adjusted tax basis). Also during the partnership's fourth taxable year it generates rental income of $135,000, operating expenses of $30,000, interest expense of $105,000, and cost recovery deductions of $90,000 ($45,000 on each remaining building). If the partnership were to dispose of the remaining two buildings in full satisfaction of its nonrecourse liability at the end of the partnership's fourth taxable year, it would realize gain of $180,000 ($900,000 amount realized less $720,000 aggregate adjusted tax basis), which represents the amount of partnership minimum gain at the end of such year. Since the amount of partnership minimum gain increased from $150,000 to $180,000 during the partnership's fourth taxable year, the amount of partnership nonrecourse deductions for such year is $30,000, consisting of cost recovery deductions allowable with respect to the two remaining apartment buildings. No minimum gain chargeback is required for the taxable year, even though the partnership disposed of one of the properties subject to the nonrecourse liability during the year, because there is no net decrease in partnership minimum gain for the year.

Example (22). (i) OC and DR form a limited partnership to acquire and lease machinery that is 5-year recovery property. The partnership elects under section 48(q)(4) to reduce the amount of investment tax credit in lieu of adjusting the tax basis of such machinery. OC, the limited partner, and DR, the general partner, contribute $100,000 each to the partnership, which obtains an $800,000 nonrecourse loan and purchases the machinery for $1,000,000. The nonrecourse loan is secured only by the machinery. The principal amount of the loan is to be repaid $50,000 per year during each of the partnership's first 5 taxable years, with the remaining $550,000 of unpaid principal due on the first day of the partnership's sixth taxable year. The partnership agreement provides that the partners' capital accounts will be determined and maintained in accordance with § 1.704–1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) will be made in accordance with the partner's positive capital account balances (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*2*)), DR will be required to restore any deficit balance in DR's capital account following the liquidation of DR's interest (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*3*)), and OC will not be required to restore any deficit balance in his capital account following the liquidation of his interest. The partnership agreement contains a qualified income offset (as defined in § 1.704–1(b)(2)(ii)(*d*)), and, as of the end of each partnership taxable year discussed herein, the items described in § 1.704–1(b)(2)(ii)(*d*) (*4*), (*5*), and (*6*) are not reasonably expected to cause or increase a deficit balance in OC's capital account. In addition, the agreement contains a minimum gain chargeback (in accordance with paragraph (b)(4)(iv)(e) of this section). The partnership agreement provides that, except as otherwise required by its qualified income offset and minimum gain chargeback provisions, all partnership items will be allocated equally between OC and DR. Finally, the partnership agreement provides that all distributions, other than distributions in liquidation of the partnership or of a partner's interest in the partnership, will be made equally between OC and DR. In the partnership's first taxable year it generates rental income of $130,000 interest expense of $80,000, and a cost recovery deduction of $150,000, resulting in a net taxable loss of $100,000. In addition, the partnership repays $50,000 of the nonrecourse liability, reducing that liability to $750,000. Allocations of these losses equally between OC and DR have substantial economic effect.
partnership minimum gain for the year.

	OC	DR
Capital account on formation	$100,000	$100,000
Less: net loss in year 1	(50,000)	(50,000)
Capital account at end of year 1	50,000	50,000

In the partnership's second taxable year, it generates rental income of $130,000, interest expense of $75,000, and a cost recovery deduction of $220,000 resulting in a net taxable loss of $165,000. In addition, the partnership repays $50,000 of the nonrecourse liability, reducing that liability to $700,000, and distributes $2,500 of cash to each partner. If the partnership were to dispose of the machinery in full satisfaction of the nonrecourse liablity at the end of that year, it would realize $70,000 of gain ($700,000 amount realized less $630,000 adjusted tax basis). Therefore, the amount of partnership minimum gain at the end of that year (and the net increase in partnership minimum gain during the year) is $70,000, and the amount of partnership nonrecourse deductions for the year is $70,000 since the partnership did not distribute any proceeds of a nonrecourse liability to the partners during that year. The partnership nonrecourse deductions for its second taxable year consist of $70,000 of the cost recovery deductions allowable with respect to the machinery. Pursuant to the partnership agreement, all partnership items comprising the net taxable loss of $165,000, including the $70,000 nonrecourse deduction, are allocated equally between OC and DR. The allocation of these items, other than the nonrecourse deductions, has substantial economic effect.

	OC	DR
Capital account at end of year 1	$50,000	$50,000
Less: net loss in year 2 (without nonrecourse deduction)	(47,500)	(47,500)
Less: nonrecourse deduction in year 2	(35,000)	(35,000)
Less: distribution	(2,500)	(2,500)
Capital account at end of year 1	(35,000)	(35,000)

This allocation of the $70,000 nonrecourse deduction equally between OC and DR satisfies requirement (2) of paragraph (b)(4)(iv)(*d*) of this section because the allocation is consistent with allocations, which have substantial economic effect, of other significant partnership items attributable to the machinery. Since the remaining requirements of paragraph (b)(4)(iv)(*d*) of this section are satisfied, the allocation of nonrecourse deductions is deemed to be made in accordance with the partners' interests in the partnership. At the end of the partnership's second taxable year, OC's and DR's shares of partnership minimum gain are $35,000 each. Therefore, pursuant to the next to the last sentence in paragraph (b)(4)(iv)(*f*) of this section, OC is treated as obligated to restore a deficit balance in his capital account of $35,000. If the partnership were to dispose of the machinery in full satisfaction of the nonrecourse liability at the beginning of the partnership's third taxable year (and had no other economic activity in that year), the partnership minimum gain would be decreased from $70,000 to zero. OC's and DR's shares of that net decrease would be $35,000 each. Upon such a disposition, the minimum gain chargeback would require that OC and DR each be allocated $35,000 of that gain (before any other allocation is made under section 704(b) with respect to partnership items for the partnership's third taxable year).

(ii) Assume the same facts as originally stated in (i) and that DT is admitted to the partnership at the beginning of the partnership's third taxable year. At the time of DT's admission, the fair market value of the machinery is $900,000. DT contributes $100,000 to the partnership (the partnership invests $95,000 of this in undeveloped land and holds the other $5,000 in cash) in exchange for an interest in the partnership. In connection with DT's admission to the partnership, the partnership's machinery is revalued on the partnership's books to reflect its fair market value of $900,000. Pursuant to § 1.704–1(b)(2)(iv)(*f*), the capital accounts of OC and DR are adjusted upwards to $100,000 each to reflect the revaluation of the partnership's machinery. This adjustment reflects the manner in which the partnership gain of $270,000 ($900,000 fair market value minus $630,000 adjusted tax basis) would be shared if the machinery were sold for its fair market value immediately prior to DT's admission to the partnership.

	OC	DR
Capital account before DT's admission	($35,000)	($35,000)
Deemed sale adjustment	135,000	135,000
Capital account adjusted for DT's admission	100,000	100,000

The partnership agreement is modified to provide that, except as otherwise required by its qualified income offset and minimum gain chargeback provisions, partnership income, gain, loss, and deduction, as computed for book purposes, will be allocated equally among the partners, and such allocations will be reflected in the partners' capital accounts. The partnership agreement also is modified to provide that depreciation and gain or loss, as computed for tax purposes, with respect to the machinery will be shared among the partners in a manner that takes account of the variation between such property's $630,000 adjusted tax basis and its $900,000 book value, in accordance with § 1.704–1(b)(2)(iv)(*f*) and the special rule contained in § 1.704–1(b)(4)(i). Finally, the partnership agreement is modified to provide that DT will not be required to restore any deficit balance in DT's capital account following the liquidation of DT's interest. Since the requirements of § 1.704–1(b)(2)(iv)(*g*) are satisfied, the capital accounts of the partners (as adjusted) continue to be maintained in accordance with § 1.704–1(b)(2)(iv). If the partnership were to dispose of the machinery in full satisfaction of the nonrecourse liability immediately following the revaluation of the machinery, it would realize no book gain ($700,000 amount realized less $900,000 book value). Thus, as a result of the revaluation of the machinery upward by $270,000, the partnership minimum gain is reduced from $70,000 immediately prior to such revaluation to zero. Under paragraph (b)(4)(iv)(*f*) of this section, OC's and DR's shares of that decrease are $35,000 each.

(iii) Assume the same facts as in (ii) and that also during the partnership's third taxable year the partnership generates rental income of $130,000, interest expense of $70,000, a cost recovery deduction of $210,000, and a book depreciation deduction (attributable to the machinery) of $300,000. As a result the partnership has a net taxable loss of $150,000 and net book loss of $240,000. In addition, the partnership repays $50,000 of the nonrecourse liability (after the date of DT's admission), reducing the liability to $650,000, and distributes $5,000 of cash to each partner. If the partnership were to dispose of the machinery in full satisfaction of the nonrecourse liability at the end of the year, $50,000 of book gain would result ($650,000 amount realized less $600,000 book value). Therefore, the amount of partnership minimum gain at the end of the year is $50,000, which represents a net decrease in partnership minimum gain of $20,000 during the year. (This is so even though there would be an increase in partnership minimum gain in the partnership's third taxable year if minimum gain were computed with reference to the adjusted tax basis of the machinery.) Nevertheless, pursuant to the next to the last sentence of paragraph (b)(4)(iv)(*c*) of this section, the amount of nonrecourse deductions of the partnership for its third taxable year is $50,000 (the net increase in partnership minimum gain during the year determined by adding back the $70,000 decrease in partnership minimum gain attributable to the revaluation of the machinery to the $20,000 net decrease in partnership minimum gain during the year). The $50,000 of partnership nonrecourse deductions for the year consist of book depreciation deductions allowable with respect to the machinery of $50,000. Pursuant to the partnership agreement all partnership items comprising the net book loss of $240,000 including the $50,000 nonrecourse deduction, are allocated equally among the partners. The allocation of these items, other than the nonrecourse deductions, has substantial economic effect. Consistent with the special partners' interests in the partnership rule contained in § 1.704–1(b)(4)(i), the partnership agreement provides that the $210,000 cost recovery deduction for the partnership's third taxable year is, in accordance with section 704(c) principles, shared $55,000 to OC, $55,000 to DR, and $100,000 to DT.

	OC		DR		DT	
	Tax	Book	Tax	Book	Tax	Book
Capital account at end of year 2	($35,000)	$100,000	($35,000)	$100,000	$100,000	$100,000
Less: nonrecourse deduction	(9,166)	(16,666)	(9,166)	(16,666)	(16,666)	(16,666)
Plus: items other than nonrecourse deduction in year 3	(25,834)	(63,334)	(25,834)	(63,334)	(63,334)	(63,334)
Less: distribution	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)
Capital account at end of year 3	(75,000)	15,000	(75,000)	15,000	15,000	15,000

The allocation of the $50,000 nonrecourse deduction equally among OC, DR, and DT satisfies requirement (2) of paragraph (b)(4)(iv)(*d*) of this section because the allocation is consistent with allocations, which have substantial economic effect, of other significant partnership items attributable to the machinery. Since the remaining requirements of paragraph (b)(4)(iv)(*d*) of this section are satisfied, such allocation is deemed to be made in accordance with the partners' interests in the partnership. At the end of the partnership's third taxable year, OC's, DR's, and DT's shares of partnership minimum gain are $16,666 each.

(iv) Assume the same facts as in (iii) and that during the partnership's fourth taxable year the partnership generates rental income of $130,000, interest expense of $65,000, a cost recovery deduction of $210,000, and a book depreciation deduction (attributable to the machinery) of $300,000. As a result, the partnership has a net taxable loss of $145,000 and a net book loss of $235,000. In addition, the partnership repays $50,000 of the nonrecourse liability, reducing that liability to $600,000, and distributes $5,000 of cash to each partner. If the partnership were to dispose of the machinery in full satisfaction of the nonrecourse liability at the end of the year, $300,000 of book gain would result ($600,000 amount realized less $300,000 book value). Therefore, the amount of partnership minimum gain as of the end of the year is $300,000, which represents a net increase in partnership minimum gain during the year of $250,000. Thus, since the partnership did not distribute any proceeds of a nonrecourse liability that are allocable to an increase in partnership minimum gain, the amount of partnership nonrecourse deductions for that year equals $250,000, consisting of book depreciation deductions of $250,000. Pursuant to the partnership agreement, all partnership items comprising the net book loss of $235,000, including the $250,000 nonrecourse deduction, are allocated equally among the partners. That allocation of all items, other than the nonrecourse deductions, has substantial economic effect. Consistent with the special partners' interests in the partnership rule contained in § 1.704–1(b)(4)(i), the partnership agreement provides that the $210,000 cost recovery deduction for the partnership's fourth taxable year is, in accordance with section 704(c) principles, shared $55,000 to OC, $55,000 to DR, and $100,000 to DT.

	OC		DR		DT	
	Tax	Book	Tax	Book	Tax	Book
Capital account at end of year 3	($75,000)	$15,000	($75,000)	$15,000	$15,000	$15,000
Less: nonrecourse deduction	(45,833)	(83,333)	(83,333)	(83,333)	(83,333)	(83,333)
Plus: items other than nonrecourse deduction in year 4	12,499	5,000	12,499	5,000	5,000	5,000
Less: distribution	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)
Capital account at end of year 4	(113,334)	(68,333)	(113,333)	(68,333)	(68,333)	(68,333)

The allocation of the $250,000 nonrecourse deduction equally among OC, DR, and DT satisfies requirement (2) of paragraph (b)(4)(iv)(*d*) of this section. Since the remaining requirements of paragraph (b)(4)(iv)(*d*) of this section are satisfied, such allocation is deemed to be made in accordance with the partners' interests in the partnership. At the end of the partnership's third taxable year, OC's, DR's, and DT's shares of partnership minimum gain are $100,000 each.

(v) Assume the same facts as (iv) and that at the beginning of the partnership's fifth taxable year it sells the machinery for $650,000 (using $600,000 of the proceeds to repay the nonrecourse liability), resulting in a taxable gain of $440,000 ($650,000 amount realized less $210,000 adjusted tax basis) and a book gain of $350,000 ($650,000 amount realized less $300,000 book basis). The partnership has no other items of income, gain, loss, or deduction for such year. As a result of the sale, partnership minimum gain is reduced from $300,000 to zero, reducing OC's, DR's, and DT's shares of partnership minimum gain to zero from $100,000 each. The minimum gain chargeback requires that OC, DR, and DT each be allocated $100,000 of that gain (an amount equal to each partner's share of the net decrease in partnership minimum gain resulting from the sale) before any allocation is made to them under section 704(b) with respect to partnership items for the partnership's fifth taxable year. Thus, the allocation of the first $300,000 of book gain $100,000 to each of the partners is deemed to be made in accordance with the partners' interests in the partnership under paragraph (b)(4)(iv)(*e*) of this section. The allocation of the remaining $50,000 of book gain equally among the partners has substantial economic effect. Consistent with the special partners' interests in the partnership rule contained in § 1.704–1(b)(4)(i), the partnership agreement provides that the $440,000 taxable gain is, in accordance with section 704(c) principles, shared $161,667 to OC, $161,667 to DR, and $116,666 to DT.

	OC		DR		DT	
	Tax	Book	Tax	Book	Tax	Book
Capital account at end of year 4	($113,334)	($68,333)	($113,334)	($68,333)	($68,333)	($68,333)
Plus: minimum gain chargeback	138,573	100,000	138,573	100,000	100,000	100,000
Plus: additional gain	23,094	16,666	23,094	16,666	16,666	16,666
Capital account before liquidation	48,333	48,333	48,333	48,333	48,333	48,333

Example (23). (i) A partnership owns 4 properties, each of which is subject to a nonrecourse liability of the partnership. During a taxable year of the partnership, the following events take place. First, the partnership generates a cost recovery deduction (for both book and tax purposes) with respect to Property W of $10,000 and repays $5,000 of the nonrecourse liability secured only by that property, resulting in an increase in minimum gain with respect to that liability of $5,000. Second, the partnership generates a cost recovery deduction (for both book and tax purposes) with respect to Property X of $10,000 and repays none of the nonrecourse liability secured by that property, resulting in an increase in minimum gain with respect to that liability of $10,000. Third, the partnership generates a cost recovery deduction (for both book and tax purposes) of $2,000 on Property Y and repays $11,000 of the nonrecourse liability secured only by that property, resulting in a decrease in minimum gain with respect to that liability of $9,000 (although at the end of that year, there remains minimum gain with respect to that liability). Finally, the partnership borrows $5,000 on a nonrecourse basis, giving as the only security for that liability Property Z, which is a parcel of undeveloped land with an adjusted tax basis (and book value) of $2,000, resulting in a net increase in minimum gain with respect to that liability of $3,000. The net increase in partnership minimum gain during that year is $9,000, so that the amount of nonrecourse deductions of the partnership for that taxable year is $9,000. Those nonrecourse deductions consist of $3,000 of cost recovery deductions with respect to Property W and $6,000 of cost recovery deductions with respect to Property X. The amount of nonrecourse deductions consisting of cost recovery deductions is determined as follows. With respect to the nonrecourse liability secured by Property Z, with respect to which there is no cost recovery deduction, the amount of cost recovery deductions that constitutes nonrecourse deductions is zero. Similarly, with respect to the nonrecourse liability secured by Property Y, for which there is no increase in minimum gain, the amount of cost recovery deductions that constitutes nonrecourse deductions is zero. With respect to each of the nonrecourse liabilities secured by Properties W and X, which are (i) secured by property with respect to which there are cost recovery deductions and (ii) for which there is an increase in minimum gain, the amount of cost recovery deductions that constitutes nonrecourse deductions equals the product obtained by multiplying the net increase in partnership minimum gain ($9,000) times a fraction, the numerator of which is the total cost recovery deductions with respect to the partnership property securing that particular liability to the extent of the increase in minimum gain with respect to that liability and the denominator of which is the sum of the numerators for each such liability. Thus, for the liability secured by Property W, the amount is $9,000 times $5,000/$15,000. For the liability secured by Property X, the amount is $9,000 times $10,000/$15,000. (If one depreciable property secured 2 partnership nonrecourse liabilities, the amount of cost recovery or book depreciation with respect to that property would be allocated among such liabilities in accordance with the method by which adjusted basis is allocated under § 1.704–1(b)(2)(iv)(*c*)).

(ii) Assume the facts as in (i) except that the loan secured by Property Z is $15,000 (rather than $5,000), resulting in a net increase in minimum gain with respect to that liability of $13,000. Thus, the net increase in partnership minimum gain is $19,000, and the amount of nonrecourse deductions of the partnership for that taxable year is $19,000. Those nonrecourse deductions consist of $5,000 of cost recovery deductions with respect to Property W, $10,000 of cost recovery deductions with respect to Property X, and a pro rata portion of the partnership's other items of deduction, loss, and section 705(a)(2)(B) expenditure for that year. The method for computing the amounts of cost recovery deductions that constitute nonrecourse deductions is the same as in (i) for the liabilities secured Properties Y and Z. With respect to each of the nonrecourse liabilities secured by Properties W and X, the amount of cost recovery deductions that constitutes nonrecourse deductions equals the total cost recovery deductions with respect to the partnership property securing that particular liability to the extent of the increase in minimum gain with respect to that liability.

§ 1.704–1 [Amended]

Par. 5. Section 1.704–1 is amended as follows:

1. Paragraph (b)(0) is amended by removing the words "Nonrecourse liabilities of the partnership where a person related to a partner has economic risk of loss . . . 1.704–1 (b)(4)(iv)(*h*)" from the table and adding, in their place, the words "Effective date and cross reference . . . 1.704–1(b)(4)(iv)(*h*)."

2. Paragraph (b)(2)(ii)(*c*) is amended by adding the following new sentence to the end thereof: "For purposes of this paragraph (b)(2), if a partner contributes a promissory note to the partnership during a partnership taxable year beginning after December 29, 1988 and the maker of such note is a person related to such partner (within the meaning of § 1.752–1T(h), but without regard to subdivision (4) of that section), then such promissory note shall be treated as a promissory note of which such partner is the maker.

3. Paragraph (b)(2)(ii)(*h*) is amended by adding the following new sentence to the end thereof: "For purposes of the preceding sentence, sections 267(b) and 707(b)(1) shall be applied for partnership taxable years beginning after December 29, 1988 by (*1*) substituting "80 percent or more" for "more than 50 percent" each place it appears in such sections, (*2*) excluding brothers and sisters from the members of a person's family, and (*3*) disregarding section 267(f)(1)(A)."

4. Paragraph (b)(2)(ii)(*d*)(*6*) is amended by removing from the last parenthetical the words "under paragraph (b)(4)(iv)(*e*) of this section."

5. Paragraph (b)(4)(iv)(*h*) is revised to read as follows:

(*h*) *Effective date and cross reference.* The rules of this paragraph (b)(4)(iv) generally are effective only for partnership taxable years beginning on or before December 29, 1988. See § 1.704–1T(b)(4)(iv)(*m*) for transition rules. For the rules generally applicable to allocations attributable to nonrecourse liabilities for partnership taxable years beginning after December 29, 1988, see § 1.704–1T(b)(4)(iv). See paragraph (b)(1)(ii) of this section for additional rules regarding the effective date of this section.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 6. The authority for Part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

§ 602–101 [Amended]

Par. 7. Section 602.101(c) is amended by inserting the following in the appropriate places in the table:

1. "1.752–4T . . . [1545–1090]."

2. "1.704–1T(b)(4)(iv)(*m*)(*2*) . . . [1545–1090]."

* * * * *

There is a need for immediate guidance with respect to the provisions contained in this Treasury decision. For this reason, it is found impracticable to issue it with notice and public procedure under subsection (b) of section 553 of title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

Approved:

O. Donaldson Chapoton,

Assistant Secretary of the Treasury.

December 2, 1988.

[FR Doc. 88–29765 Filed 12–29–88; 8:45 am]

BILLING CODE 4830–01–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[PS-229-84]

Treatment of Partnership Liabilities; Allocations Attributable to Nonrecourse Liabilities

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the rules and regulations portion of this issue of the **Federal Register**, the Internal Revenue Service is issuing final and temporary regulations concerning the treatment of partnership liabilities and the allocation of deductions attributable to nonrecourse debt. The temporary regulations reflect changes to the applicable tax law made by section 79 of the Tax Reform Act of 1984. The text of the temporary regulations also serves as the comment document for this notice of proposed rulemaking.

DATES: Written comments and requests for a public hearing must be delivered or mailed by March 30, 1989.

ADDRESS: Send comments and requests for a public hearing to: Internal Revenue Service, Attn: CC:CORP:T:R (PS-229-84), Room 4429, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Robert E. Shaw, 202-343-8459, or Mary Munday, 202-377-9470 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collections of information should be sent to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer TR:FP, Washington, DC 20224.

The collections of information in this regulation are in §§ 1.752-4T(c) and 1.704-1T(b)(4)(iv)(*m*)(*2*). This information is required by the Internal Revenue Service to administer sections 752 and 704(b). The respondents are partnerships who wish to make the elections under §§ 1.752-4T(c) and 1.704-1T(b)(4)(iv)(*m*)(*2*).

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require greater or less time, depending on their particular circumstances.

Estimated total annual reporting burden: 417 hrs.

The estimated annual burden per respondent varies from 3 minutes to 8 minutes, depending on individual circumstances, with an estimated average of 5 minutes.

Estimated number of respondents: 5,000.

Estimated annual frequency of responses: 1.

Background

The temporary regulations in the Rules and Regulations portion of this issue of the **Federal Register** amend the Income Tax Regulations (26 CFR Part 1) under sections 752 and 704(b) of the Internal Revenue Code of 1986.

For the text of the temporary regulations, see T.D. 8237 published in the Rules and Regulations portion of this issue of the **Federal Register**. The preamble to the temporary regulations explains the amendments to the regulations.

Special Analyses

These rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. A general notice of proposed rulemaking is not required by 5 U.S.C. 553 for interpretative regulations. Therefore, these rules do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6) and a Regulatory Flexibility Analysis is not required.

Comments and Request for a Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably a signed original) to the Internal Revenue Service. All comments will be available for public inspection and copying in their entirety. A public hearing will be scheduled and held upon written request by any person who submits written comments on the proposed rules. Notice of the time and place for the hearing will be published in the **Federal Register**.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 88-29764 Filed 12-29-88; 8:45 am]

BILLING CODE 4830-01-M

Federal Register

Friday
December 30, 1988

Part III

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 179

Irradiation in the Production, Processing, and Handling of Food; Final Rule; Denial of Request for Hearing and Response to Objection

DEPARTMENT OF HEALTH AND HUMAN SERVICES

FOOD AND DRUG ADMINISTRATION

21 CFR Part 179

[Docket Nos. 81N-0004 and 84F-0230]

Irradiation in the Production, Processing, and Handling of Food

AGENCY: Food and Drug Administration.

ACTION: Final rule; denial of requests for hearing and response to objections.

SUMMARY: The Food and Drug Administration (FDA) is denying the requests that it has received for a hearing on the final rules that amended the food additive regulations to authorize the use of gamma radiation for the treatment of pork to control *Trichinella spiralis* and for the treatment of certain other foods. After reviewing the objections to the two final rules and the requests for a hearing, FDA has concluded that none of the objections has provided the information necessary to justify a hearing. FDA, however, is amending the language in the regulation that describes minor dry ingredients that may be radiation sterilized because objections and experience have shown that this language is ambiguous.

DATES: The amendment in 179.26(b) (21 CFR 179.26(b)) is effective December 30, 1988; written objections on the amendment and requests for a hearing on the amendment by January 30, 1989.

ADDRESS: Written objections on the amendment to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Clyde A. Takeguchi, Center for Food Safety and Applied Nutrition (HFF-330), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5740.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of July 22, 1985 (50 FR 29658), in response to a petition by Radiation Technology, Inc., FDA issued a final rule authorizing the irradiation of fresh pork to control *Trichinella spiralis*. FDA based its decision on data in the petition and in its files. The agency had published a notice announcing the filing of the petition (FAP 4M3789) in the **Federal Register** of July 23, 1984 (49 FR 29682).

In the **Federal Register** of April 18, 1986 (51 FR 13376), FDA issued a final rule, referred to herein as the "omnibus rule," that: (1) permitted manufacturers to use radiation at doses not to exceed 1 kilogray (kGy)(100 krad) to inhibit the growth and maturation of fresh foods and to disinfest food of arthropod pests; (2) permitted manufacturers to use radiation at doses not to exceed 30 kGy (3 Mrad) to disinfect dry or dehydrated aromatic vegetable substances (such as spices and herbs) of microorganisms; (3) required that foods that are irradiated be labeled to show this fact both at the wholesale and at the retail level; and (4) required that manufacturers maintain process records of irradiation for a specified period and make such records available for FDA inspection. FDA initiated this action by publishing a proposal in the **Federal Register** of February 14, 1984 (49 FR 5713).

A. Requests for hearing on final rules

Section 409(f) of the Federal Food, Drug, and Cosmetic Act (the act), 21 U.S.C. 348(f), provides that, within 30 days after publication of an order relating to a food additive regulation, any person adversely affected by such an order may file objections specifying with particularity the provisions of the order considered objectionable, stating reasonable grounds for the objections, and requesting a public hearing on such objections.

Under 21 CFR 171.110 of the food additive regulations, objections and requests for a hearing are governed by 21 CFR Part 12 of FDA's regulations. Under 21 CFR 12.22(a), (1) each objection must be submitted on or before the 30th day after the date of publication of the final rule; (2) each objection must be separately numbered; (3) each objection must specify with particularity the provision of the regulation or proposed order objected to; (4) each objection on which a hearing is requested must specifically so state; failure to request a hearing on an objection constitutes a waiver of the right to a hearing on that objection; and (5) each objection requesting a hearing must include a detailed description and analysis of the factual information to be presented in support of the objection. Failure to include a description and analysis for an objection constitutes a waiver of the right to a hearing on that objection.

FDA received 59 objections to the irradiated pork rule and 245 objections to the omnibus rule. Many of the objections expressed general opposition to food irradiation but identified no substantive question to which the agency can respond. Because these objections failed to raise any basis on which to question the validity of the final rules, the agency is denying them.

Seventeen objections to the irradiated pork rule and 53 objections to the omnibus rule pointed to a specific aspect of the rule but did not request a hearing. Twenty objections to the irradiated pork rule and 12 objections to the omnibus rule requested a hearing. These objections are addressed below.

Some of the objections requested a stay of the regulations. In the **Federal Register** of February 23, 1987 (52 FR 5450), FDA denied these requests because the public interest did not require a stay. FDA evaluated each of the contentions made in support of a stay and concluded that they failed to create significant doubts about the safety of the food irradiated under the conditions of either of the two regulations.

B. Standard for granting a hearing

The criteria for deciding whether to grant or deny a hearing are stated in 21 CFR 12.24(b). The regulation states that a hearing will be granted when the material submitted shows the following:

(1) There is a genuine and substantial issue of fact for resolution at a hearing. A hearing will not be granted on issues of policy or law.

(2) The factual issue can be resolved by available and specifically identified reliable evidence. A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions.

(3) The data and information submitted, if established at a hearing, would be adequate to justify resolution of the factual issue in the way sought by the person. A hearing will be denied if the Commissioner concludes that the data and information submitted are insufficient to justify the factual determination urged, even if accurate.

(4) Resolution of the factual issue in the way sought by the person is adequate to justify the action requested. A hearing will not be granted on factual issues that are not determinative with respect to the action requested, e.g., if the Commissioner concludes that the action would be the same even if the factual issue were resolved in the way sought, or if a request is made that a final regulation include a provision not reasonably encompassed by the proposal.

(5) The action requested is not inconsistent with any provision in the act or any regulation in this chapter particularizing statutory standards. The proper procedure in those circumstances is for the person requesting the hearing to petition for an amendment or waiver of the regulation involved.

(6) The requirements in other applicable regulations, e.g., 21 CFR 10.20, 12.21, 12.22, 314.200, 430.20(b), 514.200, and 601.7(a), and in the notice promulgating the final regulation or the notice of opportunity for hearing are met.

A party seeking a hearing is required to meet a "threshold burden of tendering evidence suggesting the need for a hearing." *Costle* v. *Pacific Legal Foundation,* 445 U.S. 198, 214–215 (1980), *reh. den.,* 445 U.S. 947 (1980), citing *Weinberger* v. *Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609, 620–621 (1973). An allegation that a hearing is necessary to "sharpen the issues" or to "fully develop the facts" does not meet this test. *Georgia Pacific Corp.* v. *U.S. E.P.A.,* 671 F.2d 1235, 1241 (9th Cir. 1982). If a hearing request fails to identify any evidence that would be the subject of a hearing, there is no point in holding one.

A hearing request must not only contain evidence, but that evidence must raise a material issue of fact concerning which a meaningful hearing might be held. *Pineapple Growers Ass'n* v. *FDA,* 673 F.2d 1083, 1085 (9th Cir. 1982). Where the issues raised in the objection are, even if true, legally insufficient to alter the decision, the agency need not grant a hearing. *Dyestuffs and Chemicals, Inc.* v. *Flemming,* 271 F.2d 281 (8th Cir. 1959), *cert. denied,* 362 U.S. 911 (1960). FDA need not grant a hearing in each case where an objector submits additional information or posits a novel interpretation of existing information. (See *United States* v. *Consolidated Mines & Smelting Co.,* 455 F.2d 432 (9th Cir. 1971)). Stated another way, a hearing is justified only if the objections are made in good faith, and if they "draw in question in a material way the underpinnings of the regulation at issue." *Pactra Industries* v. *CPSC,* 555 F.2d 677 (9th Cir. 1977). Finally, courts have uniformly recognized that a hearing need not be held to resolve questions of law or policy. (See *Citizens for Allegan County, Inc.* v. *FPC,* 414 F.2d 1125 (D.C. Cir. 1969); *Sun Oil Co.* v. *FPC,* 256 F.2d 233, 240 (5th Cir.), *cert. denied,* 358 U.S. 872 (1958)).

Even if the objections raise material issues of fact, FDA need not grant a hearing if those same issues were adequately raised and considered in an earlier proceeding. Once an issue has been so raised and considered, a party is estopped from raising that same issue in a later proceeding without new evidence. The various judicial doctrines dealing with finality are validly applied to the administrative process. In explaining why these principles "self-evidently" ought to apply to an agency proceeding, the D.C. Circuit wrote:

> The underlying concept is as simple as this: Justice requires that a party have a fair chance to present his position. But overall interests of administration do not require or generally contemplate that he will be given more than a fair opportunity.

Retail Clerks Union, Local 1401, R.C.I.A. v. *NLRB,* 463 F.2d 316, 322 (D.C. Cir. 1972). (See *Costle* v. *Pacific Legal Foundation, supra* at 1106. See also *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.,* 404 F.2d 804 (D.C. Cir. 1966)).

C. Objections to the pork regulation and the omnibus regulation

Six of the 20 objections to the irradiated pork rule that requested a hearing did not point to any specific aspect of the rule. Six of the 12 objections to the omnibus rule that requested a hearing were either form letters or objections that requested a hearing on the subject but that did not point to any specific aspect of the rule that they sought to challenge. Because no evidence was submitted in support of these objections, they raise no factual issue for resolution and, therefore, do not justify a hearing. The agency will not discuss them further.

One objection to the omnibus rule requested a hearing but was not submitted to FDA until after the close of the objection period. Hence, this objection failed to satisfy the requirements of 21 U.S.C. 348(f)(1) and need not be considered further by the agency. *ICMAD* v. *HEW,* 574 F.2d 553, 558 n.8 (D.C. Cir.), *cert. denied,* 439 U.S. 893 (1978). Issues raised in the tardy objection were also raised in other objections, however, and thus will be addressed in this document.

One of the objectors to the omnibus rule, the Health and Energy Institute, on behalf of itself and the Environmental Policy Institute (HEI), submitted numerous objections. However, HEI submitted very little evidence in support of these objections. HEI did promise, with respect to several of its objections, to submit evidence at any hearing that is held. FDA evaluated these objections. Most did not present enough information to draw the agency's action into question in a material way. These the agency proceeded to consider without further information from HEI. However, some of the objections did suggest the possible existence of a substantial issue of fact but did not identify enough evidence to determine whether these objections provided an appropriate basis for an evidentiary hearing. On February 2, 1987, the agency wrote to HEI and asked it to submit additional information on this latter group of objections to aid FDA in deciding whether any of them justified a hearing (Ref. 1). HEI provided additional information on March 6, 1987 (Ref. 2).

On May 5, 1987, the agency again wrote to HEI and requested two references that HEI had cited in its March 6, 1987, submission but that were not available in FDA's files (Ref. 3). FDA gave HEI 14 days to supply copies of these references. On May 21, 1987, HEI provided one of these references, an article cited by that reference, and two additional articles, but it was unable to obtain the second reference that FDA had requested (Ref. 4).

There was considerable overlap in the objections to the two rules on irradiation. Some objections raised in response to the pork rule are, in fact, more applicable to the omnibus rule. Therefore, FDA will deal with the objections to both rules together.

Because HEI provided the most detailed objections, its objections will be the focus of much of this document. Where other objections raised the same or a similar issue as one raised by HEI, FDA will incorporate these other objections in its description of the issue. The agency has grouped together all objections that raise the same concern and has analyzed most of the objections according to the following four-part format: (1) A statement of a specific position or conclusion set forth by FDA in the final rule; (2) a summary of the challenge to that conclusion and of the basis for the request for a hearing, if one was made; (3) a discussion of whether the objection justified a hearing on that objection; and (4) where appropriate, a review of the evidence relevant to the objection.

II. Safety of Food Irradiation

In both the pork and omnibus final rules, FDA concluded that food irradiated under specified conditions is safe. FDA based its conclusion primarily on an analysis (49 FR 29682; 51 FR 13376 at 13378) that demonstrated that foods irradiated at doses permitted under these final rules undergo only minimal chemical change and are toxicologically indistinguishable from nonirradiated foods. The agency considered the sensitivity of a variety of state-of-the-art toxicology testing regimens, including extraction and concentration of radiolytic products, to determine the best way of evaluating the safety of irradiated foods (Ref. 5). The agency's analysis also included a review by the Bureau of Foods Irradiated Foods Task Group (Task Group) of all available

animal feeding studies with irradiated foods (Ref. 6). The Task Group concluded that the studies did not provide evidence that irradiated food caused adverse toxicological effects (51 FR 13376 at 13378). Based on these reviews and on the information in the agency's files, the agency concluded that there is an adequate margin of safety for foods irradiated under the conditions of these final rules, and that no further toxicological testing need be required (51 FR 13376 at 13378.)

Several objections stated that FDA's conclusion on the safety of irradiation is based on assumptions and theoretical analyses. These objections stated that the agency should have relied on evidence such as animal feeding studies. The most detailed statement of this point was made by HEI in its objection to the omnibus rule. HEI stated that: "* * * the FDA promulgated a regulation to allow increased food irradiation, declaring the process and resulting food safe, based on mere assumptions of safety, rather than on scientific tests which demonstrate the safety of the process, and the FDA has ignored scientific testing data and other scientific evidence which suggests adverse impacts from consuming irradiated food * * *." In support of this general statement, HEI made 22 specific objections, each of which, it claimed, justified a hearing. The agency has considered each of these objections, and it finds that none of them presents a genuine and material issue of fact that would justify a hearing on the general issue that HEI has raised.

A discussion of the objections related to the safety of food irradiation follows.

A. Estimates of consumption of irradiated foods

In 1979, FDA established the Bureau of Foods Irradiated Food Committee (BFIFC) to review the existing agency policy concerning the irradiation of foods (Ref. 5). BFIFC was charged to recommend "toxicologic [testing] requirements appropriate for assessing the safety of irradiated food * * *, where the degree of testing is consistent with the potential risk as predicated on the level of human exposure."

1. BFIFC exposure estimates

HEI stated that "BFIFC used incorrect dietary data to declare safety." In support of this objection, HEI stated that:

> BFIFC assumed that consumption of irradiated food would constitute only 10 percent of the human diet (51 FR 13377), despite petitions before the agency to allow irradiation of additional foods that might increase total consumption of foods that have been irradiated.

(Paragraph I.1. from HEI's May 19, 1986, objection.)

A hearing will not be granted on factual issues that are not determinative with respect to the action requested (21 CFR 12.24 (b)(4)). In this objection, HEI has challenged the correctness of BFIFC's conclusions on the grounds that BFIFC was incorrect on the portion of the diet that will be irradiated. However, the BFIFC report makes clear that its conclusions were not based on the portion of the diet that would be irradiated. In concluding that food irradiated at doses not exceeding 1 kGy (100 krad) is safe for human consumption, BFIFC stated: "This [conclusion] is based solely on an estimate of the concentration of individual URP's [unique radiolytic products] produced by the radiation dose to the food, and pertains even if a *high* portion of the total human diet is irradiated at 100 krad" (emphasis added) (Ref. 5). Therefore, because this objection fails to challenge the finding that provides the actual basis for BFIFC's conclusion, it does not provide the basis for a hearing.

Furthermore, HEI's objection that BFIFC assumed that consumption of irradiated food would constitute only 10 percent of the human diet is incorrect. What BFIFC said was that conceivably 40 percent of a person's diet could be irradiated if the process is widely adopted, but that it was unlikely that more than 10 percent would be irradiated (51 FR 13376 at 13377). BFIFC's considerations were not restricted to the foods permitted to be irradiated under this rule but included all foreseeable applications of food irradiation.

In reaching its own conclusion about the safety of irradiation, FDA did not rely solely on the BFIFC report, as HEI's objection seemed to imply. Instead, FDA relied on the totality of evidence before it, including the report from the Task Group and the other evidence referenced in the proposal and omnibus rule. On this basis, the agency concluded that irradiation of food under the conditions that it specified is safe.

2. Irradiation of Certain Aromatic Vegetable Substances

The agency decided that certain aromatic vegetable substances, such as dried spices and seasonings, can be irradiated safely at a dose of up to 30 kGy (3 Mrad) (51 FR 13376 at 13378). This decision was based primarily on two factors. First, FDA found that the amount of radiolytic products that would be consumed from irradiated spices and seasonings is so small that such irradiated foods can be considered safe (51 FR 13376 at 13380). Second, the agency determined that the aromatic vegetable substances allowed to be irradiated are not sources of nutrients (51 FR 13376 at 13381), and that nutrient losses that might result from irradiation of these ingredients are of no concern. Because of comments related to language on spice consumption in the BFIFC report, the agency noted in the omnibus rule that it had not based its safety decision on an assumption that total consumption of spices would not exceed 0.01 percent of the daily diet and, indeed, recognized that total consumption of all spices would exceed 0.01 percent (51 FR 13376 at 13380).

HEI in its objection, states that:

> The FDA contends that because foods such as *individual* spices comprise less than 0.01 percent of the total diet of an individual, consequences of eating such foods need not be addressed. This ignores the fact that the total amount of all spices will exceed 0.01 percent of the diet for a wide variety of persons, which under FDA's own regulation would require toxicological testing to be performed. However, the FDA then expands its food list for exposures up to 3 megarads to include other food items such as teas and seeds, which may constitute a far greater portion of an individual's diet, especially if that individual consumes several cups of tea a day or consumes seeds and nuts in large quantities. FDA totally fails to address the proportion of an individual[']s diet with regard to teas and seeds. Many vegetarians consume far more than 0.01 percent of their total diet in the form of teas or seeds such as sunflower seeds and alfalfa seeds. Evidence regarding dietary consumption of any foods that could be irradiated under the proposed new regulations would be presented at a public hearing.

(HEI Para. I.9.) (Emphasis by HEI.)

This objection does not provide any basis for a hearing. Whether spices constitute more than 0.01 percent of the diet is not an issue. The agency estimated in the omnibus rule, "a probable intake of dried spices and culinary herbs of up to 3 grams per person per day. For the general population, this constitutes 0.1 percent of the total diet of 3 kilograms." (51 FR 13376 at 13380.)

Nor has HEI justified a hearing on the safety of the consumption of irradiated spices at a level of 0.1 percent of the diet. In the omnibus rule, FDA concluded that consumption of irradiated spices at this level is safe (51 FR 13376 at 13380). In support of this conclusion, FDA relied upon the BFIFC report (Ref. 5), the Task Group report (Ref. 6), and on other information in its files. HEI has not tendered any evidence

that would challenge FDA's reliance on this material or that would suggest that this conclusion is not correct.

Moreover, HEI is not correct that under FDA's regulations, the fact that the amount of spices in the total diet will exceed 0.01 percent would require toxicological testing to be performed. FDA has not adopted regulations that require toxicological testing of a food ingredient if that ingredient constitutes a certain portion of the diet, and HEI has not cited any regulation that imposes such a requirement. HEI appears to be referring to a recommendation in the BFIFC report that was mentioned in the advance notice of proposed rulemaking (ANPR) (46 FR 18992; March 27, 1981). The BFIFC report took the position that irradiation of any individual ingredient that constituted less than 0.01 percent of the diet was not of sufficient concern to require further toxicological testing.

This report was a recommendation to the agency, not a regulation. In response to a comment on the proposal, the agency stated that radiolytic products from different spices are likely to be different, and that the intent of the recommendation in BFIFC's report was not to set a precise dietary percentage limit of 0.01 percent but rather to acknowledge that the amounts of radiolytic products that would potentially be consumed from irradiated dried spices and seasonings are so small that such irradiated foods can be considered safe as ordinarily used. Based on the BFIFC report and other information available to it, the agency concluded that irradiation of spices under the conditions permitted by the regulation is safe (51 FR 13376 at 13380). HEI has not provided any basis on which to contest this conclusion. Therefore, this objection does not provide any basis for a hearing.

Nonetheless, HEI has pointed to a possible source of confusion caused by the wording of the regulation. In final rules issued on July 5, 1983 (48 FR 30613 at 30614), and April 18, 1985 (50 FR 15415), the agency listed numerous spices, seasonings, and culinary herbs that are permitted to be irradiated. The list included several seeds, such as caraway seeds and celery seeds, as well as substances such as orange petals and chamomile used to prepare herbal teas. In the omnibus final rule, FDA decided to describe these substances generically rather than by a specific list. It adopted the term "aromatic vegetable substances." The agency established five categories of such substances that included all the individual substances on the original list, as well as other aromatic vegetable substances used as minor ingredients (51 FR 13376 at 13381).

This generic listing has been the source of some confusion. The agency has consistently referred to these dry or dehydrated aromatic vegetable substances that can be irradiated at doses not exceeding 30 kGy as ingredients that are not sources of nutrients but that are used in small amounts solely for their aromatic and flavoring characteristics. HEI has pointed to two examples of seeds—sunflower seeds and alfalfa seeds—that are not necessarily used in small amounts for their aromatic and flavoring characteristics but that may be used in other ways and that may actually be sources of nutrients. Grains (such as wheat, rice, or oats) are also examples of seeds that would not be considered "aromatic vegetable substances" within the meaning of this regulation. Only seeds that are used solely for their aromatic and flavoring properties, and that are not important sources of nutrients, are aromatic vegetable substances that may be irradiated under this regulation at doses not exceeding 30 kGy to control microorganisms. To make this clear, FDA is adding the phrase "when used as ingredients in small amounts solely for flavoring or aroma" after the term "aromatic vegetable substances" in § 179.26(b).

The agency has also found that the term "vegetable seasonings" has not been well understood. This term could be interpreted to include numerous substances whose irradiation at the 30 kGy level FDA did not intend to approve. For example, FDA intended this term to mean seasonings that are used in a manner similar to spices and never intended it to include vegetable pieces used for seasoning purposes under various standards of identity, such as 21 CFR 155.130 (Canned corn). Vegetable pieces used in such a manner may constitute a larger portion of the diet than the agency considered. To eliminate this confusion, the agency is revising the term "vegetable seasonings" to read "vegetable seasonings that are used to impart flavor but that are not either represented as, or appear to be, a vegetable that is eaten for its own sake." Thus, onion pieces could not be irradiated, while onion powder could be. The agency believes that all of the substances that it intended to permit to be irradiated will be adequately described by this new terminology.

In addition, because FDA approved the irradiation of specific substances used in herbal teas in the July 1983 and April 1985 final rules, the agency listed "teas" among the categories of dry aromatic vegetable substances in the omnibus rule. Herbal teas, however, are not the same as the product commonly known as "tea", i.e., the product derived from the shrub *Thea sinensis L.* The agency is unaware of any reason to irradiate tea itself, as opposed to those products called "herbal teas,"and has no information that anyone has ever proposed to irradiate tea. The agency believes that it erred in including the word "teas" in the regulation because the term "culinary herbs" encompasses any dry herbal tea product.

Therefore, the agency is modifying the wording of paragraph § 179.26(b) as follows: (1) To add the phrase "when used as ingredients in small amounts solely for flavoring or aroma" after the term "aromatic vegetable substances"; (2) to add the words "that are used to impart flavor but that are not either represented as, or appear to be, a vegetable that is eaten for its own sake" after the words "vegetable seasonings"; and (3) to remove the word "teas" from the list of types of substances that may be irradiated at the 30 kGy level.

B. Need for Toxicological Testing

The agency concluded that foods irradiated at the levels permitted by the regulation need not be tested toxicologically because the types and concentrations of radiolytic products in these foods after irradiation would be such that even with the most sensitive toxicological testing it would not be possible to measure any toxicological effects (51 FR 13376 at 13378).

HEI stated:

> BFIFC admitted that "some radiolytic products may be unique to irradiated foods," termed such chemicals "unique radiolytic products (URP's)" and then *assumed* that such URP's would not constitute more than 3 parts per million concentration in food (51 FR 13377). Each food item could have its individual URP's, so a wide variety of URP's is possible in the fruits, vegetables, grains, and other foods that could be irradiated under the new regulation. The concentration of URP's is not the crucial factor, since cancer can be initiated by a single URP or carcinogenic chemical. FDA presents no scientific proof that those radiolytic products unique to irradiated foods are "chemically similar to known natural food components (and) are likely to be toxicologically similar also" (51 FR 13378). FDA should require extensive studies to be performed to demonstrate the safety of these chemicals before human consumption is permitted. Specifically, concentrated amounts [of] radiolytic products should be fed to animals in carefully controlled studies to test for potential mutagenicity and carcinogenicity, as suggested by Drs. Samuel Epstein and John Gofman in *Science* Vol. 223, p. 1354. Until these types of studies are performed there is

no basis for the wholesale approval of irradiation. Since FDA's regulation did not require studies to test for the long-term health impact of these chemicals, it is in violation of the Food, Drug and Cosmetic Act, and evidence will be presented at the public hearing.

(HEI Para. I.3.) (Emphasis by HEI.)

In this objection, HEI has made a number of allegations about the significance of FDA's decision not to require toxicological testing before concluding that irradiation of food in the circumstances set forth in § 179.26 is safe. However, HEI has failed to make an adequate proffer to support a hearing on any of these allegations.

Under FDA's regulations, a hearing will not be granted on the basis of mere allegations. (21 CFR 12.24(b)(2)). Consistent with this regulation, the relevant case law provides that where a party requesting a hearing only offers allegations without an adequate proffer to support them, the agency may properly disregard those allegations. *General Motors Corp.* v. *FERC*, 656 F.2d 791, 798 n. 20 (D.C. Cir. 1981). For example, FDA need not grant a hearing on HEI's claim that each irradiated food item has its own individual URP's because HEI has not presented any evidence to support this claim.

Furthermore, HEI's allegation that BFIFC *"assumed"* (emphasis by HEI) that "* * * URP's would not constitute more than 3 parts per million concentration in food * * * is also without support. As noted in the final rule, BFIFC based its estimate of the likely concentration of URP's in foods on a review of experimental data showing the amount and type of chemical change likely to be caused by a given amount of radiation (51 FR 13376 at 13377). HEI has not presented any evidence that challenges the basis for BFIFC's analysis or the agency's reliance on that analysis.

HEI asserts that the concentration of URP's is not the crucial factor but again has not provided any evidence or rationale to support its assertion. Even if HEI is correct that cancer can theoretically be initated by a single URP or carcinogenic chemical, to justify a hearing, HEI would have to provide some evidence that would reasonably link low levels of URP's to the causation of cancer. HEI has not presented any such evidence.

As discussed earlier in this document and in the omnibus rule, FDA examined all available data from animal feeding studies with irradiated foods and found no link between irradiated food and cancer (51 FR 13376 at 13378). Therefore, HEI's assertion is a mere allegation that is not supported by any evidence. FDA will not grant a hearing on the basis of such an assertion (21 CFR 12.24(b)(2)).

HEI's allegation that FDA has not presented scientific evidence that radiolytic products are chemically and toxicologically similar to known natural food components is untrue. The agency did cite specific articles on the radiation chemistry of food components in the proposed omnibus rule (49 FR 5714 at 5721, Ref. 7 to 12; see also 51 FR 13376 at 13380) and included other references in the administrative file (Docket No. 81N-0004). The agency considered this information in its safety evaluation of radiolytic products.

While FDA has the ultimate burden of proof when it approves the use of a food additive, in the sense that the agency must find the additive to have been shown safe, once the agency makes a finding in a listing document, the burden shifts to an objector to come forward with evidence that calls that finding into question. *American Cyanamid Co.* v. *FDA*, 606 F. 2d 1307, 1314–1315 (D.C. Cir. 1979). To justify a hearing, HEI would have to present some evidence that suggests that there are significant toxicological or chemical differences between radiolytic products and known natural food components. HEI has failed to present any such evidence and, thus, has not provided a basis for a hearing.

HEI contends that until carcinogenicity and mutagenicity studies are performed on concentrated radiolytic products, as suggested by Epstein and Gofman in a letter to the editor of *Science* (Ref. 17), there is no basis for the wholesale approval of irradiation. Epstein and Gofman stated that, "Stable radiolytic products could be extracted from irradiated food by various aqueous and nonaqueous solvents, which could then be concentrated and subsequently tested."

BFIFC, in its report (Ref. 5, p. 18), explicitly considered testing requirements, including the option of testing extracted and concentrated radiolytic products. Based on its review of the available literature dealing with the identity, amount and potential toxicity of radiolytic products, BFIFC recommended that such testing was not necessary to assure the safety of foods irradiated at doses below 1 kGy or of minor ingredients irradiated at doses below 50 kGy because of the low potential concentration of radiolytic products in such foods. The agency, in the omnibus rule, agreed with the recommendation and concluded that foods irradiated under the conditions of the regulation are safe, and that no additional toxicological testing should be required (51 FR 13376 at 13378).

HEI has not justified a hearing on this conclusion. Epstein and Gofman's letter merely presents a general assertion. HEI has not supported it with any evidence that the levels of radiolytic products formed in food irradiated under the conditions of the regulation would be so high as to require that toxicological testing be done or to call into question FDA's conclusion that foods that have been irradiated are safe. Therefore, HEI has not justified a hearing on this issue under 21 CFR 12.24(b)(2).

Finally, HEI asserts that because FDA did not require long-term animal studies, it is in violation of the act. This is a legal issue. Thus, it cannot serve as a basis for a hearing because a hearing will be granted only on the basis of a substantial issue of fact, not on issues of policy or law (21 CFR 12.24.(b)(1)).

FDA discussed applicable sections of the act in the omnibus rule. The agency stated that, "Section 409 of the act lists the [safety] criteria which must be considered by the agency before a food additive regulation is issued. The statute does not prescribe what safety tests should be performed but leaves that determination to the discretion of scientists." (51 FR 13376). As stated above, FDA's scientists have concluded that foods irradiated at the levels permitted need not be tested toxicologically, and the agency agreed with this conclusion (51 FR 13376 at 13378). HEI has not cited any authority that contradicts FDA's conclusions about the type of data that is necessary to support the approval of the use of a food additive. Therefore, FDA finds that this aspect of HEI's objection is without merit.

C. Animal Feeding Studies

As stated in the previous response, FDA concluded that foods irradiated in accordance with this regulation are safe on the basis of the findings and conclusions of BFIFC, the Task Group, and other information in the agency files.

1. Consideration of Wholesomeness Studies

HEI stated that:

The FDA admits that "useful information has been learned from those feeding studies where there has been some exaggeration of dose relative to that prescribed by this regulation," and argues that such information establishes the safety of food irradiated in accordance with the regulation (51 FR 13382). In a review of 1,223 wholesomeness studies conducted by J. Barna for the Hungarian Academy of Sciences in 1979, study results were classified as either neutral, adverse, or beneficial. Each study could have several outcomes, since studies could address more

than one issue. Barna found 1,414 adverse effects, 185 beneficial effects, and 7,191 neutral effects * * *. A more detailed compilation of adverse effects identified in the Barna study, prepared by [the] Coalition for Alternatives in Nutrition and Healthcare, is attached as Exhibit B. FDA's Irradiated Foods Task Group did not take into account this review of safety studies compiled by J. Barna, despite their objective to "compile and summarize the toxicology data pertaining to irradiated foods." 51 FR 13378 FDA should have considered these studies when reviewing relevant toxicological data, and should not have simply dismissed the adverse evidence. Testimony of scientists regarding this FDA failure will be presented at the public hearing.

(HEI Para. I.16.)

A hearing will not be granted on the basis of mere allegations or general descriptions and contentions (21 CFR 12.24 (b)(2)). HEI must, at a minimum, "raise a material issue concerning which a meaningful hearing might be held". *Pineapple Growers Ass'n of Hawaii* v. *FDA* 673 F. 2d 1083, 1085 (9th Cir. 1982).

HEI alleges, without elaboration or support, that the Task Group did not take into account the review article by Barna (Ref. 18). This statement is belied by the record. The Task Group considered the 1979 Barna article cited by HEI, listed it and all of the available relevant studies cited therein in the bibliography of reports evaluated by the Task Group (Ref. 19), and placed this listing along with the evaluation forms for these studies on public display. Thus, HEI's objection is without merit and is not a basis for a hearing.

HEI also misrepresents the conclusions of Barna's article. Contrary to what HEI implies, Barna did not conclude that the irradiation of food is unsafe. In fact, Barna carefully reviewed the technological, biotechnical, and analytical inadequacies that "* * * may lead to adverse effects * * * which could be mistaken as consequences of radiation treatment * * *" and concluded that "* * * neither beneficial nor adverse effects of irradiated food consumption are consistent, unambiguous and reproducible. Neither of them can be traced back to a given food or group of foods or level of radiation dose." (Ref. 18, p. 205 and p. 266.)

Furthermore, contrary to HEI's allegation, FDA did not dismiss any adverse evidence. The agency stated in the omnibus rule that the Task Group examined in detail all studies that either raised questions concerning the possibility of adverse effects or that appeared to support a conclusion that the irradiated food studied is safe and concluded that studies with irradiated foods do not show adverse toxicological effects (51 FR 13376 at 13378). This review of available toxicology data included an attempt to identify any consistent patterns or trends of adverse effects reported in different studies. The agency found no patterns or trends that would demonstrate that a reported adverse toxicological effect was attributable to irradiation of the food (51 FR 13376 at 13384). HEI has not pointed to specific evidence that FDA either dismissed without cause or misinterpreted in making this finding. Thus, it has failed to justify a hearing.

2. Consideration of Possible Adverse Effects

HEI stated that:

The Irradiated Foods Task Group, which reviewed available toxicological data concerning irradiated foods, examined 69 studies in detail (51 FR 13378). Thirty-two of these 69 studies indicated adverse effects from irradiated foods, yet the Task Group concluded that the studies did not show adverse effects. This cannot be considered "scientific" nor honest. Evidence regarding the Task Group report and the problems associated with it will be presented at the public hearing.

(HEI Para. I.5.)

A hearing will not be granted on the basis of mere allegations or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). HEI must, at a minimum, "raise a material issue concerning which a meaningful hearing might be held." *Pineapple Growers Ass'n of Hawaii* v. *FDA, supra.*

The Task Group examined in detail those studies, referred to above, that appeared on their face to show adverse effects. The Task Group found that because of problems associated with diet or inadequate experimental design, any adverse toxicological effects reported in these studies could not be attributed to irradiation of the food (Ref. 6). In the omnibus rule, FDA noted that it relied on the findings of the Task Group in concluding that foods irradiated under the conditions of the regulation are safe (51 FR 13376 at 13378). HEI has not submitted any specific information from any of the studies to challenge the Task Group's analysis nor cited any evidence that calls into question the safety of foods irradiated under the conditions of the regulation.

A promise to present evidence regarding alleged problems associated with studies reviewed by the Task Group does not provide a sufficient basis on which to grant a hearing. A person requesting a hearing must support its allegations with an adequate proffer of evidence. *General Motors Corp.* v. *FERC,* 656 F.2d 791, 798 n.20 (D.C. Cir. 1981). HEI has failed to make such a proffer on this issue and thus has failed to demonstrate that a hearing is appropriate on whether the Task Group conclusions are correct.

D. Polyploidy

In the omnibus rule, the agency responded to comments claiming that polyploidy (chromosomal changes) had been shown by workers at the National Institute of Nutrition (NIN), Hyderabad, India, to be a toxic consequence in animals and humans of ingestion of irradiated wheat (Ref. 20). The agency cited a summary of a report (51 FR 13376 at 13385) by a scientific committee (hereafter called "the Indian Committee") that was commissioned by the Indian Government to investigate why studies done at NIN were contradicted by studies conducted at the Bhaba Atomic Research Centre (BARC) in Bombay, which showed no adverse effect. The Indian Committee had conducted an indepth review of the data from both laboratories and concluded that there was no evidence that increased polyploidy was associated with ingestion of irradiated wheat (Ref. 21). FDA's Task Group (Ref. 22) reviewed the studies performed at NIN during the 1970's and the findings of the Indian Committee. Based on the Task Group's review and other available evidence, the agency accepted the finding of the Indian Committee that the conclusions reached by investigators at NIN were not supported by the raw data (51 FR 13376 at 13385).

HEI disagreed with FDA's decision, stating:

A study by Bhaskaram, et al, * * * found increased incidence of chromosomal changes (polyploidy) in the blood of malnourished children fed freshly irradiated wheat, and subsequent studies found similar results in test animals. Food irradiation proponents have charged that this study was fraudulent and was repudiated by the National Institute of Nutrition in India which sponsored the study. Relevant correspondence regarding this study is attached as Exhibit C, verifies that the study has not been repudiated by the National Institute of Nutrition, and indicates other studies conducted that relate to this issue. The FDA claims that some unnamed "committee of Indian scientists" has refuted this study, but their refutation does not appear in the refereed scientific literature or in the journal in which the original study appeared (51 FR 13385). The evidence identified in Exhibit C and further evidence supporting the concerns raised by the Bhaskaram study would be presented at the public hearing. In addition, the National Institute of Nutrition replicated the freshly irradiated wheat studies in monkeys and found increased incidence of polyploid cells. VIJAYALAXMI, "Cytogenetic Studies in

Monkeys Fed Irradiated Wheat," *Toxicology* 9: 1978: 181–184. The fact that this study was performed and confirmed the previous findings of Bhaskaram was not mentioned in the FDA final rule. The above evidence and additional evidence will be presented at public hearings.

(HEI Para. I.18.)

HEI's exhibit C contains a copy of the Bhaskaram study with malnourished children (Ref. 20); a copy of a November 14, 1984, memorandum from Martin Welt, Ph.D., to the Executive Director of HEI and other members of a panel discussion on "Alternate Uses—Focus on Food Irradiation," stating that the study may have been fraudulent, that authorities at NIN had repudiated the study, and that an Expert Committee appointed by the International Food Irradiation Project found that the study was without merit; a February 20, 1985, letter from Dr. P.S. Elias of the International Project in the Field of Food Irradiation, stating that the Joint FAO/IAEA/WHO Expert Committee on Food Irradiation (JECFI) considered the Bhaskaram study when it gave full toxicological clearance to irradiation of food up to 10 kGy (1 Mrad); an April 2, 1985, letter from Dr. B.S. Narasinga Rao, Director, NIN, explaining why the NIN studies on irradiated wheat were conducted; and a January 18, 1986, letter from Dr. S.G. Srikantia, former Director of NIN, stating that NIN had not repudiated the Bhaskaram study and listing published studies designed to determine whether irradiated foods cause polyploidy or dominant lethal mutations.

Because HEI stated that it would present further evidence supporting the concerns raised by the Bhaskaram study at a hearing, on February 2, 1987, FDA requested that HEI set forth in detail that further evidence. On March 6, 1987, HEI responded by largely reiterating its objection:

> FDA relied upon an unpublished, unnamed "committee of Indian scientists" who challenged a study published in a refereed scientific journal by Bhaskaram, et al., finding polyploidy in the blood of malnourished children fed wheat *freshly* irradiated at doses legalized by FDA.
>
> Food irradiation promoters suggested that the study was fraudulent during a November 8, 1984 panel on food irradiation at the American Nuclear Society/European Nuclear Society joint meeting held in Washington, DC. A panel member even claimed that the study was repudiated by the director of the Institute conducting the study. We wrote to the Institute, and they responded that they stand behind their study. In fact, similar problems with freshly irradiated wheat have been demonstrated in the blood of both monkeys and mice.

(HEI's emphasis) HEI further stated that:

> * * * FDA cites the "committee" report as having been "presented to the Joint Expert Committee in 1976," although agency personnel later had to retract their claim.
>
> The so-called committee of Indian scientists turned out to be two researchers who submitted a "confidential" report to the Ministry of Health and Family Planning in India. The report was requested because research undertaken by the Bhaba Atomic Research Centre (BARC) reported different results than those found by NIN. BARC was seeking approvals to irradiate food. The two person committee submitted a confidential, unpublished report critical of NIN in 1976, and NIN responded with a confidential report to the Indian Government verifying the validity of their work and refuting in detail the claims and conclusions of the critical report. They also included independent evaluations of their data by two of the country's [India's] foremost cytogeneticists. Additional correspondence regarding this issue is attached.

(HEI March 6, 1987, response, p. 8 (Ref. 2).)

HEI also stated that it felt that studies on dominant lethal mutations that were cited in Dr. Srikantia's letter submitted in support of its original objection should be addressed; cited a study by Hickman, et. al., "Rat Feeding Studies on Wheat Treated with Gamma-Radiation I. Reproduction" (Ref. 23) as a disturbing finding that suggests the need for further research in these areas; and cited a passage from Conning, "Evaluation of the Irradiation of Animal Feedstuffs" (Ref. 24) which refers to a study on the effect of an irradiated diet on lymphocyte number.

The "additional correspondence" attached to the March 6th submission consisted of a letter from the Coalition to Stop Food Irradiation (CSFI) to Food Chemical News, a trade newspaper, explaining CSFI's understanding of the history of the Indian Committee report, with enclosures. The enclosures consisted of a letter from FDA to CSFI providing documentation on how FDA received the summary report of the Indian Committee and correspondence between Dr. S.G. Srikantia, former Director of NIN, and Professor J. Schubert of Michigan State University, concerning whether the NIN study was described as fraudulent by members of the November 8, 1984, panel.

The objection, and the attached correspondence, appear to address several subjects, many of which are not related to the finding of polyploidy. The agency will address the polyploidy question first, then deal with all other studies not related to polyploidy but cited in this objection.

1. Allegations That NIN Study Is Fraudulent

First, HEI challenges allegations that the Bhaskaram study was fraudulent. However, such allegations are not an issue in this rulemaking. FDA did not base its conclusion on a finding that the data were fraudulent. FDA concluded in the final rule that the available data from NIN did not provide an appropriate basis on which to conclude that increased polyploidy was caused by ingesting irradiated wheat. Thus, a hearing need not be granted on whether these studies are fraudulent.

2. Whether NIN Has Refuted the Conclusions of the Indian Committee and the Significance of That Fact

Second, HEI argued that certain individuals do not accept the conclusions of the Indian Committee appointed by the Indian Ministry of Health and Family Planning to resolve the question of whether polyploidy is caused by eating freshly irradiated wheat. HEI stated that NIN responded to the Indian Government in a document that verifies the validity of the NIN studies and that refutes the Indian Committee report in detail. However, neither HEI nor anyone else has submitted this document to FDA. HEI thus implies that data or analyses not seen by FDA could resolve this issue in its favor.

The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle* v. *Pacific Legal Foundation, supra,* 445 U.S. at 214. To justify a hearing, HEI would have had to submit the NIN response or some other evidence that challenges the findings and conclusions of the Indian Committee and that would cause the agency to change its conclusion.[1] HEI

[1] FDA received a letter, dated September 26, 1986, from Dr. Srikantia, Director of NIN when the Bhaskaram study was conducted, stating that the Indian Committee report was a confidential document submitted to the Government of India at the Government's request. He said that he had submitted a reply to the Government, and that two well-known cytogeneticists had examined NIN's data in depth and had agreed with NIN's findings. FDA wrote to Dr. Srikantia on October 27, 1986, and November 24, 1986, stating that FDA was not aware of his rebuttal and invited him to submit any information to FDA that would be relevant to the issue raised by objections. Dr. Srikantia replied on December 16, 1986, but did not submit a copy of his rebuttal to the Indian Committee or of any other report. Instead, he simply stated that he disagreed with the report of the Indian Committee; that many would agree that the polyploidy studies were of good design; that two well-known cytogeneticists in India independently reviewed NIN's work on polyploidy in children, monkeys, and rats and have agreed with its conclusions; and that NIN's

Continued

has not submitted any such evidence. Thus, HEI has not provided a basis for a hearing.

3. Citation of Indian Committee Report

HEI's third point is that FDA made an error in the way in which it cited the Indian Committee report.[2] FDA agrees that it incorrectly cited this report as a "Report Submitted to the Joint FAO/IAEA/WHO Expert Committee on the Wholesomeness of Irradiated Food, 1976" (51 FR 13376 at 13398). HEI is correct that the committee report was commissioned by the Ministry of Health and Family Planning in India to determine why results from the BARC differed from those reported by NIN.

However, FDA's error in citing this report did not affect the availability of this information. The agency placed a copy of the report summary on public file with the other references. The incorrect citation also did not change the report's conclusions, the validity of its conclusions, or the validity of the agency's conclusions based on that report. Therefore, because the agency's miscitation of the report did not affect the proceeding in any material way, and because HEI has not alleged that it did, the miscitation does not provide a basis for granting a hearing (21 CFR 12.24(b)(4)).

4. The Monkey Study

Fourth, HEI states that Vijayalaxmi, at NIN, replicated the freshly irradiated wheat studies in monkeys and found increased incidence of polyploid cells (Ref. 25), thus confirming the previous findings of Bhaskaram.

A hearing will not be granted on the basis of mere allegations or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). HEI must, at a minimum, "raise a material issue concerning which a meaningful hearing might be held." *Pineapple Growers Ass'n of Hawaii* v. *FDA, supra.* Although FDA did not explicitly cite the monkey study in the omnibus rule, the administrative record shows that this study was among the NIN studies that the Task Group and FDA considered. The agency based its conclusion on the findings of the Task Group and on the other information in the administrative record (51 FR 13376 at 13378). The Task Group concluded (Ref. 22) that *none* of the studies on polyploidy done at NIN, including those reported both by Bhaskaram (Ref. 20) and Vijayalaxmi (Ref. 25, 26, and 27), was reliable.

A person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle* v. *Pacific Legal Foundation, supra,* 445 U.S. at 214. To justify a hearing, HEI would have had to submit some evidence that challenges the conclusion that all the NIN studies were not reliable. For example, this standard could have been met if HEI had provided evidence that the monkey study was designed to correct the problems with the earlier NIN studies that were noted by the Indian Committee and by the agency (Ref. 22) or had provided evidence that the design of the NIN studies was not flawed. HEI, however, has failed to proffer any such evidence and thus has not provided any basis to justify a hearing on this objection.

5. Letter From Dr. Srikantia

Dr. Srikantia's January 18, 1986, letter to HEI stated that NIN had not repudiated the Bhaskaram study.

FDA did not state that NIN had repudiated the study, nor did it base its conclusion on a finding that the data were repudiated by NIN. Such an allegation is not an issue in this rulemaking. FDA concluded in the final rule that the available data from NIN did not provide an appropriate basis on which to conclude that increased polyploidy was caused by ingesting irradiated wheat.

Dr. Srikantia's letter referred to reports on studies designed to detect polyploidy, including three reports other than those performed at NIN (Ref. 29, 30, and 31). Two of the cited reports (Refs. 29 and 30) did not find increased polyploidy in the cells of animals fed irradiated food or freshly irradiated diets. One of these two reported the results of six in vivo genetic toxicity tests using three different irradiated foods: fish, dates, and chicken (Ref. 29). The tests were as follows: sex-linked recessive lethal mutations in *Drosophila* (dried dates only); chromosome aberrations in bone marrow of Chinese hamsters; micronucleus test in rats, mice, and Chinese hamsters; sisterchromatid exchange to bone marrow of mice and Chinese hamsters, as well as in spermatogonia of mice; and DNA metabolism in spleen cells of Chinese hamsters. The authors concluded that none of the tests provided any evidence of genetic toxicity. The agency had reviewed preliminary reports of some of these tests and referenced them in the omnibus rule (51 FR 13376 at 13397) and in the administrative file (81N-0004). The second study (Ref. 30) did not find an increase in frequency of polyploid cells in the bone marrow of rats fed irradiated wheat. The agency had reviewed this study and listed it in the administrative file.

In the third report cited, Renner (Ref. 31) concluded that "(f)eeding a standard diet freshly irradiated with high doses (>3 Mrads) has a transitory effect in the bone marrow of Chinese hamsters as evidenced by an increased incidence of polyploid cells" but that "there is no

---

observation that polyploidy in children quickly disappeared after cessation of feeding with freshly irradiated wheat was not at variance with biological possibilities. He also reiterated NIN's position that wheat subjected to irradiation must be stored for 3 months to be safe for consumption. He stated that just because wheat is likely to be stored for even longer periods does not negate NIN's findings on freshly irradiated wheat.

[2] Because of the controversy over the mutually contradictory findings at two Government laboratories, the Indian Ministry of Health and Family Planning appointed a committee of two University scientists (Indian Committee) to identify the cause of the discrepancy between the data from these two groups. The Indian Committee (Ref. 21) critically examined the data from both laboratories and concluded that an important reason for the conclusion regarding increased polyploidy was the abnormally low frequency of polyploidy (0.0 percent) in the cells of children not eating irradiated wheat (Ref. 20). The Indian Committee also stated that cells from the malnourished children at the beginning of the study exhibited a fuzzy appearance and could not be counted properly. They concluded that the frequency of 1.8 percent polyploid cells found in children eating freshly irradiated wheat was well within the normal range of healthy human beings.

The Indian Committee also examined studies by Vijayalaxmi reporting polyploidy in rats and mice fed freshly irradiated wheat. They evaluated the techniques used by NIN workers to determine the fraction of polyploid cells and found that the method used yielded highly variable and unreproducible results. They concluded that the differences between Vijayalaxmi's findings and those of researchers at BARC "mainly lie in the faulty and biased selection of the sample" and that "the results from animals fed freshly irradiated wheat are compatible with those from animals fed unirradiated wheat." The Indian Committee did not consider the monkey study, which was published after the Indian Committee report; however, there is no evidence that the Vijayalaxmi study in monkeys was designed to overcome the serious problems of faulty and biased selection of the sample noted by the Indian Committee in the two earlier studies by the same author.

The 1976 meeting of the Joint FAO/IAEA/WHO Expert Committee on Food Irradiation (JECFI) in Geneva, Switzerland considered the question of polyploidy. JECFI noted the contradictory results of different investigators (Ref. 28). They also noted that the significance of observations of polyploidy are unclear because the range of the observations of the incidence of polyploidy varies considerably between normal groups of the same species of animal, and that the toxicological implications of an increased incidence of polyploidy are not understood. However, they concluded that resolution of the contradictory conclusions was not necessary because the studies on freshly irradiated wheat were not relevant to actual practice considering that wheat is usually stored longer than 12 weeks; and no increase in polyploidy was reported by any investigator, including those at NIN, for wheat stored 12 weeks after irradiation. They recommended unconditional acceptance of wheat and ground wheat products irradiated for the purpose of disinfestation to a maximum dose of 1 kGy (100 krad) and did not recommend an explicit storage requirement. Dr. Srikantia, the Director of NIN, was a member of the JECFI that made this recommendation.

evidence for any mutagenic effect being produced as a result of feeding an irradiated diet." He noted that the irradiation dose required for insect disinfestation is less than 100 kilorads, and no effects on polyploidy incidence were seen at doses below 2,000 kilorads (2 Mrad). Thus, this study does not provide evidence that polyploidy occurs in animals fed food irradiated under conditions of the regulation. HEI has not explained why this study supports its contention or cited any study other than those conducted at NIN that has reported an association between eating food freshly irradiated at a dose permitted under the regulation and polyploidy. Thus, HEI has failed to provide a basis for a hearing.

Dr. Srikantia's letter also cited seven studies on dominant lethal mutations, two of which reported an effect and five of which reported no effect. FDA discussed the two studies on dominant lethal mutations that reported an effect in the omnibus rule (51 FR 13376 at 13385 and 13387) and concluded that one study, conducted at NIN, was unreliable, and that the observations in the other study were not evidence of dominant lethal mutation and could not be reproduced in three comparable studies. (See also the section on "Dominant Lethal Tests.") Neither HEI nor Dr. Srikantia has proffered any evidence or explanation that challenges or calls into question the agency's analysis of these studies. Nor has HEI provided any explanation of why it considers studies on dominant lethal mutations to be relevant to polyploidy. Therefore, HEI has not provided a basis for a hearing on this question.

6. Hickman Study

In its March 6, 1987, letter HEI stated that a study by Hickman et al. (Ref. 23):

> * * * concluded that wheat irradiated at least 2 to 5 weeks before feeding showed no adverse reproductive effects. Yet the study tables reveal that twice as many stillbirth[s] occurred in those fed wheat irradiated at 200 krad compared to the control. Four litters in the 200 krad irradiated wheat group were stillborn, compared to one in the control group. Such disturbing findings suggest the need for further research in these areas.

(HEI March 6, 1987, response, p. 9 (Ref. 2).)

The Hickman study investigated whether reproductive effects are caused by feeding wheat treated with gamma radiation to rats and does not discuss polyploidy. The authors of the study concluded that this study showed no adverse effects. The number of stillbirths in the high dose group, though higher than the concurrent controls, was still within the normal range for this rat colony. Moreover, the number of stillbirths in the group fed wheat irradiated at a dose permitted by the omnibus rule was less than that of the concurrent controls. The agency agreed that the authors' conclusions were valid and referenced this study in the omnibus rule (51 FR 13376 at 13386). HEI has not provided any basis on which to challenge the conclusions of the authors and of FDA. Nor has HEI proffered any evidence to relate this study to polyploidy. Instead, HEI has merely suggested that such findings indicate a need for further research in these areas. A hearing will not be granted on the basis of mere allegations or contentions (21 CFR 12.24(b)(2)). Thus, HEI's reference to the Hickman study does not provide a basis for a hearing.

7. Conning Review

Finally, in its March 6, 1987 letter, HEI stated that:

> Conning, D.M., "Evaluation of the Irradiation of Animal Feedstuffs," in P.S. Elias and A.J. Cohen, ed's, RECENT ADVANCES IN FOOD IRRADIATION, 247 at 263 (1983) cites a study by Ehrenber. [sic] L. et al which found a 15 to 20 percent reduction in the lymphocyte count in male Sprague-Dawley rats, whether fed within 96 hours of irradiation or after storage for up to 1 year. Lymphocytopenia was produced by all diets irradiated at or above 6 kGy. Conning notes at page 268: "The agents responsible for the lymphocytopenia induced by irradiated laboratory diets have not been identified or their mechanism of action satisfactorily explained. There appears to be no published work that contradicts these findings, the various studies by Huismans being inadequate in a number of respects. A possible effect on the immune system has still not been ruled out and further carefully-controlled experiments in this area using adult animals are warranted, particularly in the light of the Russian study which indicated that long-term feeding of an irradiated diet produces kidney damage possibly by an immunological mechanism."

(March 6, 1987, response, p. 9 (Ref. 2).)

In his review, Conning (Ref. 24) cited two studies by Ehrenberg and colleagues (Ref. 32 and 33). One of these studies (Ref. 32) reported that lymphocytopenia was produced by feeding diets irradiated at or above 6 kGy, but not at 2 kGy. The other study (Ref. 33) reported a 15 to 20 percent reduction in lymphocyte counts in rats fed diets irradiated at 30 to 90 kGy. As Conning stated, " * * * the effect was at the limit of detection, a 60 kGy irradiated diet resulting in only a 7% reduction in the lymphocyte number" (Ref. 24).

HEI has not provided any reason for considering these studies relevant to its objection that irradiated food causes polyploidy. Further, the effects reported in these studies are not relevant to the uses of irradiation permitted under the conditions of the regulation, which limits irradiation of foods other than minor ingredients to a dose not exceeding 1 kGy. HEI has not provided any basis for finding that studies with food irradiated at such exaggerated doses have any relevance to the safety of food irradiated under the conditions set forth in 21 CFR 179.26. Thus, this aspect of HEI's objection does not provide a basis for a hearing.

Moreover, FDA's Task Group considered these studies and determined that they suffered from such serious methodological deficiencies that no valid conclusions could be drawn on the basis of the data from them (Ref. 19). HEI has not contested this determination. Nor did other feeding studies reviewed by the agency show a similar effect.

The long-term rat feeding study done in the Soviet Union and referred to by Conning is also unrelated to polyploidy. The authors of the study reported damage to kidneys and testes in rats fed irradiated feed. The agency addressed this study in a response to a comment on the omnibus rule (51 FR 13376 at 13386) and concluded that because of the lack of data in available reports on this study, in contrast to the considerable amount of data that FDA had from other studies that showed no effects, the results described in these Soviet Union reports did not raise substantial questions about the safety of food irradiated under the conditions of this regulation (51 FR at 13376 at 13386). (This study is discussed elsewhere in the document. See section II. E. "Studies Reporting Effects on Kidney and Testes.") HEI has not provided any basis, nor cited any evidence, that would call the agency's conclusion into question. Thus, it has failed to justify a hearing on this aspect of the objection.

In sum, HEI's reference to Conning and the studies that Conning cites in his review article does not justify a hearing on polyploidy because HEI has not provided any basis for considering these studies relevant to polyploidy. In addition, FDA had considered virtually all of the studies cited by Conning and found them not to provide a reliable basis on which to make conclusions about the safety of the uses of food irradiation at issue in this proceeding. HEI has not challenged these findings.

Thus, HEI has merely disagreed with the agency's conclusion that the studies conducted at NIN in India do not provide a basis on which to find that adverse effects would be caused by ingestion of irradiated foods and has not

provided any evidence that would challenge the findings of the Indian Committee or the analysis of the agency. Instead, HEI has submitted letters from persons associated with the studies that say that they have not retracted their work and has referred to other studies unrelated to polyploidy. HEI has not proffered any evidence to show that polyploidy is a true adverse effect from ingestion of irradiated food that should be considered further by the agency. Thus, HEI's objection consists of mere allegations and contentions and of references to data previously considered by the agency that do not challenge the agency's conclusion. Consequently, the objection does not provide an adequate basis for a hearing.

8. FDA's Consideration of Scientific Evidence

In another assertion, related to the Bhaskaram study, HEI stated that:

> The FDA argues that animal testing is not always necessary to declare a food additive or process safe, where by "sound reasoning" it can determine otherwise (51 FR 13382). The FDA goes on to dismiss animal testing data which indicates hazards from consuming irradiated food, which cannot be considered the use of "sound reasoning." Animal testing was not "too insensitive to show an effect from irradiation of food at the doses allowed," in some studies, such as the study by Bhaskaram et al. "Effects of feeding irradiated wheat to malnourished children," 28 THE AMERICAN JOURNAL OF CLINICAL NUTRITION 130 (Feb. 1975). This study found blood abnormalities in malnourished children fed freshly irradiated wheat. This is but one example of FDA's failure to protect public health by acting on evidence of harm from food irradiation. If ignoring scientific studies indicating harm is FDA's "sound reasoning," then FDA is incapable of "sound reasoning." Further evidence regarding this issue will be presented at the public hearing, including additional scientific studies and testimony by scientists.

(HEI Para. I.15.)

The agency asked HEI on February 2, 1987, to set forth in detail the factual information and analysis that it intended to present at a hearing.

On March 6, 1987, HEI stated:

> The FDA assumption that doses of 100,000 rads will not create any harmful effects in food was not based upon the scientific animal feeding literature or other documented research. It should be characterized as a hope or a theory, rather than as a fact. Dr. Donald Louria is in the process of reviewing the five studies considered by a 1982 FDA panel as "adequate" to support the safety of irradiated foods. Two of the five studies reviewed thus far suffer flaws, according to Dr. Louria. We are now asking other scientists to review these studies, now that they have been identified.

(HEI March 6, 1987, response, p. 6 (Ref. 2).)

A hearing will not be granted on the basis of mere allegations or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). HEI must, at a minimum, "raise a material issue concerning which a meaningful hearing might be held." *Pineapple Growers Ass'n of Hawaii* v. *FDA*, supra.

In this objection, HEI alleges that FDA has dismissed animal testing data that indicate that there is a hazard from irradiated foods and has ignored scientific evidence. To justify a hearing on these assertions, HEI must point to some evidence that FDA did not consider that would challenge the conclusions of the agency or that shows that the agency has not correctly analyzed testing data. The only specific evidence that HEI has pointed to in support of its allegations is the Bhaskaram study (Ref. 20). HEI's objection must provide at least a plausible basis on which to find that FDA is incorrect in finding that this study is unreliable. As the discussion in the preceding section makes clear, however, HEI has failed to do so. Thus, the objector has not met its "threshold burden of tendering evidence suggesting the need for a hearing." (See *Costle* v. *Pacific Legal Foundation*, supra.)

Moreover, a hearing will not be granted on factual issues that are not determinative with respect to the action requested (21 FR 12.24(b)(4)). Even if the agency agreed that two of the five studies referred to by HEI in its March 6, 1987, submission suffer flaws, this fact would not change the agency's conclusion that there is an adequate margin of safety for foods irradiated under the conditions of the regulation. Although the agency found that the studies in question were supportive of its conclusion on safety, those studies were not the primary basis for FDA's conclusion that foods irradiated under the conditions of the regulation are safe. FDA's conclusion was based on its review of all available evidence, including the findings, rationale, and conclusion of BFIFC and of the Task Group (51 FR 13376 at 13378). HEI has not proffered any evidence that would call this evidence into question. Thus, HEI has not justified a hearing.

HEI promised to present additional scientific studies and testimony by Dr. Donald Louria or other scientists at a hearing but did not specify what evidence it would present. A hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. A person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle* v. *Pacific Legal Foundation, supra*, 445 U.S. at 214. Because HEI failed to submit the promised scientific reviews and to specify the evidence it would present at a hearing, FDA has no way of determining whether this evidence justifies a hearing. Therefore, HEI has failed to meet its threshold burden.

E. Studies Reporting Effects on Kidney and Testes

In the spring of 1984, the U.S. Department of Agriculture (USDA) submitted to FDA several reports of studies conducted with radiation-sterilized chicken (hereafter referred to as "the Raltech studies") (49 FR 40623; October 17, 1984). These studies were conducted to test the safety of chicken irradiated in the frozen state, in the absence of air, at sterilizing doses. The food tested and the conditions of irradiation were totally different from those that FDA proposed to permit. Nonetheless, the agency received several comments on its omnibus proposal alleging that effects on the kidneys and testes, and on the survival of mice in one of these studies, showed that foods irradiated under the conditions of the proposal had not been shown to be safe (51 FR 13376 at 13386). Although these studies were not directly relevant to the safety evaluation of the irradiated foods permitted by this rule, FDA thoroughly evaluated them to determine whether any adverse effects had been demonstrated that would raise new safety questions or that would challenge the basis of FDA's analysis. FDA found that no adverse effects had been shown that could be attributed to irradiation of the food (50 FR 29658). The adverse effects noted appeared to be attributable either to chance occurrence or to giving mice such a high proportion of chicken meat in the diet. FDA concluded that these studies provided no information that would cast doubt on the safety of the foods that could be irradiated under either the pork rule (50 FR 29658) or the omnibus rule (51 FR 13376 at 13386).

In the omnibus final rule, FDA also responded to comments concerning a study done in the Soviet Union that reported damage to kidneys and testes of rats fed irradiated lab chow. The agency concluded that the data reported in the two available reports on this study are inadequate to conclude that irradiation of the diet caused adverse effects, and that, considering the far larger amount of data from other similar studies that showed no effects, these reports did not raise substantial

questions about the safety of food irradiated under the conditions of this regulation (51 FR 13376 at 13386).

1. Objection to omnibus rule

HEI stated:

The FDA stated that one comment noted increased kidney damage in the Raltech irradiated chicken studies (51 FR 13386), and the FDA did not address this concern in item no. 33. [Comment 33 in the omnibus rule.] In item no. 34, the FDA cited two Russian reports that found damage to kidneys and testes in rats fed irradiated feed, but dismissed these studies. Evidence regarding the studies which FDA chose to uphold and evidence regarding the original studies, so that the FDA conclusions can be evaluated properly, would be presented at the public hearing. (HEI Para. I.21.)

Further, HEI stated that:

The FDA cites a report prepared by Raltech scientists which was reviewed by Donald W. Thayer, Chief of the Food Safety Laboratory of the Eastern Regional Research Center of the Department of Agriculture in SUMMARY OF SUPPORTING DOCUMENTS FOR WHOLESOMENESS STUDIES OF PRECOOKED (ENZYME INACTIVATED) CHICKEN PRODUCTS IN VACUUM SEALED CONTAINERS EXPOSED TO DOSES OF IONIZING RADIATION SUFFICIENT TO ACHIEVE "COMMERCIAL STERILITY" (51 FR 13386)[.] Dr. Thayer concluded that "two of the studies namely the dominant lethal study and the chronic toxicity, oncogenicity, multigeneration reproductive study with mice had some possibly adverse findings which will require careful consideration before the process can be declared safe" (at page 9)[.] The Agency concluded that independent examination of the lesions did not support classification of the lesions as carcinogenic, but the FDA fails to explain the increased deaths in the study group fed gamma irradiated chicken. Further testimony regarding this study would be offered at a public hearing. (HEI Para. I.20.)

FDA asked HEI on February 2, 1987, to set forth in detail the factual information that it intended to present at a hearing. On March 6, 1987, the objector responded by stating that:

Dr. Donald Louria, New Jersey College of Medicine, will be asked to comment on the validity of the original research study on kidney damage and testes, and to explain whether other studies refute the studies suggesting damage or whether these studies differ from those showing damage. (HEI March 6, 1987, response, p. 11 [Ref. 2].)

Although HEI stated its disagreement with FDA's evaluation of the Raltech studies of mice fed radiation-sterilized chicken, it has not identified any evidence that would call into question any of the agency's conclusions. HEI has not identified any evidence, nor offered any reason, that would provide a basis on which to find that a study on radiation-sterilized chicken is relevant to a rule that does not permit either the irradiation of food at the levels necessary to sterilize chicken or the irradiation of chicken.

As discussed in the omnibus rule, the agency concluded that the decreased survival in the female mice was not treatment-related because it occurred in only one sex group, and because the decrease was only marginal (51 FR 13376 at 13386). HEI has not proffered any evidence to challenge this conclusion. Rather, HEI simply asserts that further testimony regarding this study would be offered at a hearing. A hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that supports the need for a hearing. *Costle* v. *Pacific Legal Foundation*, supra, 445 U.S. at 214. HEI has failed to meet that threshold. Therefore, a hearing on this objection is denied.

Moreover, the agency noted that mice in all groups fed chicken meat (both nonirradiated and irradiated) showed signs of kidney damage (51 FR 13376 at 13386). The incidence of this effect was far higher in the mice fed frozen nonirradiated chicken than in either of the groups fed irradiated chicken. Therefore, the agency concluded that the effects were the result of the high protein content of the chicken diets rather than of the irradiation of some diets (51 FR 13376 at 13386). HEI has not proffered any evidence to challenge this conclusion.

Nor has HEI identified any specific, reliable evidence that would challenge FDA's conclusion that the reported results of the Soviet Union rat study were not supported by data and were contradicted by other studies. As FDA stated in the omnibus rule (51 FR 13376 at 13386), critical information necessary to verify that the reported effects are treatment related is not available. It is the objector's burden to come forward with evidence that would show that the agency's analysis is incorrect. *American Cyanamid Co.* v. *FDA*, supra, 606 F.2d at 1314–1315. HEI has not met this burden.

The agency attempted to obtain the raw data from the study done in the Soviet Union through several sources but could not obtain such information. The Counselor, Foreign Affairs Administration, Soviet Ministry of Health responded to FDA's request by stating that "the indicated materials are the intellectual property of the authors of the experiment and cannot be forwarded to the Administration's scientists" (Ref. 34).

As for Dr. Thayer's statement, HEI stated:

Dr. Thayer concluded that "two of the studies namely the dominant lethal study and the chronic toxicity, oncogenicity, multigeneration reproductive study with mice had some possibly adverse findings which will require careful consideration before the process can be declared safe."

This statement was drawn by HEI, somewhat out of context, from a report to FDA (Ref. 35) by USDA that summarized the studies on radiation-sterilized chicken that it was submitting to FDA. Dr. Thayer's complete statement was:

On balance these studies supported the conclusion that the irradiation sterilized chicken products were wholesome, however, two of the studies namely the dominant lethal study and the chronic toxicity, oncogenicity, multigeneration reproductive study with mice had some possibly adverse findings which will require careful consideration before the process can be declared safe. (Ref. 35, p. 9.)

Thus, Dr. Thayer's statement merely alerted FDA to review these studies more fully.

As discussed above, the agency did review the Raltech mouse study and found no effects on mice that could be attributed to the consumption of irradiated food. Furthermore, in the summary report, Dr. Thayer went on to discuss the reason for highlighting the dominant lethal study. He stated:

There was no evidence that any of the diets induced dominant lethal effects in mice which ate chicken as 35% of the total diet; however, again the positive control, in this case triethylenemelamine, did not induce lethal mutations in spermatid and spermatozoan stages of spermatogenesis in mice * * *. (Ref. 33, p. 22.)

Dr. Thayer was pointing out that this dominant lethal study would not be considered a valid study in determining the safety of radiation-sterilized chicken. However, even if this study were valid, it would not justify a hearing because, as stated earlier, the Raltech studies on radiation-sterilized chicken are not relevant to this omnibus rulemaking.

Thus, the Thayer report cited by HEI does not support HEI's contention that irradiated food is unsafe. Because HEI has not proffered any other evidence that supports its general contention, it has failed to meet the threshold burden of tendering evidence that suggests that there is a need for a hearing on this issue (see *Costle* v. *Pacific Legal Foundation*, supra, and (21 CFR 12.24(b)(2)).

HEI has also stated that Dr. Louria will be asked to comment on the validity of the "original research study." A

hearing cannot be granted on a mere statement that someone will testify about the validity of a study without a proffer as to what that person will testify to that demonstrates that there is a genuine and substantial issue of fact that provides a basis for a hearing. Thus, a hearing on this objection is denied.

2. Objection to irradiated pork rule

Public Citizen Health Research Group (HRG), in its objection to the irradiated pork rule, also argued that FDA's dismissal of increased testicular tumors in the radiation sterilized chicken study was inappropriate in light of the Soviet Union report on damage to the testes. HRG did not indicate that it intended to present any evidence at a hearing, however.

To justify a hearing, a challenge to an agency's factual conclusion must present a live controversy. *Community Nutrition Institute* v. *Young*, supra, 773 F.2d at 1364. In addition, the objection must raise a material issue concerning which a meaningful hearing might be held. *Pineapple Growers Ass'n* v. *FDA*, supra, 673 F.2d at 1085. HRG's objection fails to meet these requirements.

HRG's objection to the irradiated pork rule appears to draw upon a comment that FDA received in the omnibus rulemaking concerning the rat study conducted in the Soviet Union. At the time of HRG's objection, FDA had not fully considered this comment.

Ultimately, FDA decided, as it explained in the final rule in the omnibus proceeding (51 FR 13376 at 13386), that the Soviet reports lacked critical information necessary for proper evaluation of the study. The burden then shifted to HRG to maintain the viability of its objection by proffering some information that called into question the agency's conclusion on this study. However, HRG failed to submit an objection to the agency's conclusion.

As a result, there is no reason to hold a hearing on this objection because there is no live controversy and thus no material issue on which a hearing could be held. In the absence of some explanation from HRG for why the Soviet Union reports on the rat study are valid in spite of the deficiencies cited by the agency, or for why the agency was wrong in finding that there were deficiencies, it is undisputed that those reports do not provide an appropriate basis on which to question the safety of pork irradiated in accordance with the irradiated pork regulation. Therefore, the information submitted by HRG does not justify the factual determination urged, and FDA is denying HRG's request for a hearing on this issue under 21 CFR 12.24(b)(3).

Moreover, the agency carefully considered the possibility of a treatment-related incidence of testicular tumors in the radiation-sterilized chicken study. As discussed in the irradiated pork rule and the omnibus rule, agency scientists examined the histology slides and concluded that the evidence did not support a treatment-related induction of testicular tumors (50 FR 29658; 51 FR 13376 at 13386). HRG did not submit any evidence that would call the agency's evaluation of the histology slides into question.

F. Alleged Effects on Fertility

As discussed above, FDA reviewed and evaluated all available animal feeding studies, including reproduction studies, and placed a list of such studies along with the results of its review on public file as references in its omnibus rule (51 FR 13376 at 13397).

The agency made clear in the omnibus rule that, based on the Task Group's examination of all the data, FDA concluded that studies with irradiated foods do not show adverse toxicological effects (51 FR 13376 at 13378; Ref. 36).

HEI stated that,

> Fertility effects of eating irradiated foods are addressed by the FDA (51 FR 13387 [sic]), which chose to ignore studies finding adverse impacts. Critiques of the studies dismissed by the FDA along with critiques of the studies accepted by the FDA would be presented at a public hearing on the issue. (HEI Para. I.22.)

A hearing will not be granted on mere allegations (21 CFR 12.24(b)(2)). In this objection, HEI has not met its "threshold burden of tendering evidence suggesting the need for a hearing." *Costle* v. *Pacific Legal Foundation*, supra, 445 U.S. 198, 214 (1980). HEI alleges that the agency ignored studies that found that consumption of irradiated food had an adverse impact on fertility but has not cited or identified a single such study. Thus, HEI's objection consists of the bald assertion that the agency ignored studies that found an adverse impact on fertility. Without a proffer of evidence to support this assertion, HEI has not justified a hearing (21 CFR 12.24(b)(2).)

G. Early Studies on Irradiated Bacon

As discussed in the omnibus rule (51 FR 13376 at 13384), FDA issued a regulation in 1963 to permit radiation sterilization of bacon based on summaries of feeding studies submitted in a petition (28 FR 1456; February 15, 1963). However, following evaluation of the complete reports of these studies, FDA concluded that the sponsor had not met its burden for demonstrating safety (33 FR 12055; August 24, 1968) and revoked the bacon regulation (33 FR 15416; October 17, 1968).

Objections to the irradiated pork rule stated that FDA should not have issued the irradiated pork regulation because of these studies on irradiated bacon. Some objections noted that these earlier studies caused FDA to revoke its regulation on irradiated bacon. Two of these objections requested a hearing. In the most complete discussion of this issue, HRG stated that:

> In 1963, in response to a petition from the Army, the FDA approved the irradiation for canned bacon. However, in 1968, the FDA rescinded this approval after it reviewed the studies upon which this approval was based and found that they raised doubts about the safety of irradiated bacon * * *. So far as we know, this conclusion has never been reversed. However, before FDA can state that irradiated bacon, or other pork products, are safe, the conclusions from 1968 must be addressed. (Objection No. 27 by HRG, p. 2 (Ref. 37).)

HRG's objection to the irradiated pork rule appears to draw upon a comment that FDA received in the omnibus rulemaking concerning the revocation of the bacon regulation. At the time of HRG's objection, FDA had not fully considered this comment. As it explained in the final rule in the omnibus proceeding (51 FR 13376 at 13384), the agency reconsidered its 1968 action and concluded that the data on radiation-sterilized bacon are of such poor quality that they were inadequate to demonstrate either safety or adverse effects (51 FR 13376 at 13384). The burden then shifted to HRG and the other objectors to maintain the viability of this objection by proffering some information that called into question the agency's conclusion. However, HRG and the other objectors did not object to the agency's discussion and resolution of this issue in the omnibus rule.

As a result, there is no reason to hold a hearing on this objection because there is no live controversy and thus no material issue on which a hearing could be held. In the absence of some explanation from HRG or the other objectors for why the irradiated bacon reports are valid in spite of the deficiencies cited by the agency, or for why the agency was wrong in finding that there were deficiencies, it is undisputed that those reports do not provide an appropriate basis on which to question the safety of pork irradiated in accordance with the irradiated pork regulation. Therefore, the information submitted by HRG does not justify the factual determination urged, and FDA is denying HRG's request for a hearing on this issue under 21 CFR 12.24(b)(3).

Moreover, the agency did not consider it necessary to discuss irradiated

canned bacon in the irradiated pork rule because radiation-sterilized canned bacon is not relevant to the irradiation of fresh pork to control *Trichinella spiralis*. Radiation-sterilized canned bacon, irradiated at doses of 27.9 kGy and 55.8 kGy, is a significantly different product than fresh pork irradiated at doses between 0.3 and 1.0 kGy, as permitted in the July 22, 1985, regulation. A person requesting a hearing must support its allegations with an adequate proffer of evidence. *General Motors Corp.* v. *FERC*, 656 F.2d 791, 798 n.20 (D.C. Cir. 1981). HRG and the other objectors have not proffered any evidence or explanation as to why radiation-sterilized canned bacon has any relevance to the safety of fresh pork irradiated under the conditions set forth in 21 CFR 179.26. Thus, they have failed to provide a basis on which a hearing could be held.

H. Drosophila Study

In the omnibus rule, FDA responded to a comment alleging that a mutagenicity (sex-linked recessive lethal) study in fruit flies (*Drosophila*) raised on radiation-sterilized chicken meat showed an effect consistent with chromosomal damage (51 FR 13376 at 13386). The study (Ref. 38) showed no evidence of mutagenicity. However, the authors of the study also reported data that showed fewer offspring in all groups raised on chicken meat, as compared to those raised on the standard diet for fruit flies, with the fewest offspring in the groups raised on irradiated diets. The agency concluded that this effect could occur for a number of reasons unrelated to reproductive toxicity, and that mammalian data on reprodution, which are more relevant to humans than are *Drosophila* data, do not show a pattern or trend indicative of adverse reproductive effects (51 FR 13376 at 13386). Therefore, the agency found that this observation of fewer offspring in fruit flies fed radiation-sterilized chicken meat was not relevant to the determination of the safety of foods irradiated in compliance with the omnibus regulation.

HEI stated that:

"The Final Report on the Evaluation of the Mutagenicity of Irradiated Sterilized Chicken by the Sex-linked Recessive Lethal Test in *Drosophila melanogaster*" by Raltech Scientific Services revealed that fruit flies fed gamma irradiated checken had seven times fewer offspring than those fed heat treated chicken (See Exhibit D). Efforts to enrich the basal food medium did not affect this finding, and further details of this study would be provided at a public hearing. While the FDA chose to consider this finding an "unreliable indicator of an adverse reproductive effect" (51 FR 13386), other scientists consider the findings alarming and would provide testimony to that effect at a public hearing. The FDA urged that studies on mammals would be more appropriate for reproduction information, but the planned two year Raltech study on rats to look for multigenerational effects was aborted after only 39 weeks, and its results are therefore not adequate to declare safety. (HEI Para. I.19.)

On February 2, 1987, the agency asked HEI to set forth in detail the factual information and analysis that it intended to present in support of this objection at a hearing. HEI submitted a reply on March 6, 1987. Only one of the points that HEI made in its March 6 reply was related in any way to its original objection. In addition to amplifying its original objection regarding the reproductive effects noted in the Raltech *Drosophila* study, HEI referred to the following: a Raltech study of mice fed radiation-sterilized chicken; a Raltech study of rats fed radiation-sterilized chicken; promised testimony by a genetics expert; a study of DNA metabolism in spleen cells of Chinese hamsters fed irradiated fish; and a study of mutation in *Drosophila* fed X-irradiated DNA. FDA has considered all of the points that HEI made in its submissions and, for the reasons considered below, finds that none provide any evidence or rationale that could show that radiation sterilization of chicken caused adverse reproductive effects in *Drosophila*. Neither have they shown why these studies should be considered relevant to the safety of foods irradiated under the conditions of this rule. Thus, in this objection HEI has failed to raise an issue of fact that would justify a hearing (21 CFR 12.24(b)(1)). For the sake of clarity, the agency will discuss each of the points in turn, starting with the Raltech *Drosophila* study.

1. Raltech studies

a. *Raltech Drosophila study.* In its March 6, 1987, response, HEI stated that:

Dr. Thayer reported "* * * an unexplained significant reduction in the production of offspring in cultures of *D. melanogaster* reared on gamma irradiated chicken. This response was dose related and was not overcome by the addition of vitamin supplements." In fact, the table already submitted (which was not part of the Thayer report) demonstrates that the fruit flies fed gamma irradiated chicken have *seven* times fewer offspring than those fed thermally processed (cooked) chicken. A dose response pattern occurred with higher concentrations of gamma-irradiated chicken producing fewer offspring.

Food irradiation proponents declared the results irrevelant, since fruit flies don't normally eat chicken. The table clearly shows that fruit flies consuming no chicken had far more offspring, but it is certainly fair to compare the groups eating the chicken diets or the study would not have been funded in the first place. The positive control, the chicken diet with a known hazardous chemical, led to better reproduction than either the electron or gamma irradiated diets. The fruit flies eating electron irradiated chicken had about three times more offspring than those fed gamma treated chicken, but far fewer offspring than those eating heat treated chicken. (HEI March 6, 1987, response, p. 10 (Ref. 2).)

To justify a hearing, HEI would have to proffer evidence to support its allegation that the *Drosophila* sex-linked recessive lethal mutagenic study with radiation-sterilized chicken meat is relevant for evaluating reproduction effects in mammals, specifically, humans, from foods permitted to be irradiated under FDA's regulation. It has failed to proffer any such evidence.

The sex-linked recessive lethal test in *Drosophila melanogaster* is a standard test designed to detect a particular mutagenic effect, namely, a preferential decrease in male offspring (e.g., see EPA's Toxic Substances Control Act Test. Guidelines, 50 FR 39252 at 39441; September 27, 1985). The study done by Raltech (Ref. 38) with radiation-sterilized chicken did not show this sex-linked recessive mutagenic effect.

Although there was no mutagenic effect observed in this test, the authors noted that *Drosophila* raised on chicken meat had substantially fewer offspring, compared to controls, with the fewest offspring from the *Drosophila* raised on gamma irradiated chicken. As stated above, FDA in its omnibus final rule discounted the significance of this finding on the grounds that the Raltech *Drosophila* study was an unreliable indicator of adverse reproductive effects (51 FR 13376 at 13386).

While, as stated above, FDA has the ultimate burden of proof when it approves the use of a food additive, once the agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward with evidence that calls into question FDA's conclusion. *American Cyanamid Co.* v. *FDA*, supra, 606 F. 2d at 1314–1315. To justify a hearing on this determination, HEI would have to proffer some evidence that demonstrates the relevance of the finding to the safety of food irradiated under the conditions permitted by the omnibus rule or to provide some basis for challenging the reasons that FDA gave for discounting this finding. HEI has failed to do so. It has merely reasserted that there was a finding of reduced offspring.

Significantly, a second study with frozen chicken and gamma irradiated chicken showed that this effect was seen with both types of chicken and was directly related to the amount of chicken meat in the diet (Ref. 38). Based on these results, the agency concluded in the omnibus rule that the observed effect on reproduction could be caused by a number of factors other than irradiation (51 FR 13376 at 13386). HEI has not proffered any evidence that would contradict this conclusion and that would tie this effect directly to irradiation.

Furthermore, as the agency pointed out in the omnibus rule, this test with *Drosophila* has not been designed or validated for testing reproductive toxicity. Reproductive tests are designed to provide information concerning the effects of a test substance on gonadal function, conception, parturition, lactation, weaning and the development of offspring and are therefore carried out in mammalian species (Ref. 39 and, for example, see 50 FR 39252 at 39432). An observation from a study not designed or controlled to test for reproductive effects cannot be used in place of a study so designed and controlled, although it can raise questions for resolution in mammalin reproductive toxicity studies. As stated in the omnibus rule (51 FR 13376 at 13386), mammalian data on reproduction have shown no consistent patterns or trends indicative of adverse reproductive effects from irradiated foods.

Nor has HEI proffered any explanation as to why a study on radiation-sterilized chicken is relevant to the safety of foods irradiated under the conditions permitted by this rule. Rather, HEI has merely asserted that "other scientists consider this finding [of reduced offspring] alarming" and promised to provide testimony at a hearing. A hearing cannot be granted on a mere statement that someone will testify about the relevance of the study without a proffer as to what that person will testify to that demonstrates that there is a genuine and substantial issue of fact that provides a basis for a hearing. *Costle* v. *Pacific Legal Foundation*, supra, 445 U.S. at 214. Thus, HEI has failed to justify a hearing on this issue (21 CFR 12.24(b)(2)).

b. *Raltech mouse study.* In its response, HEI also referred to an increased number of deaths among mice fed gamma-irradiated chicken.

> In studies of mice fed test diets before birth to death or scheduled termination, survival of both sexes was significantly reduced for those fed gamma irradiated food, and the group eating gamma irradiated chicken had the highest incidence of several tumors among those analyzed. To counter claims of possible harm, the National Toxicology Program assembled a new panel to review the slides on lesions in the test animals, and this panel declared that the lesions were not cancerous. Nonetheless, this panel failed to explain the increased number of deaths among the animals eating gamma irradiated chicken. It did demonstrate disagreement among experts. (HEI March 6, 1987, response, p. 10 (Ref. 2).)

Again, HEI has not proffered evidence or explained why this study (Ref. 40), in which radiation-sterilized chicken (irradiated at a dose of 56 kGy) was fed to the mice, is relevant to a rule that does not permit radiation sterilization of chicken. Furthermore, HEI has not proffered any evidence to support its contention that survival was significantly decreased in both sexes. The agency noted a marginally decreased survival in the female mice of the group fed gamma-irradiated chicken but not in the male mice (51 FR 13376 at 13386). Because the decreased survival reported was marginal and occurred only in one sex group, the agency did not consider it to be treatment-related. HEI has not proffered evidence to support its allegation or to challenge the agency's conclusion or to demonstrate why the study should even be considered in this proceeding. In the absence of such a proffer from HEI, there is no basis to find that a meaningful hearing can be held on HEI's claim. (See *Pineapple Growers Ass'n* v. *FDA*, supra, 673 F.2d at 1085.)

HEI also alleges that mice fed gamma-irradiated chicken meat had the highest incidence of "several tumors" but does not specify any tumor type and does not provide any evidence to show that any specific tumor is treatment-related. A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). Because HEI has failed to make any proffer in support of its assertion, FDA may properly disregard it. *General Motors Corp.* v. *FERC*, supra, 798 n.20 (D.C. Cir. 1981). Thus, HEI has failed to justify a hearing on this issue.

The agency's review of this study raised concern about the possible treatment-related incidence of only one tumor type, testicular tumors. As discussed in the irradiated pork rule and in the omnibus rule, after examining the histopathology slides, agency scientists concluded that the evidence did not support a treatment-related induction of testicular tumors (50 FR at 29658; 51 FR 13376 at 13386).

Moreover, as noted by HEI, the National Toxicology Program's Board of Scientific Counselors also concluded that the data on testicular tumors do not demonstrate a carcinogenic response. The agency agreed with that conclusion. HEI has not proffered any evidence to challenge the agency's analysis and conclusion (51 FR 13376 at 13386).

c. *Raltech rat study.* HEI stated that a rat study that was not completed should be repeated.

> * * * Although Dr. Thayer did not highlight the problem, one study to explore offspring effects had to be terminated prematurely due to excessive mortality among pups in all diet groups. The study, intended to last two years, was cancelled after only 9 months. Instead of repeating the study to determine the true long-term reproductive effects, the researchers declared the process safe on their limited 9 month data. Critics charge this is a violation of good scientific practice. (HEI March 6, 1987, response, p. 10 (Ref. 2).)

HEI has not proffered any evidence or explained why a study on rats fed radiation-sterilized chicken is necessary to reach a conclusion about the validity of a rule that does not authorize the radiation sterilization of chicken. Nor has it provided any evidence showing that the study raises a health issue about an irradiated food. A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). Because HEI has failed to make any proffer in support of its assertion FDA may not properly disregard this study. *General Motors Corp.* v. *FERC*, supra, 798 n.20 (D.C. Cir. 1981). Thus, HEI has failed to justify a hearing on this issue.

The rat study cited by HEI was terminated due to lactation failure in the parent females. This effect was present across all diet groups (i.e., irradiated and control), with no evidence of toxicity due to the test diets (Ref. 41). In order to justify a hearing on this question, HEI must point to evidence either that the terminated study raises a safety issue that challenges the agency's conclusion that food irradiated under the conditions of the omnibus rule is safe, or that such a study is necessary to reach such a conclusion.

Because HEI has not proffered any evidence to support its contention that the absence of a rat reproduction study with radiation-sterilized chicken raises a question on the safety of food irradiated under the conditions of the regulation, it has failed to meet a threshold burden of tendering evidence that suggests there is a need for a hearing on this issue. (See *Costle* v. *Pacific Legal Foundation*, supra, 445 U.S. 214–215, 21 CFR 12.24(b)(2).)

d. *Testimony by a genetics expert.* HEI promised to provide testimony by a

genetics expert regarding the Raltech studies:

Genetic experts like Dr. Cecil B. Jacobson, Director of the Reproductive Genetics Center, will be asked to comment on the relevance of the Raltech findings, which he considered important. (HEI March 6, 1987, response, p. 11 (Ref. 2).)

Announcement of a proposed witness is not a basis for justifying a hearing. HEI has stated that it would ask for testimony from someone like Dr. Jacobson. The mere assertion that an individual may testify on the Raltech findings, without any indication as to what he will testify to, does not provide a sufficient basis on which to grant a hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle* v. *Pacific Legal Foundation,* supra, 445 U.S. at 214. HEI has failed to do so. Thus, it has not established that a factual issue that would justify a hearing exists.

2. Other studies

HEI cited two other studies: a study that reported an effect on DNA metabolism in spleen cells of Chinese hamsters fed irradiated fish (Ref. 29) and a study that reported mutation in *Drosophila* fed x-irradiated DNA (Ref. 42). HEI said of these studies:

Renner, et al., "An Investigation of the Genetic Toxicology of Irradiated Foodstuffs Using Short-term Test System. III—*In Vivo* Tests in Small Rodents and in *Drosophila Melanogaster,*" 20 FOOD CHEM. TOXIC. 867 (1982). This study found that feeding irradiated fish affected DNA metabolism in the spleen cells of Chinese hamsters. Although not cited in the author's summary, Table 6 indicates a significantly different distribution of chromosome number from the control group and the group given unirradiated chicken for number of cells with a chromosome number (2N) 22 at p. 873. This finding should also be considered in regard to Item 18, above.

(HEI March 6, 1987, response, p. 11 (Ref. 2).)

Parkash, O., "Induction of Sex-linked Recessive Lethals and Visible Mutations by Feeding X-Irradiated DNA to Drosophila Melanogaster," 205 NATURE 312 (Jan. 16, 1965). This study quotes Muller as asserting, "It is hardly conceivable that the variety of types of visible mutations could be induced *en masse* by any agent without there being some appreciable effect on the lethal mutation frequency also". Their study fed irradiated DNA to fruit flies and detected a mutagenic effect. The authors state at p. 313, "Further, if our conclusions are substantiated, one might infer that the sterilization of food by using high doses of ionizing radiations is not desirable".

(HEI March 6, 1987, response, p. 11 (Ref. 2).)

The Renner and Parkash studies have nothing to do with the effect of irradiated food on the number of offspring and thus provide no evidence to support HEI's assertion that the reduced number of offspring in *Drosophila* fed radiation-sterilized chicken was caused by irradiation. Renner et al., reported that six in vivo genetic toxicity tests (including a study on DNA metabolism in spleen cells) were carried out on hamsters fed irradiated or nonirradiated cooked chicken, dried dates, and cooked fish (Ref. 29). The agency had reviewed preliminary reports of some of these tests and referenced them in the omnibus rule (51 FR 13376 at 13397) and in the administrative file (81N–0004). The authors concluded that none of the tests provided any evidence of genetic toxicity induced by irradiation. Thus, this study does not provide any basis on which to question the safety of food irradiation.

Table 6, cited in HEI's objections, enumerates the number of cells with chromosomal aberrations in each of the experimental groups. It is true that, in Table 6, the authors reported a difference in the proportion of cells with the normal number of chromosomes in the different treatment groups. However, the proportion of cells with the *normal* number of chromosomes was greater in the hamsters fed irradiated fish than in those fed the control diet (emphasis added). HEI has not explained how a greater proportion of normal cells and a corresponding lesser proportion of abnormal cells in the hamsters fed irradiated fish provides a basis for concluding that ingestion of irradiated foods leads to any adverse effects. Thus, HEI has not justified a hearing on the basis of the Renner study.[3]

Parkash, in a preliminary study, reported a sex-linked recessive lethal effect when fruit flies were fed irradiated DNA (Ref. 42). As discussed earlier, a sex-linked recessive lethal study is designed as an indicator of mutagenicity. HEI has not provided evidence to show how this mutagenicity study can be used to support its claim that irradiated food causes adverse effects on fertility.

Under FDA's regulations, a hearing will not be granted on the basis of mere allegations (21 CFR 12.24(b)(2)). Consistent with this regulation, the relevant case law provides that where a party requesting a hearing only offers allegations without an adequate proffer to support them, the agency may properly disregard those allegations. *General Motors Corp.* v. *FERC,* 656 F.2d 791, 798 n. 20 (D.C. Cir. 1981). In the absence of an explanation of how the Parkash study relates to the alleged adverse effects on fertility in the Raltech study, there is no basis for a hearing on this aspect of the objection.

In addition, Parkash stated that "if our conclusions are substantiated, one might infer that the sterilization of food by using high doses of radiations is not desirable." However, the mutagenic effect reported by Parkash could not be reproduced in later studies (Refs. 43 and 44) designed to test the effect of irradiated DNA on *Drosophila.* These studies, along with the agency's evaluation of the studies, were included in the administrative record of the omnibus rulemaking (see Refs. 3 and 4 in the omnibus rule; 51 FR 13376 at 13397). To justify a hearing on the basis of the Parkash study, HEI would have to provide some basis to find that the Parkash study could be relied on in the face of Parkash's own statement and of the findings in the studies reported in Refs. 43 and 44. HEI failed to do so. Thus, HEI has failed to justify the factual determination its objection urged and thus has failed to justify a hearing on the Parkash study under 21 CFR 12.24(b)(3).

I. Dominant Lethal Tests

HRG objected to the irradiated pork rule and requested a hearing based on a possible risk of chromosome damage. HRG stated that:

A number of studies also raise the possibility that consumption of irradiated food may damage the chromosomes. Such effects have been shown in dominant lethal tests on rats and mice.

In reviewing these and other studies, Dr. Jonathan Ward, of the University of Texas Medical Branch, and an expert in genetic toxicology, concluded that "these studies as a group fail to either prove or disprove the existence of a hazard from the use of irradiated food. It appears possible that unstable mutagenic products may be produced in foods by irradiation * * *. It is difficult to believe that adquate tests of the effects on radiation of food can be conducted without individually evaluating the

[3] Moreover, HEI states that this effect should be considered in regard to Item 18 of their objection (see the earlier discussion on polyploidy). Table 6 demonstrates that there were no increased chromosomal aberrations or polyploid cells in the bone marrow cells of Chinese hamsters given diets of irradiated or unirradiated chicken, dates, or fish for 6 days, and that the number of cells with the *normal* number of chromosomes was higher in the hamsters fed irradiated fish than in those fed untreated fish or the control diet (emphasis added). This evidence contradicts HEI's contention that irradiated food fed to animals results in polyploid cells in the bone marrow cells. HEI has not provided any explanation as to how this evidence can be considered to support its claim.

components of the foods for which radiation sterilization is intended."

(HRG objection, p. 3 (Ref. 37).)

To justify a hearing, a challenge to an agency's factual conclusion must present a live controversy. *Community Nutrition Institute* v. *Young, supra,* 773 F.2d at 1364. In addition, the objection must raise a material issue on which a meaningful hearing might be held. *Pineapple Growers Ass'n* v. *FDA, supra,* 673 F.2d at 1085. HRG's objection fails to meet these requirements.

HRG's objection to the irradiated pork rule quotes a letter from Dr. J. Ward to the Commissioner of FDA. FDA dealt with this letter as a comment in the omnibus rulemaking. At the time of HRG's objection, FDA had not fully considered this comment. Ultimately, FDA responded to this comment in the final rule in the omnibus proceeding (51 FR 13376 at 13385 and 13387), stating that two of the three studies that reported dominant lethal effects were unreliable, and that there was no biological significance to the reported adverse effects in the third study because the results could not be reproduced in three comparable studies. The burden then shifted to HRG to maintain the viability of its objection by proffering some information that called into question the agency's conclusion on this matter. However, HRG failed to object to that conclusion.

As a result, there is no reason to hold a hearing on this objection because there is no live controversy and thus no material issue on which a hearing could be held. In the absence of some explanation from HRG for why the dominant lethal studies showed that irradiation of the food caused the reported effect, in spite of the agency's determination to the contrary in the omnibus rule, it is undisputed that those reports do not provide an appropriate basis on which to question the safety of pork irradiated in accordance with the irradiated pork regulation. Therefore, HRG's objection would not justify the factual determination urged, and FDA is denying HRG's request for a hearing on this issue under 21 CFR 12.24(b)(3).

Moreover, the agency notes that even Dr. Ward's letter does not state that these studies demonstrate that irradiated food caused dominant lethal mutations. Dr. Ward stated only that "these studies as a group fail to either prove or disprove the existence of a hazard from the use of irradiated food * * *. I would encourage the FDA to carefully evaluate the existing data" (Ref. 45). The agency did not base its decision on safety solely on these studies but did carefully evaluate all available toxicology data (51 FR 13376 at 13378). Therefore, there is no dispute with the letter cited by HRG in its objection.

J. In Vitro Effects of Irradiated Sugar Solutions

In the omnibus rule, the agency responded to a comment that sugars irradiated in simple solution have been shown to cause toxic biological effects during in vitro testing (51 FR 13376 at 13383). The agency agreed that such effects were seen with simple sugar solutions but cited reports that found that irradiation of sugars in food, that is, in typically complex food matrices, does not produce the same toxic effect that occurs when these sugars are irradiated in simple solution. The agency stated:

> There is ample evidence that the types and quantities of radiolytic products from irradiation of sugar solutions are not only dose dependent but are also dependent on specific conditions such as oxygen concentration and metal ions present in foods but not present in simple sugar solutions.

(51 FR 13376 at 13383.)

The agency concluded that "* * * irradiated aqueous sugar solutions are unsuitable models for predicting and extrapolating toxicity of irradiated foods * * *. Additionally, no evidence indicates that irradiated foods, including those containing sugars, will cause adverse toxic effects to animals or humans."

(51 FR 13376 at 13383.)

HEI's objection stated:

> The FDA admitted that "irradiated solutions of sugars have been shown to cause biological effects in vitro" (51 FR 13383), but argued that the adverse findings would not apply to complex food matrices. Evidence of the applicability of these findings to fruits and vegetables would be offered at a public hearing.

(HEI Para. I.17.)

On February 2, 1987, the agency asked HEI to set forth in detail the factual information and analysis that it intended to present at a hearing. On March 6, 1987, HEI responded by citing a 1982 study by Adam on radiolysis of *alpha, alpha*-trehalose in concentrated aqueous solution (Ref. 46); two in vitro mutagenic studies, one conducted by Holsten et al. (Ref. 47) on the effect of irradiated sugar solutions on carrot tissue cultures and the other by Shaw and Hayes (Ref. 48) on the effect of irradiated sugar solutions on leucocyte cell cultures; and two chapters on radiation chemistry of foods, one by Basson (Ref. 49) and the other by Beyers et al. (Ref. 50), from a 1983 book, "Recent Advances in Food Irradiation."

A hearing will not be granted on the basis of mere allegations or general descriptions and contentions (21 CFR 12.24(b)(2)). HEI must, at a minimum, "raise a material issue concerning which a meaningful hearing might be held." *Pineapple Growers Ass'n of Hawaii* v. *FDA,* supra, 673 F.2d 1085.

As stated earlier, FDA does not dispute that irradiated sugar solutions have caused toxic effects in cell cultures. However, the agency concluded in the omnibus rule that irradiated sugar solutions are unsuitable models for predicting toxicity of irradiated foods (51 FR 13376 at 13383). The first article cited by HEI (Ref. 46) reports on experiments showing that common food components mixed with sugar solutions can affect the final composition of radiolytic products formed from the sugar, consistent with FDA's conclusion that the types and quantities of radiolytic products depend on specific conditions present in foods but not present in simple sugar solutions (51 FR 13376 at 13383). The other two articles (Refs. 47 and 48) merely report the results of in vitro tests with simple sugar solutions.

HEI has not provided any evidence or rationale for concluding that in vitro toxicity studies using simple sugar solutions are suitable models for evaluating the safety of eating foods, such as fruits and vegetables, irradiated under the conditions of the regulation. To justify a hearing, HEI must provide some basis on which to find that FDA's conclusion on the relevance of these studies was incorrect. It has failed to do so, however. Thus, the objector has not met its "threshold burden of tendering evidence suggesting the need for a hearing." (See *Costle* v. *Pacific Legal Foundation,* supra.)

Moreover, the authors of the chapters (Refs. 49 and 50) cited by HEI concluded that radiolysis products from carbohydrates, including simple sugars, are not a hazard (Ref. 49, p. 23), and that in vitro studies with simple sugars are not applicable to the safety of irradiated fruits and vegetables (Ref. 50, p. 176). This conclusion is consistent with the agency's analysis, and these chapters were referenced by FDA in its final rule (51 FR 13376 at 13379 and 13383).

HEI cites selected parts of these chapters out of context to reach a conclusion that is opposite to that of the authors. HEI stated that:

> This study [by Basson] states, "* * * the chemical changes following irradiation of a model fruit cell are dominated by the radiolytic decomposition of the sugar fraction" at page 12. It notes at page 13, "The radiolysis of oxygen in dilute aqueous solutions leads almost exclusively to the production of hydrogen peroxide," which is

"mildly cytotoxic * * *." Rapid destruction of hydrogen peroxide is claimed for fruits, but that is not the same as total destruction of possible hazardous molecules. The importance of sugar exposure to radiation should be apparent from the statement at page 12, "The maximum yields of all radiolytic products due to an individual component have been calculated and it is clear how the carbohydrates (glucose, sucrose, fructose) contribute overwhelmingly to the product spectrum." Given the importance of sugars in the average daily diet, radiation effects on sugars cannot be "assumed" to be safe.

(HEI March 6, 1987, response, p. 7 (Ref. 2).)

HEI, however, eliminates the conclusions reached by the author. Basson stated:

No consistent mutagenic activity due to these products could be shown using the Ames test and none was observed in a host-mediated assay. Furthermore, it was shown that the presence of other fruit components eliminated any genotoxic activity and this is consistent with the observation that real fruits do not develop genotoxic activity in test systems as a result of irradiation.

The radiolysis of oxygen in dilute aqueous solutions leads almost exclusively to the production of hydrogen peroxide. In these model systems, hydrogen peroxide has been shown to react readily with a number of food components such as enzymes, trace metals and certain amino acids. Thus although hydrogen peroxide is mildly cytotoxic it does not present a hazard when produced in the presence of typical fruit components because of its rapid destruction.

(Ref. 49, p. 12.)

Thus, Basson's discussion explains why in vitro studies of irradiated sucrose solutions are not good models for irradiated fruits. The agency agreed with Basson's analysis in the omnibus rule (51 FR 13376 at 13383). HEI has proffered no evidence for challenging this conclusion. Thus, the Basson chapter, rather that justifying resolution of the issue of the significance of in vitro studies of irradiated sugar solutions in the way sought by HEI, supports exactly the opposite conclusion. (See 21 CFR 12.24(b)(3).)

HEI cites the chapter by Beyers et al.:

This paper summarizes research that the FDA should carefully scrutinize. While the authors of this study conclude that irradiation is no more destructive to food than heating, the destruction caused by irradiation will often be added to heating in cooking preparation of food.

The Beyers study cites evidence of harmful effects of ionizing radiation, such as mutagenicity studies carried out on various irradiated sugar solutions cited at page 175. The spot test and the Ames test were used to detect mutagenic effects of irradiated sugar solutions and radiolytic products of the sugars. The results were positive for sugar solutions in four cases for the spot test and in three cases for the Ames test. The host-mediated assay was negative for all four. We do not believe that one should dismiss the adverse findings and rely only on the tests which showed no mutagenicity. The Beyers new work found all five irradiated sugars studied to be mutagenic in at least one instance and found the presence of oxygen had a marked influence on the mutagenic response of irradiated sugar solutions. The authors concluded that the interaction of these sugars with other components of actual fruits could account for the absence of mutagenic response in animal feeding studies, but we contend that the danger of irradiated sugars needs further study.

(HEI March 6 response, p. 7 (Ref. 2).)

HEI's contention "that the danger of irradiated sugars needs further study" adds nothing to the discussion above. HEI states that the chapter summarizes research that FDA should scrutinize but then disagrees with the authors' analysis, without providing any evidence to support its disagreement, and ignores the authors' cautionary advice on misinterpretation of data. In this article the authors state:

To assess the relevance of the observed mutagenic effects on the safety of irradiated foods, experiments were carried out on mammalian cells (Swiss albino male mice). None of the four tester strains which had shown biological activity in the *in vitro* experiments showed any evidence of an increased reversion frequency. It was pointed out that extrapolation of findings with cell cultures and simple forms of life to the more complex mammalian systems should be carried out with great caution as they may be meaningless.

(Ref. 50, p. 176.)

Scrutiny of the evidence that HEI has referenced reveals that that evidence does not challenge FDA's conclusion that the in vitro studies are not applicable to the safety of fruits and vegetables irradiated under the conditions of the regulation.

Thus, HEI's objection, when fully analyzed, consists of its unsupported allegation that the results of in vitro testing of irradiated sugars are applicable to complex food matrices. As stated earlier, a bare contention without facts cannot be a basis for a hearing. Because HEI has not proffered any evidence that supports its general contention, it has failed to meet a threshold burden of tendering evidence that suggests there is a need for a hearing on this issue (See *Costle* v. *Pacific Legal Foundation, supra*) (21 CFR 12.24(b)(2).)

K. Effect on Pathogenic Microorganisms

In the omnibus rule, the agency addressed comments that asserted that irradiation intended to eliminate one food hazard may affect the microbial spoilage patterns of foods, thereby creating a new food hazard. These comments expressed concern that *Clostridium botulinum* spores would survive irradiation and would produce botulin toxin without typical signs of food spoilage. The agency concluded that this concern did not apply to the uses of irradiation permitted under the regulation because dry foods (such as spices) do not provide a growth medium for *C. botulinum* spores, and a 1 kGy radiation dose is too low to change normal spoilage patterns (51 FR 13376 at 13381).

1. Change in spoilage patterns

HEI stated that:

FDA admits that irradiation intended to eliminate one food hazard may affect the microbial spoilage patterns of food, thereby creating a new hazard, especially the *C. botulinum* spores (51 FR 13361) [sic]. The FDA argues that this concern does not apply to irradiation of dry foods or foods treated below 100,000 rad. FDA has not addressed the issue of botulism in wet foods, such as canned tomatoes or other wet foods approved for irradiation under this rule. The FDA regulation would continue to allow irradiation of fresh pork below 100,000 rads, and botulism organisms that might be present on fresh pork will not be destroyed by 100,000 rads of radiation. However, in an April 7, 1986 letter to Martin A. Welt, FSIS Deputy Administrator Dr. Ronald E. Engel warned: "After careful review of the scientific literature by our scientists, outside consultants, and the FDA (Food and Drug Administration), it was concluded that there are no data to support the microbiological safety of irradiated vacuum-packaged pork at an absorbed dose of 30–100 kilorad. Further, we believe that any initiative to sell and distribute perishable irradiated products through the mail or through methods other than the usual commercial distribution channels should not be permitted * * *. *When a vacuum-packaged fresh pork product has been irradiated between 30–100 kilorad there is a concern that a potential health hazard might result from further reducing the natural flora and allowing Clostridium botulinum spores, if present, to produce toxin under conditions where typical spoilage is not evident.*" (emphasis added [by HEI]).

The FDA has clearly failed to properly address this important concern, and further evidence will be offered at a public hearing.

(HEI Para. I.13.)

A hearing will not be granted on the basis of mere allegations or general descriptions and contentions (21 CFR 12.24(b)(2)). HEI alleges that the agency had not addressed the issue of botulism in "wet" foods.[4] FDA's conclusion in the

[4] The agency assumes that HEI's use of the term "wet" foods was to distinguish "dry" foods, such as spices, from all other foods that contain significant amounts of water.

final rule that irradiation of food below 1 kGy will destroy few spoilage bacteria and thus will not change normal spoilage patterns applied to all food, including "wet" foods (51 FR 13376 at 13381). Thus, FDA did address this issue.

While, as stated above, FDA has the ultimate burden of proof when it approves the use of a food additive, once the agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward with evidence that calls into question FDA's conclusion. *American Cyanamid Co.* v. *FDA, supra,* 606 F.2d at 1314–1315. HEI has not presented any evidence to demonstrate that irradiation of "wet" foods under the conditions permitted would affect the common spoilage pattern enough to create a new microbial hazard with botulism. In the absence of such evidence, HEI has provided no basis to justify a hearing.

Moreover, HEI's reference to botulism in canned tomatoes demonstrates a lack of understanding about what is permitted under this regulation and about food processing practices. Fresh tomatoes may be irradiated at low doses to control insects or to inhibit ripening, but such extra processing would not normally be done for a product to be thermally processed nor for a canned product. More important, any effect of precanning radiation processing on spoilage organisms or *C. botulinum* spores, even at doses permitted by this regulation, would be superseded by the total sterilization of the food during the canning process.

HEI's objection was filed to the omnibus rule, which did not pertain to the irradiation of pork. Irradiation of pork was permitted under the rule issued on July 22, 1985 (50 FR 29658). HEI's objection was submitted nearly 9 months after publication of the irradiated pork rule in the Federal Register, long after the 30-day objection period. Therefore, HEI's objection with respect to pork is not timely. *ICMAD* v. *HEW,* 574 F.2d 553, 558 n.8 (D.C. Cir.), *cert. denied* 39 U.S. 893 (1978).

Moreover, HEI's statement that "[t]he FDA regulation would continue to allow irradiation of fresh pork below 100,000 rads, and botulism organisms that might be present on fresh pork will not be destroyed by 100,000 rads of radiation" is not an issue in dispute. HEI has not presented any evidence to show that irradiation of pork under these conditions will affect the common spoilage pattern enough to create a new microbial hazard with botulism. Therefore, under 21 CFR 12.24(b)(2), HEI has failed to justify a hearing with this allegation.

The USDA letter cited by HEI deals only with the vacuum packaging of low dose irradiated pork and shipment of such pork through the mail. As noted in the letter, vacuum packaging of irradiated pork is not permitted by USDA. (USDA has jurisidiction over meat products under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*).) A hearing will not be granted on factual issues that are not determinative with respect to the action requested (21 CFR 12.24(b)(4)). Vacuum packaging of pork is not an issue in these final rules and thus not a basis for granting a hearing.

As for HEI's claim that it would produce further evidence at a hearing, as stated above, a hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle* v. *Pacific Legal Foundation, supra,* 445 U.S. at 214. Thus, HEI has not proffered any evidence relevant to its contention that irradiation of food under the conditions of this regulation would create a new microbiological hazard.

2. Mutation of microorganisms

In adopting the omnibus rule, FDA considered comments that irradiation may create or produce potentially harmful radiation-resistant bacteria, new bacteria, or viral mutants. The agency concluded that the possibility was remote that organisms affected by mutatiions would be more virulent ormore harmful than those created in nature (51 FR 13376 at 13382).

HEI stated that:

> The FDA dismissed the problem of the creation of mutant bacteria and viruses by suggesting that mutations do occur naturally, and the increased mutations caused by ionizing radiation should therefore be ignored or discounted (51 FR 13361) [sic]. Diseases such as AIDS may well be the product of mutant viruses, and public health authorities would certainly agree that steps to prevent the spread of such viruses are essential to maintaining public health. Yet the FDA, without specific scientific evidence to support it, argues that mutant viruses or bacteria cannot be more harmful than those occurring naturally. The FDA further argues that if a hazard might exist naturally, the FDA has no obligation to prevent the increase of such a hazard. This attitude is clearly in violation of the Federal Food, Drug and Cosmetics [sic] Act. The proposed doses of irradiation are clearly doses that will allow bacteria and viruses to survive on foods, since very high doses (generally in the millions of rads) are needed to kill them. Ionizing radiation is a well established mutagenic agent, and the FDA response to comments warning of this danger is simply speculative and inadequate. Further evidence by appropriate scientists and professionals will be offered at the public hearing.

(HEI Para. I.14.)

A party requesting an evidentiary hearing cannot rely merely on speculation to support its request. To justify a hearing on this objection, HEI must offer some evidence that supports its contention that dangerous mutant viruses or bacteria will be created by irradiation of food at the levels permitted by FDA. For example, this standard could have been met if HEI had submitted evidence on the types of mutant viruses and bacteria found in irradiated foods, evidence on the conditions that exist during irradiation that make it likely that mutations affecting safety will occur, or some other evidence that would provide a basis to call into question FDA's conclusion that the possibility that harmful mutant organisms will be produced is remote. Yet, HEI has not made any such proffer. HEI has provided no evidence to support its allegations.

The agency finds that this objection is merely a general description of HEI's position, and that it does not raise a factual issue for resolution at a hearing. Therefore, HEI has failed to justify a hearing under 21 CFR 12.24(b)(2).

HEI's promise to provide unspecified evidence does not remedy this deficiency. A hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that supports the need for a hearing. *Costle* v. *Pacific Legal Foundation, supra,* 445 U.S. at 214.

There is no dispute that radiation, like heat, can cause mutations but that does not mean that irradiation of food causes mutations that present new safety problems. In response to a comment in the omnibus rule (51 FR 13376 at 13382), FDA referenced a report of a 1982 meeting of the Board of the International Committee on Food Microbiology and Hygiene of the International Union of Microbiological Societies (Ref. 51). At that meeting, the Board concluded that "Irradiation induced genetic mutation of pathogens in food did not create an increased hazard to health and in the Board's opinion there would be no qualitative difference between the kind of mutation induced by ionizing irradiation and that induced by any other pasteurization/partial preservation methods such as heat treatment or vacuum drying." Other studies have come to the same conclusion (See Refs. 52 to 54).

3. Effect on aflatoxin production

In the omnibus rule (51 FR 13376 at 13381), FDA responded to a comment that cited studies by Priyadarshini and Tulpule in which aflatoxin producing organisms were added to wheat after irradiation and autoclaving (steam sterilization), as well as to wheat that had been autoclaved only. Increased levels of aflatoxin were reported in the wheat that had been irradiated. FDA concluded that the studies did not replicate actual food handling practices in that wheat would not be steam-sterilized in addition to being irradiated, and that infection with aflatoxin producing organisms would ordinarily occur before harvest. FDA noted that it had no evidence that would lead it to conclude that food irradiated and stored under normal handling practices would show increased aflatoxin production and concluded that the results cited did not justify modification of the rule.

In its proposal for the omnibus rule (49 FR 5714 at 5717), FDA cited a report by Schindler that irradiation of mold spores in aqueous suspension may increase aflatoxin production but noted that other studies had shown either no increase or a decrease in aflatoxin production after irradiation. FDA tentatively concluded in the proposal that because this study did not replicate actual use conditions its results were not an adequate basis for concluding that irradiation of food should not be permitted. Comments on the proposal did not address the Schindler study on whether an adequate study must replicate actual use conditions.

HEI objected to the omnibus final rule on the ground that:

> The FDA dismissed evidence that aflatoxin production can be increased by exposure to ionizing radiation, citing two studies by Priyadarshini & Tulpule as being inappropriate because "the studies referenced do not replicate actual food-handling practices" (51 FR 13361) [sic]. Whether a scientific study replicates food handling practices is not the issue here. The issue is whether a greater danger to consumers is created by the increased production of fungal toxins due to irradiation. Aflatoxin production is already a well known problem in terms of our food supply. Since naturally occurring aflatoxin contamination of foods has been identified as a problem in many countries * * *, the FDA ought to be aware of this problem. The FDA earlier cited Schindler, A.F., et al., "Enhanced Aflatoxin Production by *Aspergillus flavus* and *Aspergillus parasiticus* after Gamma Irradiation of the Spore Innoculum [sic],: JOURNAL OF FOOD PROTECTION, 43:7–9, 1980, and Applegate, K.L. and J.R. Chipley, "Increased Aflatoxin Production by *Aspergillus flavus* via Cobalt Irradiation," POULTRY SCIENCE, 52:1492–1496, 1973, which found increased aflatoxin production after irradiation. The above studies compared non-irradiated foods with irradiated foods, and found greater aflatoxin production in the irradiated foods. While all of these studies were conducted in laboratories, where before and after conditions could be properly evaluated, one cannot claim that the aflatoxins will magically disappear from the food environment before foods reach a food irradiator. The scientific literature indicates that the Environmental Protection Agency considers aflatoxins a potent carcinogenic hazard, and therefore, the FDA should either present evidence to refute the scientific studies cited above or prevent its use based upon the greater danger of aflatoxin production on foods so treated. Further evidence regarding the stimulation of aflatoxins would also be offered at a public hearing.

(HEI Para. I.12.)

On March 6, 1987, HEI responded to an FDA request for the evidence that it intended to present on this issue by citing a statement by Horace Graham in a 1980 book (Ref. 55) that more information is needed. HEI also cited: an EPA document that ranked aflatoxin B–1 high in its list of suspected carcinogens; a statement by Dr. Lester Crawford (Associate Administrator of the Food Safety and Inspection Service, USDA) that "if studies show increased aflatoxin production on irradiated foods, he would be concerned, since aflatoxin is considered most carcinogenic;" a book section on aflatoxin toxicity and mechanism of action; and a study on an epidemic of hepatitis in humans who consumed contaminated maize.

Given FDA's conclusion in the final rule that "[t]he agency has no evidence that would lead it to conclude that food irradiated and stored under normal handling practices would show increased aflatoxin production" (51 FR 13376 at 13381), it is not enough for HEI to assert that the issue is not whether the study replicates food handling practices. To justify a hearing, HEI must point to some basis for finding that FDA's conclusion is wrong. HEI must either point to some evidence that the aflatoxin concentration on food under actual food handling conditions would be increased by irradiation or explain why the laboratory studies that FDA stated are not relevant to actual food handling practice should be considered relevant. HEI has failed to do so. Therefore, HEI has failed to justify a hearing.

While, as stated above, FDA has the ultimate burden of proof when it approves the use of a food additive, once the agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward with evidence that calls into question FDA's conclusion. *American Cyanamid Co.* v. *FDA, supra*, 606 F.2d at 1314–1315. HEI has not presented any evidence to challenge FDA's conclusion that foods irradiated and stored under normal handling practices do not show increased aflatoxin production. In the absence of such evidence, HEI has provided no basis to justify a hearing.

FDA does not disagree with HEI's statement in its March 6, 1987, submission that aflatoxin B–1 is a carcinogen; that a significant increase in aflatoxin in the food supply would be of concern; that aflatoxins are toxic; and that aflatoxin consumption has been associated with outbreaks of hepatitis. Furthermore, FDA has never claimed that "aflatoxins will magically disappear from the food environment before foods reach a food irradiator," as stated in HEI's original objection.

None of this information, however, challenges FDA's conclusion that foods irradiated and stored under normal handling practices do not show increased aflatoxin production. Because HEI has failed to challenge FDA's conclusion, it has failed to justify a hearing on that conclusion. A hearing will not be granted if there is no genuine issue of fact for resolution (21 CFR 12.24(b)(1)).

The statement by Graham cited by HEI states that "[m]ore information on the effects of low level irradiation on mycotoxin-producing molds is needed * * *." Graham (Ref. 55) goes on to say that post-irradiation handling of any food, including grains, should be done in such a way as to preclude the outgrowth of toxin-forming, or any other type, of spoilage organism. He stressed the importance of the storage temperatures, the relative humidity of the storage atmosphere, and the water content of the food product. Graham referenced a study by Behere et al. (Ref. 56). This study, which closely resembled actual food handling conditions, showed no radiation-related increase in the amount of toxin produced in grains artificially infected with *A. flavus* before or after irradiation at a dose of 0.2 kGy (Ref. 56). The authors of the study stated that the storage experiments showed that the moisture content of the grain was critical for fungal growth and aflatoxin production. Thus, Behere's study, and hence Graham's chapter cited by HEI, are consistent with FDA's conclusion that foods irradiated and stored under normal handling practices do not show increased aflatoxin production. Consequently, this study does not create an issue of fact and does not provide a basis for a hearing on FDA's conclusion (21 CFR 12.24(b)(1)).

L. Trichinosis

Several objections to the irradiated pork rule stated that there are no significant benefits to food irradiation, and that other methods to control *Trichinella spiralis* exist. In addition, they stated that trichinosis is not a serious health problem and requested a hearing because there are cheaper and safer ways to control trichinosis.

FDA concluded that irradiation of pork at 0.3 to 1 kGy is a safe and effective means of controlling *Trichinella spiralis*. The seriousness of the health hazard from trichinosis or the availability of alternative methods for preventing this health problem are not factors that can be considered under the Food Additives Amendment.[5] Rather, a decision to permit use of an additive must be based solely on consideration of whether it is safe under the conditions of use, and whether it performs the intended technical effect. Thus, even if the objectors could show there are cheaper and safer ways to control trichinosis, such a showing would not provide an appropriate basis for the agency to change its conclusion. Therefore, the objectors did not justify a hearing under 21 CFR 12.24(b)(4).

M. Free Radical Formation

In the final rule, FDA stated that free radicals are formed during irradiation of food and dissipate quickly in the presence of water (51 FR 13376 at 13379). Free radicals formed in dry spices and seasonings are known to persist for long periods of time while these foods remain dry but dissipate quickly when the dry ingredient is added to moist foods (51 FR 13376 at 13379). FDA noted that free radical reactions are also common during conventional food processing. The agency stated that the important question in deciding on the safety of irradiated foods was not whether free radicals may be formed, but whether a toxic radiolytic product could be formed in sufficient amounts to make the food unsafe. FDA concluded that the evidence does not show that toxic radiolytic products are formed in sufficient amounts to cause concern about the safety of irradiated foods (51 FR 13376 at 13378).

HEI objected on the basis that:

> Free radical formation is currently a prime area of investigation of cancer induction, and should not be ignored merely because such substances may be present (and causing cancer) in other foods. FDA's comment that "[because] irradiation produces free radicals as reactive intermediates in the food itself, the high water content of all fresh food provides a medium for their rapid degradation" (51 FR 13379). This statement is erroneous for two reasons. First, this statement clearly contradicts FDA's approval of spice irradiation, which the agency states was "based on the fact that the amount of chemical change in the solid, dry state of a food is less than would occur when substantial portions of liquid are present" (51 FR 13380). Secondly, the issue with free radicals is that they form new chemical bonds of unknown toxicity which are then ingested into the body. FDA's statement that "they are not likely to persist or be present at all in food by the time that food reaches the consumer" (51 FR 13379) is misleading at best, as the dangers of free radicals do not necessarily consist of their reactions *inside the body*, but rather within the food prior to consumption. Since FDA does not know what the long-term health effects of consuming such foods is, it should withdraw its regulation and hold a public hearing to consider evidence as to the adverse effects of such foods.
>
> (HEI Para. I.6 Emphasis added by HEI.)

The agency asked HEI on February 2, 1987, to set forth in detail the factual information and analysis on this objection that it intended to present at a hearing.

On March 6, 1987, the objector: (1) Stated that Dr. George Tritsch would testify on the relationship of free radical formation and cancer, (2) cited three articles discussing free radicals in food, and (3) referred to statements by two persons that more studies should be done. HEI's original objection and supplementary response raise several distinct concerns, none of which present an issue of fact that would justify the granting of a hearing on the safety of food irradiation.

1. Alleged contradiction

In the original objection, HEI stated that "FDA's comment that '[because] irradiation produces free radicals as reactive intermediates in the food itself, the high water content of all fresh food provides a medium for their rapid degradation' (51 FR 13379) * * * is erroneous" because it "contradicts FDA's approval of spice irradiation, which the agency states was 'based on the fact that the amount of chemical change in the solid, dry state of a food is less than would occur when substantial portions of liquid are present' (51 FR 13380)." HEI has not explained why it believes that these statements are contradictory.

HEI's allegation appears to be based on a misunderstanding of free radical chemistry. In foods with high water content, the free radicals that are produced during irradiation degrade quickly to form radiolytic products (51 FR 13376 at 13380). Thus, the free radicals are short-lived and chemical change occurs readily. In dry, solid foods, such free radicals are less able to react to form radiolytic products and therefore persist longer as free radicals (51 FR 13376 at 13380). In general, the amount of radiolytic products formed by irradiation is less in those foods that are dry than in foods with high water content (49 FR 5714 at 5716).

The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle* v. *Pacific Legal Foundation*, supra, 445 U.S. at 214. By merely asserting that the statements are contradictory but not submitting any evidence to support that assertion, HEI has failed to demonstrate that an issue of fact exists. Thus, there is no basis for a hearing on this assertion under 21 CFR 12.24(b)(2).

2. Free radicals and cancer research

HEI stated that Geroge Tritsch, Ph.D., a researcher at the Roswell Park Memorial Institute, would summarize scientific investigation into free radical formation and its relation to induction of cancer.

A hearing request must raise a material issue of fact concerning which a meaningful hearing might be held. *Pineapple Growers Ass'n* v. *FDA*, supra, 673 F.2d at 1085. The statement that "free radical formation is currently a prime area of investigation of cancer induction" is not in dispute. Thus, this statement does not justify a hearing under 21 CFR 12.24(b)(1).

Moreover, a hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. To justify a hearing, HEI would have to provide some basis to believe that the investigations to be summarized by Tritsch raise questions about the safety of irradiated foods. The mere assertion that an individual will summarize investigations on the relationship of free radical formation and cancer does not establish that such investigations are relevant to the safety of irradiated foods and therefore justify a hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing, *Costle* v. *Pacific Legal Foundation*, supra, 445 U.S. at 214, and HEI has not done so with respect to this objection.

[5] The agency still believes, however, that trichinosis is a serious public health hazard and infections can lead to death. Although the incidence of trichinosis has declined in recent years, there are still enough outbreaks from eating insufficiently cooked pork to warrant concern. In fact, there are probably more incidents of trichinosis than of foodborne botulism (Ref. 57). Treatments such as the use of irradiation ensure that pork products are not the sources of trichinella infection.

3. Production of free radicals in food

HEI referred to articles by Basson (Ref. 49), Simic et al. (Ref. 58), and Kesavan (Ref. 59) as evidence that free radical formation occurs in foods exposed to ionizing radiation. HEI stated:

> Basson * * * notes at page 11, "When the model fruit cell is irradiated, nearly all the incident energy is absorbed by the water (80–90% of the cell mass) and leads to the production of water free radicals * * *"
>
> Simic, et al. * * * point out that radiation-induced free radical reactions which occur in irradiated foods are responsible for all the biological and chemical effects, desirable or undesirable, producing a variety of radiolytic products that are dependent on dose, dose rate, temperature, atmosphere, physical state and extent of hydration. We [HEI] believe that the radiolytic products in each food item should be examined on a case by case basis, rather than granting blanket safety approval for all food irradiated at low doses, since such safety cannot rationally be assumed.
>
> * * * Kesavan, discussing irradiation of food, admits, "Dry seeds and food subjected to high doses do contain large amounts of free radicals." Kesavan suggests that since these free radicals dissipate with storage, we should not be concerned. Since FDA does not require storage of irradiated foods until dissolution of free radicals, and since some studies suggest adverse effects from freshly irradiated food (Bhaskaram, discussed later), we disagree.

(HEI March 6, 1987, response, p. 1 (Ref. 2).)

The statements that HEI references do not justify the granting of a hearing. A hearing will not be granted unless there is a genuine and substantial issue of fact for resolution (21 CFR 12.24(b)(1)). FDA does not dispute the statements made by the authors of these references. The agency agrees that free radicals are formed in food during irradiation (51 FR 13376 at 13379).

The first two references that HEI cites are simply examples of many similar reports that discuss radiation chemistry of foods and food components. FDA used these reports to support its finding that products formed during irradiation are predictable.

On the basis of these reports, HEI asserts that radiolytic products in each food item should be examined on a case-by-case basis. Yet, HEI has not cited anything in these two reports that supports this assertion. Neither Basson nor Simic et al., state that food items must be evaluated on an individual basis nor does either author present any evidence that would justify a case-by-case evaluation. Thus, all that HEI has really presented is an unsupported statement of its belief on how safety assessments should be made. A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). Because HEI has failed to make any proffer that supports its assertion, FDA may properly disregard it. *General Motors Corp.* v. *FERC*, 656 F. 2d 791, 798 n. 20 (D.C. Cir. 1981). Thus, HEI has failed to justify a hearing on this issue.

HEI, in discussing the Kesavan article, implies that the amount of free radicals in dry foods is a basis for requiring a mandatory storage period, although Kesavan did not reach this conclusion. HEI claims that irradiated foods are unsafe because FDA has not required a minimum storage period.

In the omnibus rule, FDA found that it was not necessary to establish a minimum storage period because there was no evidence that pointed to such a need. To establish that an issue exists, and thus to justify a hearing, HEI would have to point to evidence that shows that FDA erred, and that some minimal storage period is necessary to dissipate free radicals and to assure the safety of irradiated food. *American Cyanamid Co.* v. *FDA*, supra, 606 F. 2d at 1314–1315. HEI has not cited any study in which free radicals in foods were found to cause harm. It references only the Bhaskaram study in support of its claim that adverse effects are associated with freshly irradiated food. As previously discussed, however, FDA considered the Bhaskaram study (See II. D. *Polyploidy* above) and found that it does not provide a valid basis on which to judge the safety of such food. HEI has not cited any other evidence to support its contention here. Therefore, HEI has not provided any basis for concluding that the presence of free radicals in irradiated food requires that a mandatory storage period for that food needs to be established and thus has failed to meet its threshold burden of tendering evidence that suggests the need for a hearing on this issue. *Costle* v. *Pacific Legal Foundation, supra*, 445 U.S. at 214. Thus, HEI has failed to justify a hearing under 21 CFR 12.24(b)(1).

Moreover, a study designed specifically to address whether free radicals that might persist in food pose a serious safety concern has been conducted (cited as reference 34 by FDA in the omnibus rule). In that study, "Long Term Animal Feeding Study for Testing the Wholesomeness of Irradiated Diet with a High Content of Free Radicals" (Refs. 60 and 61), rats were fed a diet containing 35 percent dry milk that was irradiated at 45 kGy shortly before feeding and that still contained a high quantity of free radicals, as measured by electron paramagnetic resonance spectrometry. This use of a very high radiation dose for a large fraction of the diet is far in excess of what is permitted by the omnibus rule. The authors reported no treatment-related toxicological effects from the free radicals present in the milk-powder diet.

4. Need for more studies

HEI referred to a statement on food irradiation by USDA's A.E. Olson at the Second National Conference for Food Protection (1984), and quoted from a 1980 book, *Safety of Foods*, by Graham (Ref. 55). Of Dr. Olson's statement, HEI stated:

> A.E. Olson, of the U.S. Department of Agriculture, recently said in the proceedings of the Second National Conference for Food Protection, May 1984, regarding food irradiation: "As this process becomes important in the preparation of a particular food, studies should be undertaken on the possible formation of toxic compounds in that food and the effects on [sic] the processing on nutrient bioavailability. Particular attention should be directed to the possible formation of any previously unidentified compounds in that food and how they may affect food safety and nutrition."

(HEI March 6, 1987, response, p. 2 (Ref. 2).)

HEI also asserted that Graham's chapter, "Safety and Wholesomeness of Irradiated Foods" (Ref. 55) stated that: "'* * * more work needs to be done before convincing conclusions can be arrived at' regarding carcinogenicity of irradiated foods, despite the large number of studies already conducted."

A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). The statements that HEI cites concern food irradiation in general. HEI has failed to show that either of these general statements raises questions about the agency's specific findings on minor dry ingredients and foods irradiated at a low dose. In general, the agency agrees with Olson and Graham that particular attention should be directed to the possible formation of any previously unidentified compounds in irradiated food and to how these compounds may affect food safety and nutrition. In this instance, however, the agency found that the evidence was adequate to conclude that food irradiated under the conditions of the regulation is safe. HEI has not presented any basis to believe that either author would disagree. Thus, in the absence of evidence that ties Olson's or Graham's statements to the specific uses at issue here, HEI's assertions based on these statements

are no more than mere allegations and do not provide a basis for a hearing.

N. Chemical Changes Caused by Irradiation

The agency considered the chemical changes caused by irradiation and concluded that the chemical differences between foods processed at radiation doses permitted by the regulation and nonirradiated foods are very small and do not affect the safety of the foods (51 FR 13376 at 13377).

HEI stated that:

> BFIFC admitted that new chemicals are formed in foods exposed to ionizing radiation, but did not address the safety of chemicals formed in such foods unless they were "unique to irradiated foods" (51 FR 13377). Harmful chemicals have been identified in foods exposed to ionizing radiation, and some of these chemicals are known to be carcinogenic, such as benzene and formaldehyde. BFIFC ignored the data in the scientific literature and the data submitted in comments responding to the proposed regulation. Data to be presented at public hearings is already part of the Docket Record of FDA, and should have been incorporated into the final regulation.

(HEI Para. I.2.)

There are two aspects to this objection that must be analyzed to determine if HEI has provided the basis for a hearing: (1) The objection's assertion with respect to harmful chemicals being created in irradiated food; and (2) the assertion that BFIFC, or more importantly, FDA, ignored data.

1. Creation of harmful chemicals

Under FDA's regulations and the relevant case law, to present a substantial issue of fact, an objection must do more than make general allegations. It must specifically identify reliable evidence that supports its contentions (21 CFR 12.24(b)(2)). Here, HEI contends that harmful chemicals are formed in food that is irradiated but specifically identifies only benzene and formaldehyde as substances that are formed. Therefore, FDA will consider whether HEI has demonstrated that a substantial issue of fact exists with respect to whether the production of these two chemicals during irradiation affects the safety of the food that is irradiated.

To establish a basis for a hearing, data and information must be submitted that, if established at a hearing, would be adequate to justify resolution of a factual issue in the way sought by the objector and to justify the action requested (21 CFR 12.24(b)(3)). Thus, HEI must provide some basis to find that the levels of benzene or formaldehyde that would be formed in food under the conditions of the regulation raise sufficient concern to affect the conclusion reached by FDA that food irradiated in accordance with 21 CFR 179.26 is safe. Based on its review of HEI's objection, FDA finds that HEI has not done so and, therefore, has not justified a hearing on the effects of benzene and formaldehyde in irradiated food.

a. *Benzene.* HEI has not provided any evidence to show either that benzene is formed in food irradiated under the conditions of the regulation, or that the amount of benzene that might be formed when food is irradiated would be toxicologically significant. Instead, HEI has merely asserted that the entire record previously considered by FDA provides the basis for its contention. Such a general allegation, without any specific evidence to support it, does not provide a basis for a hearing (21 CFR 12.24(b)(2)).

The agency cited a report showing that an increased amount of benzene was found when frozen beef was irradiated in the absence of air at a sterilizing dose, 56 kGy (5.6 Mrad), a level much greater than that permitted by this regulation (Ref. 14). The concentration of benzene in this radiation-sterilized beef was reported as 19 parts per billion (ppb). After cooking, the beef contained 15 ppb benzene, compared to 2 ppb and 3 ppb benzene in cooked beef that has been heat sterilized or frozen but not irradiated. In a 1977 report for the Department of the Army entitled, "Evaluation of the Health Aspects of Certain Compounds Found in Irradiated Beef" (Ref. 14), the Federation of American Societies for Experimental Biology's (FASEB's) Select Committee on the Health Aspects of Irradiated Beef (the Select Committee) stated that much larger amounts of benzene had been found in eggs and refrigerated haddock that had not been irradiated. The Select Committee noted that benzene had also been reported in 20 other nonirradiated foods by numerous workers, but comparison with irradiated samples was difficult because of the lack of quantitative data for the nonirradiated foods.

The Select Committee concluded that the small addition of benzene from radiation-sterilized beef would contribute only a trivial increment to the normal body burden and is unlikely to increase significantly whatever hazard exists from other sources. FDA is not aware of any evidence that would call this conclusion into question, and HEI has not cited any. If benzene is formed in food during irradiation under the conditions of this regulation, FDA would expect the concentration to be far lower than in the radiation-sterilized beef because the permitted dose is less than one-fiftieth of that used with the beef.

b. *Formaldehyde.* The agency does not dispute that formaldehyde may be a secondary reaction product of carbohydrates in aqueous solutions irradiated in the presence of oxygen (Ref. 62). To justify a hearing under 21 CFR 12.24(b)(3), HEI must proffer evidence that formaldehyde: (1) Is carcinogenic when ingested; (2) is formed in food irradiated under the conditions of the regulation; and (3) if formed, is formed in amounts sufficient to raise a health concern. HEI has not provided evidence on any of these three points and thus has failed to justify a hearing.

Formaldehyde is an intermediate in normal amino acid metabolism in the body and is found at the parts per million level in human blood (Ref. 63). Moreover, formaldehyde has been reported to occur in various foods that have not been irradiated, including: red meats, poultry, fish, eggs, cheese, fresh fruits, beer, and soft drinks, generally in the low parts per million range (Refs. 64 to 67). HEI did not state its basis for describing fromaldehyde as carcinogenic, but the agency assumes that HEI is referring to a study in which formaldehyde, administered intranasally to rats, produced carcinomas at the site of application (Ref. 68). The agency previously has concluded that this study is not relevant to the question of whether formaldehyde is carcinogenic when ingested. The agency, in its denial of requests for a hearing on aspartame, concluded that formaldehyde is not carcinogenic when ingested (49 FR 6672; February 22, 1984). HEI has not cited any evidence that would call this conclusion into question and thus has not provided any basis for reconsidering that conclusion.

In the aspartame decision, the agency considered chronic studies in which hexamethylenetetramine was administered to three strains of mice for 60 weeks in drinking water in doses of 0.5 to 5 percent and to Wistar rats in drinking water at 1 percent for 104 weeks. Because hexamethylenetetramine is degraded in the acid medium of the stomach to formaldehyde and ammonia, these studies directly tested whether orally administered formaldehyde is carcinogenic. In the hexamethylenetetramine studies, no evidence of carcinogenic activity was found in any of the test groups (49 FR 6672 at 6680).

In addition, referring to the rat study (Ref. 68) that showed that formaldehyde administered intranasally produced

carcinomas in the nasal cavities, the agency stated: "The site of the carcinomas strongly indicates that the neoplastic process is a localized, not a systemic, reaction to the known irritating and cytotoxic properties of formaldehyde. No increase in tumor incidence was observed at sites remote to direct exposure. The same study supports the further conclusion that direct exposure to relatively high concentrations of formaldehyde gas is necessary before the carcinogenic process occurs" (49 FR 6672 at 6680).

Therefore, with respect to formaldehyde, the agency has not found, and HEI has not cited, any evidence that formaldehyde is carcinogenic when ingested; that formaldehyde is found in irradiated foods at levels significantly different than in nonirradiated food; or that formaldehyde is harmful when ingested at the levels normally found in food. Thus, HEI has not provided any evidence demonstrating that a material issue of fact exists.

2. Whether FDA ignored data

In its objection, HEI stated that "BFIFC admitted that new chemicals are formed in foods exposed to ionizing radiation, but did not address the safety of chemicals formed in such foods unless they were 'unique to irradiated foods' (51 FR 13377)."

HEI's allegation that BFIFC did not address the safety of chemicals unless they were unique is not supported by the administrative record. BFIFC considered both the probable total yield of radiolytic products and the fraction of such products that may be unique before concluding that: "Based on what we have learned from our review of *all* aspects of food irradiation it is apparent that any toxicological testing requirements must *also* be predicated on the amounts of new chemical constituents generated by the irradiation process (URP's)" (emphasis added). Thus, BFIFC considered *all* radiolytic products, not only *new* or unique radiolytic products. A hearing will not be held unless there is a genuine and substantial issue of fact for resolution (21 CFR 12.24(b)(1)), and HEI has failed to show that such an issue exists on this point.

HEI also alleges that "BFIFC ignored the data in the scientific literature and the data submitted in comments responding to the proposed regulation. Data to be presented at public hearings is already part of the Docket of FDA, and should have been incorporated into the final regulation." It should be pointed out that BFIFC's main task was to determine what types of toxicological testing requirements would be appropriate to assure the safety of irradiated foods. BFIFC was a temporary committee that ceased to exist nearly 4 years before FDA issued the proposal that elicited comments on irradiation. Therefore, BFIFC could not have considered data submitted in comments responding to the proposed regulation. However, FDA in its omnibus rulemaking considered not only the BFIFC report, but also other information in the agency's files, including the data submitted with comments to the proposed regulation.

HEI has not identified any specific data that FDA or BFIFC ignored. It has not, for example, cited any studies that were available at the time FDA was considering the omnibus rule, but that the agency failed to consider. A person requesting a hearing must support its allegations with an adequate proffer of evidence. *General Motors Corp.* v. *FERC, supra,* 656 F.2d at 798 n.20. HEI has failed to make such a proffer on this issue and thus has failed to demonstrate that a hearing is appropriate on whether the agency ignored data.

O. Production of Hydrogen Peroxide in Irradiated Foods

In the omnibus rule, FDA responded to a comment that hydrogen peroxide is produced by irradiation and may contribute to carcinogenesis. The agency stated that it had previously considered a Japanese study (Ref. 69) concerning the potential carcinogenicity of hydrogen peroxide and concluded that the evidence does not demonstrate that hydrogen peroxide is a carcinogen (51 FR 13376 at 13379; see also 46 FR 2341; January 9, 1981). FDA further noted that any hydrogen peroxide formed would be rapidly degraded by natural enzymes and antioxidants in food, and that any residual hydrogen peroxide, if present, would be considerably less than that encountered ordinarily in foods and environmental sources.

HEI stated:

> The FDA admitted "the formation of detectable quantities of hydrogen peroxide, organic peroxides, and hydroperoxides during irradiation of foods in the presence of oxygen," but erroneously claimed that such peroxides would disappear before food consumption (51 FR 13379). While the FDA might regard the Japanese study finding duodenal cancer caused in C57B mice by hydrogen peroxide as inconclusive, the FDA offers no *evidence* to disprove the study findings. Further evidence regarding the dangers of peroxides will be offered at the public hearing, along with the reasons for considering the Japanese study important.

(HEI Para. I.7.) (Emphasis by HEI.)

This objection raises the question of the extent to which FDA may rely on the determination that it made in the 1981 rulemaking that hydrogen peroxide has not been shown to be a carcinogen. A similar question was raised in *Community Nutrition Institute* v. *Novitch,* 773 F.2d 1356 (D.C. Cir. 1985). In that case, in the course of challenging FDA's approval of the use of aspartame in ready-to-drink beverages, the objector also challenged the agency's approval of certain dry uses of aspartame. The court rejected the latter challenge, stating: "The agency's conclusions concerning the safety of the dry use of aspartame, except to the extent that new evidence suggests that the FDA may not rely on these prior findings in its deliberations on wet use, may not be raised again in this proceeding in the interests of administrative finality and judicial economy." (*Id.* at 1362–1363.)

Consequently, in this proceeding, the agency can rely on the findings that it made about hydrogen peroxide in earlier rulemakings except to the extent that new evidence that raises questions about the agency's conclusion is presented.

The agency subjected the data from the Japanese study cited by HEI to an in-depth analysis in its final decision on the safe use of hydrogen peroxide as a sterilizing agent for food packaging materials (46 FR 2341; January 9, 1981). After review, including consultation with the authors of the study, the agency concluded that the results of the study did not provide sufficient evidence to designate hydrogen peroxide as a carcinogen. FDA placed the manuscripts of the Japanese study and memoranda of FDA's Cancer Assessment Committee on public display in the Dockets Management Branch under Docket No. 79F–0318.

In addition, FDA has recently completed its review of whether hydrogen peroxide is generally recognized as safe (GRAS) for direct addition to food (51 FR 27169; July 30, 1986). The agency discussed the Japanese study in its November 17, 1983, GRAS proposal (48 FR 52323).

For the objector to raise a material question of fact about the safety of hydrogen peroxide, it must point to evidence that is inconsistent with FDA's conclusions. Yet, HEI has not provided any information to support its claim that hydrogen peroxide is carcinogenic, or that other peroxides are present in irradiated foods in hazardous amounts. While, as stated above, FDA has the ultimate burden of proof when it approves the use of a food additive, once the agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward

with evidence that calls into question FDA's conclusion. HEI has failed to present any such evidence. *American Cyanamid Co.* v. *FDA, supra,* 606 F. 2d at 1314–1315. Rather, HEI merely promised to provide further evidence at a hearing on the dangers of peroxides and on a study that FDA had previously evaluated in depth in a proceeding in which no one requested a hearing.

A hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle* v. *Pacific Legal Foundation, supra,* 445 U.S. at 214. As discussed above, HEI has not proffered any evidence on hydrogen peroxide to challenge the agency's conclusion that food irradiated under the conditions of the regulation is safe. Thus, a hearing on this objection is denied.

In addition, HEI's statement that FDA * * * erroneously claimed that such peroxides would disappear before food consumption (51 FR 13379) * * *" is a bald assertion, without any proffer of evidence to support it. HEI has not cited any evidence that hydrogen peroxide would remain in irradiated food at significant levels. A hearing will not be granted on the basis of mere allegations or denials (21 CFR 12.24(b)(2)). Thus, HEI has failed to justify a hearing on this point.

P. Radiolytic Products

BFIFC stated that radiolytic product generation is dependent primarily upon the amount of energy absorbed by the food. Based on a review of available literature identifying and quantifying substances produced in foods by radiation, BFIFC estimated that irradiation of food at 1 kGy would generate approximately 30 parts per million of radiolytic products. BFIFC used experimental data on irradiated and nonirradiated food to estimate that approximately 90 percent of the radiolytic products identified were known natural food components and noted that the remaining 10 percent were chemically similar to known natural food components (51 FR 13376 at 13378). Based on the findings of BFIFC and the Task Group, and on its review of the other information in the administrative record of the omnibus proceeding, FDA concluded that food irradiated under the conditions of the regulation is safe (51 FR 13376 at 13378).

1. Effect of irradiation on pesticide residues

In response to a comment about the fate of pesticide residues on produce, the agency concluded that the total amount of radiolytic products from pesticide chemicals on foods that are irradiated will be virtually nil, and that these radiolytic products do not pose a hazard to health (51 FR 13376 at 13380).

HEI stated that:

> The FDA admitted that a pesticide chemical present on irradiated food could be chemically changed by the irradiation process (51 FR 13360) [sic]. The FDA offered no scientific evidence regarding the types of changes that might be expected, but a mere "guess" or "estimate" regarding the parts per million to be found in food. This is equivalent to guessing that a potential hazard is harmless, and does not carry out the FDA mandate to assure safety. Further evidence regarding these dangers and the FDA failure to assess them will be offered at the public hearing.

(HEI Para. I.8.)

(See Objection No. 159 in Docket.)

To justify a hearing, an objector must meet a threshold burden of tendering evidence suggesting a need for a hearing. *Costle* v. *Pacific Legal Foundation, supra,* 445 U.S. at 214. It must point to facts that provide a basis on which to question the agency's conclusions. *Cerro Wire & Cable Co.* v. *FERC,* 677 F.2d 124, 129 (D.C. Cir. 1982). Here, to raise questions about FDA's conclusions, HEI would have to point to some evidence that would lead one to conclude that degradation products are more toxic than the pesticide itself, and that the amount of degradation products is sufficient to make a difference in the toxicity of the resulting residue mixture. HEI has not proffered any evidence, however.

Although HEI promises to offer evidence at a hearing, a hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of a hearing. A person requesting a hearing must support its allegations with an adequate proffer of evidence. *General Motors Corp.* v. *FERC,* 656 F.2d 791, 798 n.20 (D.C. Cir. 1981). Rather than presenting evidence, HEI asserts that FDA did not adequately justify its conclusions. Such an assertion will not justify a hearing. While, as stated above, FDA has the ultimate burden of proof when it approves the use of a food additive, once the agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward with evidence that calls into question FDA's conclusion. *American Cyanamid Co.* v. *FDA, supra,* 606 F.2d at 1314–1315. HEI has failed to present any such evidence. Thus, it has not provided any basis for a hearing.

2. Metabolism of radiolytic products

One objection to the omnibus regulation which did not request a hearing took exception to FDA's response to a comment concerned that highly toxic unidentified radiolytic products may be present at low concentrations. The objector cited FDA's response and objected as follows:

> P. 13386—"Such URP's may be free radical coupling products of lipid and protein-derived radicals, dimers, and cross-linked products. However, enzymatic hydrolysis * * * by normal digestive enzymes is expected to yield normal molecular subunits such as fatty acids, amino acids, monosaccharides * * *." Many of the coupling products may involve carbon-carbon bonds that are not degraded by digestive enzymes.

(See Objection No. 159 in Docket.)

The agency has considered this objection and has found it to be without merit. The objector has misrepresented the agency's analysis on coupling products by omitting the words "of some of these compounds." The agency stated in the omnibus rule that URP's may be formed, including some that are structurally atypical of parent molecules, such as free radical coupling products of lipid and protein-derived radicals, dimers, and cross-linked products, and that *some* of these would be digested normally (51 FR 13376 at 13386). BFIFC had concluded that enzymatic hydrolysis of such radiolytic products by digestive enzymes would metabolize the majority of such radiolytic products to yield normal molecular subunits, such as fatty acids, amino acids, and other components that would result normally from the digestion of the parent molecules (Ref. 5). Neither the agency nor BFIFC said or implied that all coupled or crosslinked products would be digested to normal components. BFIFC's analysis did show, however, that while it was assuming coupled products to be unique, most of these products would be metabolized in the same way as other food components, and the amount of products with uncharacterized toxic potential would be reduced considerably.

Therefore, the objector has not pointed to any problem in the agency's position but has focused on the production of possible unique radiolytic products. The agency did consider the possible production of such products and concluded that the possibility of their formation would be extremely low, and that they would be virtually impossible to detect toxicologically (51 FR 13376 at 13378).

As noted in the omnibus rule (51 FR 13376 at 13379), the important issue that the agency has had to consider is the probability that a toxic radiolytic end-product will be formed in sufficient amounts to make the food unsafe. The agency's review of hundreds of animal feeding studies produced no evidence of the presence of radiolytic products in toxic amounts in foods radiated under conditions consistent with those permitted under the omnibus rule. This failure to find toxic amounts of radiolytic products supports the agency's conclusion on safety. The objector has provided no information to challenge this conclusion.

3. Toxicity of radiolytic products

One objection to the omnibus regulation which did not request a hearing took exception to FDA's discussion of the usefulness of the toxicological studies that the agency reviewed:

P. 13384—"* * * if a potent toxic material were present at any level of toxicological significance in irradiated foods ingested by test animals, some consistent toxicological signs would be manifest in the studies." Why? These studies you reviewed covered a wide variety of foods, tested animals, dosages of radiation used, diets used, etc. One should *not* expect consistent toxicological signs. On p. 13380 you state "* * * radiolytic products from different spices are likely to be different." The same is true of different fruits and vegetables, so the toxicological effects would be expected to be different here too. Don't you think so?

(See Objection No. 159 in Docket.)

Most foods, including those tested in animal feeding studies, are composed mainly of water, carbohydrates, fats, and proteins as well as lesser amounts of vitamins, minerals, and a large variety of flavoring components. Because the same constituents dominate the composition of many foods, one would expect similar products from foods with similar composition.

The major reaction resulting from irradiating foods that have a significant water content, such as fruits and vegetables, involves reaction of free radicals of water with other food constituents, such as carbohydrates. Thus, while it is true that if a potent toxicant were formed in irradiated food, its toxic significance would not be the same at all doses or in all foods, it does not follow that if a potent toxicant were present in irradiated food, there would be no correlation among the studies FDA reviewed. Therefore, because FDA reviewed a large amount of animal feeding study data, a potent toxicant should have shown some pattern in similar studies with similar foods. FDA did not see such a pattern.

Because the data from tests with a wide variety of foods at a variety of doses do not provide evidence of a potent toxic material, the likelihood of finding a toxic effect with food irradiated under the limited conditions permitted by this rule is so small as to be insignificant. The objector has merely disagreed with the agency's conclusion and has not provided any evidence to the contrary.

Q. Test for Quantity of Radiolytic Products in Food

HEI stated:

FDA has not developed an empirical test for measuring effectively the quantities of residual toxic radiolytic products and unique radiolytic products present in irradiated foods. FDA should withdraw its regulation until research into developing such a test, currently underway at the National Bureau of Standards, is completed. Evidence regarding this issue and the work underway at NBS will be presented at the public hearing.

(HEI Para. I.4.)

Under FDA's regulations, a hearing will not be granted on factual issues that are not determinative with respect to the action requested (21 CFR 12.24(b)(4)). HEI has failed to point to any specific way in which the rule itself is inadequate without a test. HEI has not explained what it means by "an empirical test," what such a test would accomplish, or what allegedly toxic or unique radiolytic products require quantitative measurement. Thus, HEI has not provided a basis for a hearing.

Furthermore, HEI has not provided any basis to find that the work done at the National Bureau of Standards (NBS) is relevant to this proceeding. The work conducted at NBS was a research project funded by USDA in 1986. This project was directed primarily at developing an analytical method for determining whether poultry has been irradiated. The project involved detection of a radiolytic product of an amino acid found in proteins. It was not designed to be applicable to the foods covered by this regulation.

R. Possible Synergistic Effect

A synergistic effect is an action by two or more substances to produce an effect that each substance is incapable of producing by itself. Such an effect can be beneficial or detrimental. The agency does not ordinarily consider hypothetical synergistic effects unless there is reason to believe that there will be synergistic effects that present a safety concern. It did not consider such effects in this rulemaking because available evidence did not suggest that there are any such effects.

HEI stated that:

The FDA fails to address the potentially synergistic effects of new chemicals created by the food irradiation process in different foods [sic] items that might be ingested by an individual. Evidence of such synergistic effects would be presented at a public hearing.

(HEI Para I.10.)

HEI has not presented any evidence to show that there is any likelihood that synergistic effects will occur among the chemicals created in food by irradiation. Rather, HEI's request for a hearing merely alleges that such effects will occur, without providing any supporting evidence other than a vague offer to present evidence at the hearing. Mere allegations are insufficient to justify a hearing. An objector must make an adequate proffer of evidence to support its allegations and to show that they provide a basis on which to call into question the agency's conclusions. *Cerro Wire & Cable Co.* v. *FERC*, supra, 677 F. 2d at 129.

Moreover, a hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle* v. *Pacific Legal Foundation*, supra, 445 U.S. at 214. By merely making the bald assertion that the possibility of synergistic effects exists and by failing to submit any evidence to support that assertion, the objector has failed to demonstrate that an issue of fact exists with respect to the possible synergistic effects of radiolytic products and thus has failed to justify the granting of a hearing.

FDA is not aware of any evidence that radiolytic products produce synergistic effects. FDA stated in the omnibus rule that experiments have shown that very few, if any, of the radiolytic products are unique to irradiated foods (51 FR 13376 at 13378). One can speculate on possible synergism among any of the thousands of chemical components that are naturally present in the daily diet, but unless one has reason to believe that a particular effect may occur, such speculation is likely to be fruitless and, therefore, an inappropriate subject for study. HEI has not provided a plausible hypothesis or appropriate information that would lead one to suspect adverse synergistic effects from components of irradiated foods.

S. Induced Radioactivity: Sodium-24

One objection to the irradiated pork rule stated that when pork has been irradiated, sodium-24 becomes a pure gamma emitter in the pork for 24 hours after treatment, thereby creating a dangerous situation for 24 hours. The objector did not submit any data to support this objection, nor did it request a hearing.

The agency has considered this objection and has found it to be without merit. FDA stated in its 1981 advance notice of proposed rulemaking that "the use of ionizing radiation of appropriate source energy does not induce any detectable radioactivity in foods when measured by methods that can easily detect the presence of radioisotopes that occur naturally in foods" (46 FR 18992; March 27, 1981). The report that served as a basis for this statement (Ref. 70) noted that sodium-24 can be produced and measured in foods when they are irradiated by sources with energy levels in excess of 12 million electron volts (MeV) but not after irradiation by sources of 10 MeV or less. The agency has limited the use of sources of radiation to those that produce radiation at energies of 10 MeV or less (21 CFR 179.26(a)). The radiation energies of cobalt-60 and cesium-137 are both below 2 MeV. The agency is not aware of any evidence to demonstrate that irradiation of pork under the conditions of the regulation produces measurable amounts of sodium-24.

T. Summary

In this section on safety, the agency has addressed objections to its conclusion that foods irradiated under the conditions of the regulation are safe.[6] The agency has considered these objections and finds that none of them justifies a hearing under the criteria outlined in 21 CFR 12.24(b). Thus, the agency is denying all of the objections and requests for a hearing on the safety of the irradiation of food under the conditions set forth in 21 CFR 179.26.

III. Effect on Nutritional Quality

As stated earlier, some changes in food chemistry occur during irradiation processing. Such changes can occur in nutrients as in other components of food. Although certain nutrients in particular food commodities are extremely sensitive to irradiation, there would not be a significant effect on a consumer's diet from food irradiation unless the consumer depended on a particularly sensitive food for a major portion of the dietary need for a particularly sensitive nutrient. Just as with other processing methods, the nutritional consequences of irradiating a food must be evaluated by considering the likely effect on the diet as a whole.

As a comparison, the freezing process is probably the best preservation method for retention of vitamin content; however, this method is not without some effect on the processed food. For example, some vegetables lose up to 14 percent of vitamin C and from 3 to 8 percent of thiamine when frozen. In the case of pork chops, an excellent source of thiamine, losses in this vitamin following 6 months of frozen storage have been reported to range from an insignificant amount to as much as 40 percent (Refs. 71 and 72).

Before freezing, most vegetables are blanched to inactivate enzymes that would otherwise cause unacceptable changes in sensory properties and nutritive value during frozen storage. Losses of vitamin C during water blanching and cooling of eight common vegetables (e.g., green beans, broccoli, and spinach) range as high as 70 percent, with an average loss of around 25 percent. Losses of thiamine in some of these same vegetables range as high as 80 percent.[7]

Nevertheless, although some nutrient losses occur during processing, one would not say that freezing renders such foods to be nutritionally unwholesome or unsafe. The same criteria for determining safety and wholesomeness must be applied to processing by irradiation.

Any change caused by irradiation will be dose dependent, so that the significance becomes less as the dose gets smaller. The agency cited several references in its proposal (49 FR 5714 at 5721) that demonstrate that there are no significant nutrient differences between nonirradiated foods and foods irradiated at a dose below 1 kGy (100 krad). FDA agreed with those reports and concluded that nutritional variations in foods irradiated under the conditions of the regulation are nearly always negligible and therefore of no significance to human health. Because the agency considered food irradiated under the conditions of the regulation to be no different nutritionally from nonirradiated foods, and because no comment submitted evidence to the contrary, the agency concluded that destruction of nutrients was not an issue in this rulemaking (51 FR 13376 at 13381).

HEI stated that:

> Nutrient destruction is generally admitted regarding exposure to ionizing radiation, but the FDA states that there is no nutritional difference between unirradiated food and food irradiated at levels below 100,000 rads (51 FR 13381). This claim is false, and relevant evidence will be submitted at the public hearing. For example, an initial study conducted at the USDA's Eastern Regional Research Center in Philadelphia found that pork irradiated at 100 krads suffered a 20% loss of thiamine. Since nutrient loses at doses higher than 100 krads are usually dose related and are well documented (See Exhibit A, Tony Webb, "Food Irradiation in Britain" pp. 14 & 15), it is unreasonable to claim that losses magically disappear at lower levels.

(HEI Para. I.11.)

On February 2, 1987, FDA requested that HEI submit the information that it intended to present at a hearing to support its contention that nutritional differences in food irradiated under the conditions of the regulation are significant. In its reply of March 6, 1987, HEI cited 10 documents but did not include copies of any of those documents. Seven of the documents that HEI cited were on the effect of irradiation on vitamins and other nutrients, including natural antioxidants; two articles were on the effect of irradiation on fats; and one reference discussed nutritional loss as a function of dose. FDA searched its files for the documents mentioned by HEI and was able to locate all but two. On May 5, 1987, the agency again wrote to HEI and requested the two references that were not available in the ageny's files. HEI provided one of the references but was unable to locate the second.

A. Original Objection

In its objection, HEI challenged FDA's statement in the omnibus rule that "* * * the available literature indicated that there are no nutritional differences between unirradiated food and food irradiated at levels below 1 kGy (100 Krad) * * *" (51 FR 13376 at 13381). It is not clear, however, whether HEI is claiming that irradiation of some foods will reduce the amounts of some nutrients, or that foods irradiated under the conditions of this regulation will adversely affect the nutritional status of humans who consume these foods. FDA did not intend to imply that there are never changes in nutrient levels when food is irradiated. FDA's statement was intended to mean that the nutrient losses below 1 kGy are so small as to be of no nutritional consequence for the human diet. Because the amount of chemical change is directly proportional

[6] HEI made 21 specific objections on safety, each of which, it claimed, justified a hearing. HEI made a 22d objection on the nutritional quality of irradiated foods. This objection is discussed in the next section.

[7] Many papers have been published to document such results. A succinct summary in tabular form is contained in Ref. 73.

to dose, it is reasonable to conclude that some fraction of the nutrients may be lost at any dose, and that the amount lost will approach zero as the dose approaches zero. FDA has never claimed "that losses magically disappear at lower levels * * *" as HEI apparently asserts in its objection.

To justify a hearing on this point, it is not enough for HEI to simply assert that some nutrient loss can occur. HEI must present evidence that suggests that nutrient losses in food irradiated at doses permitted by the regulation are sufficiently large and would so affect the diet that such food would be nutritionally unwholesome or unsafe. A hearing will not be held unless resolution of a factual issue in the way sought by the objector is adequate to justify the action requested (21 CFR 12.24(b)(4)).

In its objection, HEI stated that an unpublished USDA study "* * * found that pork irradiated at 100 Krads suffered a 20% loss of thiamine." HEI has neither provided any evidence from such a study nor provided any basis for why its statement, if true, would show that irradiated pork is unsafe. A hearing will not be held unless a factual issue can be resolved by specifically identified reliable evidence (21 CFR 12.24(b)(2)).

HEI also stated that other "* * * relevant evidence will be submitted at the public hearing * * *." As stated above, FDA requested that HEI submit the information it intended to present, and HEI responded by citing 10 documents. These documents and the questions they raise are considered below.

B. Effect on Nutrients

Seven of the documents HEI cited referred to the possible loss of nutrients, such as vitamins, when food is irradiated. HEI cited one reference (Ref. 50) on the effects of irradiation on the vitamin C content of orange juice, one reference on the effects of irradiation on *beta* carotene in solution, and one reference to an unpublished USDA study on the thiamine content of irradiated bacon in the raw, cooked, or freeze-dried form. HEI stated that:

> Ascorbic acid losses in orange juice amounted to 10% to 70% after irradiation with 2.5 to 10.0 kGy according to Beyers, M. et al., "Chemical Consequences of Irradiation of Subtropical Fruits," in P.S. Elias and A.J. Cohen, ed's, RECENT ADVANCES IN FOOD IRRADIATION, 171 at 178 (1983).

(HEI March 6, 1987, response, p. 3 (Ref. 2).)

> Snauwaert, F. et al., "Influence of Gamma Irradiation on the Provitamin A (Beta-Carotene) in Solution," in RADIATION PRESERVATION OF FOOD, IAEA & FAO: Vienna, 29 (1973). Table II demonstrates dose related reduced Beta-carotene at doses ranging from 3.36 to 205 krad. The researchers stated, "At doses higher than 200 krad Beta-carotene tends to degrade completely."

(HEI March 6, 1987, response, p. 4 (Ref. 2).)

> A recent report submitted to USDA's Food Safety and Inspection Service by the Agricultural Research Service reported that "thiamine content of bacon in raw, cooked, or freeze-dried form degraded at a significantly higher rate during cooking if the bacon had been irradiated," according to *Food Chemical News* 42 (Nov. 10, 1986). We have not yet obtained a copy of this report, but we believe that it should be considered by FDA.

(HEI March 6, 1987, response, p. 3 (Ref. 2).)

HEI cited testimony before Congress, on behalf of the National Nutritional Foods Association, on a bill to provide Federal coordination for the continued development and commercialization of food irradiation. The testimony claimed that irradiation would reduce the concentration of natural "protective materials," such as antioxidants, in proportion to the radiation dose and operating conditions.

(HEI March 6, 1987, response, p. 4 (Ref. 2).)

HEI also cited three review articles that discuss loss of vitamins and other nutrients in irradiated foods.

> Dennison, R.A. and E.M. Ahmed, "Review of the Status of Irradiation Effects on Citrus Fruits", from PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON FOOD IRRADIATION, June 6–10, 1966, IAEA/FAO, 619 at 627 (1967). Vitamin C losses indicated by several studies are summarized at p. 627.

(HEI March 6, 1987, response, p. 3 (Ref. 2).)

> Murry, T.K.[sic], "Nutritional Aspects of Food Irradiation," presented to the Joint FAO/IAEA/WHO Expert Committee on the Wholesomeness of Irradiated Food, Oct. 27-Nov. 3, 1980. This paper cites a variety of studies evaluating nutritional aspects of irradiated food. It admits that nutritional losses occur at low doses, but dismisses them by stating that they are less than those found with other food processes. Canned foods are well known to be nutritionally depleted, and the consumer can readily tell that a food was canned since it is purchased in a can or jar. Irradiated food can be sold as "fresh," with only a misleading symbol, after April 18, 1988, and consumers are unlikely to realize that the food is processed and that vitamin content is reduced. Murry reported that Azar observed losses of up to 22% in thiamine as well as riboflavin, niacin, and pyridoxine in rice.

(HEI March 6, 1987, response, p. 3 (Ref. 2).)

> Vakil, Urmila K. et al., "Nutritional and Wholesomeness Studies with Irradiated Foods: India's Program," RADIATION PRESERVATION OF FOOD, IAEA & FAO: Vienna 673 (1973). Table IV shows losses in nutrients when wheat is irradiated at doses of 20 krad and 200 krad. They found that 8 to 12% of total thiamine, riboflavin and niacin were lost due to radiation treatment. Up to 25-35% of alpha-tocopherol, localized in the germ, was lost with radiation doses of 20 and 200 krad. An overall increase of about 8% in free amino acid levels was observed on irradiation up to 1 Mrad. Ionizing radiation caused fragmentation of the starch and proteins in wheat. B vitamins were reduced in irradiated shrimp.

(HEI March 6, 1987, response, p. 5 (Ref. 2).)

The issue raised by HEI must be a material issue concerning which a meaningful hearing might be held. *Pineapple Growers Ass'n of Hawaii* v. *FDA*, supra 1085. As discussed above, the agency recognizes that irradiation can produce nutrient losses under some conditions but has concluded that such effects are not a safety concern under the conditions of the regulation.

To justify a hearing, HEI must provide evidence that nutritional loss in a food irradiated under the conditions of this regulation either renders the food unsafe or has a significant effect on the diet of humans (see 21 U.S.C. 348(c)(5)(B)). While, as stated above, FDA has the ultimate burden of proof when it approves the use of a food additive, once the agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward with evidence that calls into question FDA's conclusion. *American Cyanamid Co.* v. *FDA*, supra, 606 F. 2d at 1314–1315.

Despite the fact that it referenced numerous documents, HEI has submitted no information to support its allegation that nutritional differences in food irradiated under the conditions of the regulation are significant to human health and are a safety concern. For example, in the first three studies cited above, none of the foods discussed can be irradiated under the conditions of the regulation.

The statement of the National Nutritional Foods Association cited by HEI contends that "antioxidants" occurring naturally in food are chemically consumed in reaction with other radiolytic products. However, either the authors of the statement nor HEI has provided evidence to support the contention that irradiation of food under the conditions of the regulation will result in a significant reduction in these "protective materials" or to show that any reduction that might occur would be detrimental to the consumer.

The other three articles cited by HEI are compilations of data from many studies. None of these authors concluded that losses of nutrients from foods irradiated at doses permitted by the regulation are of any significance to human health. For example, HEI cites Murray as stating that nutritional losses "are less than those found with other food processes." [8] Another of these cited authors (Vakil) concluded that "[c]ompositional changes and nutritional losses due to irradiation are comparable to those caused by conventional processing methods * * *." HEI has not provided any rationale to show why these articles would support its contention that losses of nutrients from foods irradiated under conditions permitted by the regulation would render the food unsafe or have a significant effect on human health. Thus HEI has not provided any basis for a hearing.

Moreover, HEI's statement that "* * * consumers are unlikely to realize that the [irradiated] food is processed * * *" is not true. The agency requires that the labeling of an irradiated food must state that the food has been irradiated (21 CFR 179.26(c)). (See also IV. Labeling).

C. Effect on Fats

HEI cited two references on the toxicity or indigestibility of fats with high peroxide values (rancid fats) (Refs. 75 and 76).

Draybill [sic], H.F., "Nutritional and Biochemical Aspects of Foods Preserved by Ionizing Radiation," 50 J. HOME ECONOMICS 695 (Nov. 19, 1958) citing Andrews, J.S., Mead, J.F., and Griffith, W.H., "Toxicity of lipid peroxides in the rat," 15 FED. PROC. 918 (1956), states, "Highly peroxidized oils (peroxide number of 3,000) produced by irradiation and oxidation are toxic when fed to rats at 20 per cent level in diet, but fats of lower peroxide numbers (peroxide number below 400) when fed at same level in a diet to rats were nontoxic and maintained normal growth (8)." The nutritive value of the macronutrients is apparently adversely affected.

Schreiber, Manuel, and E.S. Nasset, "Digestion of Irradiated Fat in Vivo," 14 J. APPLIED PHYS 639 (1959) concluded that "irradiation of lard is detrimental to digestion in the dog." This study found that irradiation increased the peroxide value of lard from 1–2 to 176, and that in 14 months of cold storage the peroxide value continued to rise. The damaged irradiated fats apparently caused poor digestion, with irradiated lard failing to leave the stomach in normal time periods.

(HEI March 6, 1987, response, p. 3 (Ref. 2).)

Neither of these studies provides a basis for a hearing. Both studies are directed to the health effects of fats and oils with high peroxide content (rancid fats). The toxicity or indigestibility of rancid fats is not in dispute, however.

Peroxides are produced in fats by a variety of means, including heating and storage as well as by irradiation in the presence of air. HEI has not provided any reason to believe that rancidity is a consequence of irradiating foods under the conditions of this regulation. However, even if irradiation causes rancidity of foods, this fact would not cause the agency to change its conclusion. Foods with a high fat peroxide content (rancid fats) are not eaten because they are unpalatable. It is unlikely that any food that would become rancid when irradiated would be irradiated because such an irradiated food would not be marketable. Therefore, these studies would not provide a basis for finding irradiation to be unsafe and thus do not provide a basis for granting a hearing under 21 CFR 12.24(b)(4).

D. Control of Dose

HEI stated that:

While setting an upper limit of 100,000 rads for food preservation helps limit nutrient losses due to radiation (since nutrient losses increase with dose), in practice, it is quite possible that foods will get even higher doses than planned. In a petition to the FDA to allow higher irradiation doses for spices (3,000,000 rads), R.L. Hall, Vice President—Science & Technology of McCormick & Company, Inc., stated, "In existing large-scale irradiators, it is quite likely that an overdose of up to 250% can be expected." Control of dose is clearly not as simple as it sounds. Measurable losses of food nutrients at doses higher than 100,000 rads may suggest losses occurring at lower doses, whether or not these losses are easily measured.

(HEI March 6, 1987, response, p. 2 (Ref. 2).)

HEI appears to misunderstand both the requirements of the regulation and the practical significance of the variation in dose during processing. In its proposal, FDA discussed the dose variation that a given bag, barrel, or pallet of food receives during irradiation. In an example, it stated that in a typical use application, one portion of the container may receive three times (or 300 percent) as much radiation as the portion receiving the smallest dose (49 FR 5714 at 5717). Hall's statement refers to the need for a margin 250 percent above the minimum dose, similar to FDA's estimate. The petition that HEI refers to requested that the maximum dose be set high enough to allow a minimum dose that is effective. The dose of 1 kGy (100,000 rads) permitted by this regulation is the maximum dose allowed for foods that are sources of nutrients, not the minimum. Because of the variation in dose at different positions of a container during irradiation, treatment to a maximum dose of 1 kGy means that other portions of the container are likely to receive less than 0.5 kGy and the overall average dose is likely to be less than 0.75 kGy. Thus, food irradiated under the conditions of the regulation will not receive a dose greater than the maximum allowed. In fact, on the average, food will receive a considerably lower dose than that permitted by the regulation, not a higher dose.

HEI has not provided any evidence that any food irradiated under the conditions of the regulation will receive a dose of radiation that is greater than that allowed. Thus, there is no issue of fact in dispute for resolution at a hearing (21 CFR 12.24(b)(2)).

IV. Labeling

In the omnibus rule, the agency required wholesale and retail labeling of all food that has been irradiated (first generation food) because the irradiation of food, like other processing, could affect its organoleptic characteristics. The agency did not require special retail labeling for an irradiated ingredient in a multiple-ingredient food (second generation food) because such a food has obviously been processed, and the effects of radiation on individual ingredients would likely have no significant effect on the final product (51 FR 13376 at 13389).

A. Use of Term "Ionizing"

One objection to the omnibus final rule, which did not include a request for a hearing, stated that because infrared, ultraviolet, and visible radiation, as well as microwaves and radiowaves, are all nonionizing forms of radiation, labeling the food as treated "by irradiation" or "with radiation", without stating the type of radiation, misleads the consumer. The objector stated that "[i]t is clearly hypocritical of the FDA to say it encourages consumer education but not require it in the form of explicit labels stating that the radiation is *ionizing*."

The objector is correct that there are several forms of radiation, not all of which are ionizing. However, requiring the use of unfamiliar technical terms

[8] HEI also cited an article by Azar (Ref. 74), referenced by Murray, that reported 22 percent loss of thiamine and other vitamins in irradiated rice, without reporting the dose applied. HEI did not provide a copy of this study when FDA requested it for review. In the absence of this article, the agency cannot evaluate this evidence. A reference to information that is not available cannot serve as a basis for a hearing to consider such information.

does not necessarily convey useful information to most consumers. The word "radiation" is commonly used for the type of radiation emitted by radioactive matter or by X-ray machines, i.e., ionizing radiation. The agency chose to require only this simple term on a label because the agency felt that it would inform the consumer at least as well as the more technical terminology (51 FR 13376 at 13387).[9] The objector did not provide any evidence that the additional word would increase the understanding of most consumers. However, the agency does permit the manufacturer to state specifically the type of radiation used in the treatment, e.g., "Treated with ionizing radiation," or "Treated with gamma radiation," if the more specific description is indeed applicable (51 FR 13376 at 13388).

B. Petition to Reconsider the Labeling Statement

The agency received a petition to reconsider the labeling provisions and decided to treat that petition as an objection because FDA received it within the 30 day objection period. The objector (Docket No. 81–N0004/PRC) argued in its objection that the required statement "Treated with radiation" is misleading. He provided data from a limited consumer survey as the basis for proposing that the required statement be replaced by the word "picowaved" or "irradiated".

In this consumer survey, consumers in one city were asked whether they would think that food that was labeled "treated with radiation" contained radiation, and whether they would buy such food. Consumers in another city were asked the same question except the term "ionizing radiation" was used on the hypothetical label. A majority of respondents stated that they would not buy food labeled in this way because it might be radioactive. No consumers were asked about their understanding of the words "picowaved" or "irradiated."

The agency recognizes that many consumers do not understand the meaning of the word "radiation," but it believes that any confusion created by use of the terms "radiation" or "irradiation" can be corrected by proper consumer education. The petitioner provided no evidence that the phrasing requested would be more informative than that required by the regulation. Therefore, FDA rejects this request.

[9] FDA does not require a statement that the food has been irradiated on foods treated by nonionizing radiation. Therefore, there should be no confusion of terms.

C. Retail Labeling

1. Label statement

Several objections to the irradiated pork rule stated that the label for pork treated with radiation should so indicate and objected that the regulation did not require special labeling. One of the objectors requested a hearing.

These objectors are confused about what the irradiated pork rule did. It amended 21 CFR 179.22(b) by adding pork to the list of foods that may be irradiated. Paragraph (c) of 21 CFR 179.22 required the statement "Treated with gamma radiation"on labels of irradiated food. The irradiated pork rule did not exempt pork from the labeling requirement in 21 CFR 179.22(c). Thus, the objections to the irradiated pork rule were wrong in concluding that the regulation did not require special labeling.

Section 179.22(c) was superseded by the omnibus rule, which also establishes labeling requirements for all irradiated foods. Thus, under the former 21 CFR 179.22 or the current 21 CFR 179.26, labels of irradiated pork must state that the food has been irradiated. Consequently, these objections raise no issue to be resolved at a hearing.

2. International logo

One objector, the petitioner for the irradiated pork regulation, requested that the international logo for irradiation be used as an alternative to specific wording required by 21 CFR 179.22(c).

The agency concluded in the omnibus rule that an internationally used logo should be placed on labels and labeling, along with specified wording that would explain the meaning of the logo to consumers until the logo became readily recognized. Underlying this action is a finding by the agency that consumers are not aware of the meaning of the logo, and that it would therefore not be appropriate at this time to place the logo on a food label without an appropriate explanation. The objector has not presented anything other than a mere assertion that the logo is an appropriate alternative to the wording required by the agency. Therefore, the agency rejects this alternative.

3. Two year "sunset clause"

Several objections to the omnibus rule expressed opposition to a 2-year "sunset clause" for the required label statement that accompanies the international, or "radura," logo. They claimed that the logo, by itself, is misleading and will not provide the needed information to the consumer. The objectors said that it is unrealistic to expect all consumers to become informed about the logo in a 2-year period, and that the use of the logo alone would be objectionable. Some of the objectors requested a hearing.

On February 18, 1988, the agency published a proposal to extend the wording requirement (52 FR 4856) and provided 30 days for comment on this proposal. On April 18, 1988, the agency published a final regulation that discussed all comments and extended the wording requirement another 2 years until April 18, 1990 (52 FR 12756). Thus, the agency has agreed that 2 years was too short a time for the wording requirement and has amended the regulation accordingly. Consequently, these requests for a hearing are moot.

D. Ingredient Labeling

Several objections were opposed to irradiation of an ingredient without requiring special labeling on all foods that contain that ingredient. Some of the objectors requested a hearing on whether FDA should require ingredient labeling. The most comprehensive statement of this objection was submitted by HEI, which stated that:

> The FDA ably defends its decision to label irradiated foods to consumers, and then ignores the arguments for informing consumers in the case of irradiated food ingredients. The importance of giving consumers the right to choose is not obliterated by the combination of more than one food item into a food product, so food ingredients should be treated the same as individual food items. FDA did not reveal its selective interpretation of its own rules regarding the labeling of irradiated foods in its proposed rule, so the issue of food ingredients was not addressed in the comments on the proposed rules. Nothing in current law (21 CFR 179) nor in the FDA regulation states that irradiated ingredients are exempt from labeling. Under these regulations, many foods could therefore be exempted from the labeling requirement under the ingredients loophole * * *. Evidence to be presented at the hearings will include consumer demands to be properly informed about the processes to which food has been subjected, the ability of food processors to provide the required labels for food ingredients as well as for individual food items, the logic and necessity of extending the labeling requirements to food ingredients. Evidence would be presented by various consumer organizations such as the National Coalition to Stop Food Irradiation, Coalition for Alternatives in Nutrition and Healthcare, and market research experts, physicians, and scientists.
>
> (HEI Para. III.)

Before establishing a labeling requirement, the agency must have some evidence that such a requirement is necessary and consistent with the

law.[10] The act requires that the label of a food fabricated from two or more ingredients bear the common or usual name of each ingredient (except that spices, flavorings, and colorings need not be declared by name) (21 U.S.C. 343(i)). The act does not require that the label declare details of processing for each ingredient. Special labeling could be required if the processing is material in light of representations made for the food or material with respect to consequences that may result from using the food (21 U.S.C. 321(n)).

FDA concluded that finished foods that had been irradiated should bear special labeling because such processing could cause changes in organoleptic or storage properties. Such changes could be significant in light of the fact that such foods would be perceived as unprocessed without special labeling (51 FR 13376 at 13388, 13389). On the other hand, FDA had no evidence that irradiation of an ingredient would affect the characteristics of a multiple ingredient food in any significant way. Therefore, the agency concluded that the labeling requirements for irradiated ingredients should be the same as for any other processed ingredients, namely, to declare them by their common or usual name without any requirement for stating whether they were processed (51 FR 13376 at 13389).

To justify a hearing, the objectors must proffer evidence that raises an issue of fact with respect to the agency's finding. The objector would have to present evidence that irradiation of an ingredient affected the final product to such an extent that the common or usual name was no longer appropriate, or that the consequences that may result from use of the final food are such that the consumer needs advance notice that an ingredient has been irradiated. HEI has failed to proffer any such evidence, however. HEI merely has stated that it would present evidence from various consumer organizations at a hearing. A hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of the hearing.

The contention that labeling for irradiated ingredients was not addressed in the proposal is not correct. In the February 14, 1984, proposal (49 FR 5714), FDA requested comment on: (1) Whether it should require any type of label statement on food that has been treated by irradiation; and (2) if so, whether the statement should be required only on every food that has been irradiated (first generation food) or also on finished food with respect to each irradiated ingredient (second generation food) (see 49 FR 5714 at 5718). In the proposal, the agency set out its tentative conclusion that special labeling need not be required either when an ingredient was irradiated, or when a whole food was irradiated, and it requested comment on that tentative conclusion. FDA ultimately changed its mind and concluded that all foods that have been irradiated should bear special labeling. However, the agency also concluded that it could find no reason to require special labeling of a food that contains an ingredient processed by irradiation. Thus, the agency did in fact give notice in the proposal that it would consider whether to require special labeling of foods that contain irradiated ingredients.

The objector's statement that neither the current law nor FDA regulations state that irradiated ingredients are exempt from labeling raises an issue of law. Thus, it cannot serve as a basis for a hearing because a hearing will be granted only on the basis of a substantial issue of fact, not on issues of policy or law (21 CFR 12.24(b)(1)). Moreover, the agency has not exempted irradiated ingredients from any requirement of law or regulation. It has simply required special labeling for a finished food that has been irradiated so that consumers will know that it has been processed. As stated earlier, the act requires only that the presence of an ingredient be declared on a label, not a declaration of whether the ingredient has been processed. The objectors have proffered no rationale for concluding that the labeling requirement in this rule is inconsistent with the law.

V. Source of Radiation

One objection to the irradiated pork rule, from a radiation processing company, stated that the sources of radiation should not be limited to cobalt-60 and cesium-137 but should be consistent with the text and the spirit of § 179.26 in the proposed omnibus regulation. The objector requested a hearing.

A hearing will not be granted on factual issues that are not determinative to modifying the regulation (21 CFR 12.24(b)(4)). The irradiated pork rule was based on a petition limited to the two sources of radiation listed. Thus, the objector in requesting consideration of the use of an electron beam source is raising an issue that was not part of that rulemaking. However, in the rulemaking resulting in the omnibus rule, the agency considered use of all radiation sources and issued a rule that permits the use of an electron beam source for the use sought by the objector. Therefore, this objection is moot and needs no further consideration.

VI. Worker Safety

FDA referred comments on the proposed omnibus rule that related to worker safety and plant safety to the Occupational Safety and Health Administration (OSHA) and the Nuclear Regulatory Commission (NRC) because those agencies have jurisdiction over such issues. They advised FDA that current regulatory procedures are adequate to ensure the safety of the worker and of the general public (51 FR 13376 at 13395). HEI requested a hearing, stating:

> The FDA has promulgated a regulation to allow food irradiation using radioactive sources, x-ray equipment, and electron beam equipment without requiring proper and adequate regulations regarding equipment, periodic inspection of facilities and equipment, training of personnel, and related necessary regulations to ensure both worker safety and the safety of the general public.

(HEI Para. IV)

A hearing will not be granted on questions related to regulatory authority outside of FDA's jurisdiction (21 CFR 12.24(b)(5)). The agency stated in the omnibus rule that regulations on worker safety and public safety are governed by laws administered by government agencies other than the FDA. If the objector has any evidence demonstrating that worker safety or the safety of the general public in the vicinity of radiation facilities is not being protected adequately, it should submit such evidence to the agency with regulatory control over operation of the facility. Instead, HEI asserts that FDA's regulation concerning the safety of food does not impose requirements that are properly considered by other agencies under other laws. HEI has proffered no legal basis for issuing worker safety requirements in a food additive regulation nor any reason why its concern is not the proper responsibility of other agencies. Nor has it proffered any factual evidence to support its allegation that current regulations are inadequate. Thus, HEI has not provided any basis for a hearing.

VII. Environmental Impact

In the March 27, 1981, advance notice of proposed rulemaking, the agency requested comments on all aspects of food irradiation, including any environmental impact (46 FR 18992 at

[10] With respect to food labeling, the consumer's right to know has been defined by Congress in the requirements of the Federal Food, Drug, and Cosmetic Act. The agency has no basis to impose additional requirements once a manufacturer has met the statutory obligation.

18993). The agency considered the potential environmental impact when preparing the 1984 proposal and stated that: (1) existing safeguards in the Occupational Safety and Health Administration (OSHA), the Nuclear Regulatory Commission (NRC), the Department of Transportation (DOT), and FDA regulations are adequate to ensure that there will be no adverse environmental impact; (2) radiolytic products formed during processing are of no environmental concern and to the extent that irradiation would replace fumigation by toxic chemicals, it would reduce the amount of toxic residues entering the environment from fumigation; and (3) no evidence exists that exposure to radiation will result in mutant pathogens (49 FR 5714 at 5721). The agency tentatively concluded that the action would not have a significant impact on the human environment and announced that its finding of no significant impact and its environmental assessment document were available for public review. The agency responded to comments on this issue in the omnibus rule and concluded that none of the comments provided any information that would cause it to alter its previous determination (51 FR 13376 at 13395 and 13396).

A. Inadequate Review

HEI requested a hearing on a claim that the regulation allowed greatly expanded uses of food irradiation without an adequate environmental assessment or an appropriate environmental impact statement. HEI's claim was based on two contentions: (1) that there is insufficient assurance that the government agencies responsible for protecting the public from radiation are capable of carrying out that responsibility, and (2) that FDA did not document its claim in the omnibus rule that concerns over the formation of mutant pathogens at food irradiation facilities are unfounded. With respect to the second contention, HEI stated:

> Evidence will be presented from the scientific literature and from appropriate scientists regarding the probability and danger of mutant pathogens being created, and the need for further environmental assessment and preparation of an environmental impact statement regarding this issue.

(HEI Para. V.)

Neither of HEI's contentions justifies a hearing. A hearing will not be granted on the basis of mere allegations or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). HEI must, at a minimum, "raise a material issue concerning which a meaningful hearing might be held." *Pineapple Growers Ass'n of Hawaii* v. *FDA, supra.*

HEI's first contention merely states an opinion that laws on worker and public safety are not properly enforced. As discussed earlier, before it issued its omnibus rule, FDA was advised by the relevant agencies that current regulatory procedures are adequate to ensure that there will be no adverse environmental effects either to the worker or the general public. If HEI wishes to challenge current regulatory procedures, HEI should raise the issue with the agencies in question.

The second contention simply disagrees with FDA's conclusion on the likelihood of producing mutant microorganisms that are more virulant or harmful than the parent microorganism. The agency has responded to this issue earlier in the section on "Mutation of microorganisms." HEI has not proffered any evidence in support of this contention and, thus, has not justified a hearing.

B. Environmental Assessment

In the irradiated pork rule published on July 22, 1985, the agency stated that FDA's environmental regulations (21 CFR Part 25) had been replaced by a more recent rule published in the **Federal Register** of April 26, 1985 (50 FR 16636), and cited the new section that would be applicable to a decision of this type. The new environmental regulation, which became effective on July 25, 1985, set forth policies and supplemental procedures for compliance with the National Environmental Policy Act of 1969 (NEPA).

Several objections to the irradiated pork rule requested a hearing and stated that FDA issued its rule on July 22, 1985, to avoid doing an environmental assessment according to the environmental rules that became effective July 25, 1985.

The accusation that FDA ignored its environmental rule is without merit. The environmental rule that became effective on July 25, 1985, did not establish any requirements that were not followed by FDA in its July 22, 1985, decision. On December 11, 1979 (44 FR 71742), FDA stated in its proposal to revise its rules governing the preparation of environmental impact documents under NEPA, that it would follow the procedures required by that proposal pending publication of the final rule. The final environmental rule that became effective July 25, 1985, did not change those procedures. The objectors have not cited any aspect of the new environmental regulation that was not satisfied by the procedures that the agency followed in adopting the irradiated pork rule. Thus, the objectors have failed to demonstrate that an issue of fact exists and therefore have not justified a hearing under 21 CFR 12.24(b)(1).

C. Petitioner Cited for Violations

Several objections requested a hearing and stated that the petitioner for the irradiated pork rule was cited for safety and environmental violations and should not be entrusted with the safety of food.

A hearing will not be granted on factual issues that are not determinative to the action requested (21 CFR 12.24(b)(4)). A food additive regulation is not a license for an individual petitioner but is a conclusion that actions in compliance with the regulation are safe. The fact that a petitioner was cited for violations is not relevant to whether the use of irradiation to treat food under the conditions of the regulation is safe. Therefore, such information is not a basis for granting a hearing.

VIII. 30-Day Objection Period

Notice was given in the **Federal Register** of July 23, 1984 (50 FR 29682), that FDA was considering a petition to permit irradiation of pork. The irradiated pork regulation, issued a year later on July 22, 1985, provided for a 30-day period for anyone adversely affected by the ruling to file an objection.

Several objections to the irradiated pork rule requested a hearing and stated that the 30-day time period for filing objections is unrealistic and particularly unfair and discriminatory to those located away from the Washington, DC, area.

A hearing will not be granted on issues of policy or law (21 FR 12.24(b)(1)). The time period for objections is established by statute. Section 409(f) of the act (21 U.S.C. 348(f)) provides that any person adversely affected by publication of an order may file objections within 30 days after such order. Thus, the time period for objections is not an issue on which a hearing can be held.

IX. References

The following sources referred to in this document have been placed on display in the Dockets Management Branch (address above), and may be seen between 9 a.m. and 4 p.m., Monday through Friday. References marked with an asterisk [*] are not on display but are available as published books.

1. Taylor, J. M., FDA letter to Kathleen M. Tucker, Health and Energy Institute, February 2, 1987.

2. Tucker, K. M., HEI letter to John M. Taylor, Associate Commissioner for Regulatory Affairs, March 6, 1987.

3. Pauli, G. H., FDA letter to Kathleen M. Tucker, Health and Energy Institute, May 5, 1987.

4. Schaeffer, K., HEI letter to George H. Pauli, Food and Drug Administration, May 21, 1987.

5. Brunetti, A. P., et al., "Recommendations for Evaluating the Safety of Irradiated Foods," final report prepared for the Director, Bureau of Foods, FDA, July 1980.

6. Food Additives Evaluation Branch, "Final Report for the Task Group for the Review of Toxicology Data on Irradiated Foods," memorandum to W. Gary Flamm, April 9, 1982.

*7. Elias, P. S. and A. J. Cohen, "Radiation Chemistry of Major Food Components," Elsevier Scientific Publishing Co., New York, 1977.

8. Simic, M. G., "Radiation Chemistry of Amino Acids and Peptides in Aqueous Solutions," *Journal of Agricultural and Food Chemistry*, 26:6, 1978.

9. Diehl, J. F., et al., "Radiolysis of Carbohydrates and Carbohydrate-Containing Foodstuffs," *Journal of Agricultural and Food Chemistry*, 26:15, 1978.

10. Nawar, W. W., "Reaction Mechanisms in the Radiolysis of Fats: A Review," *Journal of Agricultural and Food Chemistry*, 26:21, 1978.

11. Ward, J. F., "Chemical Consequences of Irradiating Nucleic Acids," *Journal of Agricultural and Food Chemistry*, 26:25, 1978.

12. Merritt, C., Jr., et al., "Effect of Radiation Parameters on the Formation of Radiolysis Products in Meat and Meat Substances," *Journal of Agricultural and Food Chemistry*, 26:29, 1978.

13. Basson, R. A., et al., "An Assessment of the Toxicity of Irradiated Fruits Using Radiation Chemical Principles," in *Proceedings of an International Symposium on Food Preservation by Irradiation,"* vol. II, International Atomic Energy Agency (IAEA–SM–221/50), Vienna, 1978.

14. Chinn, H. I. (Chairman, Select Committee on Health Aspects of Irradiated Beef), "Evaluation of Health Aspects of Certain Compounds Found in Irradiated Beef," Federation of American Societies for Experimental Biology (FASEB), Bethesda, 1977.

15. Chinn, H. I., "Supplement I. Further Toxicological Considerations of Volatile Compounds," FASEB, Bethesda, 1979.

16. Chinn, H. I., "Supplement II. Possible Radiolytic Compounds," FASEB, Bethesda, 1979.

17. Epstein, S. S., and J. W. Gofman, "Irradiation of Foods," *Science*, 223:1354, 1984.

18. Barna, J., "Compilation of Bioassay Data on the Wholesomeness of Irradiated Food Items," *Acta Alimentaria*, 8(3):205, 1979.

19. Bibliography of reports evaluated by the Task Group and the evaluation forms for the referenced reports.

20. Bhaskaram, C. and G. Sadasivan, "Effects of Feeding Irradiated Wheat to Malnourished Children," *American Journal of Clinical Nutrition*, 28:130, 1975.

21. Kesavan, P. C., and P. V. Sukhatame, "Summary of the Technical Report on the Data of NIN, Hyderabad, and BARC, Bombay, on the Biological Effects of Freshly Irradiated Wheat," report submitted to the Indian Ministry of Health and Family Planning, 1976.

22. Task Group, summary evaluation table for in vitro mutagenic studies on grain, 1982.

23. Hickman, J. R., et al., "Rat Feeding Studies on Wheat Treated with Gamma Radiation, I. Reproduction," *Food and Cosmetics Toxicology*, 2:15, 1964.

24. Conning, D. M., "Evaluation of the Irradiation of Animal Feedstuffs," *in "Recent Advances in Food Irradiation,"* edited by Elias, P. S., and A. J. Cohen, Elsevier Biochemical Press, The Netherlands, p. 247, 1983.

25. Vijayalaxmi, "Cytogenetic Studies in Monkeys Fed Irradiated Wheat," *Toxicology*, 9:181, 1978.

26. Vijayalaxmi and G. Sadaswan, "Chromosomal Aberrations in Rats Fed Irradiated Wheat," *International Journal of Radiation Biology*, 27:135, 1975.

27. Vijayalaxmi, "Genetic Effects of Feeding Irradiated Wheat to Mice," *Canadian Journal of Genetics and Cytology*, 18:231, 1976.

28. Joint FAO/IAEA/WHO Expert Committee, "Wholesomeness of Irradiated Food," WHO Technical Report Series, No. 604, Geneva, 1977.

29. Renner, H. W., et al., "An Investigation of the Genetic Toxicology of Irradiated Foodstuffs Using Short-Term Test Systems. III *In vivo* tests in small rodents and in *Drosophila melanogaster*," *Food and Chemical Toxicology*, 20:867, 1982.

30. George, K. P., et al., "Frequency of Polyploid Cells in the Bone Marrow of Rats Fed Irradiated Wheat," *Food and Cosmetics Toxicology*, 14:289, 1976.

31. Renner, H. W., "Chromosome Studies on Bone Marrow Cells of Chinese Hamsters Fed a Radiosterilized Diet," *Toxicology*, 8:213, 1977.

32. Löfroth, G. et al., "Biological Effects of Irradiated Foods. II. Chemical and Biological Studies of Compounds Distilled from Irradiated Foods." *Arkiv Für Zoologi*, 18:529, 1965.

33. Ehrenberg, L., et al., "Biological Effects of Irradiated Foods, I. Effect on Lymphocyte Numbers in the Peripheral Blood of Rat," *Arkiv für Zoologi* Serie 2, 18:195, 1965.

34. Nikitin, I. K., Soviet Ministry of Health, Foreign Affairs Administration, telegram to Mr. Zimmerman, U.S. Department of State, February, 1986.

35. Thayer, D. W., "Summary of Supporting Documents for Wholesomeness Studies of Precooked (Enzyme Inactivated) Chicken Products in Vacuum Sealed Containers Exposed to Doses of Ionizing Radiation Sufficient to Achieve 'Commercial Sterility,'" submitted to the Food and Drug Administration, March 19, 1984.

36. Irradiated Foods Task Group, "Study Reports Indicating Adverse Effects," September 15, 1982.

37. Greenberg, A., and S. M. Wolfe, M.D., objection to FDA, Docket No. 84F–0230, August 20, 1985 (Obj. 27).

38. Raltech Scientific Services, Inc., "Evaluation of the Mutagenicity of Irradiation Sterilized Chicken by the Sex-linked Recessive Lethal Test in *Drosophila melanogaster*," report to U.S. Army Medical Research and Development Command, June, 1979.

39. FDA, Bureau of Foods, "Toxicological Principles for the Safety Assessment of Direct Food Additives and Color Additives Used in Food," 1982.

40. Ralston Purina Co., "Final Report: A Chronic Toxicity, Oncogenicity, and Multigeneration Reproductive Study Using CD–1 Mice to Evaluate Frozen, Thermally Sterilized, Cobalt-60 Irradiated, and 10 MeV Electron Irradiated Chicken Meat," report to U.S. Department of Agriculture, Agricultural Research Service, June 1983.

41. Ralston Purina Co., "Irradiation Sterilized Chicken Meat: A Feeding Study in Rats," report to U.S. Department of Agriculture, Agricultural Research Service, July 1982.

42. Parkash, O., "Introduction of Sex-linked Recessive Lethals and Visible Mutations by Feeding X-irradiated DNA to *Drosophila Melanogaster*," *Nature*, 205:312, 1965.

43. Chopra, V. L., "Tests on *Drosophila* for the Production of Mutations by Irradiated Medium or Irradiated DNA," *Nature*, 208:698, 1965.

44. Khan, A. H., and T. Alderson, "Mutagenic Effect of Irradiated and Unirradiated DNA in *Drosophila*," *Nature*, 208:700, 1965.

45. Ward, J. B., Jr., letter to Commissioner F. Young, FDA, January 3, 1985.

46. Adam, S., "Radiolysis of alpha, alpha-Trehalose in Concentrated Aqueous Solution; The Effect of Co-irradiated Proteins and Lipids," *International Journal of Radiation Biology*, 42:531, 1982.

47. Holsten, R. D., Sugii, and F. C. Steward, "Direct and Indirect Effects of Radiation on Plant Cells: Their Relation to Growth and Growth Induction," *Nature*, 206:850, 1965.

48. Shaw, M. W. and E. Hayes, "Effects of Irradiated Sucrose on the Chromosomes of Human Lymphocytes in Vitro," *Nature*, 213:12544, 1966.

49. Basson, R. A., "Advances in Radiation Chemistry of Food and Food Components—An Overview," *in Recent Advances in Food Irradiation*, edited by Elias, P. S. and A. J. Cohen, Elsevier Biochemical Press, The Netherlands, p. 7, 1983; and references contained therein.

50. Beyers, M., et al., "Chemical Consequences of Irradiation of Subtropical Fruits," *in Recent Advances in Food Irradiation*, edited by Elias, P. S. and A. J. Cohen, Elsevier Biochemical Press, The Netherlands, p. 171, 1983.

51. Board of the International Committee on Food Microbiology and Hygiene, "The Microbiological Safety of Irradiated Food," report of a meeting with participation of WHO, FAO, and IAEA, Copenhagen, December 16, 1982, CX/FH 83/9, and references contained therein.

52. Mossel, D. A. A., "Health Protection Aspects of Food Irradiation at the Pasteurization Level," *Acta Alimentaria*, 6(3):253, 1977.

53. Joint FAO/IAEA/WHO Expert Committee, "Wholesomeness of Irradiated Food," WHO Technical Report Series 659, Geneva, 1981.

54. Ingram, M. and J. Farkas, "Microbiology of Foods Pasteurized by Ionizing Radiation," *Acta Alimentaria*, 6:123, 1977.

*55. Graham, H. D., "Safety and Wholesomeness of Irradiated Foods," *in "The Safety of Foods,"* 2d ed., edited by Graham, H. D., Avi Publishing Co., Westport, CT, p. 574, 1980.

56. Behere, A. G., et al., "Production of Aflatoxins during Storage of Gamma-Irradiated Wheat," *Journal of Food Science*, 43:1102, 1978.

57. Centers for Disease Control, "Annual summary 1984: reported morbidity and mortality in the United States," *Morbidity Mortality Weekly Report*, 33(54), 1986.

58. Simic, M. G., M. Dizaroglu, and E. Degraff, "Radiation Chemistry—Extravaganza or an Integral Component of Radiation Processing of Food," *Radiation Physics Chemistry*, 22:233, 1983.

59. Kesavan, P. C., "Indirect Effects of Radiation in Relation to Food Preservation: Facts and Fallacies," *Journal of Nuclear Agriculture and Biology*, 7:93, 1978.

60. Renner, H. W., and D. Reichelt, "Zur Frage der Gesundheitlichen Unbedenklichkeit Hohen Kozentrationen von Freien Radikalen in Bestrahlin Lebensmitteln," *Zentralblatt fur Veterinarmedizin. Reihe B.* 20:648, 1973.

61. Reichelt, D., H. W. Renner, and J. F. Diehl, "Long Term Animal Feeding Study for Testing the Wholesomeness of Irradiated Diet with a High Content of Free Radicals," translation by the Department of the Army, Federal Research Institute for Food Preservation, Karlsruhe, 1972.

62. Urbain, W. M., "Food Irradiation," *Advances in Food Research*, 24:155, 1978.

63. Heck, H. d'A., et al., "Formaldehyde (CH_2O) Concentrations in the Blood of Humans and Fischer-344 Rats Exposed to CH_2O Under Controlled Conditions," *American Industrial Hygiene Association Journal*, 46(1):1, 1985.

64. Mohler, K. and G. Denbsky, "Zur Bestimmung des Formaldehyds in Lebensmitteln," *Zeitschrift fur Lebensmittel-Untersuchung und-Forschung, (Berlin)*, 42:109, 1970.

65. Lorenz, K. and J. Maga, "Staling of White Bread: Changes in Carbonyl Composition and glc Headspace Profiles," *Journal of Agriculture and Food Chemistry*, 20:211, 1972.

66. Radford, T. and D. E. Dalsis, "Analysis of Formaldehyde in Shrimp by High-Pressure Liquid Chromatography," *Journal of Agriculture and Food Chemistry*, 30:600, 1982.

67. Lawrence, J. F., and J. R. Iyengar, "The Determination of Formaldehyde in Beer and Soft Drinks by HPLC of the 2,4-Dinitrophenylhydrazone Derivative," *International Journal of Environmental Analytical Chemistry*, 15:47, 1983.

68. Kerns, W. D., K. L. Pankov, D. J. Donofrio, E. J. Gralla, and J. A. Swenberg, "Carcinogenicity of Formaldehyde in Rats and Mice After Long-Term Inhalation Exposure," *Cancer Research*, 43:4382, 1983.

69. Ito, A., H. Watanabe, and M. Naito, "Prevalence of Gastric Erosions and Duodenal Tumors with a Continuous Oral Administration of Hydrogen Peroxide in C57B1/6J Mice," Unpublished, Docket No. 79F-0318.

70. Koch, H. W. and E. H. Eisenhower, "Radioactivity Criteria for Processing of Foods," National Bureau of Standards Report, 1965.

71. Lee, F. A., R. F. Brooks, A. M. Pearson, J. I. Miller and J. J. Wanderstock, "Effect of Rate of Freezing on Pork Quality, Appearance, Palatability, and Vitamin Content," *Journal of the American Dietetic Association*, 30:351, 1954.

72. Leher, W. P., Jr., A. C. Wiese, W. R. Harvey and P. R. Moore, "Effect of Frozen Storage and Subsequent Cooling on the Thiamin, Riboflavin, and Nicotinic Acid Content of Pork Chops," *Food Research*, 16:485, 1951.

73. Fennema, O., "Effects of Freeze-Preservation on Nutrients," *in "Nutritional Evaluation of Food Processing,"* 2d Ed., edited by Harris, R. S. and E. Karmas, ACI Publishing, Westport, CT, 1975, p. 244.

74. Azar, M., et al., "The Effect of Irradiation on the Composition of Iranian Rice," Communication to WHO, Ministry of Health and Welfare, Iran, 1979. (Reference not available).

75. Andrews, J. S., J. F. Mead, and W. H. Griffith, "Toxicity of Lipid Peroxides in the Rat," *Federation Proceedings*, 15:918, 1956.

76. Schreiber, M. and E. S. Nasset, "Digestion of Irradiated Fat *in Vivo.*," *Journal of Applied Physiology*, 14:639, 1959.

X. Summary and Conclusions

Based on a comprehensive evaluation of all relevant evidence, the agency concluded that food irradiated under the conditions of the April 18, 1986, omnibus final rule and the July 22, 1985, irradiated pork final rule is safe. The agency received objections to these rules relating to food safety, nutritional quality, labeling, worker safety, environmental impact, the statutory objection period, and the permitted sources of radiation. The agency has determined that the information submitted by the objectors does not raise material issues of fact that would justify an evidentiary hearing on any of the objections. The agency has also determined that the objections do not demonstrate a basis for revoking or amending the regulations except for clarifying wording on the items permitted to be irradiated. Thus, for the reasons stated in the discussions above, FDA is responding to the objections by amending the regulation as stated below and by denying all requests for a hearing.

XI. Objections

Any person who will be adversely affected by the amendment to § 179.26(b) regarding the description of aromatic vegetable substances may at any time on or before January 30, 1988 file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 179

Food additives, Food labeling, Food packaging, Irradiation of foods, Radiation protection, Reporting and recordkeeping requirements, Signs and symbols.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 179 is amended to read as follows:

PART 179—IRRADIATION IN THE PRODUCTION, PROCESSING, AND HANDLING OF FOOD

1. The authority citation for 21 CFR Part 179 continues to read as follows:

Authority: Secs. 201(s), 409, 72 Stat. 1784–1788 as amended (21 U.S.C. 321(s), 348); 21 CFR 5.10; §§ 179.25 and 179.26 also are issued under secs. 402, 403, 703, 704, 52 Stat. 1046–1048 as amended, 1057, 67 Stat. 477 as amended (21 U.S.C. 342, 343, 373, 374); 21 CFR 5.10, 5.11.

2. Section 179.26 is amended in the table in paragraph (b) by revising the fifth entry under the headings "Use" and "Limitations" to read as follows:

§ 179.26 Ionizing radiation for the treatment of food.

* * * * *

(b) * * *

Use	Limitations
* * * * *	
For microbial disinfection of the following dry or dehydrated aromatic vegetable substances when used as ingredients in small amounts solely for flavoring or aroma: culinary herbs, seeds, spices, vegetable seasonings that are used to impart flavor but that are not either represented as, or appear to be, a vegetable that is eaten for its own sake, and blends of these aromatic vegetable substances. Turmeric and paprika may also be irradiated when they are to be used as color additives.	Not to exceed 30 kGy (3 Mrad).
* * * * *	

* * * * *

Dated: December 21, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88–29885 Filed 12–29–88; 8:45 am]

BILLING CODE 4160–01–M

federal register

Friday
December 30 1988

Part IV

Department of Commerce

International Trade Administration

Binational Panel Reviews and Extraordinary Challenge Committees; United States-Canada Free-Trade Agreement; Notice

DEPARTMENT OF COMMERCE

International Trade Administration

Binational Panel Reviews and Extraordinary Challenge Committees; United States-Canada Free-Trade Agreement

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: Under Article 1904 of the United States-Canada Free-Trade Agreement ("Agreement") signed on January 2, 1988, the Government of the United States and the Government of Canada negotiated rules of procedure for Article 1904 binational panels and Article 1904 extraordinary challenge committees.

EFFECTIVE DATE: These rules take effect on the date that the Agreement enters into force.

FOR FURTHER INFORMATION CONTACT: Lisa B. Koteen, (202) 377–1754, or Jean Heilman Grier, (202) 377–0833.

SUPPLEMENTARY INFORMATION:

Background

Chapter 19 of the U.S.-Canada Free-Trade Agreement ("Agreement") establishes a mechanism for replacing domestic judicial review of determinations in antidumping and countervailing duty cases involving imports from the other country with review by independent binational panels. These panels acting in place of national courts will, if requested, expeditiously review final determinations to determine whether they are consistent with the antidumping or countervailing duty law of the country that made the determination. Title IV of the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100–449, 102 Stat. 1851 (1988) amends U.S. law to implement Chapter 19 of the Agreement.

The Rules of Procedure for Article 1904 Binational Panel Reviews are intended to give effect to the provisions of Chapter 19 of the Agreement with respect to panel reviews conducted pursuant to Article 1904 of the Agreement. These Rules set forth the procedures for requesting and conducting panel reviews.

The Rules of Procedure for Article 1904 Extraordinary Challenge Committees are intended to give effect to the provisions of Chapter 19 of the Agreement with respect to extraordinary challenges conducted pursuant to Article 1904 of the Agreement. These Rules prescribe the procedures for the initiation, conduct, and completion of extraordinary challenges of panel reviews.

These Rules are the result of negotiations between the United States and Canada to carry out Article 1904 of the Agreement.

Rules of Procedure for Article 1904 Binational Panel Reviews

U.S.-Canada Free Trade Agreement

Contents

Preamble

Rule

1. Short Title
2. General Intent
3. Interpretation

Part I—General

6. Duration and Scope of Panel Review
8. Responsibilities of the Secretary
17. Internal Functioning of Panels
19. Computation of Time
21. Counsel of Record
22. Filing, Service and Communications
28. Pleadings and Simultaneous Translation of Panel Reviews in Canada
32. Costs

Part II—Commencement of Panel Review

33. Notice of Intent to Commence Judicial Review
34. Request for Panel Review
36. Joint Panel Reviews
39. Complaint
40. Notice of Appearance
41. Record for Review

Part III—Panels

44. Announcement of Panel
45. Violation of Code of Conduct

Part IV—Proprietary Information and Privileged Information

46. Filing under Seal
48. Disclosure Orders and Protective Orders
55. Privileged Information
57. Violations of Disclosure Undertakings and Protective Orders

Part V—Written Proceedings

58. Form and Content of Pleadings
60. Filing of Briefs
61. Failure to File Briefs
62. Content of Briefs
63. Motions

Part VI—Oral Proceedings

67. Location
68. Pre-hearing Conference
69. Oral Argument
70. Subsequent Authorities
71. Oral Proceedings *in Camera*

Part VII—Decisions and Completions of Panel Reviews

72. Orders and Decisions
75. Panel Review of Action on Remand
76. Re-examination of Orders and Decisions
78. Delay in Delivery of Decisions

Part VIII—Completion of Panel Review

Schedule A—Disclosure Undertaking Forms

Schedule B—Protective Order Application Forms

Preamble

The Parties,

Having regard to Chapter Nineteen of the Free Trade Agreement between Canada and the United States of America;

Acting pursuant to Article 1904.14 of the Agreement;

Adopt the following Rules of Procedure, which shall come into force on the same day as the Agreement comes into force and shall from that day govern all panel reviews conducted pursuant to Article 1904 of the Agreement.

Short Title

1. These Rules may be cited as the *Article 1904 Panel Rules.*

Statement of General Intent

2. These Rules are intended to give effect to the provisions of Chapter Nineteen of the Agreement with respect to panel reviews conducted pursuant to Article 1904 of the Agreement and are designed to result in decisions of panels within 315 days after the commencement of the panel review. The purpose of these Rules is to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904. Where a procedural question arises that is not covered by these Rules, a panel may adopt the procedure to be followed in the particular case before it by analogy to these Rules.

Interpretation

3. In these Rules,

"Agreement" means the Free Trade Agreement between Canada and the United States of America, signed on January 2, 1988;

"Code of Conduct" means the code of conduct established by the Parties pursuant to Article 1910 of the Agreement;

"Complainant" means a Party or interested person that files a Complaint pursuant to rule 39;

"Counsel" means

(a) With respect to a panel review of a final determination made in the United States, a person entitled to appear as counsel before a federal court in the United States; and

(b) With respect to a panel review of a final determination made in Canada, a person entitled to appear as counsel before the Federal Court of Canada;

"Counsel of record" means a counsel referred to in subrule 21(1);

"Deputy Minister" means the Deputy Minister of National Revenue for Customs and Excise or his successor and includes any person authorized to perform any power, duty or function of the Deputy Minister under the *Special Import Measures Act;*

"Final determination" includes, in the case of Canada, a definitive decision within the meaning of subsection 77.1(1) of the *Special Import Measures Act;*

"First Request for Panel Review" means

(a) Where only one Request for Panel Review is filed for review of a final determination, that Request, and

(b) Where more than one Request for Panel Review is filed for review of the same final determination, the Request that is filed first;

"Government information" means

(a) With respect to a panel review of a final determination made in Canada, information

(i) The disclosure of which would be injurious to international relations or national defense or security,

(ii) That constitutes a confidence of the Queen's Privy Council for Canada, or

(iii) Contained in government to government correspondence that is transmitted in confidence, and

(b) With respect to a panel review of a final determination made in the United States, information classified in accordance with Executive Order No. 12065 or its successor;

"Interested person" means a person that, pursuant to the laws of the country in which a final determination was made, would be entitled to commence proceedings for judicial review of the final determination;

"Investigating authority" means the competent investigating authority that issued the final determination subject to review;

"Legal holiday" means

(a) With respect to the United States section of the Secretariat, Saturday, Sunday, New Year's Day (January 1), Martin Luther King's Birthday (third Monday in January), Washington's Birthday (third Monday in February), Memorial Day (last Monday in May), Independence Day (July 4), Labor Day (first Monday in September), Columbus Day (second Monday in October), Veterans' Day (November 11), Thanksgiving Day (fourth Thursday in November), Christmas Day (December 25), any day designated as a holiday by the President or the Congress of the United States, and any day on which the offices of the Government of the United States located in the District of Columbia are officially closed; and

(b) With respect to the Canadian section of the Secretariat, Saturday, Sunday, New Year's Day (Janaury 1), Good Friday, Easter Monday, Victoria Day (third Monday in May), Canada Day (July 1), Labour Day (first Monday in September), Thanksgiving Day (second Monday in October), Remembrance Day (November 11), Christmas Day (December 25), Boxing Day (December 26), and any other day fixed as a statutory holiday by the Government of Canada or by the province in which the section is located;

"Panel" means a binational panel established pursuant to Annex 1901.2 to Chapter Nineteen of the Agreement for the purpose of reviewing a final determination;

"Participant" means any of the following that files a Complaint pursuant to rule 39 or a Notice of Appearance pursuant to rule 40:

(a) A Party,

(b) An investigating authority,

(c) An interested person, and

(d) In the case of a panel review of a final determination made in Canada, a person that, pursuant to the laws of Canada, would be entitled to appear and be represented in a judicial review of the final determination;

"Party" means the Government of Canada or the Government of the United States;

"Person" means

(a) An individual,

(b) A Party,

(c) An investigating authority,

(d) A government of a province, state or other political subdivision of the country of a Party,

(e) A department, agency or body of a Party or of a government referred to in paragraph (d), or

(f) A partnership, corporation or association;

"Pleading" means a Request for Panel Review, a Complaint, a Notice of Appearance, a Change of Service Address, a Designation of Record, a Notice of Motion, a Notice of Change of Counsel of Record, a brief and any other written submission filed by a participant;

"Privileged information" means

(a) With respect to a panel review of a final determination made in Canada, information of the investigating authority that is subject to solicitor-client privilege under the laws of Canada or constitutes part of the deliberative process with respect to the final determination and with respect to which the privilege has not been waived, and

(b) With respect to a penal review of a final determination made in the United States, information of the investigating authority that is subject to the attorney-client, attorney work product or government deliberative process privilege under the laws of the United States and with respect to which the privilege has not been waived;

"Proof of service" means

(a) With respect to a panel review of a final determination made in Canada,

(i) An affidavit of service stating by whom the document was served, the day of the week and date on which it was served, where it was served and the manner of service, or

(ii) An acknowledgment of service by counsel for a participant stating by whom the document was served, the day of the week and date on which it was served and the manner of service and, where the acknowledgment is signed by a person other than the counsel, the name of that person followed by a statement that the person is signing as agent for the counsel, and

(b) With respect to a panel review of a final determination made in the United States,

(i) A certificate of service in the form of a statement of the date and manner of service and of the name of the person served, signed by the person who made service, or

(ii) An acknowledgment of service by the person served stating by whom the document was served and the date and manner of service;

"Proprietary information" means

(a) With respect to a panel review of a final determination made in the United States, business proprietary information under the laws of the United States, and

(b) With respect to a panel review of a final determination made in Canada, information that was accepted by the Deputy Minister or the Tribunal as confidential in the proceedings before the Deputy Minister or the Tribunal and with respect to which the person that designated or submitted the information has not withdrawn the person's claim as to the confidentiality of the information;

"Responsible Secretariat" means the section of the Secretariat located in the country in which the final determination under review was made;

"Responsible Secretary" means the Secretary of the responsible Secretariat;

"Secretariat" means the Secretariat established pursuant to Article 1909 of the Agreement;

"Secretary" means the Secretary of the United States section or the Secretary of the Canadian section of the Secretariat and includes any person authorized to act on behalf of the Secretary;

"Service address" means

(a) With respect to a Party, the facsimile number, if any, and address filed as the service address of the Party with the Secretariat,

(b) With respect to a person other than a Party, the facsimile number, if any, and address of the counsel of record for the person or, where the person is not represented by counsel, the facsimile number, if any, and address set out by the person in a Request for Panel Review, Complaint or Notice of Appearance as the address at which the person may be served, or

(c) Where a Change of Service Address has been filed by a Party or the person, the facsimile number, if any, and address set out as the service address in that form;

"Service list" means, with respect to a panel review,

(a) Where the final determination was made in the United States, the list maintained by the investigating authority of persons that have been served in the proceedings leading to the final determination, and

(b) Where the final determination was made in Canada, the list of persons to whom notice of the final determination was sent by the Deputy Minister or the list of persons that appeared in the proceedings before the Tribunal, as the case may be;

"Tribunal" means the Canadian Import Tribunal or its successor and includes any person authorized to act on its behalf.

4. The definitions set forth in Article 1911 of the Agreement are hereby incorporated into these Rules.

5. Where these Rules require notice to be given, it shall be given in writing.

Part I—General

Duration and Scope of Panel Review

6. A panel review commences on the day on which a first Request for panel Review is filed with the Secretariat and terminates on the day on which a Notice of Completion of Panel Review is effective.

7. Panel review shall be limited to

(a) The allegations of error of fact or law, including the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review; and

(b) Procedural and substantive defenses raised in the panel review.

Responsibilities of the Secretary

8. The normal business hours during which the offices of the Secretariat shall be open to the public shall be 9:00 a.m. to 5:00 p.m. each weekday except

(a) In the case of the United States section of the Secretariat, legal holiday of that section; and

(b) In the case of the Canadian section of the Secretariat, legal holidays of that section.

9. The responsible Secretary shall provide administrative support for each panel review and shall make the arrangements necessary for the oral proceedings and meetings of each panel, including court reporters to record the oral proceedings and, if required, interpreters to provide simultaneous translation.

10. Each Secretary shall maintain a file for each panel review comprised of either the original or a copy of all documents filed in the panel review. The file number assigned to a first Request for Panel Review shall be the Secretariat file number for all documents filed or issued in that panel review. All documents filed shall be stamped by the Secretariat to show the date and time of receipt.

11. The responsible Secretary shall forward to the other Secretary a copy of all documents filed in the office of the Secretary in a panel review and all orders and decisions issued by a panel.

12. (1) Where under these Rules a responsible Secretary is required to cause a notice or other document to be published in the *Canada Gazette* and the **Federal Register**, the responsible Secretary shall forthwith

(a) Cause the notice or other document to be published in the publication of the country in which the responsible Secretariat is located; and

(b) Send a copy of the notice or other document to the other Secretary, together with a request that the other Secretary cause the notice or other document to be published in the publication of the other country.

(2) On receipt of a request referred to in subrule (1)(b) the other Secretary shall comply with the request as soon as possible.

13. (1) Each Secretary and every member of the staff of the Secretariat shall, before taking up his duties, file

(a) A Disclosure Undertaking, in the form referred to in Schedule A, with the Deputy Minister and the Tribunal; and

(b) A Protective Order Application, in the form referred to in Schedule B, with the International Trade Administration of the United States Department of Commerce and the United States International trade Commission.

(2) Where a Secretary or a member of the staff of the Secretariat files a Disclosure Undertaking or Protective Order Application in accordance with subrule (1), the appropriate investigating authority shall issue to the Secretary or the member a Disclosure Order or a Protective Order, as the case may be.

14. (1) Every panelist, assistant to a panelist, court reporter and translator shall, before taking up his duties in a panel review, file with the investigating authority a Disclosure Undertaking, in the form referred to in Schedule A or a Protective Order Application, in the form referred to in Schedule B, as the case may be.

(2) Where a panelist, an assistant to a panelist, a court reporter or a translator files a Disclosure Undertaking or a Protective Order Application in accordance with subrule (1), the investigating authority shall issue the Disclosure Order or Protective Order, as the case may be.

(3) The responsible Secretary shall ensure that every panelist, assistant to a panelist, court reporter and translator, before taking up his duties in a panel review, files with the responsible Secretariat

(a) In the case of a panelist, four copies of a Disclosure Order or of a Protective Order, signed by him; and

(b) In any other case, four copies of a Disclosure Order or of a Protective Order.

15. Where a document containing proprietary information or privileged information is filed with the Secretariat in a panel review, each Secretary shall ensure that

(a) The document is stored in an area dedicated to the storage of documents containing proprietary information or privileged information and the area is identified as such an area;

(b) The wrapper of the document is clearly marked to indicate that it contains propietary information or privileged information, as the case may be; and

(c) Access to the document is limited to

(i) In all cases, officials of and counsel for the investigating authority whose final determination is under review,

(ii) In the case of proprietary information, the person who submitted the proprietary information to the investigating authority or counsel for that person,

(iii) In the case of proprietary information, persons who have filed with the responsible Secretariat a Disclosure Order or Protective Order with respect to the document, and

(iv) In the case of privileged information filed in a panel review of a final determination made in the United States, persons with respect to whom the panel has ordered disclosure of the privileged information under rule 55, if the persons have filed with the responsible Secretariart a Protective Order with respect to the document.

16. (1) Each Secretary shall permit access by any person to the information in the file in a panel review that is not proprietary information or privileged information and shall provide copies of that information on request and payment of an appropriate fee.

(2) Each Secretary shall, in accordance with subrule 15(c) and the terms of the applicable Disclosure Order, Protective Order or order of the panel

(a) Permit access to proprietary information or privileged information in the file of a panel review; and

(b) On payment of an appropriate fee, provide a copy of the information referred to in subrule (a).

(3) No document filed in a panel review shall be removed from the offices of the Secretariat except in the ordinary course of the business of the Secretariat or pursuant to the direction of a panel.

Internal Functioning of Panels

17. (1) A panel may adopt its own internal procedures, not inconsistent with these Rules, for routine administrative matters.

(2) Subject to subrule 26(b), meetings of a panel may be conducted by means of a telephone conference call.

18. The deliberations of a panel shall take place in private and remain secret and only panelists may take part in the deliberations. Staff of the responsible Secretariat and assistants to panelists may be present by permission of the panel.

Computation of Time

19. (1) In computing any time period fixed in these Rules or by an order or decision of a panel, the day from which the time period begins to run shall be excluded and, subject to subrule (2), the last day of the time period shall be included.

(2) Where the last day of a time period computed in accordance with subrule (1) falls on a legal holiday of the responsible Secretariat, that day and any other legal holiday of the responsible Secretariat immediately following that day shall be excluded from the computation.

20. A panel may extend any time period fixed in these Rules if

(a) Adherence to the time period would result in unfairness or prejudice to a participant or the breach of a general legal principle of the country in which the final determination was made;

(b) The time period is extended only to the extent necessary to avoid the unfairness, prejudice or breach;

(c) The decision to extend the time period is concurred in by four out of the five panelists; and

(d) In fixing the extension, the panel takes into account the intent of the Rules to secure just, speedy and inexpensive reviews of final determinations.

Counsel of Record

21. (1) A counsel who signs any document filed pursuant to these Rules on behalf of a participant shall be the counsel of record for the participant from the date of filing until a change is effected in accordance with subrule (2).

(2) A participant may change its counsel of record by filing with the responsible Secretariat a Notice of Change of Counsel of Record signed by the new counsel, together with proof of service on the former counsel and the other participants.

Filing, Service and Communications

22. Subject to subrules 14(3), 41(5)(b), 41(6), and 48(1) and rules 43, 52 and 55, no document is filed with the Secretariat until one original and eight copies of the document are received by the responsible Secretariat during its normal business hours and within the time period fixed for filing.

23. The responsible Secretary shall be responsible for the service of documents as follows:

(a) Notices of Intent to Commence Judicial Review shall be served on each Party and the investigating authority;

(b) Requests for Panel Review, Complaints and Notices of Appearance shall be served on the Parties, the investigating authority and the persons listed on the service list; and

(c) Disclosure Orders, Protective Orders, decisions and orders of a panel and Notices of Completion of Panel Review shall be served on the participants.

24. (1) Subject to subrule (4), all documents filed by a participant, other than the administrative record, an item of the administrative record filed pursuant to subrule 41(5) or rule 43 and documents required by rule 23 to be served by the responsible Secretary, shall be served by the participant on the counsel of record of the other participants, or where a participant is not represented by counsel, on the participant.

(2) A proof of service shall appear on, or be affixed to, all documents referred to in subrule (1).

(3) Where a document is served by an expedited delivery courier or mail service, the date of service set out in the affidavit of service or certificate of service shall be

(a) In the case of a panel review of a final determination made in the United States, the day on which the document is consigned to the courier service or is mailed; and

(b) In the case of a panel review of a final determination made in Canada, the date that is five days after the day on which the document is consigned to the courier service or is mailed.

(4) A document containing proprietary information or privileged information shall be under seal in accordance with rule 46 and shall be served only on

(a) The investigating authority; and

(b) Participants that have been granted access to the proprietary information or privileged information under a Disclosure Order, Protective Order or order of the panel, as the case may be.

25. (1) Subject to subrule 26(a), service of a document may be effected in the following manner:

(a) By delivering a copy of the document to the service address of the participant;

(b) By sending a copy of the document to the service address of the participant by facsimile transmission or an expedited delivery courier or mail service, such as express mail in the United States or Priority Post in Canada; or

(c) By personal service on the participant.

26. Where proprietary information or privileged information is disclosed in a panel review to a person pursuant to a Disclosure Order or Protective Order, the person shall not

(a) File, serve or otherwise communicate the proprietary information or privileged information by facsimile transmission; or

(b) Communicate the proprietary information or privileged information by telephone.

27. Service on an investigating authority shall not constitute service on a Party and service on a Party shall not constitute service on an investigating authority.

Pleadings and Simultaneous Translation of Panel Reviews in Canada

28. Rules 29 to 31 apply with respect to a panel review of a final determination made in Canada.

29. Either English or French may be used by any person or panelist in any document or oral proceeding.

30. (1) Subject to subrule (2), any order or decision, including the reasons therefor, issued by a panel shall be made available simultaneously in both English and French where

(a) In the opinion of the panel, the order or decision is in respect of a question of law of general public interest or importance; or

(b) The proceedings leading to the issuance of the order or decision were conducted in whole or in part in both English and French.

(2) Where

(a) An order or decision issued by a panel is not required by subrule (1) to be made available simultaneously in English and French, or

(b) An order or decision is required by subrule (1)(a) to be made available simultaneously in both English and French but the panel is of the opinion that to make the order or decision available simultaneously in both English and French would occasion a delay prejudicial to the public interest or result in injustice or hardship to any participant, the order or decision, including the reasons therefor, shall be issued in the first instance in either English or French and thereafter at the earliest possible time in the other language, each version to be effective from the time the first version is effective.

(3) Nothing in subrule (1) or (2) shall be construed as prohibiting the oral delivery in either English or French of any order or decision or any reasons therefor.

(4) No order or decision is invalid by reason only that it was not made or issued in both English and French.

31. (1) Any oral proceeding conducted in both English and French shall be translated simultaneously.

(2) Where a participant requests simultaneous translation of oral proceedings in a panel review, the request shall be made as early as possible in the panel review and preferably at the time of filing a Complaint or Notice of Appearance.

(3) Where the chairperson of a panel is of the opinion that there is a public interest in the panel review, the chairperson may direct the responsible Secretary to arrange for simultaneous translation of any of the oral proceedings in the panel review.

Costs

32. Each participant shall bear the costs of and incidental to its own participation in any panel review.

Part II—Commencement of Panel Review

Notice of Intent to Commence Judicial Review

33. (1) Where an interested person intends to commence judicial review of a final determination, the interested person shall

(a) Where the final determination was made in the United States, serve a Notice of Intent to Commence Judicial Review on

(i) Both Secretaries,

(ii) The investigating authority, and

(iii) All persons listed on the service list; and

(b) Where the final determination was made in Canada,

(i) Serve a Notice of Intent to Commence Judicial Review on both Secretaries and all persons listed on the service list, and

(ii) Cause the Notice of Intent to Commence Judicial Review to be published in the *Canada Gazette*.

(2) Where the final determination referred to in subrule (1) was made in Canada, the Secretary of the Canadian section shall serve a copy of the Notice of Intent to Commence Judicial Review on the investigating authority.

(3) Every Notice of Intent to Commence Judicial Review referred to in subrule (1) shall include the following information:

(a) The name and service address of the interested person filing the Notice;

(b) The name and telephone number of counsel for the interested person or, where the interested person is not represented by counsel, the telephone number of the interested person;

(c) The title of the final determination for which judicial review is sought, the investigating authority that issued the final determination, the file number assigned by the investigating authority and the appropriate citation if the final determination was published in the *Canada Gazette* or the **Federal Register**; and

(d) The date on which the notice of the final determination was received by the other Party if the final determination was not published in the *Canada Gazette* or the **Federal Register**.

Request for Panel Review

34. (1) A Request for Panel Review shall be made in accordance with the requirements of

(a) Section 77.11 or 96.3 of the *Special Import Measures Act* and regulations made thereunder;

(b) Section 516A of the *Tariff Act of 1930*, as amended, and regulations made thereunder; or

(c) Section 408 of the *United States-Canada Free Trade Agreement Implementation Act of 1988*, as amended, and regulations made thereunder.

(2) A request for Panel Review shall contain the following information:

(a) The name and service address of the Party or interested person requesting panel review;

(b) The name and telephone number of counsel for the Party or interested person or, where the interested person is not represented by counsel, the telephone number of the interested person;

(c) The title of the final determination for which panel review is requested, the investigating authority that issued the final determination, the file number assigned by the investigating authority and the appropriate citation, if the final determination was published in the *Canada Gazette* or the **Federal Register**;

(d) The date on which notice of the final determination was received by the other Party, if the final determination was not published in the *Canada Gazette* or the **Federal Register**;

(e) Where a Notice of Intent to Commence Judicial Review has been served and the sole reason that the Request for Panel Review is made is to require review of the final determination by a panel, a statement to that effect; and

(f) The Service list.

35. (1) On receipt of a first Request for Panel Review filed within the time period fixed in the Act referred to in paragraph 34(1)(a), (b) or (c) pursuant to which the Request for Panel Review is made, the responsible Secretary shall

(a) Forthwith forward a copy of the Request to the other Secretary;

(b) Forthwith inform the other Secretary of the Secretariat file number; and

(c) Serve a copy of the first Request for Panel Review on the persons listed on the service list together with a statement setting out the date on which the Request was filed and stating that

(i) A Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with rule 39 within 30 days after the filing of the first Request for Panel Review.

(ii) A Party, investigating authority or interested person that does not file a Complaint may participate in the panel review by filing a Notice of Appearance in accordance with rule 40 within 45 days after the filing of the first Request for Panel Review,

(iii) In the case of a final determination made in Canada, any person that would be entitled to appear and be represented in a judicial review of the final determination may participate in the panel review by filing a Notice of Appearance in accordance with rule 40 within 45 days after the

filing of the first Request for Panel Review, and

(iv) The panel review shall be limited to the allegations of error of fact or law, including the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review and the procedural and substantive defense raised in the panel review.

(2) On the filing of a first Request for Panel Review each Secretary shall forthwith cause a notice of that Request to be published in the *Canada Gazette* and the *Federal Register*. The notice shall state that a Request for Panel Review has been received and shall specify the date on which the Request was filed, the final determination for which review is requested and the information set out in subrule (1)(c).

Joint Panel Reviews

36. (1) Subject to subrules (3) and 37(1), where a panel is established to review a final determination made under paragraph 41(1)(a) of the *Special Import Measures Act* that applies with respect to particular goods of the United States and a first Request for Panel Review of a final determination made under paragraph 43(1) of that Act with respect to those goods is filed, on the request of a participant in the former panel review or an interested person listed in the service list of the latter panel review that certifies that it intends to become a participant in the latter panel review, the final determinations shall be reviewed jointly by one panel unless a participant in the former panel review or an interested person listed in the service list of the latter panel review that certifies that it intends to become a participant in that panel review objects.

(2) Subject to subrules (3) and 37(2), where a panel is established to review a final determination made under section 705(a) or 735(a) of the *Tariff Act of 1930*, as amended, that applies with respect to particular goods of Canada and a first Request for Panel Review of a final determination made under section 705(b) or 735(b) of that Act with respect to those goods is filed, on the request of a participant in the former panel review or an interested person listed in the service list of the latter panel review that certifies that it intends to become a participant in the latter panel review, the final determinations shall be reviewed jointly by one panel unless a participant in the former panel review or an interested person listed in the service list of the later panel review that certifies that it intends to become a participant in that panel review objects.

(3) A request for joint panel review or an objection to joint panel review may be filed at any time before, but no later than, 20 days after the first Request for Panel Review of the final determination made under paragraph 43(1) of the *Special Import Measures Act* or section 705(b) or 735(b) of the *Tariff Act of 1930*, as amended, is filed.

37. (1) Where a panel is established to review a final determination made under paragraph 41(1)(a) of the *Special Import Measures Act* that applies with respect to particular goods of the United States and a Request for Panel Review of a negative final determination made under paragraph 43(1) of that Act with respect to those goods is filed, the final determinations shall be reviewed jointly by one panel.

(2) Where a panel is established to review a final determination made under section 705(a) or 735(a) of the *Tariff Act of 1930*, as amended, that applies with respect to particular goods of Canada and a Request for Panel Review of a negative final determination made under section 705(b) or 735(b) of that Act with respect to those goods is filed, the final determinations shall be reviewed jointly by one panel.

38. (1) Subject to subrule (2), where final determinations are reviewed jointly pursuant to rule 36 or 37, the time periods fixed for the review of the final determination made under paragraph 43(1) of the *Special Import Measures Act* or section 705(b) or 735(b) of the *Tariff Act of 1930*, as amended, shall apply.

(2) Where final determinations are reviewed jointly pursuant to rule 37, the panel shall issue its decision with respect to the final determination made under paragraph 43(1) of the *Special Import Measures Act* or section 705(b) or 735(b) of the *Tariff Act of 1930*, as amended, and where the panel remands the final determination to the investigating authority and the Determination on Remand is affirmative, the panel shall promptly thereafter issue its decision with respect to the final determination made under paragraph 41(1)(a) of the *Special Import Measures Act* or section 705(a) or 735(a) of the *Tariff Act of 1930*, as amended.

Complaint

39. (1) Any interested person that intends to make allegations of errors of fact or law, including the jurisdiction of the investigating authority, with respect to the final determination shall file with the responsible Secretariat a Complaint within 30 days after the filing of a first Request for Panel Review of a final determination.

(2) Every Complaint referred to in subrule (1) shall contain the following information:

(a) The name and service address of the complainant;

(b) The name and telephone number of the counsel for the complainant or, where the complainant is not represented by counsel, the telephone number of the complainant;

(c) The Secretariat file number for the panel review;

(d) The precise nature of the Complaint, including the applicable standard of review and the allegations of error of fact or law, including the jurisdiction of the investigating authority; and

(e) Where the final determination was made in Canada, a statement as to whether the complainant

(i) Intends to use English or French in pleadings and oral proceedings before the panel, and

(ii) Requests simultaneous translation of any oral proceedings.

Notice of Appearance

40. Within 45 days after the filing of a first Request for Panel Review of a final determination, the investigating authority and any other person that is entitled to and proposes to participate in the panel review and that has not filed a Complaint in the panel review shall file with the responsible Secretariat a Notice of Appearance containing the following information:

(a) The name and service address of the investigating authority or other person filing the Notice of Appearance;

(b) The name and telephone number of the counsel for the investigating authority or other person filing the Notice of Appearance, and, where the person is not represented by counsel, the telephone number of the person;

(c) The Secretariat file number for the panel review;

(d) In the case of a Notice of Appearance filed by an investigating authority, admissions, if any, with respect to the allegations set out in the Complaints;

(e) A statement as to whether appearance is made in support of

(i) The investigating authority,

(ii) A complainant, or

(iii) Both the investigating authority and a complainant; and

(f) Where the final determination was made in Canada, a statement as to whether the person filing the Notice of Appearance

(i) Intends to use English or French in pleadings and oral proceedings before the panel, and

(ii) Requests simultaneous translation of any oral proceedings.

Record for Review

41. (1) The investigating authority whose final determination is under review shall file with the responsible Secretariat, within 5 days after the expiration of the time period fixed for filing a Complaint, an Index comprised of a descriptive list of all items contained in the administrative record with proof of service of the Index on persons listed on the service list.

(2) An Index referred to in subrule (1) shall, where applicable, identify those items that contain proprietary information, privileged information or government information by a statement to that effect.

(3) Within 10 days after an Index is filed pursuant to subrule (1), each complainant shall, and any other participant may, file with the responsible Secretariat, together with proof of service on the investigating authority and on the other participants, a Designation of Record, designating those items in the Index that the complainant or participant considers relevant to the panel review and requests be filed by the investigating authority.

(4) Where a complainant or participant, in a Designation of Record referred to in subrule (3), designates an item identified as containing privileged information, the complainant or participant shall file, together with the Designation of Record, a Notice of Motion for disclosure of the document containing the privileged information in accordance with subrule 55(1).

(5) Within 15 days after the expiration of the time period fixed for filing a Designation of Record, the investigating authority shall file with the responsible Secretariat

(a) The final determination including reasons for the final determination, if any;

(b) Subject to subrules (6), (7) and (8), two copies of

(i) Any item listed in the Index and designated by the complainants or participants pursuant to subrule (3) and any other item listed in the Index that the investigating authority considers relevant to the panel review, or

(ii) The administrative record; and

(c) The Index marked to identify those items filed by the investigating authority.

(6) Where a document containing proprietary information is filed under subrule (5)(b) or rule 43, it shall be filed under seal in accordance with rule 46 and, where a non-proprietary description of the proprietary information has been filed with the investigating authority, four copies of that description shall be filed with the Secretariat at the same time as the document.

(7) No privileged information shall be filed with the responsible Secretariat unless it is filed pursuant to an order of a panel made under subrule 55 (3)(b), (7) or (8).

(8) No government information shall be filed with the Secretariat unless the investigating authority, after having reviewed the government information and, where applicable, pursued appropriate administrative review procedures, determines that the information may be disclosed.

42. The responsible Secretary shall give notice to all participants of the date on which the administrative record is filed pursuant to subrule 41(5).

43. Subject to subrules 41 (6), (7) and (8), where a panel directs, on its own motion or pursuant to the motion of a participant, that any part of the administrative record relevant to the panel review be filed with the responsible Secretariat, the investigating authority shall forthwith file two copies of the part with the responsible Secretariat.

Part III—Panels

Announcement of Panel

44. On the completion of the selection of a panel, the responsible Secretary shall notify the participants and the other Secretary of the names of the panelists.

Violation of Code of Conduct

45. Where a participant in a panel review believes that a panelist is in violation of the Code of Conduct, the participant shall forthwith notify a Party in writing of the alleged violation.

Part IV—Proprietary Information and Privileged Information

Filing under Seal

46. (1) Where, under these Rules, a document containing proprietary information or privileged information is required to be filed under seal with the Secretariat or is required to be served under seal, the document shall be filed or served in accordance with this rule and, where the document is a pleading, with rule 59.

(2) A document filed or served under seal shall be

(a) Bound separately from all other documents;

(b) Clearly marked

(i) In the case of a document containing proprietary information, "proprietary" or "confidential", and

(ii) In the case of a document containing privileged information, "privileged"; and

(c) Contained in an opaque inner and an opaque outer wrapper.

(3) An inner wrapper referred to in subrule (2)(c) shall disclose

(a) That proprietary information or privileged information is enclosed, as the case may be; and

(b) The Secretariat file number of the panel review.

47. Filing or service of proprietary information or privileged information with the Secretariat shall not constitute a waiver of the designation of the information as proprietary information or privileged information.

Disclosure Orders and Protective Orders

48. (1) A counsel of record or a professional retained by, or under the control or direction of, a counsel of record who wishes disclosure of proprietary information in a panel review shall file a Disclosure Undertaking, in the form referred to in Schedule A, or a Protective Order Application, in the form referred to in Schedule B, as the case may be, with respect to the proprietary information as follows:

(a) Four copies with the responsible Secretariat; and

(b) One copy with the investigating authority.

(2) A Disclosure Undertaking or Protective Order Application referred to in subrule (1) shall be served

(a) Where the Disclosure Undertaking or Protective Order Application is filed before the expiration of the time period fixed for filing a Notice of Appearance in the panel review, on the persons listed in the service list; or

(b) In any other case, on all participants, in accordance with subrule 24(1).

49. Where a Disclosure Undertaking or Protective Order Application is filed pursuant to subrule 48(1), the investigating authority shall serve the Disclosure Undertaking or Protective Order Application on the person that submitted the proprietary information to the investigating authority.

50. (1) The investigating authority shall, within 30 days after a Disclosure Undertaking or Protective Order Application is filed with it in accordance with subrule 48(1), serve on the person who filed the Disclosure Undertaking or Protective Order Application

(a) A Disclosure Order or Protective Order as the case may be; or

(b) A notification in writing setting out the reasons why a Disclosure Order or Protective Order is not issued.

(2) At the same time as serving the document referred to in subrule (1) (a) and (b), the investigating authority shall serve a copy of the document on the person that submitted the proprietary information.

51. (1) Where an investigating authority refuses to issue a Disclosure Order or Protective Order to a counsel of record or to a professional retained by, or under the control or direction of, a counsel of record or where the investigating authority issues a Disclosure Order or Protective Order with terms unacceptable to the counsel of record, the counsel of record may file with the responsible Secretariat a Notice of Motion requesting that the panel review the decision of the investigating authority.

(2) Where, after consideration of any response made by the investigating authority referred to in subrule (1), the panel decides that a Disclosure Order or Protective Order should be issued or that the terms of a Disclosure Order or Protective Order should be modified, the panel shall so notify counsel for the investigating authority.

(3) Where the final determination was made in the United States and the investigating authority fails to comply with the notification referred to in subrule (2), the panel may issue such orders as are just in the circumstances, including, without limiting the generality of the foregoing,

(a) An order refusing to permit the investigating authority to make certain arguments in support of its case or striking certain arguments from its pleadings; or

(b) An order resolving issues relating to the non-disclosed information in a manner contrary to the position of the investigating authority.

52. Where a Disclosure Order or Protective Order is issued to a person in a panel review, the person shall file four copies of the Disclosure Order or of the Protective Order with the responsible Secretariat.

53. A Disclosure Order or a Protective Order may be amended by the investigating authority at any time in a panel review if the person named in the Disclosure Order or Protective Order signs a declaration acknowledging that his Disclosure Undertaking of Protective Order Application applies with respect to the amendment.

54. Where a Disclosure Order or Protective Order is issued to a person, the person is entitled

(a) To access to the document; and

(b) Where the person is a counsel of record, to a copy of the document containing the proprietary information, on payment of an appropriate fee, and to service of pleadings containing the proprietary information.

Privileged Information

55. (1) A Notice of Motion for disclosure of a document in the administrative record identified as containing privileged information shall set out

(a) The reasons why disclosure of the document is necessary to the case of the participant filing the Notice of Motion; and

(b) A statement of any point of law or legal authority relied on, together with a concise argument in support of disclosure.

(2) Within 10 days after a Notice of Motion referred to in subrule (1) is filed, the investigating authority shall, if it intends to respond, file the following in response:

(a) An affidavit of an official of the investigating authority stating that, since the filing of the Notice of Motion, the official has examined the document and has determined that disclosure of the document would constitute disclosure of privileged information; and

(b) A statement of any point of law or legal authority relied on, together with a concise argument in support of non-disclosure.

(3) After having reviewed the Notice of Motion referred to in subrule (1) and the response referred to in subrule (2), if any, the panel may order

(a) That the document shall not be disclosed; or

(b) That the investigating authority file two copies of the document under seal with the responsible Secretariat in order that two panelists may examine the document.

(4) In a panel review of a final determination made in the United States, before examining a document in accordance with subrule (6) or (8), a panelist shall file with the responsible Secretariat four copies of a Protective Order with respect to the document, signed by him.

(5) The panel shall select the two panelists to make the examination referred to in subrule (3)(b) in such a way that one is a lawyer who is a citizen of Canada and the other a lawyer who is a citizen of the United States.

(6) The two panelists selected under subrule (5) shall

(a) Examine the document *in camera;* and

(b) Communicate their decision, if any, to the panel.

(7) The decision referred to in subrule (6)(b) shall be issued as an order of the panel.

(8) Where the two panelists selected under subrule (5) fail to come to a decision, the panel shall

(a) Examine the document *in camera;* and

(b) Issue an order with respect to the disclosure of the document.

(9) Where an order referred to in subrule (7) or (8) is to the effect that the document shall not be disclosed, the responsible Secretary shall return all copies of the document to the investigating authority by serving them under seal on the investigating authority.

56. In a panel review of a final determination made in the United States, where, pursuant to subrule 55 (3)(b), (7) or (8) disclosure of a document is granted to a person, the investigating authority shall issue to that person a Protective Order with respect to that document in accordance with the order of the panel.

Violations of Disclosure Undertakings and Protective Orders

57. Where any person alleges that the terms of a Disclosure Undertaking or Protective Order have been violated, the panel shall refer the allegations to the investigating authority for investigation and, where applicable, the imposition of sanctions in accordance with section 77.26 of the *Special Import Measures Act* or section 777(d) of the *Tariff Act of 1930,* as amended.

Part V—Written Proceedings

Form and Content of Pleadings

58. (1) Every pleading filed in a panel review shall have a heading that sets out the following information:

(a) The title of and the Secretariat file number for the panel review, if assigned;

(b) A brief descriptive title of the pleading; and

(c) The name and service address of the participant on whose behalf the pleading is filed.

(2) Every pleading filed in a panel review shall be on paper 8½ X 11 inches (216 millimetres by 279 millimetres) in size. The text of the pleading shall be printed, typewritten or reproduced legibly on one side only with a margin of approximately 1½ inches (40 millimetres) on the left-hand side with double-spacing between each line of text, except for quotations of more than 50 words, which shall be indented and single-spaced. Footnotes, titles, schedules, tables, graphs and columns of figures shall be presented in a readable

form. Briefs shall be securely bound along the left-hand margin.

(3) Every pleading filed on behalf of a participant in a panel review shall be signed by counsel for the participant or, where the participant is not represented by counsel, by the participant.

59. (1) Where a participant files a pleading that contains proprietary information, the participant shall file two sets of the pleading in the following manner:

(a) One set of pleadings under seal containing the proprietary information and labelled "Proprietary" or "Confidential" with the top of each page that contains proprietary information marked with the word "Proprietary" or "Confidential" and with the proprietary information enclosed in brackets; and

(b) One set of pleadings labelled "Non-Proprietary" or "Non-Confidential" with each page from which proprietary information has been deleted bearing a legend indicating the location from which the proprietary information was deleted.

(2) Where a participant files a pleading that contains privileged information, the participant shall file two separate sets of the pleading in the following manner:

(a) One set of pleadings under seal containing the privileged informatin and labelled "Privileged" with the top of each page that contains privileged information marked with the word "Privileged" and with the privileged information enclosed in brackets; and

(b) One set of pleadings labelled "Non-Privileged" with each page from which privileged information has been deleted bearing a legend indicating the location from which the privileged information was deleted.

Filing of Briefs

60. (1) Every complainant and every participant that filed a Notice of Appearance in support of a complainant or in support of both a complainant and the investigating authority shall file a brief no later than 60 days after the day on which the administrative record is filed under subrule 41(5).

(2) The investigating authority and every participant that filed a Notice of Appearance in support of the investigating authority, other than a participant referred to in subrule (1), shall file a brief no later than 60 days after the expiration of the time period for the filing of briefs referred to in subrule (1).

(3) A reply brief may be filed by a complainant or by a participant that filed a Notice of Appearance in support of a complainant or in support of both a complainant and the investigating authority, no later than 15 days after the expiration of the time period fixed for the filing of the brief of the investigating authority and shall be limited to rebuttal of matters that were contained in the briefs filed pursuant to subrule (2) and that were not addressed in the briefs filed pursuant to subrule (1).

(4) Any number of participants may join in a single brief, and any participant may adopt by reference any part of the brief of another participant.

(5) A participant may file a brief without appearing to present oral argument.

(6) Where a panel review of a final determination made by an investigating authority of the United States with respect to certain goods involves issues that may relate to the final determination of another competent investigating authority with respect to those goods, the latter investigating authority may file an *amicus curiae* brief in the panel review in accordance with subrule (2).

Failure to File Briefs

61. (1) Where a participant fails to file a brief within the time period fixed, the panel may order that the participant is not entitled

(a) To present oral argument;

(b) To service of any further pleadings, orders or decisions in the panel review; or

(c) To further notice of the proceedings in the panel review.

(2) Where no brief is filed by any complainant or by any interested person in support of any of the complainants within the time period fixed, a participant may make a motion for a panel decision dismissing the panel review.

(3) Where no brief is filed by an investigating authority or by any interested person in support of the investigating authority within the time period fixed, the complainant or an interested person in support of a complainant may make a motion for a panel decision referred to in rule 74 that is in accordance with the relief sought in its brief.

Content of Briefs

62. (1) Every brief shall contain information in the following order, divided into five parts:

Part I: A table of contents with page references and a table of authorities cited, with reference to the pages of the brief where they are cited and with cases alphabetically arranged;

Part II: A statement of the case:

(a) In the brief of a complainant or of a participant that filed a Notice of Appearance in support of a complainant or in support of both a complainant and the investigating authority, this part shall contain a concise statement of the relevant facts;

(b) In the brief of an investigating authority or of a participant that filed a Notice of Appearance in support of the investigating authority, other than a participant referred to in paragraph (a), this part shall contain a concise statement of the position of the investigating authority or the participant with respect to the statement of facts set out in the briefs referred to in paragraph (a), including a concise statement of other facts relevant to its case; and

(c) In all briefs, references to evidence in the administrative record shall be made by page and, where practicable, by line.

Part III: A statement of the issues:

(a) In the brief of a complainant or of a participant that filed a Notice of Appearance in support of a complianant or in support of both a complainant and the investigating authority, this part shall contain a concise statement of the issues; and

(b) In the brief of an investigating authority or of a participant that filed a Notice of Appearance in support of the investigating authority, other than a participant referred to in paragraph (a), this part shall contain a concise statement of the position of the investigating authority or the participant with respect to each issue relevant to its case.

Part IV: Argument:

This part shall consist of the argument setting out concisely the points of law relating to the issues with applicable citations to authorities and the administrative record.

Part V: Relief:

This part shall consist of a concise statement of the precise relief requested.

(2) Paragraphs in Parts I to V of a brief may be numbered consecutively.

Motions

63. (1) A motion shall be made by Notice of Motion in writing unless the circumstances make it unnecessary or impracticable.

(2) Every Notice of Motion and affidavit in support thereof, if any, shall be filed with the responsible Secretariat together with proof of service on all participants.

(3) Every Notice of Motion shall contain the following information:

(a) The title of the panel review, the Secretariat file number for that panel review and a brief descriptive title indicating the purpose of the motion;

(b) A statement of the precise relief requested;

(c) A statement of the grounds to be argued, including a reference to any rule, point of law or legal authority to be relied on, together with a concise argument in support of the motion;

(d) A statement as to whether other participants consent to the motion, if ascertainable; and

(e) Where necessary, references to evidence in the administrative record by page and, where practicable, by line.

(4) The pendency of any motion in a panel review shall not alter any time period fixed in these Rules or by an order or decision of the panel.

64. Unless the panel otherwise orders, a participant may file a response to a Notice of Motion if the response is filed within 10 days after the Notice of Motion is filed.

65. Subject to rule 66, at the direction of the chairperson, the responsible Secretary shall fix a date, time and place for the hearing of a motion and shall notify all participants of the same.

66. (1) A motion may be disposed of without personal appearance by the participants.

(2) The panel may, subject to subrule 26(b), direct that a motion be heard by means of a telephone conference call with the participants.

Part VI—Oral Proceedings

Location

67. Oral proceedings in a panel review shall take place at the office of the responsible Secretariat or at such other location as the responsible Secretary may arrange.

Pre-hearing Conference

68. (1) A panel may hold a pre-hearing conference and the responsible Secretary shall give notice of the conference to all participants.

(2) A participant may request that the panel hold a pre-hearing conference by filing with the responsible Secretariat a written request setting out the matters that the participant proposes to raise at the conference.

(3) The purpose of a pre-hearing conference shall be to facilitate the expeditious advancement of the panel review by addressing such matters as

(a) The clarification and simplification of the issues;

(b) The procedure to be followed at the hearing of oral argument; and

(c) Any outstanding motions.

(4) Subject to subrule 26(b), a pre-hearing conference may be conducted by means of a telephone conference call.

(5) Following a pre-hearing conference, the panel shall promptly issue an order setting out its rulings with respect to the matters considered at the conference.

Oral Argument

69. (1) A panel shall commence the hearing of oral argument no later than 30 days after the expiration of the time period fixed for filing reply briefs. At the direction of the panel, the responsible Secretary shall notify all participants of the date, time and place for the oral argument.

(2) Oral argument, limited to the issues in dispute and subject to the time constraints set by the panel, shall, unless the panel otherwise orders, be presented in the following order:

(a) The complainants and any participant that filed a brief in support of a complainant or in support of both a complainant and the investigating authority;

(b) The investigating authority and any participant that filed a brief in support of the investigating authority, other than a participant referred to in subrule (a); and

(c) Argument in reply, in the discretion of the panel.

(3) If a participant fails to appear at oral argument, the panel may hear argument on behalf of the other participants that are present. If no participant appears, the panel may decide the case on the basis of briefs.

Subsequent Authorities

70. (1) At any time before or after the conclusion of oral argument but before the panel has issued its decision, a participant that has filed a brief may bring to the attention of the panel a decision or judgment of a court that is relevant to the panel review and that was issued subsequent to the filing of the brief or the conclusion of oral argument by filing with the responsible Secretariat a written request setting out the citation of the decision or judgment, the page reference of the brief of the participant to which the decision or judgment relates and a concise statement, no more than one page in length, of the relevance of the decision or judgment.

(2) A request referred to in subrule (1) shall be filed as soon as possible after the issuance of the decision or judgment by the court.

(3) Where a request referred to in subrule (1) is filed with the responsible Secretariat, any other participant may file a concise statement, no more than one page in length, in response within five days of the day that the request was filed.

Oral Proceedings in Camera

71. During that part of oral proceedings in which proprietary information or privileged information is presented, a panel shall not permit any person other than the following persons to be present:

(a) The person presenting the proprietary information or privileged information;

(b) A person who has been granted access to the proprietary information or privileged information under a Disclosure Order, Protective Order or an order of a panel;

(c) In the case of proprietary information, a person as to whom the confidentiality of the propietary information has been waived; and

(d) Officials of and counsel for the investigating authority.

Part VII—Decisions and Completions of Panel Reviews

Orders and Decisions

72. The responsible Secretary shall cause notice of every decision of a panel to be published in the *Canada Gazette* and the **Federal Register.**

73. Where a Notice of Motion requesting dismissal of a panel review is filed by a participant, the panel may issue an order terminating the panel review and, where the motion is consented to by all the participants, the panel shall issue an order terminating the panel review.

74. A panel shall issue a written decision with reasons, together with any dissenting or concurring opinions of the panelists, in accordance with Article 1904.8 of the Agreement.

Panel Review of Action on Remand

75. (1) An investigating authority shall give notice of the action taken pursuant to a remand of the panel by filing with the responsible Secretariat a Determination on Remand is filed requesting that the panel review the Determination on Remand within the time specified by the panel.

(2) Where a participant files a Notice of Motion no later than 15 days after the day on which a Determination on Remand is filed requesting that the panel review the Determination on Remand, the panel shall, within 10 days after the Notice of Motion is filed, order a review of the Determination on Remand or dismiss the motion.

(3) Unless otherwise ordered by the panel, there shall be no oral argument in support of the motion referred to in subrule (2).

(4) Where a panel orders a review of a Determination on Remand, the responsible Secretary shall serve the order on all the participants, together with a notice stating that a participant may file.

(a) Written submissions in respect of the Determination on Remand no later

than 15 days after the day on which the order was issued; and

(b) A response to the written submission referred to in subrule (a) within 15 days after the submissions are filed.

(5) Where a panel orders a review of a Determination on Remand, the panel shall issue a written decision with respect to its review of the Determination on Remand no later than 90 days after the Determination on Remand is filed.

Re-examination of Orders and Decisions

76. A clerical error in an order or decision of a panel, or an error in an order or decision of a panel arising from any accidental oversight, inaccuracy or omission may be corrected by the panel at any time during the panel review.

77. (1) A participant may, within 10 days after a panel issues its decison, file a Notice of Motion requesting that the panel re-examine its decision for the purpose of correcting an accidental oversight, inaccuracy or omission and setting out

(a) The oversight, inaccuracy or omission with respect to which the request is made;

(b) The relief requested; and

(c) A statement as to whether other participants consent to the motion, if ascertainable.

(2) The grounds for a motion referred to in subrule (1) shall be limited to one or both of the following grounds:

(a) That the decision does not accord with the reasons therefor; or

(b) That some matter has been accidentally overlooked, stated inaccurately or omitted by the panel.

(3) No Notice of Motion referred to in subrule (1) shall set out any argument already made in the panel review.

(4) There shall be no oral argument in support of a motion referred to in subrule (1).

(5) Subject to subrule (6), there shall be no response to a motion referred to in subrule (1) unless the panel otherwise orders.

(6) Before granting a motion referred to in subrule (1), the panel shall give the participants an opportunity to file a response to the motion but in no case shall the time period fixed for the response be more than 15 days after the Notice of Motion is filed.

Delay in Delivery of Decisions

78. Where a panelist becomes unable to fulfill panel duties, is disqualified or dies, panel proceedings and computations of time shall be suspended, pending the appointment of a substitute panelist in accordance with the procedures set out in Annex 1901.2 to Chapter Nineteen of the Agreement.

79. Where a panelist becomes unable to fulfill panel duties, is disqualified or dies after the oral argument, the chairperson may order that the matter be reheard on such terms as are appropriate after selection of a substitute panelist.

Part VIII—Completion of Panel Review

80. Where a panel issues an order referred to in rule 73 terminating the panel review, the responsible Secretary shall cause to be published in the *Canada Gazette* and the **Federal Register** a Notice of Completion of Panel Review, effective

(a) Where all the participants consent to the dismissal, on the day after the day on which the order of the panel is issued;

(b) Where no request for an extraordinary challenge committee is filed within 30 days after the order is issued, on the 31st day; and

(c) Where a request for an extraordinary challenge committee is filed within 30 days after the order is issued, on the day referred to in rule 59 of the *Extraordinary Challenge Committee Rules.*

81. Where a panel issues a decision referred to in subrule 61(2) or a decision referred to in rule 74 that affirms the final determination, the responsible Secretary shall, 31 days after the decision is issued and if no request for an extraordinary challenge committee is filed, cause to be published in the *Canada Gazette* and the **Federal Register** a Notice of Completion of Panel Review, effective on the 31st day.

82. Where a panel issues a decision referred to in rule 74 that remands to the investigating authority, the responsible Secretary shall, 46 days after the Determination on Remand is filed and if no Notice of Motion referred to in subrule 75(2) is filed and no request for an extraordinary challenge committee is filed, cause to be published in the *Canada Gazette* and the **Federal Register** a Notice of Completion of Panel Review effective on the 46th day.

83. Where a panel issues a decision referred to in subrule 75(5) and no request for an extraordinary challenge committee is filed, the responsible Secretary shall cause to be published in the *Canada Gazette* and the **Federal Register** a Notice of Completion of Panel Review, effective on the 31st day after that decision is issued.

84. Where a request for an extraordinary challenge committee is filed within 30 days or 45 days after the decision of the panel referred to in subrule 61(2), rule 74 or subrule 75(5), as the case may be, the responsible Secretary shall cause to be published in the *Canada Gazette* and the **Federal Register** a Notice of Completion of Panel Review, effective on the day referred to in rule 59 of the *Extraordinary Challenge Committee Rules.*

85. Panelists are discharged from their duties on the day on which a Notice of Completion of Panel Review is effective.

Schedule A—Disclosure Undertaking Forms

Available from the Deputy Minister or the Tribunal, as the case may be, in the form in use on the same day as the Agreement comes into force or a form containing substantially the same terms.

Schedule B—Protective Order Application Forms

Available from the International Trade Administration of the United States Department of Commerce or the United States International Trade Commission, as the case may be, in the form in use on the same day as the Agreement comes into force or a form containing substantially the same terms.

Rules of Procedure for Article 1904 Extraordinary Challenge Committees

U.S.-Canada Free Trade Agreement

Contents

Preamble

Rule

1. Short Title
2. General Intent
3. Interpretation

Part I General

6. Duration of Extraordinary Challenge
7. Responsibilities of the Secretary
14. Internal Functioning of Committees
16. Computation of Time
18. Counsel of Record
19. Filing, Service and Communications
25. Legal Principles
27. Pleadings and Simultaneous Translation of Extraordinary Challenge Proceedings in Canada
31. Costs
32. Announcement of Committee
33. Violations of Disclosure Undertakings and Protective Orders

Part II Extraordinary Challenges Exclusively Under Article 1904.13(a) (ii) or (iii)

34. Requests for an Extraordinary Challenge Committee
36. Service of Requests for an Extraordinary Challenge Committee
37. Notices of Appearance
38. Filing of Briefs

Part III Other Extraordinary Challenges

39. Personal Information
40. Requests for an Extraordinary Challenge Committee
42. Notices of Appearance

44. Service of Requests and Appearances
45. Conduct of Proceedings

Part IV Written Proceedings

47. Filing under Seal
49. Form and Content of Pleadings
51. Content of Briefs
52. Motions

Part V Oral Proceedings

53. Oral Argument
54. Oral Proceedings *in Camera*

Part VI Orders and Decisions

Part VII Completion of Extraordinary Challenges

Schedule A—Disclosure Undertaking Forms

Schedule B—Protective Order Application Forms

Preamble

The Parties,

Having regard to Chapter Nineteen of the Free Trade Agreement between Canada and the United States of America;

Acting pursuant to Article 1904.14 of the Agreement;

Adopt the following Rules of Procedure, which shall come into force on the same day as the Agreement comes into force, and shall from that day govern all extraordinary challenge committee proceedings conducted pursuant to Article 1904 of the Agreement.

Short Title

1. These Rules may be cited as the *Extraordinary Challenge Committee Rules.*

Statement of General Intent

2. These Rules are intended to give effect to the provisions of Chapter Nineteen of the Agreement with respect to extraordinary challenges conducted pursuant to Article 1904 of the Agreement and to result in decisions typically within 30 days after the establishment of the committee. Where a procedural question arises that is not covered by these Rules, a committee may adopt an appropriate procedure to be followed.

Interpretation

3. In these Rules,

"Agreement" means the Free Trade Agreement between Canada and the United States of America, signed on January 2, 1988;

"Code of Conduct" means the code of conduct established by the Parties pursuant to Article 1910 of the Agreement;

"Committee" means an extraordinary challenge committee established pursuant to Annex 1904.13 to Chapter Nineteen of the Agreement;

"Counsel" means:

(a) With respect to a panel review of a final determination made in the United States, a person entitled to appear as counsel before a federal court in the United States; and

(b) With respect to a panel review of a final determination made in Canada, a person entitled to appear as counsel before the Federal Court of Canada;

"Counsel of record" means a counsel referred to in subrule 18(1);

"Deputy Minister" means the Deputy Minister of National Revenue for Customs and Excise or his successor and includes any person authorized to perform any power, duty or function of the Deputy Minister under the *Special Import Measures Act;*

"Final determination" includes, in the case of Canada, a definitive decision within the meaning of subsection 77.1(1) of the *Special Import Measures Act;*

"Investigating authority" means the competent investigating authority that issued the final determination that was the subject of the panel review to which an extraordinary challenge relates;

"Legal holiday" means:

(a) With respect to the United States section of the Secretariat, Saturday, Sunday, New Year's Day (January 1), Martin Luther King's Birthday (third Monday in January), Washington's Birthday (third Monday in February), Memorial Day (last Monday in May), Independence Day (July 4), Labor Day (first Monday in September), Columbus Day (second Monday in October), Veterans' Day (November 11), Thanksgiving Day (fourth Thursday in November), Christman Day (December 25), any day designated as a holiday by the President or the Congress of the United States, and any day on which the offices of the Government of the United States located in the District of Columbia are officially closed; and

(b) With respect to the Canadian section of the Secretariat, Saturday, Sunday, New Year's Day (January 1), Good Friday, Easter Monday, Victoria Day (third Monday in May), Canada Day (July 1), Labour Day (first Monday in September), Thanksgiving Day (second Monday in October), Remembrance Day (November 11), Christman Day (December 25), Boxing Day (December 26), and any other day fixed as a statutory holiday by the Government of Canada or by the province in which the section is located;

"Panel" means a binational panel established pursuant to Annex 1901.2 to Chapter Nineteen of the Agreement, the decision of which is the subject of an extraordinary challenge;

"Participant" means a Party that files a Request for an Extraordinary Challenge Committee and any of the following that files a Notice of Appearance pursuant to these Rules:

(a) A Party,

(b) A participant in the panel review that is the subject of the extraordinary challenge, and

(c) A panelist against whom an allegation referred to in Article 1904.13(a)(i) of the Agreement is made;

"Party" means the Government of Canada or the Government of the United States;

"Person" means:

(a) An individual,

(b) A Party,

(c) An investigating authority,

(d) A government of a province, state or other political subdivision of the country of a Party,

(e) A department, agency or body of a Party or of a government referred to in paragraph (d), or

(f) A partnership, corporation or association;

"Pleading" means a Request for an Extraordinary Challenge Committee, a Notice for an Extraordinary Challenge Committee, a Notice of Appearance, a Change of Service Address, a Notice of Change of Counsel of Record, a brief and any other written submission filed by a participant;

"Privileged information" means:

(a) With respect to an extraordinary challenge of a panel review of a final determination made in Canada, information of the investigating authority that is subject to solicitor-client privilege under the laws of Canada or constitutes part of the deliberative process with respect to the final determination and with respect to which the privilege has not been waived, and

(b) With respect to an extraordinary challenge of a panel review of a final determination made in the United States, information of the investigating authority that is subject to the attorney-client, attorney work product or government deliberative process privilege under the laws of the United States and with respect to which the privilege has not been waived;

"Proof of service" means:

(a) With respect to an extraordinary challenge of a panel review of a final determination made in Canada,

(i) An affidavit of service stating by whom the document was served, the day of the week and date on which it was served, where it was served and the manner of service, or

(ii) An acknowledgement of service by counsel for a participant stating by whom the document was served, the

day of the week and date on which it was served and the manner of service and, where the acknowledgement is signed by a person other than the counsel, the name of that person followed by a statement that the person is signing as agent for the counsel, and

(b) With respect to an extraordinary challenge of a panel review of a final determination made in the United States.

(i) A certificate of service in the form of a statement of the date and manner of service and of the name of the person served, signed by the person who made service, or

(ii) An acknowledgement of service by the person served stating by whom the document was served and the date and manner of service;

"Proprietary information" means:

(a) With respect to an extraordinary challenge of a panel review of a final determination made in the United States, business proprietary information under the laws of the United States, and

(b) With respect to an extraordinary challenge of a panel review of a final determination made in Canada, information that was accepted by the Deputy Minister or the Tribunal as confidential in the proceedings before the Deputy Minister or the Tribunal and with respect to which the person that designated or submitted the information has not withdrawn the person's claim as to the confidentiality of the information;

"Responsible Secretariat" means, with respect to an extraordinary challenge of a panel review, the section of the Secretariat located in the country in which the final determination reviewed by the panel was made;

"Responsible Secretary" means the Secretary of the responsible Secretariat;

"Secretariat" means the Secretariat established pursuant to Article 1909 of the Agreement;

"Secretary" means the Secretary of the United States section or the Secretary of the Canadian section of the Secretariat and includes any person authorized to act on behalf of the Secretary;

"Service address" means:

(a) With respect to a Party or panelist, the facsimile number, if any, and address filed as the service address of the Party or panelist with the Secretariat,

(b) With respect to a participant other than a Party or panelist, the service address of the participant in the panel review, or

(c) Where a Change of Service Address has been filed by a participant, the facsimile number, if any, and address set out as the service address in that form;

"Tribunal" means the Canadian Import Tribunal or its successor and includes any person authorized to act on its behalf.

4. The definitions set forth in Article 1911 of the Agreement are hereby incorporated into these Rules.

5. Where these Rules require notice to be given, it shall be given in writing.

Part I—General

Duration of Extraordinary Challenge

6. An extraordinary challenge commences on the day on which a Request for an Extraordinary Challenge Committee is filed with the Secretariat and terminates on the day on which a Notice of Completion of Extraordinary Challenge is effective.

Responsibilities of the Secretary

7. The responsible Secretary shall provide administrative support for each extraordinary challenge proceeding and shall make the arrangements necessary for meetings and any oral proceedings and, if required, interpreters to provide simultaneous translation.

8. Each Secretary shall maintain a file for each extraordinary challenge comprised of either the original or a copy of all documents filed in the extraordinary challenge proceeding. All documents filed shall be stamped by the Secretariat to show the date and time of receipt.

9. The responsible Secretary shall forward to the other Secretary a copy of all documents filed with the responsible Secretary and all orders and decisions issued by a committee.

10. (1) Where under these Rules a responsible Secretary is required to cause a notice or other document to be published in the *Canada Gazette* and the **Federal Register**, the responsible Secretary shall forthwith:

(a) Cause the notice or other document to be published in the publication of the country in which the responsible Secretariat is located; and

(b) Send a copy of the notice or other document to the other Secretary, together with a request that the other Secretary cause the notice or other document to be published in the publication of the other country.

(2) On receipt of a request referred to in subrule (1)(b), the other Secretary shall comply with the request as soon as possible.

11. (1) Every member of a committee, assistant to a member of a committee, court reporter and translator shall, before taking up his duties in an extraordinary challenge proceeding, file with the investigating authority a Disclosure Undertaking, in the form referred to in Schedule A or a Protective Order Application, in the form referred to in Schedule B, as the case may be.

(2) Where a member of a committee files a Disclosure Undertaking or a Protective Order Application in accordance with subrule (1), the investigating authority shall issue the Disclosure Order or Protective Order, as the case may be.

(3) The responsible Secretary shall ensure that every member of a committee, assistant to a member of a committee, court reporter and translator, before taking up his duties in an extraordinary challenge proceeding, files with the responsible Secretariat four copies of a Disclosure Order or of a Protective Order, as the case may be.

12. Where a document containing proprietary information, privileged information or personal information referred to in rule 39 is filed with the Secretariat in an extraordinary challenge proceeding, each Secretary shall ensure that

(a) The document is stored in an area dedicated to the storage of documents containing proprietary information, privileged information or personal information and the area is identified as such an area;

(b) The wrapper of the document is clearly marked to indicate that it contains proprietary information, privileged information or personal information, as the case may be; and

(c) Access to the document is limited to

(i) In all cases, officials of and counsel for the investigating authority whose final determination was reviewed by the panel,

(ii) In the case of proprietary information, the person who submitted the proprietary information to the investigating authority or counsel for that person,

(iii) In the case of proprietary information, persons who have filed with the responsible Secretariat a Disclosure Order or Protective Order with respect to the document,

(iv) In the case of privileged information filed in an extraordinary challenge of a decision of a panel with respect to a final determination made in the United States, persons with respect to whom the panel has ordered disclosure of the privileged information under rule 55 of the *Article 1904 Panel Rules*, if the persons have filed with the responsible Secretariat a Protective Order with respect to the document, and

(v) In the case of personal information, persons granted access to the information pursuant to an order of

the committee issued pursuant to subrule 45(b).

13. (1) Each Secretary shall permit access by any person to the information in the file in an extraordinary challenge proceeding that is not proprietary information, privileged information or personal information referred to in rule 39 and shall provide copies of that information on request and payment of an appropriate fee.

(2) Each Secretary shall, in accordance with subrule 12(c) and the terms of the applicable Disclosure Order, Protective Order or order of the panel or committee,

(a) Permit access to proprietary information, privileged information or personal information referred to in rule 39 in the file of an extraordinary challenge proceeding; and

(b) On payment of an appropriate fee, provide a copy of the information referred to in subrule (a).

(3) No document filed in an extraordinary challenge proceeding shall be removed from the offices of the Secretariat except in the ordinary course of the business of the Secretariat or pursuant to the direction of a committee.

Internal Functioning of Committees

14. (1) A committee may adopt its own internal procedures, not inconsistent with these Rules, for routine administrative matters.

(2) Subject to subrule 23(b), meetings of a committee may be conducted by means of a telephone conference call.

15. The deliberations of a committee shall take place in private and remain secret and only committee members may take part in the deliberations. Staff of the responsible Secretariat and assistants to committee members may be present by permission of the committee.

Computation of Time

16. (1) In computing any time period fixed in these Rules or by an order or decision of a committee, the day from which the time period begins to run shall be excluded and, subject to subrule (2), the last day of the time period shall be included.

(2) Where the last day of time period computed in accordance with subrule (1) falls on a legal holiday of the responsible Secretariat, that day and any other legal holiday of the responsible Secretariat immediately following that day shall be excluded from the computation.

17. A committee may in its discretion extend any time period fixed in these Rules if

(a) The extension is made solely in the interests of fairness and justice; and

(b) In fixing the extension, the committee takes into account the intent of the Rules to secure just, speedy and inexpensive final resolutions of challenges of decisions of panels.

Counsel of Record

18. (1) Until a change is effected in accordance with subrule (2), the counsel of record for a participant in an extraordinary challenge proceeding shall be

(a) The counsel for the participant in the panel review; or

(b) In the case of a Party that was not a participant in the panel review or of a panelist, the counsel who signs any document filed on behalf of the Party or panelist in the extraordinary challenge proceeding.

(2) A participant may change its counsel of record by filing with the responsible Secretariat a Notice of Change of Counsel of Record signed by the new counsel, together with proof of service on the former counsel and the other participants.

Filing, Service and Communications

19. Subject to subrule 11(3), no document is filed with the Secretariat until one original and six copies of the document are received by the responsible Secretariat during its normal business hours and within the time period fixed for filing.

20. (1) The responsible Secretary shall be responsible for the service of documents as follows:

(a) Requests for an Extraordinary Challenge Committee referred to in rule 34 shall be served, together with the applicable index, on the Party that did not make the Request and on all participants in the panel review;

(b) All documents referred to in rules 41 and 44 shall be served in accordance with those rules;

(c) Orders of a committee shall be served on all participants;

(d) Decisions of a committee shall be served on the Parties, the investigating authority and all participants; and

(e) Notices of Completion of Extraordinary Challenge shall be served on all participants.

(2) Where the decision of a committee referred to in subrule (1)(d) is with respect to a panel review of a final determination made in Canada, the decision shall be served by registered mail.

21. (1) Subject to subrule (4), all documents filed by a participant, other than documents required by rule 20 to be served by the responsible Secretary and documents referred to in subrules 35(b)(i) and 37(2)(a), shall be served by the participant on the counsel of record of the other participants, or, where a participant is not represented by counsel, on the participant.

(2) A proof of service shal appear on, or be affixed to, all documents referred to in subrule (1).

(3) Where a document is served by an expedited delivery courier or mail service, the date of service set out in the affidavit of service or certificate of service shall be

(a) In the case of an extraordinary challenge of a panel review of a final determination made in the United States, the day on which the document is consigned to the courier service or is mailed; and

(b) In the case of an extraordinary challenge of a panel review of a final determination made in Canada, the date that is five days after the day on which the document is consigned to the courier service or is mailed.

(4) A document containing proprietary information, privileged information or personal information referred to in rule 39 shall be under seal in accordance with rule 47 and shall be served only on

(a) The investigating authority; and

(b) Participants that have been granted access to the information under a Disclosure Order, Protective Order or an order of the panel or committee, as the case may be.

22. (1) Subject to subrules 20(2) and 23(a), service of a document may be effected in the following manner:

(a) By delivering a copy of the document to the service address of the participant;

(b) By sending a copy of the document to the service address of the participant by facsimile transmission or an expedited delivery courier or mail service, such as express mail in the United States or Priority Post in Canada; or

(c) By personal service on the participant.

23. Where proprietary information, privileged information or personal information referred to in rule 39 is disclosed to a person in an extraordinary challenge proceeding, the person shall not

(a) File, serve or otherwise communicate the information by facsimile transmission; or

(b) Communicate the information by telephone.

24. Service on an investigating authority shall not constitute service on a Party and service on a Party shall not constitute service on an investigating authority.

Legal Principles

25. The general legal principles of the country in which a final determination was made apply in an extraordinary challenge of the decision of the panel with respect to the final determination.

26. A committee may, in its discretion, review any part of the record of the panel review relevant to the extraordinary challenge.

Pleadings and Simultaneous Translation of Extraordinary Challenge Proceedings in Canada

27. Rules 28 to 30 apply with respect to an extraordinary challenge of a panel review of a final determination made in Canada.

28. Either English or French may be used by any person, panelist or member of a committee in any document or oral proceeding.

29. (1) Subject to subrule (2), any order or decision, including the reasons therefor, issued by a committee shall be made available simultaneously in both English and French where

(a) In the opinion of the committee, the order or decision is in respect of a question of law of general public interest or importance; or

(b) The proceedings leading to the issuance of the order or decision were conducted in whole or in part in both English and French.

(2) Where

(a) An order or decision issued by a committee is not required by subrule (1) to be made available simultaneously in English and French, or

(b) An order or decision is required by subrule (1)(a) to be made available simultaneously in both English and French but the committee is of the opinion that to make the order or decision available simultaneously in both English and French would occasion a delay prejudicial to the public interest or result in injustice or hardship to any participant,

The order or decision, including the reasons therefor, shall be issued in the first instance in either English or French and thereafter at the earliest possible time in the other language, each version to be effective from the time the first version is effective.

(3) Nothing in subrule (1) or (2) shall be construed as prohibiting the oral delivery in either English or French of any order or decision or any reasons therefor.

(4) No order or decision is invalid by reason only that it was not made or issued in both English and French.

30. (1) Any oral proceeding conducted in both English and French shall be translated simultaneously.

(2) Where a participant requests simultaneous translation of an extraordinary challenge proceeding, the request shall be made as early as possible in the proceedings.

(3) Where a committee is of the opinion that there is a public interest in the extraordinary challenge proceedings, the committee may direct the responsible Secretary to arrange for simultaneous translation of the oral proceedings, if any.

Costs

31. Each participant shall bear the costs of and incidental to its own participation in any extraordinary challenge proceedings.

Announcement of Committee

32. On the completion of the selection of the members of a committee, the responsible Secretary shall notify the participants and the other Secretary of the names of the members of the committee.

Violations of Disclosure Undertakings and Protective Orders

33. Where any person alleges that the terms of a Disclosure Undertaking or Protective Order have been violated, the committee shall refer the allegations to the investigating authority for investigation and, where applicable, the imposition of sanctions in accordance with section 77.26 of the *Special Import Measures Act* or section 777(d) of the *Tariff Act of 1930*, as amended.

Part II—Extraordinary Challenges Exclusively Under Article 1904.13(a) (ii) or (iii)

Requests for an Extraordinary Challenge Committee

34. Where a Party, in its discretion, files a Request for an Extraordinary Challenge Committee that contains an allegation, other than an allegation referred to in Article 1904.13(a)(i) of the Agreement, the Party shall file the Request

(a) Within 30 days after the termination order of the panel referred to in rule 73 of the *Article 1904 Panel Rules* is issued:

(b) Where the decision of the panel referred to in rule 74 of the *Article 1904 Panel Rules* affirms the final determination, within 30 days after that decision is issued;

(c) Where the panel does not order a review of the Determination on Remand, within 45 days after the Determination on Remand is filed pursuant to rule 75(1) of the *Article 1904 Panel Rules*; or

(d) Where the panel orders a review of the Determination on Ramand, within 30 days after the decision of the panel referred to in subrule 75(5) of the *Article 1904 Panel Rules* is issued.

35. Every Request for an Extraordinary Challenge Committee referred to in rule 34 shall be

(a) In writting and shall include a concise statement of the allegations relied on together with a concise statement of how the actions alleged have materially affected the panel's decision and the way in which the integrity of the panel review process is threatened; and

(b) Accompanied by

(i) Those items of the record of the panel review relevant to the allegations contained in the Request, and

(ii) An index of the items referred to in subrule (i).

Service of Requests for an Extraordinary Challenge Committee

36. Where a Request for an Extraordinary Challenge Committee referred to in rule 34 is filed with the responsible secretariat, the responsible Secretary shall forthwith

(a) Forward a copy of the Request and the index to the other Secretary; and

(b) Serve a copy of the Request and the index in accordance with subrule 20(1)(a), together with a statement setting out the date on which the Request was filed and stating that briefs filed in the extraordinary challenge proceeding shall be filed within 21 days of that date.

Notices of Appearance

37. (1) Within 10 days after the Requests for an Extraordinary Challenge Committee referred to in rule 34 is filed, a Party of participants in the panel review that proposes to participate in the extraordinary challenge proceeding shall file with the responsible Secretariat a Notice of Appearance.

(2) Where a participant referred to in subrule (1) proposes to rely on a document in the record of the panel review that is not specified in the index referred to in subrule 35(b)(ii), the participant shall file, together with the Notice of Appearance,

(a) The document; and

(b) A statement identifying the document and requesting its inclusion in the extraordinary challenge record.

(3) On the request of a participant referred to in subrule (2), the responsible Secretary shall include the document in the extraodinary challenge record.

Filing of Briefs

38. All briefs filed in an extraordinary challenge proceeding under this Part shall be filed within 21 days after the

Request for an Extraordinary Challenge Committee is filed.

Part III—Other Extraordinary Challenges

Personal Information

39. In an extraordinary challenge proceeding that commences with a Request for an Extraordinary Challenge Committee referred to in subrule 40(1), the information referred to in subrules 40(1) (c) and (d) and in rule 43 and all the extraordinary challenge proceedings shall be treated as personal information and shall be kept confidential

(a) In all cases, until the day after the expiration of the time period fixed for filing a Notice of Motion pursuant to subrule 43(c); and

(b) In the case where a Notice of Motion is filed pursuant to subrule 43(c),

(i) Until the order of the committee referred to in subrule 45(a) is issued, or

(ii) Where the committee makes an order referred to in subrule 45(b), indefinitely, unless the committee changes its order.

Requests for an Extraordinary Challenge Committee

40. (1) Where a Party, in its discretion, files with the responsible Secretariat a Request for an Extraordinary Challenge Committee that contains an allegation referred to in Article 1904.13(a)(i) of the Agreement, the Party shall at the same time file

(a) Those items of the record of the panel review relevant to the allegations contained in the Request;

(b) An index of the items referred to in subrule (a)

(c) Any other material relevant to the allegations contained in the Request;

(d) An affidavit certifying that the Party gained knowledge of the action of the panelist giving rise to the allegation no more than 30 days preceding the filing of the Request if the Request is filed

(i) More than 30 days after the termination order of the panel referred to in rule 73 of the *Article 1904 Panel Rules* was issued;

(ii) Where the decision of the panel referred to in rule 74 of the *Article 1904 Panel Rules* affirmed the final determination, more than 30 days after that decision was issued;

(iii) Where the panel did not order a review of the Determination on Remand, more than 45 days after the Determination on Remand was filed pursuant to rule 75(1) of the *Article 1904 Panel Rules*; or

(iv) Where the panel ordered a review of the Determination on Remand, more than 30 days after the decision of the panel referred to in subrule 75(5) of the *Article 1904 Rules* was issued; and

(e) A Notice of Request for an Extraordinary Challenge Committee.

(2) No Request for an Extraordinary Challenge Committee referred to in subrule (1) may be filed if two years or more have elapsed since the day on which

(a) The termination order of the panel referred to in rule 73 of the *Article 1904 Panel Rules* was issued;

(b) Where the decision of the panel referred to in rule 74 of the *Article 1904 Panel Rules* affirmed the final determination, that decision was issued;

(c) Where the panel did not order a review of the Determination on Remand, the Determination on Remand was filed pursuant to rule 75(1) of the *Article 1904 Panel Rules;* or

(d) Where the panel ordered a review of the Determination on Remand, the decision of the panel referred to in subrule 75(5) of the *Article 1904 Panel Rules* was issued.

41. Where a Request for an Extraordinary Challenge Committee referred to in rule 40(1) is filed, the responsible Secretary shall serve a copy of

(a) The documents referred to in subrule 40(1) on the other Party and on the panelist against whom the allegation contained in the Request is made; and

(b) The Index and the Notice referred to in subrules 40(1)(b) and (e) on all the participants in the panel review.

Notices of Appearance

42. Within 10 days after a Request for an Extraordinary Challenge Committee referred to in subrule 40(1) is filed, a Party or participant in the panel review that proposes to participate in the extraordinary challenge proceeding shall file with the responsible Secretariat a Notice of Appearance.

43. Within 15 days after a Request for an Extraordinary Challenge Committee referred to in subrule 40(1) is filed, a panelist against whom an allegation contained in the Request is made that proposes to participate in the extraordinary challenge proceeding

(a) Shall file a Notice of Appearance;

(b) May file, under seal, material to be included in the extraordinary challenge record relevant to the panelist's defense against the allegation; and

(c) May file an *ex parte* motion requesting that the extraordinary challenge proceeding be conducted *in camera.*

Service of Requests and Appearances

44. Where the time period fixed for filing an *ex parte* motion pursuant to subrule 43(c) has expired, the responsible Secretary shall serve on all participants

(a) Where no motion is filed pursuant to that subrule, the documents referred to in subrules 40(1)(c) and (d) and rule 43;

(b) Where the committee issues an order referred to in subrule 45(a), the documents referred to in subrules 40(1)(c) and (d) and rule 43, in accordance with any order of the committee; and

(c) Where the committee issues an order referred to in subrule 45(b), the documents referred to in subrules 40(1)(c) and (d) and rule 43, in accordance with subrule 45(b)(ii) and any order made by the committee.

Conduct of Proceedings

45. The order of a committee on a motion referred to in subrule 43(c) shall set out

(a) That the proceedings shall not be held *in camera*; or

(b) That the proceedings shall be held *in camera* and that

(i) All the participants shall keep confidential all information received with respect to the extraordinary challenge proceeding and shall use the information solely for the purposes of the proceeding, and

(ii) The responsible Secretary shall serve, under seal, on all the participants the documents referred to in subrules 40(1)(b) to (d) and 43(a) and (b).

46. A committee may, in its discretion, decide the procedures to be followed in the extraordinary challenge proceeding and may, for that purpose, hold a pre-hearing conference to determine such matters as the presentation of evidence and oral argument.

Part IV—Written Proceedings

Filing Under Seal

47. (1) Where, under these Rules, a document containing proprietary information, privileged information or personal information referred to in rule 39 is required to be filed under seal with the Secretariat or is required to be served under seal, the document shall be filed or served in accordance with this rule and, where applicable, with rule 50.

(2) A document filed or served under seal shall be

(a) Bound separately from all other documents;

(b) Clearly marked

(i) In the case of a document containing proprietary information, "proprietary" or "confidential",

(ii) In the case of a document containing privileged information, "privileged", and

(iii) In the case of a document containing personal information referred to in rule 39, "personal information"; and

(c) Contained in an opaque inner and an opaque outer wrapper.

(3) An inner wrapper referred to in subrule (2)(c) shall disclose

(a) That proprietary information, privileged information or personal information is enclosed, as the case may be; and

(b) The Secretariat file number of the extraordinary challenge proceeding.

48. Filing or service of proprietary information, privileged information or personal information referred to in rule 39 with the Secretariat shall not constitute a waiver of the qualification of the information as proprietary information, privileged information or personal information.

Form and Content of Pleadings

49. (1) Every pleading filed in an extraordinary challenge proceeding shall have a heading that sets out the following information:

(a) The title of and the Secretariat file number for the extraordinary challenge proceeding;

(b) A brief descriptive title of the pleading; and

(c) The name and service address of the participant on whose behalf the pleading is filed.

(2) Every pleading filed in an extraordinary challenge proceeding shall be on paper 8½ *X* 11 inches (216 millimetres by 279 millimetres) in size. The text of the pleading shall be printed, typewritten or reproduced legibly on one side only with a margin of approximately 1½ inches (40 millimetres) on the left-hand side with double-spacing between each line of text, except for quotations of more than 50 words, which shall be indented and single-spaced. Footnotes, titles, schedules, tables, graphs and columns of figures shall be presented in a readable form. Briefs shall be securely bound along the left-hand margin.

(3) Every pleading filed on behalf of a participant in an extraordinary challenge proceeding shall be signed by counsel for the participant or, where the participant is not represented by counsel, by the participant.

50. (1) Where a participant files a pleading that contains proprietary information, the participant shall file two sets of the pleading in the following manner:

(a) One set of pleadings under seal containing the proprietary information and labelled "Proprietary" or "Confidential" with the top of each page that contains proprietary information marked with the word "Proprietary" or "Confidential" and with the proprietary information enclosed in brackets; and

(b) One set of pleadings labelled "Non-Proprietary" or "Non-Confidential" with each page from which proprietary information has been deleted bearing a legend indicating the location from which the proprietary information was deleted.

(2) Where a participant files a pleading that contains privileged information, the participant shall file two separate sets of the pleading in the following manner:

(a) One set of pleadings under seal containing the privileged information and labelled "Privileged" with the top of each page that contains privileged information marked with the word "Privileged" and with the privileged information enclosed in brackets; and

(b) One set of pleadings labelled "Non-Privileged" with each page from which privileged information has been deleted bearing a legend indicating the location from which the privileged information was deleted.

(3) Where a participant files a pleading that contains personal information referred to in rule 39, the pleading shall be filed under seal and labelled "Personal Information".

Content of Briefs

51. (1) Every brief filed in an extraordinary challenge proceeding shall contain information in the following order, divided into five parts:

Part I: A table of contents with page references and a table of authorities cited, with reference to the pages of the brief where they are cited and with cases alphabetically arranged.

Part II: A statement of the case:

This part shall contain a concise statement of the relevant facts with references to the extraordinary challenge record by page and, where applicable, by line.

Part III: A statement of the issues:

(a) In the brief of a Party that files a Request for an Extraordinary Challenge Committee, this part shall contain a concise statement of the issues; and

(b) In brief of any other participant, this part shall contain a concise statement of the position taken by the participant with respect to the issues.

Part IV: Argument:

This part shall consist of the argument setting out concisely the points of law relating to the issues with applicable citations to authorities and the extraordinary challenge record.

Part V: Relief:

This part shall consist of a concise statement of the precise relief requested.

(2) Paragraphs of Parts I to V of a brief may be numbered consecutively.

Motions

52. Motions may be heard in the discretion of the committee.

Part V—Oral Proceedings

Oral Argument

53. Oral argument shall be in the discretion of the committee.

Oral Proceedings in Camera

54. During that part of oral proceedings in which proprietary information or privileged information is presented, a committee shall not permit any person other than the following persons to be present:

(a) The person presenting the proprietary information or privileged information;

(b) A person who has been granted access to the proprietary information or privileged information under a Disclosure Order or a Protective Order;

(c) A person as to whom the privilege has been waived with respect to the proprietary information; and

(d) Officials of and counsel for the investigating authority.

Part VI—Orders and Decisions

55. All orders and decisions of a committee shall be made by majority vote.

56. The responsible Secretary shall cause notice of every final decision of a committee and every order referred to in rule 55 to be published in the *Canada Gazette* and the **Federal Register**.

57. Where a Notice of Motion requesting dismissal of an extraordinary challenge proceeding is filed by a participant, the committee may issue an order terminating the proceeding and, where the motion is consented to by all the participants, the committee shall issue an order terminating the proceeding.

58. (1) A final decision of a committee shall

(a) Affirm the decision of the panel;

(b) Vacate the decision of the panel; or

(c) Where the Request for an Extraordinary Challenge Committee did not contain an allegation referred to in Article 1904.13(a)(i) of the Agreement, remand the decision of the panel to the panel for action not inconsistent with the final decision of the committee.

(2) Every final decision of a committee shall be issued in writing with reasons, together with any dissenting or concurring opinions of the members of the committee.

(3) Subrule (2) shall not be construed as prohibiting the oral delivery of the decision of a committee.

Part VII—Completion of Extraordinary Challenges

59. Where a committee issues an order terminating the extraordinary challenge proceeding, the responsible Secretary shall cause to be published in the *Canada Gazette* and the **Federal Register** a Notice of Completion of Extraordinary Challenge effective on the day after the day on which the order of the committee is issued.

60. Where a committee issues its final decision, the responsible Secretary shall cause to be published in the *Canada Gazette* and the **Federal Register** a Notice of Completion of Extraordinary Challenge effective on the day after

(a) The committee affirms the decision of the panel;

(b) The committee vacates the decision of the panel; or

(c) Where the committee remands the decision of the panel, the day after the panel gives notice to the committee that it has taken action not inconsistent with the committee's decision.

61. The members of the committee are discharged from their duties on the day on which a Notice of Completion of Extraordinary Challenge is effective in respect of the extraordinary challenge proceeding.

Schedule A—Disclosure Undertaking Forms

Available from the Deputy Minister or the Tribunal, as the case may be, in the form in use on the same day as the Agreement comes into force or a form containing substantially the same terms.

Schedule B—Protective Order Application Forms

Available from the International Trade Administration of the United States Department of Commerce or the United States International Trade Commission, as the case may be, in the form in use on the same day as the Agreement comes into force or a form containing substantially the same terms.

Robert H. Brumley,

General Counsel.

Date: December 22, 1988.

[FR Doc. 88-29905 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-25-M

federal register

Friday
December 30, 1988

Part V

Department of Commerce

International Trade Administration

19 CFR Part 356

Panel Review Under Article 1904 of the U.S.-Canada Free-Trade Agreement; Interim-Final Rule and Request for Comments

DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 356

[Docket No. 81141-8241]

Panel Review Under Article 1904 of the U.S.-Canada Free-Trade Agreement

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Interim-final rule and request for comments.

SUMMARY: Title IV of the United States-Canada Free-Trade Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988) ("the FTA Act"), establishes procedures for review by a binational panel of United States antidumping and countervailing duty final determinations involving Canadian products and for requesting panel review of Canadian antidumping and countervailing duty final determinations involving products of the United States. Title IV implements Chapter 19 of the United States-Canada Free-Trade Agreement ("Agreement"). As authorized by section 405(d) of the FTA Act, these regulations are intended to implement certain administrative procedures required by Article 1904 of the Agreement and the FTA Act.

DATES: These regulations take effect on the date that the Agreement enters into force. See Supplementary Information, below. Written comments must be received not later than 60 days after the Agreement enters into force. The International Trade Administration will publish notice of the effective date of these regulations in the Federal Register.

ADDRESS: Address written comments to Lisa B. Koteen, Senior Counsel for Trade Agreements, Room B-099, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Lisa B. Koteen, (202) 377-1754, or Jean Heilman Grier, (202) 377-0833.

SUPPLEMENTARY INFORMATION:

Background

Chapter 19 of the Agreement establishes a mechanism for resolving disputes between the United States and Canada with respect to antidumping and countervailing duty cases. The central feature of the mechanism is the replacement of domestic judicial review of determinations in antidumping and countervailing duty cases involving imports from the other country with review by independent binational panels. The United States and Canada will continue to apply their own national antidumping and countervailing duty laws to goods imported from the other country. In such cases, independent binational panels acting in place of national courts will expeditiously review final determinations under these laws to decide whether they are consistent with the antidumping or countervailing duty law of the country that made the determination. These determinations include final determinations of sales at less than fair value and subsidization by the Department of Commerce ("the Department"), and final determinations by International Trade Commission as to whether a United States industry has been injured.

The Agreement provides that only the two governments may invoke the panel review process; however, the governments of the United States and Canada will automatically trigger panel review in response to a timely request from any person who otherwise could have challenged the determination in court. Counsel for (or representatives of) interested parties that were parties to the administrative proceeding that is being challenged will argue before the panel, as they would before a court. The Agreement also requires that the United States and Canada protect sensitive business information against unlawful disclosure in the panel review process.

Title IV of the FTA Act amends U.S. law to implement Chapter 19 of the Agreement by limiting judicial review in cases involving Canadian merchandise, establishing procedures whereby private parties may appeal for binational panel review, providing an organizational structure for administering U.S. responsibilities under Chapter 19 and making other conforming amendments to U.S. law. More specifically, section 405(d) of the FTA Act authorizes the Department, as the administering authority under Title VII of the Tariff Act of 1930 ("the Act"), to issue regulations to implement Chapter 19 of the Agreement.

The procedures for binational panels are being implemented through Rules of Procedure to be issued jointly by the United States and Canada. These regulations are intended to implement certain administrative procedures required by Chapter 19 of the Agreement before an administrative proceeding has been sent to the Court of International Trade or a binational panel, as well as the administrative responsibilities of the Department that continue during and after panel review. Regulations are necessary to provide for notice of intent to seek judicial review, request for panel review, notice of receipt by Canada of scope determinations, continued suspension of liquidation, release of business proprietary and privileged information under protective order during a panel review, and sanctions for violations of such protective orders. The regulations complement the Rules of Procedure and should be used in conjunction with these Rules.

A detailed description of the interim-final rule is contained in the following section-by-section analysis.

Section 356.1

This section provides the scope of Part 356, which is to implement Article 1904 of the Agreement.

Section 356.2

This section provides definitions of terms used in Part 356.

Section 356.3

There are two types of documents that put the Department on notice that an antidumping or countervailing duty final determination involving Canadian products may be subject to review: a Notice of Intent To Commence Judicial Review and a Request for Panel Review. The Department is also responsible for receipt of requests for panel review of final determinations made by the United States International Trade Commission and equivalent determinations, involving U.S. exports, made in Canada. This section contains the filing and service requirements for such documents. If the filing and service requirements are not fulfilled, any subsequent complaint filed by that party is invalid. 19 U.S.C. 1516a(g)(2) and (3). Paragraph (a) states that an original and six copies must be filed. This is to permit copies to be placed in the files of the United States and Canadian sections of the Secretariat and for each of the five panelists to receive copies of every document filed. The deadlines for filing are set out in other sections. There is no mailbox rule for filing because of the tight deadlines in panel reviews.

Paragraph (b) requires service on every person on the service list, except for those instances, described in section 516A(g)(8)(B)(ii) of the Act, in which the United States Secretary effects service. Details of service are set out in pertinent sections.

Paragraph (c) requires that service be effected in an expedited manner. The reason for this requirement is that the time periods throughout the panel review process are generally quite short compared to those in the courts. There is only a 10-day window after the filing of a Notice of Intent to Commence Judicial

Review in which to file a Request for Panel Review. First class mail probably would not allow sufficient time after receipt of a notice for the recipient to make an informed decision and to act expeditiously.

Paragraphs (f) and (g) provide the hours and location of the United States and Canadian sections of the Secretariat. The Secretariat, created for purposes of the panel process, performs only ministerial functions pursuant to the Agreement. Legal holidays include weekends and days when the U.S. government offices in the District of Columbia are closed. There will be no night box for filing documents after normal business hours.

Section 356.4

This section identifies the persons that must be served with a Notice of Intent to Commence Judicial Review and sets forth the information required in the Notice. The Notice must be filed not later than 20 days after the final determination at issue. According to the Agreement and the FTA Act, if there is no Request for Panel Review, the party that filed the Notice of Intent to Commence Judicial Review may seek judicial review by following normal procedures, starting with a summons or summons and complaint filed within 30 days after the last date on which any Request for Panel Review must be filed.

Section 356.5

A party to the proceeding may request panel review no later than 30 days after a final determination, a term defined in these regulations. A request for review of a Canadian antidumping or countervailing duty determination, as well as a determination by the Department or the U.S. International Trade Commission, may be filed with the United States Secretary, pursuant to section 408 of the FTA Act. Requests for Panel Review of Canadian determinations that are filed with the United States Secretary must likewise follow the requirements of this section, which itemizes the contents of a Request and the service requirements.

Section 356.6

The Department occasionally receives requests to determine whether a particular product is or is not within the class or kind of merchandise covered by a dumping finding or an antidumping or countervailing duty order. These determinations are not expressly provided for by statute or regulation, except that section 516A(a)(2)(B)(vi) of the Tariff Act of 1930 establishes that they are subject to judicial review. The Agreement provides that these so-called "scope determinations" are reviewable by a panel. Scope determinations are not published in the **Federal Register**; rather, they are mailed to the parties to the proceeding, including the foreign government in countervailing duty proceedings. Under the Agreement, scope determinations will be provided to the government of Canada regardless of whether the cases to which they pertain are antidumping duty orders or countervailing duty orders. The time period for commencing panel review of scope determinations begins with the receipt by Canada of a written notice from the Department. This section specifies how receipt is to be effected.

Section 356.7

To commence a panel review of a scope determination, a party to the proceeding would have to file notice within 30 days of the date on which Canada received notice of the determination. To commence judicial review, the party would be required to file notice within 20 days of that date. This section provides the means by which a party to the proceeding may learn the date on which Canada received notice. The filing requirements in paragraph (b) follow the Department's filing requirements instead of those of the Secretariat. Paragraph (c) provides that the Department shall respond within five business days, which is intended to give an adequate opportunity for the requester to seek judicial review or to initiate the panel review process.

Section 356.8

Upon request of a participant in a panel review, the Department would not order the Customs Service to liquidate suspended entries that are relevant to that participant until after the review is completed. This provision is necessary because, unless a party to the administrative proceeding seeks an injunction in court, the Department will instruct the U.S. Customs Service to liquidate entries after the Department issues a final determination in a review under section 751(b) of the Act, the International Trade Commission issues a final determination of a "changed circumstances" review under section 751(b), or the Department issues a determination as to the class or kind of merchandise covered by an antidumping or countervailing duty order. 19 U.S.C. 1516a(c). Binational Panels under Chapter 19 of the Agreement do not have injunctive powers, however. Section 401(a) of the FTA Act therefore provides a means for preventing automatic liquidation of entries pending completion of the panel process.

A domestic interested party that is a participant in a panel review may request that suspension continue for entries from producers, exporters, and importers affected by the panel review. Producers, exporters, and importers that are participating in the panel review also may request continued suspension, but only for entries of their merchandise.

Section 356.9

Under section 403 of the FTA Act, during a binational panel review certain persons may have access to business proprietary information contained in the administrative record before the panel, but only if they apply for, and the Department issues, a protective order. The persons who are eligible for access are: the panelists; any staff, such as law clerks and secretaries, whom a panelist may employ; counsel for participants in the panel review, or other representatives, such as independent consultants whom counsel may retain for the panel review (and who are under the direction or control of counsel); the Secretaries of the U.S. and Canadian sections of the Secretariat and Secretariat personnel; and U.S. government officials who are members of an interagency committee, chaired by the Office of the United States Trade Representative, that would be called upon to consider requests to convene an extraordinary challenge committee to review a panel decision (or the members's designees). The last group is identified in section 405 of the FTA Act. The persons who have access to proprietary information without protective orders are: the participant that submitted the information; that participant's counsel; and officials of the Department who are directly involved in the panel review or were involved in the administrative proceeding at issue.

Section 356.10

This section identifies the persons who must submit applications for protective order in order to receive access to the proprietary information in an administrative record and details the contents of the application forms. Persons in every category in § 356.9, except for paragraph (c), are eligible to apply for disclosure of proprietary information under protective order. As described in paragraph (b)(5), individuals covered by § 356.9(c), nonprofessionals who are full-time employees of panelists (but who are not members of the panel staff), or are full-time employees of counsel or consultants to counsel, such as law clerks, paralegals, and secretarial and clerical staff, would not submit

protective order applications but would have access to the proprietary information at issue under the terms of any protective order issued to the panelist, attorney or consultant who employs them.

Paragraph (b) sets forth the procedures for eligible persons apply for a protective order. This paragraph indicates, in general, the contents of application forms, timing, and service requirements. Counsel and other representatives to parties to the proceeding who received access to business proprietary information under an administrative protective order during the administrative proceeding may retain the information and any materials that they prepared that contain such information pending issuance of a protective order under these regulations. Actual forms will be available from the Department. Paragraph (c) covers those persons to whom the Department is required to issue a protective order; *i.e.*, panelists, members of the interagency group, extraordinary challenge committee members, the U.S. and Canadian secretaries, and their staffs. Paragraph (d) covers counsel or non-attorney professionals, to whom disclosure is not mandatory. They also must file copies of their protective orders with the Secretariat and serve all participants. Others who are granted protective orders, including the Secretaries and their staffs, panelists and their assistants, extraordinary challenge committee members, and members of the interagency group, must file copies of their protective orders with the Secretariat but are not required to serve copies on participants. Paragraph (f) provides for modification of a protective order.

Section 356.11

This section deals with release of privileged documents under protective order. On infrequent occasions, the administrative record under review may contain documents for which the Department claims privilege, namely an attorney-client, attorney work product, or government pre-decisional process privilege. *See Zenith Radio Corp* v. *United States*, 764 F.2d 1577, 1579 (Fed. Cir. 1985).

The reason for classifying documents as privileged is to permit a free and frank exchange of views—between attorney and client in the first instance, in preparation for litigation in the second instance, and within an agency in the third. Candor and debate within the Department should be encouraged, but they could be constrained by the risk of disclosure to a judge or panelist who subsequently reviews the ultimate administrative decision, particularly if the document contains recommendations at odds with that decision. *See, e.g., Sprague Electric Co.* v. *United States*, 462 F. Supp. 966 (Cust. Ct. 1978).

Under the Rules of Procedure for binational panel review under Article 1904 of the Agreement, the Department would not include privileged documents in the copy of the administrative record that is transmitted to the Secretariat for the panel's use, although the documents for which privilege is claimed would be listed in the index of the record. If there were any challenge to the privilege claim, the panel would first examine the affidavits in support of the claim of privilege to determine whether there is any question as to the validity of the claim or if the privilege were qualified and the challenger's need for access outweighed the Department's need to withhold the document from scrutiny. *Asahi Chemical Industry Co., Ltd.* v. *United States*, 1 CIT 21 (1980). If the affidavits were not dispositive, then the panel would select two lawyer representatives, one from each country, to examine *in camera* any document at issue. For the two representatives to examine the document, the Department would issue a protective order. Only if the two representatives could not agree whether the document should be disclosed, either as not privileged or, if privileged, under a protective order, would the full panel be granted access under protective order to examine the document and decide whether it should be disclosed.

In accordance with the process prescribed by the Rules of Procedure, this section provides the mechanics of applications for and issuance of protective orders for privileged information subject to panel review. The process is similar to that described in § 356.10 regarding protective orders for proprietary information.

If privileged information was relevant to an issue that is subsequently referred to an extraordinary challenge committee, then the extraordinary challenge committee members must also have access to the privileged information. The protective order mechanism is therefore extended to cover them. In addition, when privileged information is at issue, a protective order for privileged information would be issued to the U.S. Government officials who, as the responsible interagency group, must review a request for an extraordinary challenge committee.

Section 356.12. This section provides that a person determined to have violated a protective order or disclosure undertaking may be liable to the United States for a civil penalty not to exceed $100,000 for each violation, barred from representing another person before the Department for a designated time period, denied access to proprietary information for a designated time period, or subject to other appropriate administrative sanctions. Sanctions can be also taken against persons other than the one who violated the protective order or disclosure undertaking, such as the firm, partner, associate, employee, employer, or client of that person.

Section 356.13. Under certain circumstances, explained in this section, the administrative law judge may modify or waive the rules in Subpart D.

Section 356.14. This section authorizes an Office Director under the Deputy Assistant Secretary for Investigations, International Trade Administration, to investigate an alleged breach of a protective order or disclosure undertaking and to report the facts to the Deputy Under Secretary for International Trade no later than 180 days after receiving information concerning a violation. The Director will conduct an investigation only if the information is received within 30 days after the alleged violation occurred or, as determined by the Director, could have been discovered through the exercise of reasonable and ordinary care. Paragraph (d) of this section provides examples of actions that constitute violations of an administrative protective order that shall serve as guidelines to each person subject to a protective order. Each day of a continuing violation shall constitute a separate violation as required by paragraph (4) of section 777(d) of the Act.

Section 356.15. Under this section the Deputy Under Secretary will either initiate a proceeding by issuing a charging letter or request an authorized agency of Canada to initiate a proceeding if there is reasonable cause to believe that a person has violated a protective order or disclosure undertaking and that sanctions are appropriate for the violation. If the Department receives a request to charge from an authorized agency of Canada, the Deputy Under Secretary will promptly initiate a proceeding by issuing a charging letter.

Section 356.16. A person against whom sanctions are proposed will be notified in a charging letter of allegations, proposed sanctions, and procedures for challenging imposition of

sanctions. The parties may settle a case by mutual agreement after issuance of a charging letter.

Consistent with state bar disciplinary proceedings, the person whose information is alleged to have been released is not a party to the proceedings. The interest being vindicated is that of the Department in ensuring that its rules against unauthorized disclosure are being followed.

Section 356.17. This section provides that the Deputy Under Secretary will request an authorized agency of Canada to initiate a proceeding to impose sanctions for violation of a protective order or a disclosure undertaking by issuing a letter of request to charge. The Deputy Under Secretary will issue this request instead of a charging letter under § 356.16 only if it is determined under § 356.15 that: (1) the charged or affected party, while not subjected to any of the sanctions set forth under § 356.12, could be subjected to sanctions imposed by an authorized agency of Canada; or (2) an authorized agency of Canada would otherwise be the more appropriate forum for the initiation of a proceeding.

Section 356.18. Interim sanctions may be imposed by the administrative law judge if necessary to preserve the interests of the Department, an authorized agency of Canada, or others. Notice and an opportunity to respond must be provided to a party against whom interim sanctions are proposed, except for emergency interim sanctions. Emergency interim sanctions to preserve the status quo may be imposed for a 48-hour period. Emergency interim sanctions are similar to a temporary restraining order and would require proof of irreparable harm. The Deputy Under Secretary will provide the Secretariat notice concerning the imposition or revocation of interim sanctions or emergency interim sanctions.

Section 356.19. A party may request a hearing pursuant to paragraph (4) of section 777(d) of the Act. The Department can request a hearing only if a hearing is in the interest of justice. The Under Secretary will appoint an administrative law judge to conduct the hearing and render an initial decision.

Section 356.20. This section sets forth procedures for discovery. Voluntary discovery is encouraged. The administrative law judge may enforce a proper discovery request and make any determination or enter any order in the proceedings if a party does not comply with the discovery order. In issuing a discovery order, the administrative law judge must consider the necessity to protect proprietary information and cannot order the release of information if improper dissemination is likely to result.

Section 356.21. This section set forth procedures for issuance of a subpoena. Subpoenas may be used by any party for purposes of discovery or for obtaining documents, papers, books, or other physical exhibits for use in evidence, or for both purposes. The authority to issue subpoenas for these proceedings is provided by paragraph (7)(A) of section 777(d) of the Act.

Section 356.22. This section directs the administrative law judge to order the parties to meet or confer prior to an administrative hearing to discuss simplification of issues, stipulations, and settlements.

Section 356.23. Under this section, there may be hearings where witnesses present testimony. Such hearings are to be held in Washington, DC, unless extraordinary circumstances are present. The administrative law judge has all authority necessary to conduct the hearing, including the authority to exclude persons or seal the record to protect proprietary information. The rules of evidence prevailing in courts of law shall not apply, and all evidentiary material the administrative law judge determines to be relevant and material to the proceeding and not unduly repetitious may be received into evidence and given appropriate weight. If testimony by a witness and the submission of real evidence is not necessary in a particular case, the presence of the parties or their representatives is not necessary and submissions may be through mailing or otherwise as the administrative law judge permits. The administrative law judge has authority to establish procedures to protect proprietary information from improper dissemination.

Section 356.24. This section sets forth rules for the Deputy Under Secretary to collect information from the charged or affected parties if no party has requested a hearing.

Section 356.25. Witnesses summoned before the Department shall be paid the same fees and mileage that are paid witnesses in the courts of the United States as authorized by paragraph (7)(E) of section 777(d) of the Act.

Section 356.26. The administrative law judge, if a hearing was requested, or the Deputy Under Secretary will issue an initial decision based solely on evidence received into the record within 20 days of the conclusion of a hearing or within 15 days of the date of service of final written submissions. The initial decision must state findings of fact and the sanctions to be imposed, if any, which may be lesser included sanctions from those proposed but may not be more severe than those proposed. The burden of proof rests with the Department, which must prove a violation by a preponderance of the evidence. If the APO Sanctions Board (see below) has not issued a final decision within 60 days after the initial decision is issued, the latter becomes the final decision.

Section 356.27. The APO Sanctions Board, consisting of the Under Secretary for International Trade, the Under Secretary for Economic Affairs, and the General Counsel, or their designees, will review the initial decision. Parties have 30 days in which to submit comments on the initial decision to the Board. After that time period has expired, the Board may issue a final decision that: (1) Adopts the initial decision in whole or in part; (2) differs from the initial decision; or (3) remands the matter back to the administrative law judge or the Deputy Under Secretary. The final decision must state findings and sanctions if it differs from the initial decision. If there is a finding of a violation of a protective order or disclosure undertaking and that sanctions are to be imposed, that finding must be published in the **Federal Register** and will be provided to any Federal agency likely to have an interest in the matter. If a charged or affected party is subjected to a sanction under paragraph (a)(2) of § 356.12, the Deputy Under Secretary will provide such information to the ethics panel or other disciplinary body of the appropriate bar associations or other professional associations.

Section 356.28. This section provides that the parties may ask the APO Sanctions Board to reconsider a final decision. A party must file a motion for reconsideration with the Board within 30 days, or at a later date if material evidence is discovered which was not previously known.

Section 356.29. Proceedings shall not be public until the Department makes a final decision under these regulations, no longer subject to reconsideration, imposing a sanction (except as required for notification of the Secretariat with respect to interim sanctions or emergency interim sanctions). If the final decision is not to impose a sanction, proceedings would remain confidential. The public or nonpublic nature of proceedings which are settled would be dealt with in the settlement itself. These provisions are consistent with the approach taken by state bar associations in the conduct of attorney disciplinary proceedings.

This section also provides that the charged party, but not an affected party (*i.e.*, someone who may be subject to the proposed sanctions), or the charged party's counsel may have access to proprietary information involved in the proceeding under protective order. Normally, such access will be required if the charged party is to have a reasonable opportunity to mount a defense.

Section 356.30. Sanctions may be imposed for violations of protective orders regarding privileged information, as well as proprietary information.

Administrative Procedure Act

This interim rule is exempt from all requirements of section 553 of the Administrative Procedure Act (5 U.S.C. 553), including notice and opportunity to comment and a delay of the effective date because it implements Chapter 19 of the Agreement and thus relates to a foreign affairs function of the United States.

Executive Order 12291

Because this rule concerns a foreign affairs function of the United States, it is not a rule within the meaning of section 1(a) of Executive Order 12291, and it is not subject to the requirements of that Order. Accordingly, no Regulatory Impact Analysis was prepared.

Paperwork Reduction Act

This rule does not contain a collection of information subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). The collections of information contained in these regulations occur within the course of ongoing investigations or actions initiated prior to the determinations that are reviewable by binational panels under the Agreement. Thus they are not covered by the Paperwork Reduction Act. *See* 5 CFR 1320.3(c).

Regulatory Flexibility Act.

The Regulatory Flexibility Act does not apply to this rule because the rule was not required to be promulgated as a proposed rule before issuance as a final rule by section 553 of the Administrative Procedure Act or by any other law. Accordingly, neither an initial nor final Regulatory Flexibility Analysis has been or will be prepared.

Executive Order 12612

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612 (52 FR 41685, October 30, 1987).

Entry Into Force

It is anticipated that the Agreement will enter into force on January 1, 1989. The Office of the United States Trade Representative will confirm in a **Federal Register** notice the precise date of the Agreement's entry into force.

List of Subjects in 19 CFR Part 356

Antidumping, Canada, Countervailing duty, Imports, Judicial review, Trade agreements.

For the reasons set forth in the preamble, 19 CFR Part 356 is added to read as follows:

PART 356—PROCEDURES AND RULES FOR IMPLEMENTING ARTICLE 1904 OF THE UNITED STATES-CANADA FREE-TRADE AGREEMENT

Subpart A—Scope and Definitions

Sec.

356.1 Scope.
356.2 Definitions.

Subpart B—Procedures for Commencing Review of Final Determinations

356.3 Filing and service requirements.
356.4 Notice of intent to commence judicial review.
356.5 Request for panel review.
356.6 Receipt of notice of scope determinations by the government of Canada.
356.7 Requests to determine when the government of Canada received notice of a scope determination.
356.8 Continued suspension of liquidation.

Subpart C—Proprietary and Privileged Information

356.9 Persons authorized to receive proprietary information.
356.10 Procedures for obtaining access to proprietary information.
356.11 Procedures for obtaining access to privileged information.

Subpart D—Violation of a Protective Order or a Disclosure Undertaking

356.12 Sanctions for violation of a protective order or disclosure undertaking.
356.13 Suspension of rules.
356.14 Report of violation and investigation.
356.15 Initiation of proceedings.
356.16 Charging letter.
356.17 Request to charge.
356.18 Interim sanctions.
356.19 Request for a hearing.
356.20 Discovery.
356.21 Subpoenas.
356.22 Prehearing conference.
356.23 Hearing.
356.24 Proceeding without a hearing.
356.25 Witnesses.
356.26 Initial decision.
356.27 Final decision.
356.28 Reconsideration.
356.29 Confidentiality.

Sec.

356.30 Sanctions for violations of a protective order for privileged information.

Authority: 19 U.S.C. 1516a and 1677f(d).

Subpart A—Scope and Definitions

§ 356.1 Scope.

This part sets forth procedures and rules for the implementation of Article 1904 of the United States-Canada Free-Trade Agreement under the Tariff Act of 1930, as amended by Title IV of the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 1516a and 1677f(d)).

§ 356.2 Definitions.

For purposes of this Part: (a) "Act" means the Tariff Act of 1930, as amended;

(b) "Administrative law judge" means the person appointed under 5 U.S.C. 3105 who presides over the taking of evidence as provided by Subpart D;

(c) "Affected party" means a party against whom sanctions have been proposed for alleged violation of a protective order or disclosure undertaking but who is not a charged party;

(d) "Agreement" means the Free-Trade Agreement between Canada and the United States of America entered into between the Government of Canada and the Government of the United States of America, signed on January 2, 1988;

(e) "APO Sanctions Board" means the Administrative Protective Order Sanctions Board;

(f) "Authorized agency of Canada" means any Canadian government agency that is authorized by Canadian law to request the Department to initiate proceedings to impose sanctions alleged violation of a disclosure undertaking;

(g) "Binational panel" means a binational panel established pursuant to Annex 1901.2 to Chapter 19 of the Agreement for the purpose of reviewing a final determination;

(h) "Canadian Secretary" means the Secretary of the Canadian section of the Secretariat and includes any person authorized to act on behalf of the Secretary;

(i) "Charged party" means a person who is charged by the Deputy Under Secretary with violating a protective order or an undertaking;

(j) "Chief Counsel" means the Chief Counsel for Import Administration, U.S. Department of Commerce, or designee;

(k) "Competent investigating authority" means the agency of a government that issued the final determination at issue which may be:

(1) In the case of Canada,

(i) The Canadian Import Tribunal, or its successor, or

(ii) The Deputy Minister of National Revenue for Customs and Excise as defined in the Special Import Measures Act, of his successor; and

(2) In the case of the United States,

(i) The International Trade Administration of the United States Department of Commerce, or its successor, or

(ii) The United States International Trade Commission, or its successor.

(l) "Court" means the United States Court of International Trade;

(m) "Date of service" means, for purposes of Subpart C only, the day a document is deposited in the mail or delivered in person;

(n) "Days" means calendar days, except that a deadline which falls on a weekend or holiday shall be extended to the next working day;

(o) "Department" means the U.S. Department of Commerce;

(p) "Deputy Under Secretary" means the Deputy Under Secretary for International Trade, U.S. Department of Commerce;

(q) "Director" means an Office Director under the Deputy Assistant Secretary for Investigations, U.S. Department of Commerce, or designee, if the panel review is of a final determination by the Department under section 751 of the Act, or an Office Director under the Deputy Assistant Secretary for Compliance, or designee, if the panel review is of a final determination by the Department under section 705(a) or 735(a) of the Act;

(r) "Disclosure undertaking" means the Canadian mechanism for protecting proprietary or privileged information during proceedings pursuant to Article 1904 of the Agreement, as prescribed by section 77.21(2) of the Special Import Measures Act;

(s) "Extraordinary challenge committee" means the committee established pursuant to section 407 of the FTA Act to review decisions of a panel or conduct of a panelist;

(t) "Final determination" has the meaning assigned to the term "final determination" by Article 1911 of the Agreement and includes a Canadian definitive decision within the meaning of subsection 77.1(1) of the Special Import Measures Act;

(u) "Lesser-included sanction" means a sanction of the same type but of more limited scope than the proposed sanction for violation of a protective order or disclosure undertaking; thus, a one-year bar on representation before the Department is a lesser-included sanction of a proposed seven-year bar;

(v) "Panel review" means review of a final determination pursuant to Chapter 19 of the Agreement;

(w) "Party to the proceeding" means a person that would be entitled, under section 516A of the Act, to commence proceedings for judicial review of a final determination;

(x) "Participant" means a party to the proceeding that files a Complaint or a Notice of Appearance in a panel review, or the Department;

(y) "Parties" means the Department and the charged party or affected party in an action under Subpart D;

(z) "Person" means, for purposes of Subpart D, an individual, partnership, corporation, association, organization, or other entity;

(aa) "Proprietary information" means information the disclosure of which the Department has decided is limited under the procedures adopted pursuant to Article 1904.14 of the Agreement, including business or trade secrets; production costs; terms of sale; prices of individual sales, likely sales, or offers; names of customers, distributors, or suppliers; exact amounts of the subsidies received and used by a person; names of particular persons from whom proprietary information was obtained; and any other business information the release of which to the public would cause substantial harm to the competitive position of the submitter; or information an authorized agency of Canada has decided is limited under the procedures adopted pursuant to Article 1904.14 of the Agreement;

(bb) "Protective order" means an administrative protective order issued by the Department under 19 C.F.R. 356.10(d)(2) or 356.11(c)(1);

(cc) "Scope determination" means a determination by the Department, reviewable under section 516A(a)(2)(B)(vi) of the Act, as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or an antidumping or countervailing duty order covering Canadian merchandise, or a reconsideration pursuant to subsection 59(1) of the Special Import Measures Act;

(dd) "Secretariat" means the Secretariat established pursuant to Article 1909 of the Agreement and includes the Secretariat sections located in both Canada and the United States;

(ee) "Service address" means the facsimile number, if any, and address set out by a party to the proceeding as the address of counsel at which the party may be served, or, where the party is not represented by counsel, the facsimile number, if any, and address of the party;

(ff) "Service list" means the list maintained by the Department of parties to the proceeding;

(gg) "Under Secretary" means the Under Secretary for International Trade, U.S. Department of Commerce, or designee; and

(hh) "United States Secretary" means the Secretary of the United States section of the Secretariat and includes any person authorized to act on behalf of the Secretary.

Subpart B—Procedures for Commencing Review of Final Determinations

§ 356.3 Filing and service requirements.

(a) No Notice of Intent to Commence Judicial Review or Request for Panel Review is filed by a party to the proceeding until the original and 6 copies of the document are received by the United States Secretary or the Canadian Secretary during normal business hours of the Secretariat and within the time fixed for filing.

(b) Where a Notice of Intent to Commence Judicial Review or Request for Panel Review is filed by a party to the proceeding, the party shall serve the document on all other parties to the proceeding and the competent investigating authority, except where the document is required to be served by the United States Secretary.

(c) Service of a document on a party to the proceeding may be effected in the following manner:

(1) By delivering a copy of the document to the service address of the party to the proceeding;

(2) By sending a copy of the document to the service address of the party to the proceeding by facsimile transmission or an expedited delivery courier or mail service, such as express mail; or

(3) By personal service on the party to the proceeding.

(d) Service of a document on the competent investigating authority may be effected in any manner provided in paragraph (c) of this section, when made on the General Counsel of the competent investigating authority.

(e) A certificate of service or certificate of receipt shall appear on, or be affixed to, the documents referred to in paragraph (a).

(f) Where a Notice of Intent to Commence Judicial Review or a Request for Panel Review is served by an expedited delivery courier or mail service, the date of service set out in the certificate of service shall be the day on

which the document is consigned to the courier service or mailed.

(g)(1) The normal business hours during which the offices of the United States section of the Secretariat shall be open to the public are 9:00 a.m. to 5:00 p.m. each weekday except for legal holidays of the United States section of the Secretariat, as defined in the rules of procedure adopted pursuant to Article 1904.14 of the Agreement.

(2) The normal business hours during which the offices of the Canadian section of the Secretariat shall be open to the public are 9:00 a.m. to 5:00 p.m. each weekday except for legal holidays of the Canadian section of the Secretariat, as defined in the rules of procedure adopted pursuant to Article 1904.14 of the Agreement.

(h)(1) The United States section of the Secretariat is located at Room 4012, U.S. Department of Commerce, Pennsylvania Ave. at 14th Street, NW., Washington, D.C. 20230.

(2) The Canadian section of the Secretariat is located at P.O. Box 1711, Ottawa, Ontario, Canada K1P5R5.

§ 356.4 Notice of intent to commence judicial review.

(a) Where a party to the proceeding intends to commence judicial review of a final determination in the Court, the party shall serve a Notice of Intent to Commence Judicial Review on

(1) The United States Secretary and the Canadian Secretary;

(2) The competent investigating authority; and

(3) All parties to the proceeding.

(b) Every Notice of Intent to Commence Judicial Review referred to in paragraph (a) of this section shall include the following information:

(1) The name and service address of the party to the proceeding filing the Notice;

(2) The name and telephone number of the counsel for the party to the proceeding or, where the party is not represented by counsel, the telephone number of the party;

(3) The title of the final determination for which judicial review is sought, the case number assigned by the competent investigating authority, and the appropriate citation if the final determination was published in the **Federal Register**; and

(4) If the final determination is a scope determination, the date on which notice of the scope determination was received by the Government of Canada.

(c) A Notice of Intent to Commence Judicial Review shall be deemed to be timely filed if a Notice in compliance with these regulations is delivered no later than 20 days after

(1) The date the final determination was published in the **Federal Register**; or

(2) If the final determination is a scope determination, the date on which notice of the scope determination was received by the Government of Canada.

§ 356.5 Request for panel review.

(a) Only a party to the proceeding may request binational panel review of a final determination. To make such a request, a party must file a Request for Panel Review with the United States Secretary no later than the date that is 30 days after:

(1) The date the final determination was published in the **Federal Register** or *Canada Gazette;* or

(2) If the final determination is a scope determination, the date on which notice of the scope determination was received by the government of the other country.

(b) Receipt of a request in compliance with these rules by the United States Secretary shall be deemed to be a request for binational panel review within the meaning of section 516A(g)(8) of the Act.

(c) A Request for Panel Review shall contain the following information:

(1) The name and service address of the party to the proceeding requesting panel review;

(2) The name and telephone number of the counsel for the party to the proceeding or, where the party is not represented by counsel, the telephone number of the party;

(3) The title of the final determination for which panel review is requested, the case number assigned by the competent investigating authority, and the appropriate citation if the final determination was published in the **Federal Register** or *Canada Gazette;*

(4) Where a Notice of Intent to Commence Judicial Review has been served and the sole reason that the Request for Panel Review is made is to require review of the final determination by a panel, a statement to that effect;

(5) If the final determination is a scope determination, the date on which notice of the scope determination was received by the government of the other country; and

(6) The service list.

(d) Where a party to the proceeding files a Request for Panel Review with the Canadian Secretary, the United States Secretary shall serve a copy of the request on

(1) Any other party to the proceeding; and

(2) The competent investigating authority.

§ 356.6 Receipt of notice of scope determination by the government of Canada.

(a) Where the Department has made a scope determination, notice of such determination shall be deemed received by the Government of Canada when a certified copy of the determination is delivered to the Chancery of the Embassy of Canada during its normal business hours.

(b) Where feasible, the Department, or an agent therefor, will obtain a certificate of receipt signed by a person authorized to accept delivery of documents to the Embassy of Canada acknowledging receipt of the scope determination. The certificate will describe briefly the document being delivered to the Embassy of Canada, state the date and time of receipt, and include the name and title of the person who signs the certificate. The certificate will be retained by the Department in its public files pertaining to the scope determination at issue.

§ 356.7 Request to determine when the government of Canada received notice of a scope determination.

(a) Pursuant to section 516A(g)(10) of the Act, any party to the proceeding may request in writing from the Department the date on which the Government of Canada received notice of a scope determination made by the Department.

(b) A request shall be made by filing a written request and five copies thereof with the U.S. Department of Commerce, Import Administration, Room B-099, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230, containing the following information:

(1) The name, address, and telephone number of the counsel for the party to the proceeding filing the request; and

(2) The title and the case number assigned by the Department for the antidumping or countervailing duty proceeding in which the scope determination in question was made.

(c) The Department will respond to the request referred to in paragraph (b) within five business days of receipt.

§ 356.8 Continued suspension of liquidation.

(a) *In General.* In the case of an administrative determination specified in clause (iii) or (vi) of section 516A(a)(2)(B) of the Act and involving Canadian merchandise, the Department shall not order liquidation of entries of merchandise covered by such a determination until the forty-first day after the date of publication of the notice described in clause (iii) or receipt of the determination described in clause

(vi), as appropriate. If requested, the Department will order the continued suspension of liquidation of such entries in accordance with the terms of paragraphs (b), (c), and (d) of this section.

(b) *Eligibility to Request Continued Suspension of Liquidation.* (1) A participant in a binational panel review that was a domestic party to the proceeding, as described in section 771(9) (C), (D), (E), (F), or (G) of the Act, may request continued suspension of liquidation of entries of merchandise covered by the administrative determination under review by the panel and that would be affected by the panel review.

(2) A participant in a binational panel review that was a party to the proceeding, as described in section 771(9)(A) of the Act, may request continued suspension of liquidation of the merchandise which it manufactured, produced, exported, or imported and which is covered by the administrative determination under review by the panel.

(c) A request for continued suspension of liquidation must include:

(1) The name of the final determination subject to binational panel review and the case number assigned by the Department;

(2) The caption of the binational panel proceeding;

(3) The name of the requesting participant;

(4) The requestor's status as a party to the proceeding and as a participant in the binational panel review; and

(5) The specific entries to be suspended by name of manufacturer, producer, exporter, or U.S. importer.

(d) *Filing and Service.* (1) A Request for Continued Suspension of Liquidation must be filed with the Assistant Secretary for Import Administration, Room B-099, Pennsylvania Avenue at 14th Street, NW., Washington, DC 20230, no earlier than the date on which the first request for binational panel review is filed and no later than ten days after the expiration of the period provided in § 356.5(a) of these rules for filing a Request for Panel Review. The envelope and the first page of the request must be marked: Panel Review—Request for Continued Suspension of Liquidation.

(2) The requesting party shall serve a copy of the Request for Continued Suspension of Liquidation on the United States Secretary and all parties to the proceeding included on the service list. No request will be accepted unless a certificate of service is attached indicating that proper service has been made.

(e) *Termination of Continued Suspension.* Upon the Department's determination that panel review, including any panel review of remand determinations and any review by an extraordinary challenge committee has been concluded, the Department will order liquidation of entries the suspension of which was continued pursuant to this section.

Subpart C—Proprietary and Privileged Information

§ 356.9 Persons authorized to receive proprietary information.

Persons in paragraphs (a), (d) and (e) of this section shall, and persons in paragraphs (b) and (c) of this section may, be authorized by the Department to receive access to proprietary information if they comply with these regulations and such other conditions imposed upon them by the Department:

(a) The members of, and appropriate staff of, a binational panel or extraordinary challenge committee;

(b) Counsel to participants in panel reviews and professionals retained by, or under the direction or control of such counsel, provided that the counsel or professional does not participate in competitive decision-making activity (such as advice on production, sales, operations, or investments, but not legal advice) for the participant represented or for any person who would gain competitive advantage through knowledge of the proprietary information sought;

(c) Other persons who are retained or employed by and under the direction or control of a counsel or professional, panelist, or committee members who has been issued a protective order, such as paralegals, law clerks, and secretaries, if such other persons are

(1) Not involved in the competitive decision-making of a participant to the panel review or for any person who would gain competitive advantage through knowledge of the proprietary information sought; and

(2) Have agreed to be bound by the terms set forth on the application for protective order of the counsel or professional, panelist, or committee member;

(d) The Secretaries of the United States and Canadian sections of the Secretariat and persons retained or employed by the Secretaries, including court reporters hired by the Secretariat to transcribe panel reviews; and

(e) Such officials of the United States government as the United States Trade Representative informs the Department require access to proprietary information for the purpose of evaluating whether the United States should seek an extraordinary challenge committee review of a panel determination.

§ 356.10 Procedures for obtaining access to proprietary information.

(a) *Persons Who Must File an Application for Disclosure Under Protective Order.* In order to be permitted access to proprietary information in the administrative record of a final determination under review by a panel, all persons described in § 356.9 (a), (b), (d), or (e) shall file an application for a protective order.

(b) *Procedures for Applying for a Protective Order.*—(1) *Contents of Applications.* (i) The Department will adopt from time to time forms for submitting applications for disclosure of proprietary information pursuant to a protective order that incorporate the terms of this rule.

(ii) Such forms will require the applicant to submit a personal sworn statement stating, in addition to such other terms as the Department may require, that the applicant shall:

(A) Not disclose any proprietary information obtained under protective order and not otherwise available to the applicant, to any person other than (*1*) an official of the Department involved in the particular panel review in which the proprietary information is part of the administrative record, (*2*) the person from whom the information was obtained, (*3*) a person who has been granted access to the proprietary information at issue under section 356.9, and (*4*) a person employed and under the direction or control of a counsel or professional, panelist, or committee member who has been issued a protective order, such as a paralegal, law clerk, or secretary if such person (*i*) is not involved in competitive decision-making for a party to the panel review of for any person that would gain competitive advantage through knowledge of the proprietary information sought, and (*ii*) has agreed to be bound by the terms set forth in the application for protective order by the counsel, professional, panelist, or committee member;

(B) Not use any of the proprietary information not otherwise available to the applicant for purposes other than proceedings pursuant to Article 1904 of the Agreement; and

(C) Upon completion of the panel review, or at such earlier date as may be determined by the Department, return to the Department or certify to the Department the destruction of all documents released under the protective

order and all other documents containing the proprietary information (such as briefs, notes, or charts based on any such information received under the protective order).

(D) The sworn statement referred to in § 356.10(b) shall include an acknowledgement by the person providing it that breach thereof may subject the signatory to sanctions under § 356.12.

(2) *Timing of Applications.* Any person described in § 356.9(a) may file an application for disclosure under protective order after a Notice of Request for Panel Review has been filed with the Secretariat. Any person described in § 356.9(b) may file at the time that person files a Complaint or a Notice of Appearance. Any person described in § 356.9(d) may file an application at any time. Any person described in § 356.9(e) shall submit an application for filing by the United States Trade Representative along with notification to the Department.

(3) *Service of Applications.* (i) *Applications of Persons Described in § 356.9(b).* If a person described in paragraph (b) of section 356.9 files an application before the date on which notices of appearance must be filed in the panel review, such person shall concurrently serve four copies of such application on the United States Secretary and one copy on each person listed on the service list. If the application is filed after the deadline for filing a Notice of Appearance, such person shall serve four copies of the application on the United States Secretary and one copy on each participant in the panel review.

(ii) *Applications of Persons Described in Sections 356.9 (a), (d), and (e).* Any person described in paragraph (a), (d), or (e) of § 356.9 who files an application with the Department shall file four copies with the United States section of the Secretariat, for placement in the public inspection files of the United States and Canadian sections of the Secretariat.

(iii) *Method of Service.* Service of an application may be effected by personal service or sending a copy of the document by facsimile, express mail, or by an expedited courier service.

(4) *Release to Employees of Panelists, Committee Members, and Counsel or Professionals.* A person described in paragraph (c) of § 356.9, including a paralegal, law clerk, or secretary, may be permitted access to proprietary information disclosed under protective order by the counsel or professional, panelist, or committee member who retains or employs such person, if such person has agreed to the terms of the protective order issued to the counsel or professional, panelist, or committee member, by signing and dating a completed copy of the application for protective order of the representative panelist, or committee member in the location indicated in that application;

(5) *Counsel or Professional Who Retains Access to Proprietary Information Under a Protective Order Issued During the Administrative Proceeding.* Any Counsel or professional who has been granted access to proprietary information under protective order during an administrative proceeding that resulted in a final determination that becomes the subject of panel review may, if permitted by the terms of the protective order previously issued by the Department, retain such information until the applicant receives a protective order under this Part.

(c) *Issuance of a Protective Order to Persons Described in Section 356.9 (a), (d), and (e)*—(1) *Issuance to Persons Described in § 356.9 (a) and (d).* (i) Upon receipt by the Department of an application from a person described in paragraph (a) or (d) of § 356.9, the Department will issue a protective order authorizing disclosure of proprietary information included in the administrative record of the final determination that is the subject of the panel review at issue.

(ii) Any panelist to whom the Department issues a protective order must countersign the protective order, return one copy of the countersigned protective order to the Department, and file four copies with the United States section of the Secretariat.

(iii) When the Department issues a protective order to any person described in paragraph (a) of § 356.9, other than a panelist, that person shall file four copies with the United States section of the Secretariat.

(2) *Issuance to Persons Described in § 356.9(e).* Upon receipt by the Department from the United States Trade Representative of applications from persons requiring access to proprietary information for the purpose of evaluating whether the United States should request an extraordinary challenge committee, the Department will issue a protective order authorizing disclosure of proprietary information included in the record of the panel review at issue.

(3) The terms and obligations of any protective order issued under this paragraph will be the same as those established in § 356.10(b)(1).

(d) *Consideration of Applications from Counsel or Professionals*—(1) *Opportunity to Object to Disclosure to Persons Described in § 356.9 (b) or (c).* The Department will not rule on an application for a protective order filed by a counsel or professional until ten days after the request is filed, unless there is compelling need to rule more expeditiously. Unless the Department has indicated otherwise, any person may file an objection to the application within seven days of filing of the application. Any such objection shall state the specific reasons in the view of such person why the application should not be granted. One copy of the objection shall be served on the applicant and on all persons who were served with the application. Service shall be facsimile, express mail, or by any expedited courier service. Any reply to an objection will be considered if it is filed before the Department renders a decision.

(2) *Approval of the Applications.* If appropriate, the Department will issue a protective order permitting the release of proprietary information to an applicant and will serve a copy of the protective order on the submitter of the proprietary information.

(3) *Denial of the Application.* If the Department denies an application, it shall issue a letter notifying the applicant of its decision and the reasons therefor, and will serve a copy of the letter on the submitter of the proprietary information.

(4) *Service of a Protective Order.* If the Department issues a protective order to a person pursuant to paragraph (d)(2) of this section, such person shall immediately file four copies of the protective order with the United States Secretariat and, as soon as the deadline for the filing of Notices of Appearances has passed in the appropriate panel review, shall serve a copy of that order upon all participants in that review. Service upon the Secretariat and the participants may be effected by any means permitted by the rules of procedure adopted by the United States and Canada to implement Article 1904 of the Agreement.

(f) *Modification or Revocation of Protective Orders.* (1) If any person believes that changed conditions of fact or law, or the public interest, may require that a protective order issued pursuant to this Part be modified or revoked, in whole or in part, such person may so inform the Department. The motion shall state the changed circumstances warranting such action and shall include materials and argument in support thereof. Such motion shall be served by the movant upon the person to whom the Protective Order was issued. Responses to the motion may be filed within 20 days after

the motion is filed unless the Department indicates otherwise. The Department may also consider such action *sua sponte*.

§ 356.11 Procedures for obtaining access to privileged information.

(a) *Persons Who May Apply For Access to Privileged Information Under Protective Order.* (1) *Panelists.* If a panel decides that *in camera* examination of a document containing privileged information in an administrative record is necessary in order for the panel to determine whether the document, or portions thereof, should be disclosed under a Protective Order for Privileged Information to counsel or professionals retained by or under the direction or control of counsel, each panelist who is to conduct the *in camera* review, pursuant to the rules of procedure adopted by the United States and Canada to implement Article 1904 of the Agreement, shall file an application for disclosure of the privileged information under Protective Order for Privileged Information with the Department.

(2) *Designated Officials of the United States Government.* Where, in the course of a panel review, the panel has reviewed privileged information under a Protective Order for Privileged Information, and the issue to which such information pertains is relevant to the evaluation of whether the United States should request an extraordinary challenge committee, each official of the United States government whom the United States Trade Representative informs the Department requires access for the purpose of such evaluation shall file an application for a Protective Order for Privileged Information.

(3) *Members of an Extraordinary Challenge Committee.* Where an extraordinary challenge record contains privileged information and a Protective Order for Privileged Information was issued to counsel or professionals representing participants in the panel review at issue, each member of the extraordinary challenge committee shall file an application for a Protective Order for Privileged Information.

(4) *Other Designated Persons.* If the panel decides, in accordance with the rules of procedure adopted by the United States and Canada to implement Article 1904 of the FTA, that disclosure of a document containing privileged information is appropriate, any person identified in such a decision as entitled to release under Protective Order for Privileged Information, *e.g.*, counsel or a professional under the direction or control of counsel, Secretariat personnel, or a member of the staff of the panel, shall file an application for release under Protective Order for Privileged Information with the Department.

(b) *Contents of Applications for Release Under Protective Order for Privileged Information.* (1) The Department will adopt from time to time forms for submitting applications for disclosure of privileged information pursuant to a Protective Order for Privileged Information that incorporate the terms of this rule.

(2) Such forms shall require the applicant for release of privileged information under Protective Order for Privileged Information to submit a personal sworn statement stating, in addition to such other conditions as the Department may require, that the applicant will:

(i) Not disclose any privileged information obtained under protective order to any person other than

(A) Officials of the Department involved in the particular panel review in which the privileged information is part of the record;

(B) A person who has furnished a similar application and been issued a Protective Order for Privileged Information concerning the privileged information at issue;

(C) Such officials of the United States government as the United States Trade Representative informs the Department require access to privileged information for the purpose of evaluating whether the United States should seek an extraordinary challenge committee; and

(D) A person retained or employed by a representative or panelist who has been issued a Protective Order for Privileged Information, such as a paralegal, law clerk, or secretary, if such person has agreed to be bound by the terms set forth in the application for Protective Order for Privileged Information of the counsel, professional or panelist by signing and dating the completed application of the counsel, professional or panelist on the location indicated that application.

(ii) Use such information solely for purposes of the proceedings under Article 1904 of Agreement; and

(iii) Upon completion of the panel review, or at such earlier date as may be determined by the Department, to return to the Department or certify to the Department the destruction of all documents released under the Protective Order for Privileged Information and all other documents containing the privileged information (such as briefs, notes, or charts based on any such information received under the Protective Order for Privileged Information).

(3) The sworn statement referred to in section 356.11(b) shall include an acknowledgement by the person providing it that breach thereof may subject the signatory to sanctions under sections 356.12 and 356.30.

(c) *Issuance of Protective Orders for Privileged Information.* Upon receipt of an application for protective order under this section, the Department shall issue a protective order.

(d) *Service of Protective Order for Privileged Information.* (1) If the Department issues a Protective Order for Privileged Information to a counsel or professional, such person shall immediately file four copies of the application and Protective Order for Privileged Information with the United States section of the Secretariat and, as soon as the deadline for the filing of a Notice of Appearance has passed in the appropriate panel review, shall serve a copy of that application and order upon all participants in the panel review.

(2) If the Department issues a Protective Order for Privileged Information to any person described in paragraph (a) or (d) of section 356.9, such person shall file four copies of the application and Protective Order for Privileged Information with the United States section of the Secretariat.

(e) *Modification or Revocation of Protective Order for Privileged Information.* If any person believes that changed conditions of fact or law, or the public interest, require that a Protective Order for Privileged Information be modified or revoked, in whole or in part, such person may file with the Department a motion requesting such relief. The motion shall state the changes desired and the changed circumstances warranting such action and shall include materials and argument in support thereof. Such motion shall be served by the movant upon the person to whom the Protective Order for Privileged Information was issued. Responses to the motion may be filed within 20 days after the motion is filed unless the Department indicates otherwise. The Department may also consider such action *sua sponte*.

Subpart D—Violation of a Protective Order or a Disclosure Undertaking

§ 356.12 Sanctions for Violation of a protective order or disclosure undertaking.

(a) A person determined under this Part to have violated a protective order or a disclosure undertaking may be subjected to any or all of the following sanctions:

(1) Liable to the United States for a civil penalty not to exceed $100,000 for each violation;

(2) Barred from appearing before the Department to represent another for a designated time period from the date of publication in the Federal Register or *Canada Gazette* of a notice that a violation has been determined to exist;

(3) Denied access to proprietary information for a designated time period from the date of publication in the Federal Register or *Canada Gazette* of a notice that a violation has been determined to exist;

(4) Other appropriate administrative sanctions, including striking from the record of the panel review any information or argument submitted by, or on behalf of, the violating party or the party represented by the violating party; terminating any proceeding then in progress; or revoking any order then in effect; and

(5) Required to return material previously provided by the investigating authority, and all other materials containing the proprietary information, such as briefs, notes or charts based on any such information received under a protective order or a disclosure undertaking.

(b)(1) The firm of which a person determined to have violated a protective order or a disclosure undertaking is a partner, associate, or employee; any partner, associate, employer, or employee of such person; and any person represented by such person may be barred from appearing before the Department for a designated time period from the date of publication in the Federal Register or *Canada Gazette* of notice that a violation has been determined to exist or may be subjected to the sanctions set forth in paragraph (a) of this section as appropriate.

(2) Each person against whom sanctions are proposed under paragraph (b)(1) of this section is entitled to all the administrative rights set forth in this Subpart separately and apart from rights provided to a person subject to sanctions under paragraph (a), including the right to a charging letter, right to representation, and right to a hearing, but subject to joinder or consolidation by the administrative law judge under section 356.23(b).

§ 356.13 Suspension of rules.

Upon request by the Deputy Under Secretary, a charged or affected party, or the APO Sanctions Board, the administrative law judge may modify or waive any rule in this Subpart upon determining that no party will be unduly prejudiced and the ends of justice will thereby be served and upon notice to all parties.

§ 356.14 Report of violation and investigation.

(a) An employee of the Department or any other person who has information indicating that the terms of a protective order or a disclosure undertaking have been violated will provide the information to a Director or the Chief Counsel.

(b) Upon receiving information which indicates that a person may have violated the terms of a protective order or an undertaking, the Director will conduct an investigation concerning whether there was a violation of a protective order or a disclosure undertaking, and who was responsible for the violation, if any. For purposes of this Subpart, the Director will be supervised by the Deputy Under Secretary with guidance from the Chief Counsel. The Director will conduct an investigation only if the information is received within 30 days after the alleged violation occurred or, as determined by the Director, could have been discovered through the exercise of reasonable and ordinary care.

(c) The Director will provide a report of the investigation to the Deputy Under Secretary, after review by the Chief Counsel, no later than 180 days after receiving information concerning a violation. Upon the Director's request, and if extraordinary circumstances exist, the Deputy Under Secretary may grant the Director up to an additional 180 days to conduct the investigation and submit the report.

(d) The following examples of actions that constitute violations of an administrative protective order shall serve as guidelines to each person subject to a protective order. These examples do not represent an exhaustive list. Evidence that one of the acts described in the guidelines has been committed, however, shall be considered by the Director as reasonable cause to believe a person has violated a protective order within the meaning of § 536.15.

(1) Disclosure of proprietary information to any person not granted access to that information by protective order, including an official of the Department or member of the Secretariat staff not directly involved with the panel review pursuant to which the proprietary information was released, an employee of any other United States, foreign government, or international agency, or a member of Congress or the Canadian Parliament.

(2) Failure to follow the detailed procedures outlined in the protective order for safeguarding proprietary information, including maintaining a log showing when each proprietary document is used, and by whom, and requiring all employees who obtain access to proprietary information (under the terms of a protective order granted their employer) to sign and date a copy of that protective order.

(3) Loss of proprietary information.

(4) Failure to return or destroy all copies of the original documents and all notes, memoranda, and submissions containing proprietary information at the close of the proceeding for which the data were obtained by burning or shredding of the documents or by erasing electronic memory, computer disk, or tape memory, as set forth in the protective order.

(5) Failure to delete proprietary information from the public version of a brief or other correspondence filed with the Secretariat.

(6) Disclosure of proprietary information during a public hearing.

(e) Each day of a continuing violation shall constitute a separate violation.

§ 356.15 Initiation of proceedings.

(a) If the Deputy Under Secretary concludes, after an investigation and report by the Director under § 356.14(c) and consultation with the Chief Counsel, that there is reasonable cause to believe that a person has violated a protective order or a disclosure undertaking and that sanctions are appropriate for the violation, the Deputy Under Secretary will, at his discretion, either initiate a proceeding under this Subpart by issuing a charging letter as set forth in § 356.16 or request that the authorized agency of Canada initiate a proceeding by issuing a request to charge as set forth in § 356.17. In determining whether sanctions are appropriate and, if so, what sanctions to impose, the Deputy Under Secretary will consider the nature of the violation, the resulting harm, and other relevant circumstances of the case. The Deputy Under Secretary will decide whether to initiate a proceeding no later than 60 days after receiving a report of the investigation.

(b) If the Department receives a request to charge from an authorized agency of Canada, the Deputy Under Secretary will promptly initiate proceedings under this Part by issuing a charging letter as set forth in § 356.16.

§ 356.16 Charging letter.

(a) *Contents of Letter.* The Deputy Under Secretary will initiate proceedings by issuing a charging letter to each charged party and affected party which includes:

(1) A statement of the allegation that a protective order or a disclosure undertaking has been violated and the basis thereof;

(2) A statement of the proposed sanctions;

(3) A statement that the charged or affected party is entitled to review the documents or other physical evidence upon which the charge is based and the method for requesting access to, or copies of, such documents;

(4) A statement that the charged or affected party is entitled to a hearing before an administrative law judge if requested within 30 days of the date of service of the charging letter and the procedure for requesting a hearing, including the name, address, and telephone number of the person to contact if there are further questions;

(5) A statement that the charged or affected party has a right, if a hearing is not requested, to submit documentary evidence to the Deputy Under Secretary and an explanation of the method for submitting evidence and the date by which it must be received; and

(6) A statement that the charged or affected party has a right to retain counsel at the party's own expense for purposes of representation.

(b) *Settlement and Amendment of the Charging Letter.* The Deputy Under Secretary may amend, supplement, or withdraw the charging letter at any time with the approval of an administrative law judge if the interest of justice would thereby be served. If a hearing has not been requested, the Deputy Under Secretary will ask the Under Secretary to appoint an administrative law judge to make this determination. If a charging letter is withdrawn after a request for a hearing, the administrative law judge will determine whether the withdrawal will bar the Deputy Under Secretary from seeking sanctions at a later date for the same alleged violation. If there has been no request for a hearing, or if supporting information has not been submitted under § 356.28, the withdrawal will not bar future actions on the same alleged violation. The Deputy Under Secretary and a charged or affected party may settle a charge brought under this Subpart by mutual agreement at any time after service of the charging letter; approval of the administrative law judge or the APO Sanctions Board is not necessary.

(c) *Service of Charging Letter on a Resident of the United States.*

(1) Service of a charging letter on a United States resident will be made by:

(i) Mailing a copy by registered or certified mail addressed to the charged or affected party at the party's last known address;

(ii) Leaving a copy with the charged or affected party or with an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service for the party; or

(iii) Leaving a copy with a person of suitable age and discretion who resides at the party's last known dwelling.

(2) Service made in the manner described in paragraph (c)(1) (ii) or (iii) of this section shall be evidenced by a certificate of service signed by the person making such service, stating the method of service and the identity of the person with whom the charging letter was left.

(d) *Service of Charging Letter on a Non-resident.* If applicable laws or intergovernmental agreements or understandings make the methods of service set forth in paragraph (c) of this section inappropriate or ineffective, service of the charging letter on a person who is not a resident of the United States may be made by any method that is permitted by the country in which the person resides and that, in the opinion of the Deputy Under Secretary, satisfies due process requirements under United States law with respect to notice in administrative proceedings.

§ 356.17 Request to charge.

Upon deciding to initiate a proceeding pursuant to § 356.15, the Deputy Under Secretary will request an authorized agency of Canada to initiate a proceeding for imposing sanctions for violations of a protective order or a disclosure undertaking by issuing a letter of request to charge that includes a statement of the allegation that a protective order or a disclosure undertaking has been violated and the basis thereof.

§ 356.18 Interim sanctions.

(a) If the Deputy Under Secretary concludes, after issuing a charging letter under § 356.16 and before a final decision is rendered, that interim sanctions are necessary to protect the interests of the Department, an authorized agency of Canada, or others, including the protection of proprietary information, the Deputy Under Secretary may petition an administrative law judge to impose such sanctions.

(b) The administrative law judge may impose interim sanctions against a person upon determining that:

(1) There is probable cause to believe that there was a violation of a protective order or a disclosure undertaking and the Department is likely to prevail in obtaining sanctions under this Subpart,

(2) The Department, authorized agency of Canada, or others are likely to suffer irreparable harm if the interim sanctions are not imposed, and

(3) The interim sanctions are a reasonable means for protecting the rights of the Department, authorized agency of Canada, or others while preserving to the greatest extent possible the rights of the person against whom the interim sanctions are proposed.

(c) Interim sanctions which may be imposed include any sanctions that are necessary to protect the rights of the Department, authorized agency of Canada, or others, including, but not limited to:

(1) Denying a person further access to proprietary information,

(2) Barring a person from representing another person before the Department,

(3) Barring a person from appearing before the Department, and

(4) Requiring the person to return material previously provided by the Department or the competent investigating authority of Canada, and all other materials containing the proprietary information, such as briefs, notes, or charts based on any such information received under a protective order or a disclosure undertaking.

(d) The Deputy Under Secretary will notify the person against whom interim sanctions are sought of the request for interim sanctions and provide to that person the material submitted to the administrative law judge to support the request. The notice will include a reference to the procedures of this section.

(e) A person against whom interim sanctions are proposed has a right to oppose the request through submission of material to the administrative law judge. The administrative law judge has discretion to permit oral presentations and to allow further submissions.

(f) The administrative law judge will notify the parties of the decision on interim sanctions and the basis therefor within five days of the conclusion of oral presentations or the date of final written submissions.

(g) If interim sanctions have been imposed, the investigation and any proceedings under this Subpart will be conducted on an expedited basis.

(h) An order imposing interim sanctions may be revoked at any time by the administrative law judge and expires automatically upon the issuance of a final order.

(i) The administrative law judge may reconsider imposition of interim sanctions on the basis of new and material evidence or other good cause shown. The Deputy Under Secretary or a person against whom interim

sanctions have been imposed may appeal a decision on interim sanctions to the APO Sanctions Board, if such an appeal is certified by the administrative law judge as necessary to prevent undue harm to the Department or authorized agency of Canada, a person against whom interim sanctions have been imposed or others, or is otherwise in the interests of justice. Interim sanctions which have been imposed remain in effect while an appeal is pending, unless the administrative law judge determines otherwise.

(j) The Deputy Under Secretary may request an administrative law judge to impose emergency interim sanctions to preserve the status quo. Emergency interim sanctions may last no longer than 48 hours, excluding weekends and holidays. The person against whom such emergency interim sanctions are proposed need not be given prior notice or an opportunity to oppose the request for sanctions. The administrative law judge may impose emergency interim sanctions upon determining that the Department or authorized agency of Canada is, or others are, likely to suffer irreparable harm if such sanctions are not imposed and that the interests of justice would thereby be served. The administrative law judge will promptly notify a person against whom emergency sanctions have been imposed of the sanctions and their duration.

(k) If a hearing has not been requested, the Deputy Under Secretary will request that the Under Secretary appoint an administrative law judge for making determinations under this section.

(l) The Deputy Under Secretary will notify the Secretariat concerning the imposition or revocation of interim sanctions or emergency interim sanctions.

§ 356.19 Request for a hearing.

(a) Any party may request a hearing by submitting a written request to the Under Secretary within 30 days after the date of service of the charging letter. However, the Deputy Under Secretary may request a hearing only if the interests of justice would thereby be served.

(b) Upon timely receipt of a request for a hearing, the Under Secretary will appoint an administrative law judge to conduct the hearing and render an initial decision.

§ 356.20 Discovery.

(a) *Voluntary Discovery.* All parties are encouraged to engage in voluntary discovery procedures regarding any matter, not privileged, which is relevant to the subject matter of the pending sanctions proceeding.

(b) *Limitations on Discovery.* The administrative law judge shall place such limits upon the kind or amount of discovery to be had or the period of time during which discovery may be carried out as shall be consistent with the time limitations set forth in this Part.

(c) *Interrogatories and Requests for Admissions or Production of Documents.* A party may serve on any other party interrogatories, requests for admissions, or requests for production of documents for inspection and copying, and the party may then apply to the administrative law judge for such enforcement or protective order as that party deems warranted concerning such discovery. The party will serve a discovery request at least 20 days before the scheduled date of a hearing, if a hearing has been requested and scheduled, unless the administrative law judge specifies a shorter time period. Copies of interrogatories, requests for admissions, and requests for production of documents and responses thereto will be served on all parties. Matters of fact or law of which admission is requested will be deemed admitted unless, within a period designated in the request (at least 10 days after the date of service of the request, or within such further time as the administrative law judge may allow), the party to whom the request is directed serves upon the requesting party a sworn statement either admitting or denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully either admit or deny such matters.

(d) *Depositions.* Upon application of a party and for good cause shown, the administrative law judge may order the taking of the testimony of any person who is a party, or under the control or authority of a party, by deposition and the production of specified documents or materials by the person at the deposition. The application shall state the purpose of the deposition and shall set forth the facts sought to be established through the deposition.

(e) *Supplementation of Responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty to seasonably supplement his response with respect to any question directly addressed to

(i) The identity and location of persons having knowledge of discoverable matters; and

(ii) The identity of each person expected to be called as an expert witness at a hearing, the subject matter on which the witness is expected to testify, and the substance of the testimony.

(2) A party is under a duty to seasonably amend a prior response if the party obtains information upon the basis of which he or she

(i) Knows the response was incorrect when made; or

(ii) Knows that the response, though correct when made, is no longer true, and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the administrative law judge, agreement of the parties, or at any time prior to a hearing through new requests for supplementation of prior responses.

(f) *Enforcement.* The administrative law judge may order a party to answer designated questions, to produce specified documents or items, or to take any other action in response to a proper discovery request. If a party does not comply with such an order, the administrative law judge may make any determination or enter any order in the proceedings as he or she deems reasonable and appropriate. The administrative law judge may strike related charges or defenses in whole or in part, or may take particular facts relating to the discovery request to which the party failed or refused to respond as being established for purposes of the proceeding in accordance with the contentions of the party seeking discovery. In issuing a discovery order, the administrative law judge will consider the necessity to protect proprietary information and will not order the release of information in circumstances where it is reasonable to conclude that such release will lead to unauthorized dissemination of such information.

§ 356.21 Subpoenas.

(a) *Application for Issuance of a Subpoena.* An application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at a hearing shall be made to the administrative law judge. An application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, at a prehearing conference, at a hearing, or under any other circumstances, shall be made in writing to the administrative law judge and

shall specify the material to be produced as precisely as possible, showing the general relevancy of the material and the reasonableness of the scope of the subpoena.

(b) *Use of Subpoena for Discovery.* Subpoenas may be used by any party for purposes of discovery or for obtaining documents, papers, books, or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such person.

(c) *Application for Subpoenas for Nonparty Department Records or Personnel or for Records or Personnel of Other Government Agencies.* (1) An application for issuance of a subpoena requiring the production of nonparty documents, papers, books, physical exhibits, or other material in the records of the Department, or requiring the appearance of an official or employee of the Department, or requiring the production of records or personnel of other Government agencies shall specify as precisely as possible the material to be produced, the nature of the information to be disclosed, or the expected testimony of the official or employee, and shall contain a statement showing the general relevancy of the material, information, or testimony and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony or their substantial equivalent could not be obtained without undue hardship by alternative means.

(2) Such applications shall be ruled upon by the administrative law judge. To the extent that the motion is granted, the administrative law judge shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the official or employee as may appear necessary and appropriate for the protection of the public interest.

(3) No application for a subpoena for production of documents grounded upon the Freedom of Information Act (5 U.S.C. 552) shall be entertained by the administrative law judge.

(d) *Motion to Limit or Quash.* Any motion to limit or quash a subpoena shall be filed within 10 days after service thereof, or within such other time as the administrative law judge may allow.

(e) *Ex Parte Rulings on Applications for Subpoenas.* Applications for the issuance of subpoenas pursuant to this section may be made *ex parte*, and, if so made, such applications and rulings thereon shall remain *ex parte* unless otherwise ordered by the administrative law judge.

(f) *Role of the Under Secretary.* If a hearing has not been requested, the party seeking enforcement will ask the Under Secretary to appoint an administrative law judge to rule on applications for issuance of a subpoena under this section.

§ 356.22 Prehearing conference.

(a)(1) If an administrative hearing has been requested, the administrative law judge will direct the parties to attend a prehearing conference to consider:

(i) Simplification of issues;

(ii) Obtaining stipulations of fact and of documents to avoid unnecessary proof;

(iii) Settlement of the matter;

(iv) Discovery; and

(v) Such other matters as may expedite the disposition of the proceedings.

(2) Any relevant and significant stipulations or admissions will be incorporated into the initial decision.

(b) If a prehearing conference is impractical, the administrative law judge will direct the parties to correspond with each other or to confer by telephone or otherwise to achieve the purposes of such a conference.

§ 356.23 Hearing.

(a) *Scheduling of Hearing.* The administrative law judge will schedule the hearing at a reasonable time, date, and place, which will be in Washington, DC, unless the administrative law judge determines otherwise based upon good cause shown, that another location would better serve the interests of justice. In setting the date, the administrative law judge will give due regard to the need for the parties adequately to prepare for the hearing and the importance of expeditiously resolving the matter.

(b) *Joinder or Consolidation.* The administrative law judge may order joinder or consolidation if sanctions are proposed against more than one party or if violations of more than one protective order or disclosure undertaking are alleged if to do so would expedite processing of the cases and not adversely affect the interests of the parties.

(c) *Hearing Procedures.* Hearings will be conducted in a fair and impartial manner by the administrative law judge, who may limit attendance at any hearing or portion thereof if necessary or advisable in order to protect proprietary information from improper disclosure. The rules of evidence prevailing in courts of law shall not apply, and all evidentiary material the administrative law judge determines to be relevant and material to the proceeding and not unduly repetitous may be received into evidence and given appropriate weight. The administrative law judge may make such orders and determinations regarding the admissibility of evidence, conduct of examination and cross-examination, and similar matters as are necessary or appropriate to ensure orderliness in the proceedings. The administrative law judge will ensure that a record of the hearing will be taken by reporter or by electronic recording, and will order such part of the record to be sealed as is necessary to protect proprietary information.

(d) *Rights of Parties.* At a hearing each party shall have the right to:

(1) Introduce and examine witnesses and submit physical evidence,

(2) Confront and cross-examine adverse witnesses,

(3) Present oral argument, and

(4) Receive a transcriptor recording of the proceedings, upon request, subject to the administrative law judge's orders regarding sealing the record.

(e) *Representation.* Each charged or affected party has a right to represent himself or hereself or to retain private counsel for that purpose. The Chief Counsel will represent the Department, unless the General Counsel of the Department determines othewise. The administrative law judge may disallow a representative if such representation constitutes a conflict of interest or is otherwise not in the interests of justice and may debar a representative for contumacious conduct relating to the proceedings.

(f) *Ex Parte Communications.* The parties and their representatives may not make any *ex parte* communications to the administrative law judge concerning the merits of the allegations or any matters at issue, except as provided in § 356.18(j) regarding emergency interim sanctions.

§ 356.24 Proceeding without a hearing.

If no party has requested a hearing, the Deputy Under Secretary, within 40 days after the date of service of a charging letter, will submit for inclusion into the record and provide each charged or affected party information supporting the allegations in the charging letter. Each charged or affected party has the right to file a written

response to the information and supporting documentation within 30 days after the date of service of the information provided by the Deputy Under Secretary unless the Deputy Under Secretary alters the time period for good cause. The Deputy Under Secretary may allow the parties to submit further information and argument.

§ 356.25 Witnesses.

Witnesses summoned before the Department shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

§ 356.26 Initial decision.

(a) *Initial Decision.* The administrative law judge, if a hearing was requested, or the Deputy Under Secretary will submit an initial decision to the APO Sanctions Board, providing copies to the parties. The administrative law judge or the Deputy Under Secretary will ordinarily issue the decision within 20 days of the conclusion of the hearing, if one was held, or within 15 days of the date of service of final written submissions. The initial decision will be based solely on evidence received into the record and the pleadings of the parties.

(b) *Findings and conclusions.* The initial decision will state findings and conclusions as to whether a person has violated a protective order or an undertaking; the basis for those findings and conclusions; and whether the sanctions proposed in the charging letter, or lesser included sanctions, should be imposed against the charged or affected party. The administrative law judge or the Deputy Under Secretary may impose sanctions only upon determining that the preponderance of the evidence supports a finding of violation of a protective order or an undertaking and that the sanctions are warranted against the charged or affected party.

(c) *Finality of Decision.* If the APO Sanctions Board has not issued a decision on the matter within 60 days after issuance of the initial decision, the initial decision becomes the final decision of the Department.

§ 356.27 Final decision.

(a) *APO Sanctions Board.* Upon request of a party, the initial decision will be reviewed by the members of the APO Sanctions Board. The Board consists of the Under Secretary for International Trade, who shall serve as Chairperson, the Under Secretary for Economic Affairs, and the General Counsel.

(b) *Comments on Initial Decision.* Within 30 days after issuance of the initial decision, a party may submit written comments to the APO Sanctions Board on the initial decision, which the Board will consider when reviewing the initial decision. The parties have no right to an oral presentation, although the Board may allow oral argument in its discretion.

(c) *Final Decision by the APO Sanctions Board.* Within 60 days but not sooner than 30 days after issuance of an initial decision, the APO Sanctions Board may issue a final decision which adopts the initial decision in its entirety; differs in whole or in part from the initial decision, including the imposition of lesser included sanctions; or remands the matter to the administrative law judge or the Deputy Under Secretary for further consideration. The only sanctions that the Board can impose are those sanctions proposed in the charging letter or lesser included sanctions.

(d) *Contents of Final Decision.* If the final decision of the APO Sanctions Board does not remand the matter and differs from the initial decision, it will state findings and conclusions which differ from the initial decision, if any, the basis for those findings and conclusions, and the sanctions which are to be imposed, to the extent they differ from the sanctions in the initial decision.

(e) *Public Notice of Sanctions.* If the final decision is that there has been a violation of a protective order or an undertaking and that sanctions are to be imposed, notice of the decision will be published in the **Federal Register** and forwarded to the Secretariat. Such publication will be no sooner than 30 days after issuance of a final decision or after a motion to reconsider has been denied, if such a motion was filed. The Deputy Under Secretary will also provide such information to the ethics panel or other disciplinary body of the appropriate bar associations or other professional associations whenever the Deputy Under Secretary subjects a charged or affected party to a sanction under paragraph (a)(2) of § 356.12 and to any Federal agency likely to have an interest in the matter and will cooperate in any disciplinary actions by any association or agency.

§ 356.28 Reconsideration.

Any party may file a motion for reconsideration with the APO Sanctions Board. The party must state with particularity the grounds for the motion, including any facts or points of law which the party claims the APO Sanctions Board has overlooked or misapplied. The party may file the motion within 30 days of the issuance of the final decision or the adoption of the initial decision as the final decision, except that if the motion is based on the discovery of new and material evidence which was not known, and could not reasonably have been discovered through due diligence prior to the close of the record, the party shall file the motion within 15 days of the discovery of the new and material evidence. The party shall provide a copy of the motion to all other parties. Opposing parties may file a response within 30 days of the date of service of the motion. The response shall be considered as part of the record. The parties have no right to an oral presentation on a motion for reconsideration, but the Board may permit oral argument at its discretion. If the motion to reconsider is granted, the Board will review the record and affirm, modify, or reverse the original decision or remand the matter for further consideration to an administrative law judge or the Deputy Under Secretary, as warranted.

§ 356.29 Confidentiality.

(a) All proceedings involving allegations of a violation of a protective order or a disclosure undertaking shall be kept confidential until such time as the Department makes a final decision under these regulations, which is no longer subject to reconsideration, imposing a sanction.

(b) The charged party or counsel for the charged party will be, to the extent possible, granted access to proprietary information in these proceedings, as necessary, under administrative protective order, consistent with the provisions of § 356.10.

§ 356.30 Sanctions For Violations of a Protective Order for Privileged Information.

The provisions of this Subpart shall apply to persons who are alleged to have violated a Protective Order for Privileged Information.

Date: December 20, 1988.

Allen Moore,

Under Secretary for International Trade.

[FR Doc. 88-29906 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-05-M

Federal Register

Friday
December 30, 1988

Part VI

International Trade Commission

19 CFR Part 207

Panel Review Under Article 1904 of the United States-Canada Free-Trade Agreement; Interim Final Rule With Request for Comments

INTERNATIONAL TRADE COMMISSION

19 CFR Part 207

Panel Review Under Article 1904 of the United States-Canada Free-Trade Agreement

AGENCY: U.S. International Trade Commission.

ACTION: Interim-final rules with request for comments.

SUMMARY: Title IV of the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449 (September 28, 1988) ("FTA Act") establishes procedures for review by a binational panel of United States antidumping and countervailing duty final determinations involving Canadian products and for requesting panel review of Canadian antidumping and countervailing duty final determinations involving products of the United States. Title IV implements Chapter 19 of the United States-Canada Free-Trade Agreement ("Agreement"). As authorized by section 405(d) of the FTA Act, these regulations are intended to implement certain administrative procedures required by Article 1904 of the Agreement and the FTA Act.

DATES: These interim rules take effect on the date that the Agreement enters into force. Written comments must be received not later than 60 days after the Agreement enters into force. It is anticipated that the Agreement will enter into force on January 1, 1989. The Office of the United States Trade Representative will confirm in a **Federal Register** notice the precise date of the Agreement's entry into force. The International Trade Commission will publish notice confirming the effective date of these interim rules in the **Federal Register.**

ADDRESS: A signed original and fourteen (14) copies of each set of comments, along with a cover letter addressed to Kenneth R. Mason, Secretary, should be sent to the U.S. International Trade Commission, Office of the Secretary, 500 E Street, SW., Room 112, Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: Andrea C. Casson, Esq., 202-252-1105, or Elizabeth C. Hafner, Esq., 202-252-1113. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810.

SUPPLEMENTARY INFORMATON:

Background

Chapter 19 of the Agreement establishes a mechanism for resolving disputes between the United States and Canada with respect to antidumping and countervailing duty cases. The central feature of the mechanism is the replacement of domestic judicial review of determinations in antidumping and countervailing duty cases involving imports from the other country with review by binational panels. The United States and Canada will continue to apply their own national antidumping and countervailing duty laws to goods imported from the other country. In such cases, binational panels acting in place of national courts will expeditiously review final determinations under these laws to decide whether they are consistent with the antidumping or countervailing duty law of the country that made the determination. These determinations include final determinations of sales at less than fair value and subsidization by the Department of Commerce ("Commerce") and final determinations by the U.S. International Trade Commission ("Commission") as to whether a United States industry has been materially injured.

The Agreement provides that only the two governments may invoke the panel review process; however, the government of the United States will automatically trigger panel review in response to a timely request from any person who otherwise could have challenged the determination in court. Counsel for the participants will argue their position before the panel, as they would before a court. Each panel will consist of two panelists chosen from a United States roster, two panelists from a Canadian roster, and a fifth United States or Canadian panelist chosen by agreement or by lot. The Agreement also requires that the United States and Canada protect sensitive business information against unlawful disclosure in the panel review process.

The Agreement also provides for review of a panel decision by an extraordinary challenge committee ("committee") when either the United States Government or the Canadian Government alleges that a panelist materially violated the rules of conduct, or that the panel seriously departed from a fundamental procedural rule or exceeded its powers, authority or jurisdiction. The Committee will consist of three members, all of whom will be sitting or retired United States or Canadian judges, with at least one member from each country.

The administrative operations of panel and extraordinary challenge committee proceedings will be carried out by a Secretariat. The Secretariat will consist of a United States Secretary, located in Washington, DC and a Canadian Secretary located in the National Capital Region of Canada. By Executive Order, the United States Secretary will be located in the Department of Commerce.

Section 405 of the FTA Act establishes an interagency group, chaired by the United States Trade Representative, which will be responsible for preparing the United States rosters of potential panelists and potential committee members, and for evaluating whether the United States should seek extraordinary challenge committee reviews.

Title IV of the FTA Act amends U.S. law to implement Chapter 19 of the Agreement by limiting judicial review in cases involving Canadian merchandise, establishing procedures whereby private parties may appeal for binational panel review, providing organizational structure for administering U.S. responsibilities under Chapter 19 and making other conforming amendments to U.S. law. More specifically, section 405(d) of the FTA Act authorizes the Commission to issue regulations to implement Chapter 19 of the Agreement.

The procedures for binational panels are being implemented through Rules of Procedure issued jointly by the United States and Canada, and published elsewhere in this issue of the **Federal Register.** These regulations are intended to implement certain administrative procedures required by Chapter 19 of the Agreement involving administrative responsibilities of the Commission that continue during and after panel review. Specifically, the regulations address release of business proprietary and privileged information under administrative protective order during a panel review, and sanctions for violations of the provisions of such protective orders. The regulations complement, and should be used in conjunction with the Rules of Procedure.

This interim rule is exempt from the requirements of section 553 of the Administrative Procedure Act (5 U.S.C. 553), because it implements Chapter 19 of the Agreement and thus relates to a foreign affairs function of the United States.

The Commission has determined that this rule does not constitute a major rule for the purposes of Executive Order 12291 (46 FR 13193, Feb. 17, 1981), because it does not meet the criteria described in section 1(b) of the EO.

Moreover, because this rule concerns a foreign affairs function of the United States, it is not a rule within the meaning of section 1(a) of the EO. Since these regulations are being adopted as interim rules they are not subject to the filing requirement of section 3(c)(3) of the EO.

The Regulatory Flexibility Act does not apply to this rule because it does not affect a large number of small entities, and because the rule was not required by section 553 of the Administrative Procedure Act or by any other law to be promulgated as a proposed rule before issuance as a final rule.

Explanation of Interim—Final Rules

Section 207.90. This section provides the scope of Subpart G, which is to implement Article 1904 of the Agreement.

Section 207.91. This section provides definitions of terms used in Subpart G.

Section 207.92. There are two types of documents that put the Commission on notice that an antidumping or countervailing duty final determination involving Canadian products may be subject to review. These documents are a Notice to Commence Judicial Review ("Notice") and a Request for Panel Review ("Request"). The Tariff Act of 1930 ("Tariff Act"), as amended by section 401 of the FTA Act, provides that Commerce, in consultation with the Commission, shall by regulation prescribe the form, manner and style of Notices and Requests. 19 U.S.C. 1516a (g)(3)(B), (8)(A). The relevant regulations will be contained in Part 356 of Title 19 of the Code of Federal Regulations, which Part will contain Commerce's regulations for implementation of Article 1904 of the Agreement. Section 207.92 of the Commission's regulations refer to Commerce's regulations for the requirements for Notices and Requests.

Section 207.93. The Tariff Act, as amended by section 403 of the FTA Act, provides for certain persons to have access to business proprietary information contained in the Commission's administrative record before the panel, but only if these persons obtain an administrative protective order issued by the Commission. 19 U.S.C. 1677f(d). Section 207.93 implements this provision. The persons who are eligible for access are: The panelists and committee members, and any staff whom they employ, such as law clerks and secretaries; counsel for participants in the panel review, and their staff; other professionals retained by or under the direction or control of that counsel; the Secretaries of the Canadian and United States sections of the Secretariat and Secretariat personnel; and United States government officials, or their delegates, who are members of the interagency group designated to consider whether the United States should convene an extraordinary challenge committee. The persons who have access to proprietary information without protective orders are: The participant that submitted the information; that participant's counsel; and officials and employees of the Commission who are directly involved in the panel review or were involved in the underlying administrative proceeding.

Subsection (b) outlines the procedures for applying for a protective order. Panelists, committee members, counsel, professionals retained by counsel, the Secretaries and their personnel, and interagency group members must apply for a protective order in order to receive access. Nonprofessionals employed by panelists or by counsel, such as law clerks, paralegals, secretaries, and clericals would not submit protective order applications but, under paragraph (b)(5) would have access to the proprietary information at issue under the terms of any protective order issued to the person who employs them.

Paragraph (b)(6) explains that a counsel, or a professional retained by or under the direction or control of such counsel, previously granted access to proprietary information pursuant to an administrative protective order issued during the underlying Commission proceedings, provided the original protective order contains additional terms applicable to cases before a binational panel, shall, upon the filing by the counsel of a Complaint or a Notice of Appearance, become subject to additional terms applicable during panel review. Thus, such persons may retain the proprietary information but under similar terms and subject to the same sanctions as those who have been newly issued a protective order following the commencement of the panel review process. Paragraph (b)(6) also provides for the service of necessary documentation on other participants in the panel review, the Commission and the Secretariat.

Subsection (c) requires that upon the application for a protective order by a panelist, a committee member, any member of the Secretariat personnel, or a designated member of the interagency group, the Commission shall issue a protective order.

Subsection (d) provides for consideration of protective order applications by the Commission. Any objections to an application for a protective order to counsel or professionals working for counsel must be filed with the Commission within ten days of the date of filing of the application and shall state the reasons why the application should not be granted. After consideration, the Commission may either grant or deny the application.

Subsection (e) requires that persons who are newly granted protective orders during panel review, other than members of the interagency group, must serve copies on the Secretariat and participants. The Commission will retain in a public file copies of protective orders issued to panelists, committee members, Secretariat and its staff, interagency group members and counsel whether issued under the administrative proceeding or during the panel review process.

Subsection (f) provides for Commission revocation or modification of a protective order, either upon motion or *sua sponte*.

Section 207.94. This section deals with the release of privileged documents under protective order. The administrative record under review may contain documents for which the Commission claims attorney-client, attorney work product, or government pre-decisional privileges. One reason for classifying documents as privileged is to permit a free and frank exchange between attorney and client, and within an agency. Candor between the Commission and its counsel should be encouraged, but could be constrained by the risk of disclosure to a judge or panelist who subsequently reviews the ultimate administrative decision, particularly if the document may contain recommendations at odds with that decision. The Court of International Trade, in reviewing Commission determinations under title VII, has held that other litigants may not have access to privileged portions of the record. Both Annex 1901.2 of the Free-Trade Agreement and the Statement of Administrative Action for implementation of the FTA Act specifically contemplate that the Rules of Procedure would make provision for the treatment of privileged information.

Under the Rules of Procedure for binational panel review under Article 1904 of the Agreement, the Commission would not include privileged documents in the copy of the administrative record that is transmitted to the Secretariat for the panel's use, although the documents for which privilege is claimed would be listed in the index of the record. If there were any challenge to the privilege claim, the panel would first examine the affidavits in support of the claim of privilege to determine whether there

was a question as to the validity of the claim or if the privilege was qualified and whether the challenger's need for access outweighed the Commission's need to withhold the document from scrutiny. If the affidavits were not dispositive, then the panelists would select from among themselves two lawyers, one from Canada and one from the United States, to examine *in camera* and under protective order any document at issue. Only if the two representatives could not agree whether the document should be disclosed, either as not privileged, or if privileged, under a protective order, would the full panel be granted access under protective order to examine the document and decide whether it should be disclosed under protective order to counsel for participants specifically for use in the panel review.

The Rules of Procedure provide that at each stage of consideration of privileged documents, those documents will be protected by protective orders. In accordance with the process prescribed by the Rules of Procedure, the regulation at § 207.94 provides the mechanics of applications for and issuance of protective orders for privileged information subject to panel review. This regulation provides for the issuance of such protective orders upon appropriate application. The filing and service requirements are similar to those described in section 207.83 regarding protective orders for proprietary information.

Sections 207.100–207.121. The Tariff Act, as amended by section 403(c) of the FTA Act, declares it unlawful for any person to violate, or to induce the violation of, any provision of an administrative protective order issued during panel or committee review. 19 U.S.C. 1677f (d)(3). The Commission is authorized to impose sanctions against any person who is found by the Commission to have violated or induced violation of the terms of a protective order issued by the Commission for FTA purposes. These sanctions may include a civil penalty of up to $100,000 for each violation, and other administrative sanctions, including but not limited to debarment from practice before the Commission, as the Commission determines to be appropriate. *Id.* at (d)(4). Before imposing such sanctions, the Commission must provide notice and an opportunity for a hearing in accordance with section 554 of Title 5 of the U.S. Code. *Id.* Any person against whom sanctions are imposed may appeal the Commission's determination to the U.S. Court of International Trade. *Id.* at (d)(5). The Commission may file an action in that court to enforce sanctions assessed. *Id.* at (d)(6).

The regulations contained in §§ 207.100–207.121 address the Commission's procedures for imposing sanctions against persons who have violated, or induced violation of, the provisions of a protective order issued during panel and committee proceedings. For the purposes of the sanctions regulations the term "person", as defined in § 207.61(r) (the definition section for this subpart), means not only an individual, but also any entity such as a partnership, corporation, association or organization.

In deciding whether to initiate sanctions proceedings and whether to impose sanctions, the Commission will interpret the legislative prohibition against violation or inducement of a violation in a manner that best carries out the spirit of the legislation. Thus, a disclosure can be unintentional and still constitute a violation for which sanctions could be imposed. For example, the failure to delete proprietary information from the public version of a brief or the disclosure of proprietary information during a public hearing would constitute violations, and could subject the responsible person to sanctions, even if the disclosure was unintentional.

Nor is actual disclosure of protected proprietary information necessary to support assessment of sanctions. For example, the provisions of a protective order could be deemed violated by carelessness in handling the protected information, as evidenced by loss of the information or by failure to follow the procedures required by the protective order for safeguarding proprietary information.

Likewise, initiation of a violation is not a necessary element of inducement. A person who has accepted information knowing it is being disclosed in violation of a protective order will be regarded as having induced violation of the provisions of the protective order. For example, if counsel for a client breaches a protective order by relaying a competitor's protected proprietary information to the client, and the client accepts the information, having reason to know that counsel's action is in breach of the protective order, the client could be subject to sanctions for inducing violation of the protective order provisions.

The examples contained in the above discussion are intended to serve as guidelines, and do not represent an exhaustive list of circumstance under which the Commission could determine that a person has violated or induced violation of the provisions of a protective order.

Section 207.100. This regulation lists the types of sanctions that can be imposed upon a person who is found to have violated or induced the violation of any provision of a protective order. The sanctions include those specifically mentioned in the FTA Act, i.e., civil penalties of up to $100,000 for each violation and debarment from practice before the Commission, as well some other sanctions that the Commission believes constitute other appropriate administrative sanctions. Also tracking the statutory language, the regulation notes that each day of a continuing violation constitutes a separate violation for the purposes of assessing civil penalties. Sanctions may be imposed against persons other than the one who violated the protective order, such as the firm, partner, associate, employee, employer, or client of that person.

Section 207.101. This regulation sets out the procedures for setting in motion an inquiry into an allegation of violation. Any person who has information indicating that there has been a violation shall report the information to the Commission Secretary. Any such information should be reported immediately upon learning of the possible violation. Upon receipt of the information, the Commission may forward it to the Commission's Office of Unfair Import Investigations ("OUII"). OUII will then conduct an inquiry to determine whether there is reasonable cause to believe that a person or persons have violated or induced the violation of any provisions of a protective order.

Section 207.102. Upon completion of the inquiry, OUII may conclude (1) that there is reasonable cause to believe that there has been an actionable violation of the provisions of a protective order; (2) that a person has technically violated or induced violation of protective order provisions, but that a private reprimand would be a sufficient response to the violation; (3) that there has been no violation or inducement of violation; or (4) that there has been an actionable violation, but that the responsible person is outside the Commission's jurisdiction but within the jurisdiction of Canada. If OUII concludes that there has been no violation or inducement of violation, the file will be closed, unless otherwise ordered by the Commission. If OUII reaches another of the possible conclusions, this regulation requires that OUII make a recommendation to the Commission based upon that conclusion. The Commission may take

appropriate action regarding the initiation of sanctions proceedings, including rejecting, approving, or approving and amending any recommendation made by OUII. If the Commission determines that initiation of sanctions proceedings is appropriate, the Commission will direct the Commission Secretary to issue a "charging letter" as defined in § 207.103. Issuance of the charging letter will initiate proceedings before a Commission administrative law judge.

If appropriate, the Commission will take the necessary steps to request the authorized agency of Canada to initiate proceedings under Canadian law on the basis of an alleged violation of the protective order. It will be appropriate to take such steps if it is determined that (1) the charged party, while not subject to any of the sanctions set forth under § 207.100, could be subjected to sanctions imposed by the authorized agency of Canada; or (2) an authorized agency of Canada would otherwise be the more appropriate forum for the initiation of a proceeding.

Because an inquiry into, and a proceeding involving, an alleged breach of a protective order is a sensitive subject that could harm a person's reputation, the Commission has endeavored to provide to the extent possible for confidentiality at the various stages of sanctions proceedings. References to confidentiality occur in several of these sanctions regulations. The Commission is concerned about avoiding the detrimental effects on the reputations of persons that may arise from publicity relating to allegations of protective order violations, and about the impact upon the binational panel process of unsubstantiated allegations against panelists, committee members or the Secretariat personnel. At the same time, the Commission recognizes that some disclosures concerning the proceedings and underlying allegations and facts are necessary to the gathering of evidence. Accordingly, these regulations are designed to allow the Office of Unfair Import Investigations, charged parties and the administrative law judges to develop means in particular cases for accommodating these competing concerns.

At the inquiry stage, the Commission expects that the need for confidentiality will be respected, but will be balanced against the need to gather information in order to conduct an adequate inquiry. Subsection (d) of § 207.102 reflects this concern, by providing that all aspects of the inquiry will be kept confidential, except as needed to gather relevant evidence. The Office of Unfair Import Investigations in the conduct of its inquiry preliminary to its recommendation to the Commission will endeavor to keep the nature of the allegations and facts gathered confidential. The Office shall not, however, regard this instruction as so restrictive as to limit its investigative efforts insofar as disclosures of such allegations or facts may be necessary for the obtaining of information.

Section 207.103. A person against whom sanctions are proposed will be notified in a charging letter, which will include the allegations, proposed sanctions, and procedures for challenging imposition of sanctions. In order to protect the charged party's privacy, the charging letter will be served in a double envelope, with the inner envelope marked for opening by the addressee only. For good cause, the administrative law judge may amend the charging letter at any time, but an amendment that adds an additional charged party must be approved by the Commission. Nothing in this regulation precludes the Office of Unfair Import Investigations from seeking a separate charging letter to initiate separate proceedings against another person whom it believes should be charged with a violation under this Subpart.

Consistent with state bar disciplinary proceedings, the person whose information is alleged to have been released is not a party to the proceedings. The interest being vindicated is that of the Commission in ensuring that all provisions of its protective orders are honored.

Section 207.104. This regulation sets forth the filing time, form and content for a response to a charging letter. If the Commission issues a charging letter, it will transmit the letter confidentially to the charged party and provide for notice of the proceedings to become public pending the charged party's submission of a response to the charging letter. If the charged party desires that confidentiality restrictions be placed on the proceedings, the charged party must so state in the response to the charging letter.

Section 207.105. This regulation addresses the Commission's confidentiality concerns with respect to the actual sanctions proceedings. The provisions of the regulation are twofold. First, with respect to proprietary and certain privileged information that is necessary for the defense of the allegations, counsel for the charged party may be granted access to this information under administrative protective order. The only privileged information that can be released under this section is privileged information the disclosure of which is the subject of the sanctions proceedings. Second, upon the request (in the response to the charging letter) of any charged party, the proceedings will be kept confidential to the extent practical and permitted by law. If a request for confidentiality appears in the response, the administrative law judge shall enter an order to maintain the confidentiality of information relating to allegations of violation of a protective order to the extent practicable consistent with the needs of the parties in conducting the proceedings. The regulations leave the form of such an order to the sound discretion of the administrative law judges, who may for example take into account whether certain facts are particularly sensitive to the charged party and who shall assure that confidentiality orders do not unnecessarily impede efforts to conduct discovery or to gather relevant information.

Section 207.106. Interim measures may be imposed by the Commission if necessary. For example, a person whom the Commission has reason to believe is continuing to unlawfully disclose protected proprietary information may still have access to proprietary information pursuant to an outstanding protective order. In order to curtail possible further unlawful disclosure by that person, the Commission may determine that it is necessary to revoke the outstanding protective order without waiting for the completion of the sanctions proceedings, by which time irreparable damage may have been caused by continued disclosure of proprietary information.

As another example, in some circumstances, it may be appropriate not to make efforts to maintain the confidentiality of allegations and facts concerning alleged protective order violations or to allow some disclosures of such allegations that would otherwise not be permitted. For instance, in some cases it may be possible that the inquiry or discovery has not required OUII to contact the company whose proprietary information allegedly has been disclosed unlawfully, or that OUII has not had to notify the company of details about the allegations. Nevertheless, the alleged disclosure may be such that it could lead to such serious consequences that prevention or mitigation of harm to the company whose information has been put at risk may outweigh the interests of confidentiality. The regulations specify that disclosure of information that would otherwise be kept confidential during the proceedings

is among the interim measures that the administrative law judge may recommend to the Commission.

Notice and an opportunity to respond will be provided to a party against whom interim measures are proposed. The administrative law judge will issue a recommended determination (RD) as expeditiously as possible, generally within twenty days of the filing of the motion. The Commission will review the RD and issue its determination on interim measures usually within twenty days from issuance of the RD. Interim measures may be revoked at any time.

Section 207.107. This regulation sets forth the requirements for motions and responses to motions.

Section 207.108. This regulation provides for a preliminary conference to consider such matters as a discovery schedule and the confidentiality of the proceedings.

Section 207.109. This regulation provides for discovery under such terms as the administrative law judge may order. Voluntary discovery is encouraged.

A party desiring to depose or obtain nonprivileged documents from a Commission employee can file a motion requesting the administrative law judge to recommend that the Commission direct that employee to testify or produce the requested materials. A party desiring to depose or obtain nonprivileged information from an employee of another U.S. agency or of a Canadian agency, can file a motion requesting the administrative law judge to recommend that the Commission seek the testimony or production of requested material from that person.

Section 207.110. This regulation provides for issuance of a subpoena by the administrative law judge, upon the application of a party. Subpoenas issued under this subpart will be enforced by the Commission. The authority to issue and enforce subpoenas for these proceedings is provided by paragraphs 7(A) and 7(B) of section 777(d) of the Tariff Act (19 U.S.C. 1677f(7)(a)), as amended by section 403(d) of the FTA Act. If a party files a motion for enforcement of a subpoena, the regulation provides for the administrative law judge to recommend to the Commission in favor of or against enforcement, and in the recommendation to address each of the criteria necessary for enforcement of an administrative subpoena. Criteria that the Commission must meet in order to enforce a subpoena have been set out in *United States International Trade Commission v. E. & J. Gallo Winery*, 637 F.Supp. 1262 (D.D.C. 1985).

Section 207.111. This regulation provides for a pre-hearing conference.

Section 207.112. Under this regulation, an opportunity for a hearing must be provided for all sanctions proceedings. Consistent with the legislative mandate of the Tariff Act as amended by the FTA Act (19 U.S.C. 1677f(4)), the administrative law judge is directed to conduct a hearing that complies with section 554 of the Administrative Protective Act.

Section 207.113. This regulation defines the administrative record for sanctions proceedings.

Section 207.114. Within the time frame established by this regulation, the administrative law judge will issue an initial determination, which contains his findings and conclusions necessary to the factual and legal issues presented. In the usual case, the initial determination will be issued within ninety days of issuance of the charging letter. If the judge determines that the case is complicated, he may issue his initial determination within 120 days of the charging letter.

The Commission anticipates that the deadlines set out in this regulation can be met in most sanctions proceedings. If necessary, however, the administrative law judge may request the Commission to extend the time for issuance of an initial determination when discovery has been delayed as a result of the Commission's efforts to compel an employee or official of another United States agency, or of a Canadian agency, to respond to a deposition, or as a result of the Commission's efforts to enforce a subpoena, or when more time is needed to assure a complete record or to avoid manifest injustice.

Section 207.115. A party may request the Commission to review the administrative law judge's initial determination by filing a petition for review within fourteen days after the date the initial determination is served upon the charged party. This regulation sets out the requirements for such petition and any response. The Commission will rule on the petition within forty-five days of the date the initial determination is served.

Section 207.116. Absent a petition for review, the Commission may decide *sua sponte* to review an initial determination. This regulation provides for such review if one less than a majority of the participating Commissioners votes for ordering review *sua sponte* within forty-five days of the date the initial determination is served.

Section 207.117. Only the issues for which review is ordered will be considered by the Commission. The Commission may take any appropriate action in reviewing the initial determination, including remand.

Section 207.118. In panel review proceedings in which a final antidumping or countervailing duty determination issued by the Commission is being challenged, the Commission will be represented by the Commission's General Counsel. In the usual case, three attorneys from the General Counsel's Office will participate in the representation of the Commission before the panel—the General Counsel; the Assistant General Counsel for Litigation; and a staff attorney. In some instances, a sanctions proceeding will be initiated while the panel review for which the protection order was issued is still pending. If a participant, counsel for a participant, or a panelist involved in on ongoing panel review is charged with breaching a protective order issued during that panel review, the outcome of the sanctions proceeding, as well as the issuance of interim measures (such as revocation of the protective order) during the sanctions proceeding, could affect the ongoing panel review. In order to avoid the appearance of impropriety in such instances, the General Counsel and any other attorneys in the General Counsel's office who are participating in the panel review will not play a role in advising the Commission in matters regarding the relevant sanctions proceedings. Nor will the Assistant Counsel for title VII cases or any other attorney who participated in the underlying administrative proceedings advise the Commission in sanctions proceedings involving breach of a protective order involving ongoing panel review of the Commission's determination in those proceedings. In such instances, the Assistant Counsel for Section 337 investigations, who will have played no role in the panel review or underlying investigation, will serve as Acting General Counsel for the purpose of advising the Commission in regard to the sanctions proceedings, and will work with General Counsel staff attorneys who have not so participated.

Section 207.119. This regulation provides for the filing of a petition for reconsideration of a Commission determination. Any such petition must be filed within fourteen days after service of the determination. No responses will be accepted unless requested by the Commission, but the Commission will not grant a petition for reconsideration without first providing an opportunity for response.

Section 207.120. If the Commission's final determination, after the period for reconsideration has run, is that public

sanctions are to be imposed, the Commission will publish such determination in the **Federal Register**. The Commission will also notify whichever departments and agencies of the Canadian and United States governments are likely to have an interest in the matter, for example, the U.S. Commerce Department and the U.S. Trade Representative.

Section 207.121. This regulation provides that no interlocutory appeals will be entertained. Any material objections to the administrative law judge's rulings on motions may be raised in a petition for review of the initial determination. This regulation conforms to the Commission's intent that sanctions proceedings be concluded as expeditiously as possible.

List of Subjects in 19 CFR Part 207

Administrative practice and procedure, Antidumping, Canada, Countervailing duty, Imports, Trade agreements.

For the reasons set forth in the preamble, 19 CFR Part 207, Subpart G is added to read as follows:

Subpart G—Implementing Regulations for the United States-Canada Free-Trade Agreement

Sec.

207.90 Scope.
207.91 Definitions.
207.92 Procedures for commencing review of final determinations.
207.93 Protection of proprietary information during panel and committee proceedings.
207.94 Protection of privileged information during panel and committee proceedings.

Procedures for Imposing Sanctions for Violation of Provisions of a Protective Order Issued During Panel and Committee Proceedings

207.100 Sanctions.
207.101 Reporting of violation and commencement of investigation.
207.102 Initiation of proceedings.
207.103 Charging letter.
207.104 Response to charging letter.
207.105 Confidentiality.
207.106 Interim measures.
207.107 Motions.
207.108 Preliminary conference.
207.109 Discovery.
207.110 Subpoenas.
207.111 Prehearing conference.
207.112 Hearings.
207.113 The record.
207.114 Initial determination.
207.115 Petition for review.
207.116 Commission review on its own motion.
207.117 Review by Commission.
207.118 Role of the General Counsel in advising the Commission.
207.119 Reconsideration.
207.120 Public notice of sanctions.
207.121 Interlocutory appeals.

Subpart G—Implementing Regulations for the United States-Canada Free-Trade Agreement

Authority: Sec. 777(d) of the Tariff Act of 1930 (19 U.S.C. 1677f(d)); secs. 403, 405(d) of the United States-Canada Free-Trade Agreement Implementation Act of 1988 (102 Stat. 1851, Pub. L. No. 100-449, Sept. 28, 1988).

§ 207.90 Scope.

This subpart sets forth the procedures and regulations for implementation of Article 1904 of the United States-Canada Free Trade Agreement under the Tariff Act of 1930, as amended by Title IV of the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 1516a and 1677f(d)). These regulations are authorized by section 405(d) of the United States-Canada Free-Trade Implementation Act of 1988.

§ 207.91 Definitions.

As used in this Subpart—

(a) "Administrative Law Judge" means the United States International Trade Commission employee appointed under section 3105 of Title 5 of the United States Code to preside over the taking of evidence under this part;

(b) "Agreement" means the Free Trade Agreement between Canada and the United States of America entered into between the Government of Canada and the Government of the United States of America and signed on January 2, 1988.

(c) "Article 1904 Rules" means the Rules of Procedure for Article 1904 Binational Panel Reviews adopted by the United States of America and Canada pursuant to the Agreement.

(d) "Canadian Secretary" means the Secretary of the Canadian section of the Secretariat and includes any person authorized to act on his behalf;

(e) "Charged party", for the purposes of §§ 207.100 through 207.121, means a person who is charged by the United States International Trade Commission with violating or inducing violation of a provision of a protective order;

(f) "Commission" means the United States International Trade Commission;

(g) "Commission Secretary" means the Secretary to the Commission;

(h) "Complaint" means the complaint referred to in the Article 1904 Rules;

(i) "Date of Service" means, for the purposes of §§ 207.100 through 207.121 only, the day a document is deposited in the mail or delivered in person;

(j) "Days" means calendar days, except that a deadline which falls on a weekend or United States federal holiday shall be extended to the next working day;

(k) "Extraordinary challenge committee" means the committee established pursuant to Annex 1904.13 of the Agreement and section 407 of the FTA Act to review decisions of a panel or conduct of a panelist;

(l) "Final determination", for the purposes of § 207.82, shall have the meaning assigned to the term "final determination" by Article 1911 of the Agreement;

(m) "FTA Act" means the United States-Canada Free-Trade Implementation Act of 1988, Pub. L. No. 100-449 (Sept. 28, 1988);

(n) "Investigative attorney" means the attorney(s) designated by the Office of Unfair Import Investigations to engage in inquiries and investigatory activities with respect to investigations and proceedings under §§ 207.100 through 207.121 of Title 19 of the Code of Federal Regulations;

(o) "Notice of Appearance" means the notice of appearance provided for by the Article 1904 Rules;

(p) "Panel review" means review of a final determination pursuant to chapter 19 of the Agreement, including review by an extraordinary challenge committee;

(q) "Parties", for the purposes of § 207.100, means the investigative attorney and the persons charged in an action under § 207.100 of this subpart;

(r) "Person" means, for the purposes of § 207.100, an individual, partnership, corporation, association, organization, or other entity;

(s) "Privileged information" means all information as to which the Commission has reserved a claim of privilege in accordance with Article 1904.14 of the Agreement and the Article 1904 Rules;

(t) "Proprietary information" means all information designated or treated by the United States International Trade Commission as confidential or business proprietary under 19 U.S.C. 1677f and 19 CFR 201.6.

(u) "Protective Order" means an administrative protective order issued by the Commission;

(v) "Secretariat" means the Secretariat established pursuant to article 1909 of the Agreement and includes the Secretariat sections located in both Canada and the United States.

(w) "United States Secretary" means the Secretary of the United States section of the Secretariat and includes any person authorized to act on his behalf;

(x) Except as otherwise provided in this subpart, the definitions set forth in the Article 1904 Rules are applicable to this subpart and to any protective orders issued pursuant to this subpart.

§ 207.92 Procedures for commencing review of final determinations.

(a) *Notice of Intent to Commence Judicial Review.* A Notice of Intent to Commence Judicial Review s ll contain such information, and be in such form, manner, and style, including service requirements, as prescribed by the Department of Commerce in its regulations at 19 CFR Part 356.

(b) *Request for Panel Review.* A Request for Panel Review shall contain such information, and be in such form, manner, and style, including service requirements, as prescribed by the Department of Commerce in its regulations at 19 CFR Part 356.

§ 207.93 Protection of proprietary information during panel and committee proceedings.

(a) *Persons Authorized to Receive Proprietary Information.* The following persons may be authorized by the Commission to receive access to proprietary information if they comply with these regulations and such other conditions imposed upon them by the Commission:

(1) The members of a binational panel or an extraordinary challenge committee, and their assistants;

(2) Counsel for participants to panel reviews, provided that the counsel do not participate in competitive decision-making activity for the participant represented or for any entity that would gain a competitive advantage through knowledge of the proprietary information sought;

(3) Professionals retained by or under the direction or control of counsel for the participant;

(4) Other persons who are employed as support staff by and under the direction or control of a representative, panelist, or committee member who have been issued a protective order, such as paralegals, law clerks, and sercretaries, if such other persons

(i) Are not involved in the competitive decision-making, or the support functions for the competitive decision-making, of a participant to the proceeding or of any entity that would gain a competitive advantage through knowledge of the proprietary information sought, and

(ii) Have agreed to be bound by the terms set forth in the application for protective order of the counsel, panelist, or committee member;

(5) The Secretaries of the United States and Canadian sections of the Secretariat and persons retained or employed by the Secretaries, including court reporters hired by the Secretariat to transcribe panel reviews;

(6) Such persons who the United States Trade Representative informs the Commission require access to proprietary information solely for the purpose of evaluating whether the United States should seek an extraordinary challenge committee review of a panel decision.

(b) *Procedures for Obtaining Access to Proprietary Information*—(1) *Persons Who Must File An Application for Release Under Protective Order.* In order to be permitted access to proprietary information in the administrative record of a determination under review by a panel, all persons described in paragraphs (a) (1), (2), (3), (5) or (6), unless described in (b)(6), of this section shall file an application for release under a protective order.

(2) *Contents of Applications for Release Under Protective Order.* (i) The Secretary of the Commission shall adopt from time to time forms for submitting requests for release pursuant to a protective order that incorporate the terms of this rule.

(ii) Such forms shall require the applicant for release of proprietary information under protective order to submit a personal sworn statement that, in addition to such other conditions as the Secretary of the Commission may require, that the applicant will:

(A) Not disclose any proprietary information obtained under protective order and not otherwise available to him, to any person other than

(*1*) Personnel of the Commission involved in the particular panel review in which the proprietary information is part of the administrative record,

(*2*) The person from whom the information was obtained,

(*3*) A person who has been issued a protective order covering the same proprietary information in the panel review, and

(*4*) A person retained or employed by and under the direction or control of a counsel, panelist, or committee member who has been issued a protective order, such as a paralegal, law clerk, or secretary, if such person (*A*) is not involved in the competitive decision-making, or the support functions for the competitive decision-making, of a participant to the proceeding or of any entity that would gain a competitive advantage through knowledge of the proprietary information sought, and (*B*) has agreed to be bound by the terms set forth in the application for protective order of the counsel, panelist, or committee member.

(B) Not use any of the proprietary information released under this protective order for purposes other than the particular proceedings under Article 1904 of the Agreement;

(C) Upon completion of the panel review, or at such earlier date as may be determined by the Commission, return to the Commission or certify to the Commission the destruction of (*1*) all documents released under the protective order, and (*2*) all other documents, such as notes or charts, based on or containing any proprietary information released under the protective order; and

(D) Acknowledge that the person becomes subject to the provisions of 19 U.S.C. 1677f(d)(4) and 19 CFR 207.100 as well as section 77.26 of Canada's Special Import Measures Act, with respect to the imposition of sanctions for violation of the protective order.

(3) *Timing of Applications.* The United States and Canadian Secretaries and any person retained or employed by them may file an application at any time. Any panelist, committee member, assistant, counsel, or professional retained by or under the direction or control of counsel, may file an application for disclosure under protective order after a Notice of Request for Panel Review has been filed with the Secretariat. A person who the United States Trade Representative notifies the Commission requires access to the proprietary information may file an application when United States Representative so notifies the Commission.

(4) *Service of Applications.* (i) If a panelist, committee member, counsel for a participant or a professional retained by or under the direction or control of counsel files an application for a protective order before the date on which notices of appearance must be filed in the panel review, such person shall concurrently serve one (1) copy of such application upon each person listed on the service list maintained by the Commission during the administrative proceeding. If the application is filed after the deadline for notice of appearance, such person shall serve the application upon each person who files a complaint or notice of appearance in the panel review.

(ii) Upon receipt of an application filed by counsel or a professional retained by or under the direction and control of counsel, the Commission Secretary shall serve a copy of such application upon the person who submitted the proprietary information to the Commission.

(iii) Upon receipt of an application filed by Secretaries of the United States or Canadian sections of the Secretariat any person retained employed by the Secretaries, including court reporters

hired by the Secretariat to transcribe panel reviews, the Commission shall cause a copy of the application to be placed immediately in the public file of the Commission.

(iv) *Method of Service.* Service of an application may be effected by (*1*) personal service, or (*2*) sending a copy of the document by facsimile, Express Mail, or expedited courier service.

(5) *Release to Employees of Panelists, Committee Members and Counsel.* A person employed by and under the direction or control of a panelist, committee member, or counsel, such as a paralegal, law clerk, or secretary, may be provided with access to proprietary information disclosed under protective order to the panelist, committee member, or counsel who retains or employs such person, if such person has agreed to the terms of the protective order issued to the panelist, committee member, or counsel, by signing and dating a completed copy of the application of the panelist, committee member or counsel for protective order where indicated in that application. That person shall file a copy of that signed and dated application with the Commission Secretary.

(6) *Persons who retain access to proprietary information under a protective order issued during the administrative proceeding.* (i) If counsel or a professional (but only if that professional is retained by or under the direction or control of counsel) has been granted access in an administrative proceeding to proprietary information under a protective order that contains a provision governing continued access to that information during panel review, and that counsel files a complaint or a notice of appearance in a binational panel review of that administrative proceeding without having first certified to having relinquished or destroyed all documents containing the proprietary information, the provisions of the administrative protective order relating to continued access during panel review shall become immediately effective upon the filing of the complaint or notice of appearance. Such additional provisions shall assure that the protective order effective during panel review encompasses the conditions set forth in paragraph (b)(2)(ii) of this section.

(ii) Any person described in paragraph (b)(2)(i) of this section who, upon the filing of the complaint or notice of appearance, discovers that the representations made by him in the application for a protective order have changed or are no longer complete and correct, shall update the original application under which the protective order was granted.

(iii) Any person described in paragraph (b)(2)(i) of this section, upon the filing of the complaint or notice of appearance, shall

(A) Serve a copy of the original application and any updates to that application on each person on the service list maintained by the Commission during the administrative proceeding;

(B) File four (4) copies of the original application, any updates to that application, and the protective order with the United States Secretary; and

(C) Serve two copies of the protective order, together with a copy of the complaint or notice of appearance, upon the Commission.

(*1*) The Commission Secretary shall place one copy of each of these documents in the Commission's public inspection file.

(*2*) The Commission Secretary shall serve one copy of each of these documents upon each person who submitted the proprietary information to the Commission.

(c) *Issuance of protective order upon application by panelist, committee member, Secretariat personnel, or designated U.S. Government employee.* (1) The Commission shall issue a protective order permitting the release of proprietary information to a panelist, committee member, Secretary, other person employed or retained by the Secretariat, or designated U.S. Government employee, who has filed an application for protective order under this subpart.

(2) A panelist or committee member shall be issued two (2) copies of any protective order authorizing access to proprietary information. The applicant shall sign both copies of the order and return one to the Commission. He shall assure that copies of the signed protective order are filed with the Secretariat, as required by the Article 1904 Rules.

(d) *Issuance of protective order to applicant other than a panelist, committee member, Secretariat personnel, or designated U.S. Government employee.*—(1) *Opportunity to object.* The Commission shall not rule on an application until ten (10) days after the request is filed unless there is a compelling need to rule more expeditiously. Unless the Commission has indicated otherwise, any person may file an objection to the application within seven (7) days of the application's filing date. Any such objection shall state the specific reasons why the application should not be granted. One (1) copy of the objection shall be served on the applicant and on all persons who were served with the application. Service shall be by facsimile, Express Mail or by any expedited courier service. Any reply to an objection will be considered if it is filed before the Commission renders a decision.

(2) *Approval of the Application.*—If appropriate, the Commission shall issue a protective order permitting the release of proprietary information to an applicant. At the same time the protective order is issued, the Commission Secretary shall serve a copy of the protective order upon each person who submitted the proprietary information to the Commission.

(3) *Denial of the Application.*—If the Commission denies an application, it shall issue a letter notifying the applicant of its decision and the reasons therefor.

(3) *Filing of a protective order.*—(1) Except as required by paragraph (b)(6)(iii) of this section, any applicant, except a person described in paragraph (a)(6) of this section, who has been issued a protective order for release of proprietary information shall immediately cause a copy of that order to be placed in the public inspection files of the Secretariat, as required by the Article 1904 Rules.

(2) The Commission Secretary shall retain, in a public inspection file, copies of applications granted and protective orders issued under this section, and of any documents filed in accordance with paragraph (b)(6)(iii)(C) of this section.

(f) *Modification or Revocation of Protective Orders.*—(1) If any person believes that changed conditions of fact or law, or the public interest, may require that a protective order effective under this section be modified or revoked, in whole or in part, such person may file with the Commission a request for such relief. The Commission may consider such action *sua sponte*. The request shall state the changes desired and the changed circumstances warranting such action, and shall include materials and argument in support thereof. Unless the request is self-initiated, the person filing the request shall serve a copy of the request upon the person to whom the protective order was issued.

(2) Upon receiving a request, the Commission shall either provisionally accept the request or reject the request. The Commission shall treat a self-initiated action as a provisionally accepted request. Unless the notice of provisional acceptance states otherwise, any person may file a response to the

request within twenty (20) days after the request is filed. After consideration of the request and any responses thereto, the Commission shall take such action as it deems appropriate.

(3) If a request filed under this paragraph alleges that a person is violating the terms of a protective order, the Commission may, in addition to, or in lieu of, provisional acceptance or rejection under the subparagraph, treat the request as a report of violation under § 207.100–2 of this subpart.

§ 207.94 Protection of privileged information during panel and committee proceedings.

(a) *Persons Who May Apply for Access to Privileged Information Under Protective Order.*—(1) *Panelists.* If a panel determines that, pursuant to the Article 1904 Rules, *in camera* examination of a document containing privileged information in an administrative record is necessary in order for the panel to determine whether the document, or portions thereof, should be disclosed under a Protective Order for Privileged Information to counsel for participants or others, the Commission shall, upon application, issue a protective order authorizing the release of the privileged information to authorized panelists.

(2) *Persons Designated by the Panel.*—If a decision is made in accordance with the Article 1904 Rules that disclosure of a document containing privileged information is appropriate, any person identified in such a decision as entitled to release under Protective Order for Privileged Information, *e.g.*, panelists, their assistants, and counsel for participants, may file with the Commission an application for release under Protective Order for Privileged Information with the Commission. Upon such application, the Commission shall issue the protective order.

(3) *Designated Officers or Employees of the United States Government.*—If, in the course of a panel review, the panel has reviewed privileged information under a Protective Order for Privileged Information and the privileged information related to issues the resolution of which is the subject of the request for an Extraordinary Challenge Committee, the Commission may, upon application, issue a protective order and release such privileged information to those officials of the United States Government designated by the United States Trade Representative as being necessary for the evaluation of whether the United States should, pursuant to the Agreement, convene an extraordinary challenge committee.

(4) *Members of an Extraordinary Challenge Committee.* The Commission shall issue a protective order to members of an extraordinary challenge committee authorizing the release of privileged information that:

(i) Is part of the extraordinary challenge committee record, as defined in the Rules of Procedure for Article 1904 Extraordinary Challenge Committees; and

(ii) Was covered under a Protective Order for Privileged Information issued by the Commission to participants during panel review.

(5) Other persons who are retained or employed by and under the direction or control of a counsel, panelist, or committee member who has been issued a protective order, such as paralegals, law clerks, and secretaries, may obtain access to privileged information if such other persons have agreed to be bound by the terms set forth in the application for protective order of the counsel, panelist, or committee member.

(b) *Contents of Applications for Release Under Protective Order for Privileged Information.* (1) The Commission Secretary shall adopt from time to time forms for submitting requests for release pursuant to a Protective Order for Privileged Information that incorporates the terms of this rule.

(2) Such forms shall require the applicant for release of privileged information under Protective Order for Privileged Information to submit a personal sworn statement stating, in addition to such other conditions as the Secretary of the Commission may require, that the applicant will:

(i) Not disclose any privileged information obtained under protective order to any person other than

(A) Personnel of the Commission involved in the particular panel review in which the privileged information is part of the record;

(B) A person who has been issued a similar Protective Order for Privileged Information concerning the privileged information at issue; and

(C) A person retained or employed by or under the direction or control of a counsel, panelist, or committee member who has been issued a Protective Order for Privileged Information, such as a paralegal, law clerk, or secretary, if such person has agreed to be bound by the terms set forth in the application for Protective Order for Privileged Information of the counsel, panelist, or committee member by signing and dating the completed application of the counsel or panelist where indicated in that application.

(ii) Use such information solely for the purposes of proceedings under Article 1904 of the Agreement;

(iii) Upon completion of panel review, or at such earlier date as may be determined by the Commission, return to the Commission or certify to the Commission the destruction of all documents released under the Protective Order for Privileged Information and all other documents containing the privileged information (such as notes or charts based on any such information received under the Protective Order for Privileged Information); and

(iv) Acknowledge that sanctions, under 19 CFR 207.100 or under § 77.26 of Canada's Special Import Measures Act, may be imposed for violation of the protective order.

(c) *Filing of a protective order.* (1) Any applicant who has been issued a Protective Order for Privileged Information shall immediately cause copies of that order to be placed in the public inspection files of the Secretariat, as required by the Article 1904 Rules.

Procedures for Imposing Sanctions for Violation of Provisions of a Protective Order Issued During Panel and Committee Proceedings

§ 207.100 Sanctions.

(a) A person who is determined under this subpart to have violated or induced the violation of any provision of a protective order issued pursuant to this Subpart, may be subject to one or more of the following sanctions:

(1) A civil penalty not to exceed $100,000 for each violation. Each day of a continuing violation shall constitute a separate violation;

(2) Debarment from practice in any capacity before the Commission for a designated time period following publication of a determination that the protective order has been breached;

(3) Denial of further access to proprietary or privileged information covered by the breached protective order or to proprietary information in future Commission proceedings;

(4) An official reprimand by the Commission, either confidential or public;

(5) In the case of an attorney, accountant, or other professional, referral of the facts underlying the violation to the ethics panel or other disciplinary body of the appropriate professional association or licensing authority;

(6) When appropriate, referral of the facts underlying the violation to the United States Trade Representative or

his designees, or to another government agency; and

(7) Any other administrative sanctions as the Commission determines to be appropriate.

(b) The partners, associates, employer, and employees of any person who has violated or induced the violation of any provision of a protective order issued pursuant to this subpart, may be subject to any sanctions included in paragraph (a) of this section as the Commission determines to be appropriate.

§ 207.101 Reporting of violation and commencement of investigation.

(a) Any person who has information indicating that the terms of a protective order have been violated shall immediately report all pertinent facts relating to the possible violation to the Commission Secretary.

(b) Upon receipt of information indicating breach of a protective order, the Commission Secretary shall record the information and assign an investigation number, and shall then forward all information he has received to the Office of Unfair Import Investigations.

(c) As expeditiously as possible, the Office of Unfair Import Investigations shall conduct an inquiry to determine whether there is reasonable cause to believe that a person or persons have violated any provision of a protective order. At the conclusion of the inquiry, the Office of Unfair Import Investigations shall assess whether or not the available information is sufficient to provide reasonable cause to believe that a person or persons have violated or induced violation of the provisions of a protective order.

§ 207.102 Initiation of proceedings.

(a) Upon completion of the inquiry,

(1) If the Office of Unfair Import Investigations concludes that there is not reasonable cause to believe that a person or persons have violated or induced violation of the provisions of a protective order,

(i) The Office of Unfair Import Investigations shall submit a notice and report of his findings to the Commission; and

(ii) Unless the Commission directs otherwise, the file shall be closed and returned to the Commission Secretary.

(2) If the Office of Unfair Import Investigations concludes that there is reasonable cause to believe that a person or persons have violated or induced violation of the provisions of a protective order, the Office of Unfair Import Investigations shall

(i) Recommend that the Commission issue a charging letter as defined in § 207.103 of this subpart; or

(ii) If the facts do not warrant action beyond a private reprimand, recommend that the Commission issue a private letter, but not a charging letter, to the appropriate person; or

(iii) If the Office of Unfair Import Investigations concludes that the party to be charged is beyond the jurisdiction of the Commission but within the jurisdiction of Canada, recommend that the Commission take the necessary steps for issuance of a letter requesting the authorized agency of Canada to initiate proceedings under Canadian law on the basis of an alleged violation of the protective order.

(b) The Commission may make any appropriate determination regarding the initiation of sanctions proceedings, including rejecting, approving, or approving and amending any recommendation made by OUII.

(c) If the Commission determines that it is appropriate to issue a charging letter, the Commission Secretary shall initiate a proceeding under this Subpart by issuing a charging letter as set forth in § 207.103.

(d) If the Commission determines that it is not appropriate to issue a charging letter or to refer the facts to the authorized agency of Canada, the file shall be closed and returned to the Commission Secretary, unless the Commission directs otherwise.

(e) *Confidentiality.* Except as necessary to gather relevant evidence, all aspects of the inquiry shall remain confidential. Except as the Commission may otherwise order, the Commission Secretary shall maintain all closed investigatory files in confidence to the extent permitted by law, and shall destroy each such file one year after it is closed.

§ 207.103 Charging letter.

(a) *Contents of charging letter.* Each charged party shall be served by the Commission with a copy of a charging letter and any accompanying motion for interim measures, as provided for in § 207.106. The charging letter shall include:

(1) A statement of the allegation(s) that the provisions of a protective order has been violated and the basis thereof;

(2) A citation to § 207.100 of this subpart, for a listing of sanctions that may be imposed for breach of a protective order;

(3) A statement that official proceedings have been initiated and that the charge will be referred for a hearing and other appropriate proceedings before an administrative law judge;

(4) A statement that, upon issuance of an appropriate administrative protective order, the charged party may obtain access to the documents or other physical evidence upon which the charge is based, except for privileged material;

(5) A statement that the charged party will have the right to submit oral and written evidence and to conduct cross-examination;

(6) A statement that the charged party has a right to retain counsel at the charged party's own expense for purposes of representation; and

(7) A statement that the charged party has the right to request in the response described in § 207.104 of this subpart that the proceedings remain confidential to the extent practicable.

(b) *Service of charging letter.* (1) The charging letter will be served in a double envelope. The inner envelope will indicate that it is to be opened only by the addressee. Service of a charging letter will be made by one of the following methods:

(i) Mailing a copy by registered or certified mail addressed to the charged party at the party's last known address;

(ii) Hand delivery of a copy to the charged party or to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service for the party; or

(iii) Hand delivery of a copy to a person of suitable age and discretion who resides at the party's last known dwelling.

(2) Service shall be evidenced by a certificate of service signed by the person making such service.

(c) *Confidentiality of charging letter.* Prior to entry of an order by the administrative law judge under § 207.100–6, the charging letter will be confidential and disclosed only to necessary Commission staff and the charged parties.

(d) *Amendment of charging letter.* (1) At any time after proceedings have been initiated, the investigative attorney may request leave to amend, supplement, or withdraw the charging letter.

(2) Upon motion, the administrative law judge may grant leave to amend the charging letter for good cause shown upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the originally-charged parties or parties added to the charging letter.

(3) If the administrative law judge determines that the charging letter should be amended to include additional parties, he shall issue a recommended determination to that effect. The Commission shall review the

recommended determination, and issue a determination granting or denying the motion to amend the charging letter to include additional parties.

(4) Any amended charging letter shall be served upon all charged parties in the form and manner set forth in paragraphs (a) and (b) of this section.

§ 207.104 Response to charging letter.

(a) *Time for filing.* A charged party shall have twenty (20) days from the date of service of the charging letter within which to respond, in writing, to the allegations made in the charging letter.

(b) *Form and content.* Each response shall be under oath and signed by the charged party or its duly authorized officer, attorney, or agent, with the name, address, and telephone number of the same. Each charged party shall respond to each allegation in the charging letter, and may set forth a concise statement of the facts constituting each ground of defense. There shall be a specific admission or denial of each fact alleged in the charging letter, or if the charged party is without knowledge of any such fact, a statement to that effect.

(c) *Request for confidentiality.* The response shall contain a statement as to whether the charged party seeks an order to maintain the confidentiality of all or part of the proceedings to the extent practicable, pursuant to § 207.105 of this subpart.

§ 207.105 Confidentiality.

(a) *Protection of proprietary and privileged information.* As necessary for the preparation of a defense, counsel for the charged party may be granted access in these proceedings to proprietary information or to the privileged information the disclosure of which is the subject of the proceedings. Any such access shall be under protective order consistent with the provisions of §§ 207.63 and 207.64 of this Subpart.

(b) *Confidentiality of proceedings.* Upon the request of any charged party pursuant to § 207.104 of this subpart, the administrative law judge will issue an appropriate order providing for the confidentiality, to the extent practicable and permissible by law, of information relating to allegations of violations of a protective order, consistent with the needs of the parties in conducting of the sanctions proceedings. The order will provide that all proceedings under this provision shall be kept confidential except to the extent incorporated into a published final decision of the Commission. Any confidential information not revealed in such decision will remain protected.

§ 207.106 Interim measures.

(a) At any time after proceedings are initiated, the administrative law judge, upon motion by the investigative attorney, or on his own initiative, may issue a recommended determination to revoke the allegedly-violated protective order, to disclose information about the proceedings that would otherwise be kept confidential, or to take other appropriate interim measures.

(b) Before issuing a determination recommending interim sanctions, the administrative law judge shall afford a party against whom such measures are proposed the opportunity to oppose the motion for interim sanctions. The administrative law judge will notify the parties of the determination on interim measures as expeditiously as possible, usually within no more than twenty (20) days from the date the motion was filed.

(c) The Commission shall review any recommended determination regarding the imposition of interim measures, and within twenty (20) days from issuance of the recommended determination, or within such other time as the Commission may order, the Commission shall issue its determination regarding interim measures. The Commission may impose any appropriate interim measures.

(d) The administrative law judge may at any time recommend to the Commission that interim measures be revoked. Within ten days after issuance of any such recommendation, or within such other time as the Commission may order, the Commission shall rule on such recommendation.

(e) If the Commission takes interim measures that revoke or modify an outstanding protective order issued in the course of an ongoing panel review, the Commission Secretary shall immediately notify the Secretariat of these measures. If any such measures are revoked, the Commission Secretary shall immediately notify the Secretariat of such change.

§ 207.107 Motions.

(a) *Presentation and disposition.* (1) During the period after issuance of the charging letter and before issuance of the initial determination, all motions shall be addressed to the administrative law judge. If no administrative law judge has yet been assigned, all motions shall be addressed to the Chief Administrative Law Judge.

(2) When a proceeding is before the Commission, all motions shall be addressed to the Chairman of the Commission. All written motions shall be filed with the Commission Secretary and served upon all parties.

(b) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds therefor.

(c) *Responses.* Any response to a motion shall be filed within ten (10) days after service of the motions, or within such longer or shorter time as may be designated by the administrative law judge or the Commission. The moving party shall have no right to reply, except as permitted by the administrative law judge or the Commission.

(d) *Service.* All motions, responses, replies, briefs, petitions, and other documents filed in sanctions proceedings under this subpart shall be served by the party filing the document upon each other party. Service shall be made upon counsel for the party unless the administrative law judge or the Commission orders otherwise.

§ 207.108 Preliminary conference.

As soon as practicable after the response to the charging letter is filed, unless the administrative law judge determines that such a conference is not necessary, the administrative law judge shall direct counsel or other representatives for the parties to meet with him at a preliminary conference. At such conference, he shall consider the issuance of such orders as he deems necessary for the conduct of the proceedings. Such orders may include, as appropriate under these regulations, the establishment of a discovery schedule or the issuance of an order, if requested, to provide for maintaining the confidentiality of the proceedings pursuant to § 207.105(b) of this subpart.

§ 207.109 Discovery.

(a) *Discovery methods.* All parties may obtain discovery under such terms and limitations as the administrative law judge may order. Discovery may be by one or more of the following methods: Depositions upon oral examination or written questions; interrogatories; production of documents or things for inspection and other purposes; and requests for admissions. If a party or an officer or agent of a party fails to comply with a discovery order, the administrative law judge may take such action as he deems reasonable and appropriate. The attendance of witnesses at a deposition may be compelled by subpoena as provided in § 207.110 of this subpart.

(b) *Depositions of nonparty officers or employees of the United States or Canadian government*—(1) *Depositions of Commission officers or employees.* A

party desiring to take the deposition of an officer or employee of the Commission (other than a member of the Office of Unfair Import Investigations or of the Office of the Administrative Law Judges), or to obtain nonprivileged documents or other physical exhibits in the custody, control, and possession of such officer or employee, may file a written motion requesting the administrative law judge to recommend that the Commission direct that officer or employee to testify or produce the requested materials.

(2) *Depositions of officers or employees of other United States agencies, or of the Canadian government.* A party desiring to take the deposition of an officer or employee of another agency, or of the Canadian government, or to obtain nonprivileged documents or other physical exhibits in the custody, control, and possession of such officer or employee, may file a written motion requesting the administrative law judge to recommend that the Commission seek the testimony or production of requested material from the officer or employee.

§ 207.110 Subpoenas.

(a) *Application for issuance of a subpoena.* Except as provided in § 207.108(b) of this subpart, an application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at a hearing shall be made to the administrative law judge. The application shall be made in writing, and shall specify the material to be produced as precisely as possible, showing the relevancy of the material and the reasonableness of the scope of the subpoena. The application shall be ruled upon by the administrative law judge.

(b) *Enforcement of a subpoena.* A motion for enforcement of a subpoena shall be made to the administrative law judge. Upon consideration of the motion and any response thereto, the administrative law judge shall recommend to the Commission in favor of or against enforcement. The administrative law judge's recommendation shall provide the basis therefor, and shall address each of the criteria necessary for enforcement of an administrative subpoena. After consideration of the administrative law judge's recommendation, the Commission shall determine whether initiation of enforcement proceedings is appropriate.

(c) *Application for subpoena grounded upon the Freedom of Information Act.* No application for subpoena for production of documents grounded upon the Freedom of Information Act (5 U.S.C. 552) shall be entertained by the administrative law judge or the Commission.

§ 207.111 Prehearing conference.

The administrative law judge may direct counsel or other representatives for the parties to meet with him to consider any or all of the following:

(a) Simplification and clarification of the issues;

(b) Scope of the hearing;

(c) Stipulations and admissions of either fact or the content and authenticity of documents;

(d) Disclosure of the names of witnesses and the exchange of documents or other physical evidence that will be introduced in the course of the hearing; and

(e) Such other matters as may aid in the orderly and expeditious disposition of the proceedings.

§ 207.112 Hearings.

(a) *Purpose of the scheduling of hearings.* An opportunity for a hearing before an administrative law judge shall be provided for each action initiated under this subpart. The purpose of such hearing shall be to take evidence and hear argument in order to determine whether a party has violated or induced violation of the provisions of a protective order, and if so, what sanctions are appropriate. Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place, continuing until completed unless otherwise ordered by the administrative law judge.

(b) *Joinder or consolidation.* The administrative law judge may order joinder or consolidation if sanctions are proposed against more than one party or if violations of more than one protective order are alleged, if such joinder or consolidation would expedite processing of the cases and would not adversely affect the interests of the parties.

(c) *Compliance with Administrative Procedure Act.* The administrative law judge shall conduct a hearing that complies with the requirements of section 554 of Title 5 of the United States Code.

(d) *Reporting and transcription.* Hearings shall be reported and transcribed by the official reporter of the Commission under the supervision of the administrative law judge.

§ 207.113 The Record.

(a) *Definition of the record.* The record shall consist of—

(1) All pleadings, the charging letter and response thereto, motions and responses, and other documents and exhibits properly filed with the Commission Secretary;

(2) All orders, notices, and the recommended or initial determinations of the administrative law judge;

(3) Orders, notices, and any final determination of the Commission;

(4) Hearing transcripts, and evidence admitted at the hearing; and

(5) Any other items certified into the record by the administrative law judge.

(b) *Certification of the Record.* The record shall be certified to the Commission by the administrative law judge upon this filing of the initial determination.

§ 207.114 Initial determination.

(a) *Time for filing of initial determination.* (1) Except as may otherwise be ordered by the Commission, within ninety days, or within 120 days in a complicated case, of the date of issuance of the charging letter, the administrative law judge shall certify the record to the Commission and shall file with the Commission an initial determination as to whether each charged party has violated or induced violation of the provisions of a protective order, and as to appropriate sanctions. Any party may request the administrative law judge to treat the proceeding as a complicated case requiring 120 days for completion.

(2) The administrative law judge may request the Commission to extend the time period for issuance of the initial determination as necessary—

(i) Pending the Commission's efforts to obtain discovery pursuant to § 207.109(b)(2) of this subpart, or

(ii) Pending the Commission's efforts to enforce a subpoena pursuant to § 207.110(b) of this subpart, or

(iii) To assure adequate development of the factual record or avoid manifest injustice.

(b) *Contents of the initial determination.* The initial determination shall include the following:

(1) An opinion stating findings and conclusions necessary for the disposition of all material issues of fact, law, or discretion, and the reasons or bases therefor.

(2) A statement that the initial determination shall become the determination of the Commission unless a party files a petition for review of the determination pursuant to § 207.114 or the Commission pursuant to § 207.115 orders on its own motion a review of the initial determination or certain issues therein.

(c) *Effect of initial determination.* The initial determination shall become the

determination of the Commission forty-five (45) days after the date of the initial determination, unless the Commission within such time orders review of the initial determination or certain issues therein pursuant to § 207.114 or § 207.115 or by order shall have changed the effective date of the initial determination. In the event an initial determination becomes the determination of the Commission, the parties shall be notified thereof by the Commission Secretary.

§ 207.115 Petition for review.

(a) *The petition and responses.* (1) Any party may request a review by the Commission of the initial determination by filing with the Commission Secretary a petition for review, except that a party who has defaulted may not petition for review of any issue regarding which the party is in default. Any petition for review must be filed within fourteen (14) days after service of the initial determination on the charged party.

The petition shall:

(i) Identify the party seeking review;

(ii) Specify the issues upon which review is sought, including a statement as to whether review is sought of the initial determination regarding the existence of a violation, or of the initial determination regarding sanctions;

(iii) Set forth a concise statement of the relevant law or material facts necessary for consideration of the stated issues; and

(iv) Present a concise argument setting forth the reasons why review is necessary or appropriate.

(2) Any issue not raised in the petition for review filed under this section will be deemed to have been abandoned and may be disregarded by the Commission in determining whether to review, and in reviewing, an initial determination.

(3) Any party may file a response to the petition within seven (7) days after service of the petition, except that a party who has defaulted may not file a response to any issue regarding which the party is in default.

(b) *Grant or denial of review.* (1) The Commission shall decide whether to grant a petition for review, in whole or in part, within forty-five days of the service of the initial determination on the parties, or by such other time as the Commission may order.

(2) The Commission shall base its decision whether to grant a petition for review upon the petition and response thereto, without oral argument or further written submissions, unless the Commission shall order otherwise.

(3) The Commission shall grant a petition for review of an initial determination or certain issues therein when at least one of the participating Commissioners votes for ordering review. In its notice, the Commission shall establish the scope of the review and the issues that will be considered and make provisions for the filing of briefs and oral argument if deemed appropriate by the Commission. The notice that the Commission has granted the petition shall be served by the Commission Secretary on all parties.

§ 207.116 Commission review on its own motion.

Within forty-five (45) days of the date of service of the initial determination, the Commission on its own initiative may order review of an initial determination or certain issues therein when at least one less than a majority of the participating Commissioners votes for ordering review.

§ 207.117 Review by Commission.

Only the issues set forth in the notice of review will be considered by the Commission. On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge. The Commission may make any findings or conclusions that in its judgment are proper based on the record in the proceeding.

§ 207.118 Role of the General Counsel in advising the Commission.

When the allegedly-violated protective order was issued in connection with a panel review which was not completed as of the date the charging letter was issued, and in other appropriate circumstances, the General Counsel and any other Commission attorneys who have participated in the panel review, shall not participate in advising the Commission as to the sanctions proceedings brought under this subpart. In such cases, the Assistant General Counsel for Section 337 Investigations, who shall have had no role in the panel review or underlying investigation, shall be designated Acting General Counsel.

§ 207.119 Reconsideration.

(a) *Petition for reconsideration.* Within fourteen (14) days after service of a Commission determination, any party may file with the Commission a petition for reconsideration, setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the determination of action ordered to be taken thereunder and upon which the petitioner had no opportunity to submit arguments.

(b) *Disposition of petition for reconsideration.* The Commission shall grant or deny the petition for reconsideration. No response to a petition for reconsideration will be received unless requested by the Commission, but a petition for reconsideration will not be granted in the absence of such a request. If the motion to reconsider is granted, the Commission may affirm, set aside, or modify its determination, including any action ordered by it to be taken thereunder. When appropriate, the Commission may order the administrative law judge to take additional evidence.

§ 207.120 Public notice of sanctions.

If the final Commission decision is that there has been a violation of a protective order, and that public sanctions are to be imposed, notice of the decision will be published in the **Federal Register** and forwarded to the Secretariat. Such publication will occur no sooner than fourteen (14) days after issuance of a final decision or after any petition for reconsideration has been denied. The Commission Secretary shall also serve notice of the Commission decision upon such departments and agencies of the United States and Canadian governments as the Commission deems appropriate.

§ 207.121 Interlocutory appeals.

Rulings by the administrative law judge on motions may not be appealed to the Commission prior to the administrative law judge's issuance of his intial determination.

By order of the Commission.

Kenneth R. Mason,

Secretary.

Issued: December 22, 1988.

[FR Doc. 88-29877 Filed 12-29-88; 8:45 am]

BILLING CODE 7020-02-M

federal register

Friday
December 30, 1988

Part VII

Department of Health and Human Services

National Institutes of Health

Recombinant DNA Advisory Committee Meeting; Notice

Recombinant DNA Research; Proposed Actions Under Guidelines; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Recombinant DNA Advisory Committee; Meeting

Pursuant to Pub. L. 92–463, notice is hereby given of a meeting of the Recombinant DNA Advisory Committee at the National Institutes of Health (NIH), Building 31C, Conference Room 6, 9000 Rockville Pike, Bethesda, Maryland 20892, on January 30, 1989, from approximately 9 a.m. to adjournment at approximately 5 p.m. This meeting will be open to the public to discuss:

Proposed amendment to the Recombinant DNA Advisory Committee Charter;

Proposed revision of NIH Guidelines to refer specifically to research with plants and animals;

Request for permission to perform certain experiments;

Public information brochure on human gene therapy;

Amendment of NIH Guidelines; and

Other matters to be considered by the committee.

Attendance by the public will be limited to space available. Members of the public wishing to speak at the meeting may be given such opportunity at the discretion of the Chair.

Ms. Rachel E. Levinson, Office of Recombinant DNA Activities, National Institutes of Health, Building 31, Room B1C34, Bethesda, Maryland 20892, telephone (301) 496–9838, will provide materials to be discussed at the meeting, rosters of committee members, and substantive program information. A summary of the meeting will be available at a later date.

OMB's "Mandatory Information Requirements for Federal Assistance Program Announcements" (45 FR 39592) requires a statement concerning the official government programs contained in the *Catalog of Federal Domestic Assistance*. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers not only virtually every NIH program but also essentially every Federal research program in which DNA recombinant molecule techniques could be used, it has been determined to be not cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the *Catalog of Federal Domestic Assistance* are affected.

Dated: December 27, 1988.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 88–30075 Filed 12–29–88; 8:45 am]

BILLING CODE 4140–01–M

Recombinant DNA Research; Proposed Actions Under Guidelines

AGENCY: National Institutes of Health, PHS, DHHS.

ACTION: Notice of proposed action under NIH Guidelines for Research Involving Recombinant DNA Molecules.

SUMMARY: This notice sets forth proposed actions to be taken under the National Institutes of Health (NIH) Guidelines for Research Involving Recombinant DNA Molecules. Interested parties are invited to submit comments concerning these proposals. These proposals will be considered by the Recombinant DNA Advisory Committee (RAC) at its meeting on January 30, 1989. After consideration of these proposals and comments by the RAC, the Director of the National Institutes of Health will issue decisions on these proposals in accordance and with the Guidelines.

DATES: Comments received by January 20, 1989, will be reproduced and distributed to the RAC for consideration at its January 30, 1989, meeting.

ADDRESS: Written comments and recommendations should be submitted to Rachel E. Levinson, Office of Recombinant DNA Activities, Building 31, Room B1C34, National Institutes of Health, Bethesda, Maryland 20892. All comments received in timely response to this notice will be considered and will be available for public inspection in the above office on weekdays between the hours of 8:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Background documentation and additional information can be obtained from the Office of Recombinant DNA Activities, Building 31, Room B1C34, National Institutes of Health, Bethesda, Maryland 20892, (301) 496–9838.

SUPPLEMENTARY INFORMATION: The NIH will consider the following actions under the NIH Guidelines for Research Involving Recombinant DNA Molecules:

I. Proposal To Recommend Amending the Recombinant DNA Advisory Committee Charter

The Recombinant DNA Advisory Committee (RAC) is governed by the provisions of Pub. L. 92–463, the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees. The RAC operates under terms described in a charter that is approved by the Secretary, Department of Health and Human Services. The Director, National Institutes of Health, has asked the Recombinant DNA Advisory Committee (RAC) to discuss and comment on a proposed amendment to the RAC charter prior to asking the Secretary to consider such an amendment.

The pertinent section of the Charter is as follows:

> There shall be four standing subscommittees and *ad hoc* subcommittees as needed * * * Subcommittees shall be composed of committee members and, as required, of *ad hoc* consultants with expertise in the particular areas addressed by each subcommittee. All subcommittees shall report to the parent committee.

The proposed amendment would be inserted after the paragraph above, as follows:

> All proposals referred to a subcommittee for formal review must be approved by a majority of subcommittee members before being submitted to the parent committee. If a proposal is rejected by a subcommittee, the investigator may appeal this decision by application to the Director, NIH.

II. Proposed Changes in Appendices P and Q of the NIH Guidelines

On August 11, 1987, a "Proposal to Modify and Amend the 'Guidelines for Research Involving Recombinant DNA Molecules' to Refer Specifically to Research with Plants and Animals," was published in the **Federal Register** (52 FR 29800). These amendments would provide containment levels for plants in Appendix P and for animals in Appendix Q. On September 21, 1987, the Recombinant DNA Advisory Committee approved the amendments with certain changes. These changes are summarized here. Paragraph numbers refer to the August 11, 1987, **Federal Register** announcement (52 FR 29800).

4. The second sentence is revised to read as follows:

"Biosafety Level 1 for plants (BL1–P) is designed to provide a moderate level of containment for specific recombinant DNA research involving plants and is

recommended for experiments for which there is convincing biological evidence that precludes the possibility of survival, transfer, or dissemination of the recombinant DNA molecules into the environment, or for which there is no recognizable and predictable risk to the environment in the event of accidental release."

5. The following words in the second sentence are deleted:

"sexual and vegetative reproduction and minimizes."

37. The second sentence is revised to read as follows:

"Animals containing sequences from viral vectors, if the sequences do not lead to transmissible infection either directly or indirectly as a result of complementation or recombination in animals, may be propagated under conditions of physical containment comparable to BL1 or BL1–N and appropriate to the organism under study."

46. Revise by adding "or BL2–P + BC" after "BL3–P."

48a. This paragraph is revised to read as follows:

"III–B–5–d. BL3–P containment is recommended for experiments involving sequences encoding potent vertebrate toxins introduced into plants or associated organisms. Recombinant DNAs containing genes for the biosynthesis of toxic molecules lethal for vertebrates at an LD_{50} of less than 100 nanograms per kilogram body weight fall under Section III–A–1 and require RAC review and NIH and IBC approval before initiation."

50. The second sentence of this paragraph is amended to read as follows:

"Determination of whether or not a pathogen has a potenial for serious detrimental impact on managed (agricultural, forest, grassland) or natural ecosystems should be made by the PI and IBC, in consultation with scientists knowledgeable of plant diseases, crops and ecosystems in the geographic area of the research."

70. The third sentence of this paragraph is amended as follows:

"For certain work with plants, Appendix P replaces Appendix G; it defines Biosaftey Level 1–Plants to Biosafety Level 4–Plants (BL1–P to BL4–P)."

75. Substitute the word "arthropods" for "insects."

87. This sentence is amended to correct a typographical error, as follows:

"Personnel are required to read instructions on BL1–P greenhouse practices and procedures and to follow them."

88. The second sentence of this paragraph is deleted.

89. This sentence is revised to read as follows:

"A record is kept of experiments in progress in the facility."

91a. Substitute the word "arthropod" for "insect."

91b. Substitute the word "arthropods" for both occurrences of the word "insects."

91c. This sentence is deleted.

93a. Delete the word "permanent" in the first sentence.

93c. Substitute the word "arthropods" for "insects."

98. The third sentence of this paragraph is revised to read as follows:

"It should advise personnel of potential consequences if practices are not followed and outline contingency plans in the event containment loss results in release of organisms."

100. The second sentence is amended to read:

"Decontamination of run-off water is not necessarily required."

101. Substitute the word "arthropods" for both occurrences of the word "insects." Change "microorganisms" to "macroorganisms" to correct a typographical error.

103a. This paragraph is deleted.

105. Delete the word "permanent" in the first sentence.

106a. A new sentence is added at the end of this paragraph to read as follows:

"Soil beds are also acceptable unless propagules of experimental organisms are readily disseminated through soil."

106b. The following words are deleted from this paragraph:

"No. 30 mesh (or finer)." The word "insects" is replaced with "arthropods."

108. This sentence is revised to read as follows:

"An autoclave for treatment of contaminated greenhouse materials is available."

114. This first sentence of this paragraph is revised to read as follows:

"All experimental materials, except those that are to remain in a viable or intact state for experimental purposes, are sterilized in an autoclave or rendered biologically inactive before disposal."

115. The word "insect" is replaced with "arthropod."

116. The word "insect" is replaced with "Artropods."

122. The word "permanent" is deleted from the first sentence.

125. The word "permanent" is deleted from the first sentence.

147. The word "Insects" is replaced with "Arthropods."

153. The word "insect" is replaced with "arthropod."

160. The following sentence is deleted from this paragraph:

"A backup source of electricity is provided to run the air handling equipment if the main power source should fail."

171. This sentence is revised to read as follows:

"Ensuring that no organism that can serve as a host promote the transmission of the virus or microorganism is present within a farthest distance that the airborne virus or microorganism may be expected to be effectively disseminated."

173. Replace the word "insect" with "arthropod."

176. Replace the word "insects" with "arthropods."

177. Replace the word "insects" with "arthropods" in both occurrences.

184. The first sentence of this paragraph is amended to read as follows:

"This appendix of the NIH Guidelines specifies containment and confinement practices for research involving whole animals, both those in which the animal's genome has been altered by rcombinant DNA techniques and experiments involving recombinant-DNA-modified nicroorganisms tested on whole animals."

241. This paragraph is amended to read as follows:

"Appendix Q–II–C–1–f. Animals holding areas shall be cleaned at least once a day and decontaminated immediately following any spill of viable materials."

283. This paragraph is amended to read as follows:

"Appendix Q–II–D–1–f. Animal holding areas shall be cleaned at least once a day and decontaminated immediately following any spill of viable materials."

285. Change "18" to "16" in this paragraph.

301. The fourth sentence of this paragraph is amended to read as follows:

"The air pressure within the suit area is to be less than that of any adjacent area."

308. This paragraph is amended to read as follows:

"Appendix Q–II–D–2–u. Respirators shall be worn in rooms containing experimental animals."

328. The third sentence of this paragraph is amended to read as follows:

"It is universally accepted if bacterial spores are used to challenge and verify that the equipment is capable of killing spores then assurance is provided that all other known agents will also be

inactivated by the parameters established to operate the equipment."

After review for consistency with U.S. Department of Agriculture practices, the Agricultural Research Service has recommended the following additional changes. Again, paragraph numbers refer to the original **Federal Register** announcement.

39. Add: "The containment decision should be consistent with the APHIS Regulations identifying plant pests. 7 CFR Parts 330 and 340, "Plant Pests, Introduction of Genetically Engineered Organisms or Products, Final Rule."

70. Change to read Biosafety Level 4 Plants (BL1–P to BL4–P)."

100. Replace sentence reading "Decontamination of run-off water is not required." with "Run-off water which may contain organisms from the work tray must be appropriately decontaminated."

106b. Insert after "pollen"—"normally 10–20 um in size"

133a. Insert sentence, "A HEPA filter may be used instead of the 80–85% filters and dampers."

227. Insert after "director"—"and IBCs at the sending and receiving institution."

233. Add additional sections: "Appendix Q–II–3–B–f. Floor drains must be permanently capped or screened."

"Appendix Q–II–3–B–g. All perimeter joints and openings must be sealed to form an insect-proof structure.

"Appendix Q–II–3–B–h. All access control door(s) to interior work zone(s) must be appropriately screened (52 mesh)."

"Appendix Q–II–3–B–i. If a forced air ventilation system is provided, vents must be appropriately screened (52 mesh)."

251. Add after "laundered."—"Personnel will shower before exiting the BL3–N area and donning of personal street clothing."

255. Insert after "laboratory director"—"and IBC chairman."

261. Replace "Molded surgical masks or respirators * * *" with "Appropriate respirator protection * * *".

268. Add—"Liquid wastes from shower rooms and toilets may be decontaminated with chemical disinfectants by methods shown to be effective."

270. Add—"if arthropods are used in the experiment or the agent under study can be transmitted by an arthropod, the doors will be appropriately screened."

271. Delete the last half of paragraph, beginning with "The exhaust air from * * *."

275. Add new paragraphs—"Appendix Q–II–C–3–n. Exhaust air from BL3–N containment zone must be appropriately treated by filtering through a single HEPA filter or incinerated before release to the atmosphere. Double HEPA filtration is required if a recombinant DNA-containing organism is excreted in animals and is capable of contaminating the room air at a level to exceed $1x10^4$ organisms per cubic foot of exhausted air. A single HEPA filter must be installed in the inlet air ventilation system. Double HEPA filters are required in the supply air system when a need is identified to equip the exhaust system with double HEPA filters. Heating Ventilation Air Conditioning (HVAC) supply and exhaust ducts and filter housing must have minimal air loss in 20 minutes at 4" of water gauge pressure, or pass a halogen test with a leak rate less than 0.00001 cc/sec at 4" water gauge pressure.

"Appendix Q–II–C–3–o. The integrity of the animal room must have an air leak rate (decay rate) not to exceed 7% per minute (logarithm of pressure against time) over a 20-minute period at 2" of water gauge pressure (rate of decrease is 0.05" wgp/min.)."

308. Replace "Molded surgical masks or respirators" with "Appropriate respirator protection * * *."

325. Delete sentence "Heating Ventilation * * *."

III. Proposal To Clone the Gene Coding for Vancomycin Resistance into Streptococcus Sanguis

Sandra Handwerger, M.D., Beth Israel Medical Center, New York, has requested permission to clone the gene coding for vancomycin resistance from leuconostoc species into streptococcus sanguis via a helper plasmid system. These experiments are covered under Section III–A–2 of the NIH Guidelines which reads: "Deliberate transfer of a drug resistance trait to microorganisms that are not known to acquire it naturally, if such acquisition could compromise the use of the drug to control disease agents in humans or veterinary medicine or agriculture."

IV. Proposal To Amend Appendix H of the NIH Guidelines

The **Federal Register** of June 24, 1988 (53 FR 23775), contained a proposal by the Postal Service to ban the shipment of all etiologic agents, or materials believed to contain etiologic agents, as defined by the Department of Transportation and the Department of Health and Human Services regulations. Under Appendix H of the current NIH Guidelines for Research Involving Recombinant DNA Molecules of May 7, 1986 (52 FR 16976), this ban could apply to all shipments of recombinant molecules contained within an organism or virus, regardless of whether they are potentially hazardous to human health. Such a ban could inhibit the exchange of scientific information. It could also affect the terms and conditions under which commercial shippers would transport recombinant DNA products. The RAC recognized the potential significance of this issue and referred it to the Definitions Subcommittee of the RAC, which met on December 5, 1988.

A. Proposed Replacement of Appendix H

On December 5, 1988, the Definitions Subcommittee of the RAC unanimously recommended the following replacement of Appendix H of the NIH Guidelines for Research Involving Recombinant DNA Molecules.

"Preamble:

"Recombinant DNA molecules contained in an organism or in a viral genome shall be shipped under the appropriate requirements of the U.S. Public Health Service (42 CFR, Part 72), U.S. Department of Agriculture (9 CFR, subchapters D&E; 7 CFR, Part 340) and/or the U.S. Department of Transportation (49 CFR, Part 173). For purposes of these Guidelines the following recombinant DNA molecules contained in an organism or in a viral genome shall be shipped as etiologic agents: (1) Those listed as class 2, 3, or 4 agents in Appendix B; and/or (2) those contained in reference G–III–2 [1]; and/or (3) those regulated as animal or plant pathogens or pests under titles 7 and 9 CFR; or (4) host organisms containing recombinant DNA derived from those organisms or viral genomes.

"Appendix H–I:

"An illustration of one method of packaging and labeling of recombinant DNA-containing microorganisms and viral genomes defined as etiologic agents in the Premable is shown in Figures 1, 2, and 3. Additional information on packaging and shipping is given in the "Laboratory Safety Monograph-A Supplement to the NIH Guidelines for Recombinant DNA Research," available from the Office of Recombinant DNA Activities and in the Biosafety in Microbiological and Biomedical Laboratories.[1]

"Appendix H–II—Footnote and References of Appendix H 1. Biosafety in Microbial and Biomedical Laboratories, 2nd Edition, (May 1988), U.S. Department of Health and Human Services, Centers for Disease Control, Atlanta, Georgia 30333, and National Institutes of Health, Bethesda, Maryland 20892."

B. Proposed Replacement of the Illustration in Appendix H

The heading changes and the replacement paragraph were written by NIH staff on December 12, 1988, to reflect the intent of the Definitions Subcommittee of the RAC.

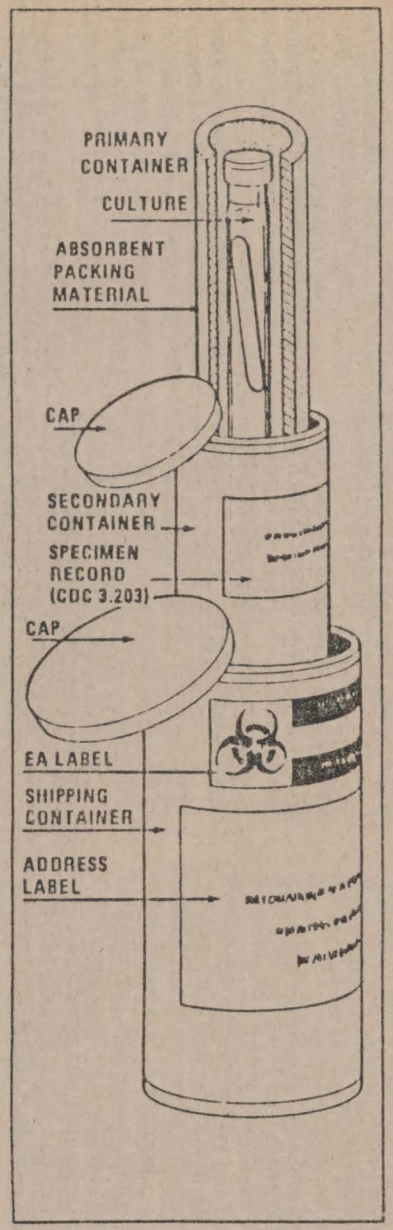
The replacement paragraph will read:

"Figures 1, 2, and 3 depict one method for the packaging and labeling of those recombinant DNA-containing organisms and viral genomes defined as etiologic agents in the Preamble of Appendix H. The key features are identified in Figure 1. It is the responsibility of the shipper to comply with the applicable requirements of 42 CFR Part 72 and 49 CFR Part 173 when shipping biological materials or etiologic agents. It is recommended that all organisms containing recombinant molecules, which are exempt and/or class 1 agents, should be shipped in secure, leak-proof containers."

See illustration attached.

BILLING CODE 4140-01-M

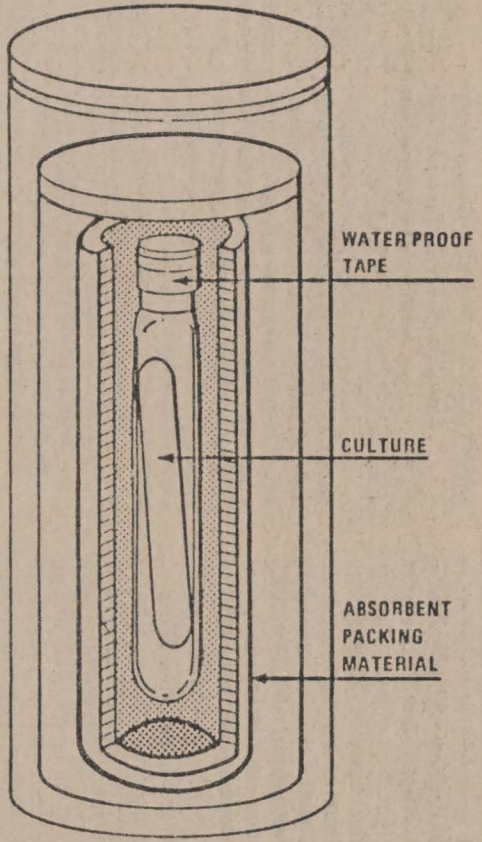
FIGURE 1



One Method for

PACKAGING AND LABELING OF ETIOLOGIC AGENTS

FIGURE 2



CROSS SECTION OF PROPER PACKING

Replacement paragraph is on attached sheet.

The Interstate Shipment of Etiologic Agents (42 CFR, Part 72) was revised July 21, 1980 to provide for packaging and labeling requirements for etiologic agents and certain other materials shipped in interstate traffic.

Figures 1 and 2 diagram the packaging and labeling of etiologic agents in volumes of less than 50 ml. in accordance with the provisions of subparagraph 72.3 (a) of the cited regulation. Figure illustrates the color and size of the label, described in subparagraph 72.3 (d) (1 - 5) of the regulations, which shall be affixed to all shipments of etiologic agents.

For further information on ~~any provision of this regulation~~ shipping of etiologic agents contact:

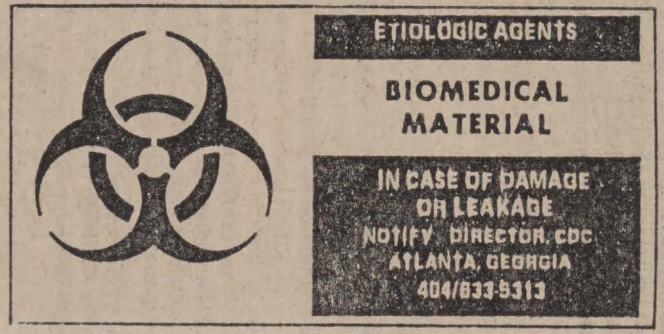
Centers for Disease Control
Attn: Biohazards Control Office
1600 Clifton Road
Atlanta, Georgia 30333

Telephone: 404-639-3883
FTS-236-3883

or Department of Transportation
ATTN: Off. of Hazardous Materials Transp.
400 7th Street, SW
Washington, D.C. 20590
(202) 366-4493

or Department of Agriculture
ATTN: Animal & Plant Hlth. Insp. Serv.
6505 Belcrest Road
Hyattsville, MD 20782
(301) 436-7908

FIGURE 3



BILLING CODE 4140-01-C

V. Review of Public Information Brochure—"Gene Therapy for Human Patients"

The Human Gene Therapy Subcommittee of the Recombinant DNA Advisory Committee has developed a document to be used in educating the nonscientific public about human gene therapy. The information brochure includes background material about the purposes and potential of research in gene therapy, about its supervision, and about why and how the public is involved. The RAC will review the document.

VI. Proposal To Amend Section IV–C—Responsibilities of NIH

The Foundation on Economic Trends and Jeremy Rifkin have submitted a petition to the NIH Office of Recombinant DNA Activities to amend the NIH Guidelines to establish a Human Eugenics Advisory Committee. The proposed amendment is as follows:

Proposed Amendment to the National Institutes of Health Guidelines for Research Involving Recombinant DNA Molecules To Establish a Human Eugenics Advisory Committee by the Foundation on Economic Trends

November 4, 1988.

Amend Section IV–C–2 as follows: At the end of Section IV–C–2, add the following:

IV–C–2-a. *Human Eugenics Advisory Committee.* The Human Eugenics Advisory Committee (HEAC) is responsible for carrying out specified functions described below as well as others assigned under its charter or by the Secretary, HHS, the Assistant Secretary for Health, and the Director, NIH.

The committee shall consist of eighteen members, including the chair, appointed by the Secretary or his or her designee, as follows:

(1) Three members who are experienced and knowledgeable in protecting the health, safety, and welfare of workers.

(2) Three members who are experienced and knowledgeable in the protection of privacy and civil liberties.

(3) Three members who are experienced and knowledgeable in protecting the rights of the handicapped.

(4) Three members who are experienced and knowledgeable in the abuses and ethical problems in the field of ante-natal and neo-natal testing.

(5) Three members who are experienced in the protection of the interests of consumers, especially in the medical and insurance fields.

(6) Three members who are experienced and knowledgeable in molecular biology and one or more of the following fields: Discrimination in education, bio-ethics, and public affairs.

Groups which have been the traditional victims of past discrimination, including minorities, women, and the disabled shall be well represented on the committee.

All meetings of the HEAC shall be announced in the **Federal Register**, including tentative agenda items, 30 days in advance of the meeting with final agendas (if modified) available at least 72 hours before the meeting.

The HEAC shall be responsible for advising the Director, NIH, on each and every proposal that involves any human gene therapy, including both somatic cell and germ line therapy. The term "major actions" in Section IV–C–1–b of these Guidelines includes all such proposals. The HEAC chairperson shall be notified of all final decisions by the Director, NIH, on all such proposals in the same manner as the RAC and IBC chairpersons are notified of certain final decisions under Section IV–C–1–b–(1).

Amend Section IV–C–1 to read as follows: Amend the second sentence to read as follows:

The Director has responsibilities under the Guidelines that involve ORDA, the RAC and the HEAC.

After the third sentence of section IV–C–1, add:

Advice from the HEAC is primarily on the ethical, philosophical, social, economic, and eugenic implications and impacts of human genetic therapy.

Amend Section IV–C–1–b by striking all of the language after "Guidelines" and inserting language thereafter so that the text of the provision reads as follows:

In carrying out the responsibilities set forth in this section, the director or a designee shall weigh each proposed action through appropriate analysis and consultation to determine that it complies with the Guidelines, presents no significant risk to health or the environment, and presents no significant risk of (i) adverse impacts on the civil liberties or on the social or economic status of those persons who may be the subject of proposed actions involving gene therapy, (ii) creating undue ethical or philosophical dilemmas or problems for such persons, and (iii) encouraging unsound, undesirable or frivolous human eugenics practices by either public or private institutions or individual practitioners. The term "significant risk" herein includes adverse implications for the interest to be protected.

Amend Section IV–C–1–b–(1) by adding "and the HEAC" after "the RAC" wherever it appears in that provision.

Amend Section IV–C–3–b–(1) by adding "and HEAC" after "RAC" where it appears in the text. In the note that follows the text, add "or a HEAC" before "meeting".

Amend Section IV–C–3–b–(2) by adding "and HEAC" after "RAC" and change "meeting" to "meetings".

Amend Sections IV–C–3–b–(3) and IV–C–3–d by adding "the HEAC" after "RAC".

The reasons for these proposed revisions are set forth in the Petition to the Director accompanying these proposals.

References

Anderson W.F.: 1984, "Prospects for human gene therapy", *Science* 226, 401–409.

Anderson W.F.: 1985, "Human gene therapy: Scientific and ethical considerations", *Journal of Medicine and Philosophy* 10, 275–291.

Anderson W.F. and Fletcher J.C.: 1980, "Gene therapy in human beings: When is it ethical to begin" ?, *New England Journal Medicine* 303, 1293–1297.

Ashley B.M.: 1985, "What does Science say we are" ? *Theologies of the Body: Humanist and Christian*, Chapter 2, The Pope John Center, pp. 19–50.

Bloch N.: 1978, "Reductionism", W.T. Reich (ed.) *Encyclopedia of Bioethics*, Free Press, Macmillan, New York, pp. 1419–1423.

Capron A.M.: 1983, "Don't ban genetic engineering", *Washington Post*, June 16, p. A26.

Davis B.D.: 1983, "The two faces of genetic engineering in man", *Science* 219, 1381.

Department of Health and Human Services: 1986, "National Institutes of Health points to consider in the design and submission of human somaticcell gene therapy protocols", *Recombinant DNA Technical Bulletin* 9(4), 221–242.

Fischhoff B., Lichtenstein S., Slovic P., Derby S.L., Keeney R.L.: 1981, *Acceptable risk*, Cambridge University Press.

Fletcher J.C.: 1983, "Moral problems and ethical issues in prospective human gene therapy", *Virginia Law Review* 69, 515–546.

Fletcher J.C.: 1985, "Ethical issues in and beyond prospective clinical trials of human gene therapy", *Journal of Medicine and Philosophy* 10, 293–309.

Fletcher, Joseph: 1979, "Humanness", in *Humanhood: Essays in Bioethics*, Prometheus Press, New York, pp. 7–19.

Friedmann T. and Roblin R.: 1972, "Gene therapy for human genetic disease" ?, *Science* 175, 949–955.

Glover J.: 1984, *What Sort of People Should There Be?*, Penguin Books, Middlesex, England, pp. 13–56, 178–187.

Gorovitz S.: 1984, "Will we still be 'human' if we have engineered genes and animal organs" ?, *Washington Post*, December 9, pp. C1, C4.

Grobstein C. and Flower M.: 1984, "Gene therapy: proceed with caution", *Hastings Center Report*, 14(2), 13–17.
Kevles D.J.: 1985, *In the Name of Eugenics*, Alfred A. Knopf, New York.
Ludmerer K.M.: 1972, *Genetics and American Society*, The Johns Hopkins University Press, Baltimore.
Manipulating life: ethical issues in genetic engineering, 1982, Church and Society, World Council of Churches, Geneva.
Mercola K.E. and Cline M.J.: 1980, "The potentials of inserting new genetic information", *New England Journal of Medicine* 303, 1297–1300.
Miller H.I.: 1983, "Gene therapy: not to be feared or over-regulated", *Bio/Technology*, June, 382.
Motulsky A.G.: 1983, "Impact of genetic manipulation on society and medicine", *Science* 219, 135–140.
National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research: 1978, *The Belmont Report*. Ethical principles and guidelines for the protection of human subjects in research, U.S. Government Printing Office, Washington, DC, DHEW publication no. [OS] 78–0012.
Nelson J.R.: 1984, "From genesis to genetics: a theological-ethical exercise", in *Human Life—A Biblical Perspective for Bioethics*, Fortress Press, Philadelphia, pp. 155–173.
Parliamentary Assemply of the Council of Europe, 33rd Ordinary Session, Recommendation 934 (On genetic engineering), 1982.
Pope John Paul II: 1982, Statement to the Pontifical Academy of Sciences (10/23/82), "Biological research and human dignity", *Origins* 12, 342–343.
Pope John Paul II: 1983, Statement to the World Medical Association (10/29/83), "The ethics of genetic manipulation", *Origins* 13, 385–389.
President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research: 1982, *Splicing Life*, U.S. Government Printing Office, Washington, DC.
Rifkin J.: 1983, *Algeny*, Viking Press, New York, pp. 14, 23, 228, 231–234.
Shinn R.L.: 1978, "Gene therapy: ethical issues", in W.T. Reich (ed.) *Encyclopedia of Bioethics*, Free Press, Macmillan, New York, pp. 521–527.
U.S. Congress: 1982, *Human Genetic Engineering*, Hearings Before the Subcommittee on Investigations and Oversight of the Committee on Science and Technology, U.S. Government Printing Office, Washington, DC pp. 2301–2346.
U.S. Congress: 1984, *Human Gene Therapy—A Background Paper*, Office of Technology Assessment, U.S. Government Printing Office, Washington, DC p. 47.
Wade N.: 1982a, "Whether to make perfect humans", *New York Times*, July 22, p. A22.
Wade N.: 1982b, "The rules for reshaping life", *New York Times*, December 29, p. A26.
Walters L.: 1986, "The ethics of human gene therapy", *Nature* 320, 225–227.
Williams D.A. and Orkin S.H.: 1986, "Somatic gene therapy: current status and future prospects", *Journal of Clinical Investigation* 77, 1053–1056.
Williamson R.: 1982, "Gene therapy", *Nature* 298, 416–418.

VII. Proposed Amendment of Section I–B—Definition of Recombinant DNA Molecules

Section I–B of the NIH Guidelines currently reads as follows:

"I–B—Definition of Recombinant DNA Molecules

"In the context of these Guidelines, recombinant DNA molecules are defined as either (i) molecules which are constructed outside living cells by joining natural or synthetic DNA segments to DNA molecules that can replicate in a living cell, or (ii) DNA molecules that result from the replication of those described in (i) above.

"Synthetic DNA segments likely to yield a potentially harmful polynucleotide or polypeptide (e.g., a toxin or a pharmacologically active agent) shall be considered as equivalent to their natural DNA counterpart. If the synthetic DNA segment is not expressed in vivo as a biologically active polynucleotide or polypeptide product, it is exempt from the Guidelines."

The National Wildlife Federation has submitted a request that the NIH Guidelines "be expanded to encompass research involving organisms engineered by techniques other than recombinant DNA."

The letter proposing this change is as follows:

The NWF requests that the National Institutes of Health (NIH) Recombinant DNA Advisory Committee (RAC) recommend to the NIH Director that the Guidelines for Research Involving Recombinant DNA Molecules ("Guidelines") be expanded to encompass research involving organisms engineered by techniques other than recombinant DNA.

Expanding the scope of the Guidelines is necessary because recent advances in science have added to the list of techniques capable of producing genetically novel organisms. A growing number of such organisms are *not* subject to the current Guidelines, which provide oversight only of those organisms formed by narrowly defined recombinant DNA techniques. Like recombinant DNA, these new techniques will produce organisms that may pose human health and environmental risks.

We readily acknowledge the difficulty of defining the scope of NIH guidelines in an era of rapid technological change. Although there may be other approaches, to begin the discussion, we propose that Section I–B of the NIH Guidelines, Definition of Recombinant DNA Molecules, be replaced by a new section bringing within the scope of the guidelines all organisms into which foreign DNA has been stably integrated, regardless of technique. We do not propose particular language because we believe that the precise contours of the Guidelines would benefit from thorough discussion by the RAC.

Background

The Guidelines were developed in 1976 to provide standards of safety in research with recombinant DNA techniques. The purpose of the Guidelines was to protect researchers and the public from potential hazards to human health and the environment posed by genetically novel organisms.[1]

The central concern of the NIH was the genetic novelty of the organisms created by recombinant DNA techniques. As the NIH stated in its 1977 Environmental Impact Statement on the Guidelines (2), "[c]oncern over the potential for hazard in organisms containing recombined DNA develops from the central idea that such recombinants will be unique types of organisms, not normally arising in nature, and that their properties will therefore be unknown and unpredictable."

As there was only one technique capable of providing transgenic organisms in 1976, the Guidelines are written to cover only that technique. Current Guidelines (3) apply only to recombinant DNA molecules, which they define "* * * as either (i) molecules which are constructed outside living cells by joining natural or synthetic DNA segments to DNA molecules that can replicate in a living cell, or (ii) DNA molecules that result from the replication of those described in (i) above." This definition captured most genetically novel organisms for review because the recombinant DNA technique depends on joining the foreign DNA to be transferred to vector DNA outside of living cells.

The New Transgenic Techniques

Since that time, scientists have developed other gene transfer techniques (e.g., electroporation, microprojectile techniques, microinjection, chemical poration, cell fusion) that can produce genetically novel organisms but will not necessarily involve "a joining of natural or synthetic segments to DNA molecules" outside living cells. References 4–13 provide a sample of techniques currently capable of producing so-called transgenic organisms—those with DNA from dissimilar parent organisms.

The key to these new transgenic techniques is that they are not dependent upon vectors to transfer the foreign DNA. Although these techniques are not yet well understood, it is known that small pieces of foreign DNA introduced into a cell without vectors can become incorporated into the chromosomes and be expressed.

As a result of these advances, transgenic organisms may be produced by a number of techniques, including, but not limited to recombinant DNA. Transgenic techniques that do not require "recombinant DNA" procedures produce organisms that can be

[1] The 1976 "Decision of the Director, NIH, to Release Guidelines for Research on Recombinant DNA Molecules" (1, p. 27904) declared that "[t]he object of these guidelines is to ensure that experimental DNA recombination will have no ill effects on those engaged in the work, on the general public, or on the environment".

identical to organisms created with recombinant DNA techniques.

RAC members acknowledged the deficiencies in the current Guidelines at June 3, 1988, meeting in a discussion of amendments to the Guidelines regarding transgenic animals (14, 15, 16). Certain experiments with transgenic animals are not subject to the Guidelines because the DNA added to the animals is not "recombinant DNA" as defined by the Guidelines. According to meeting participants,

- "* * * there is a serious and significant loophole that needed to be addressed * * *" (16, p. 18);
- the technology exists to create non-recombinant transgenic organisms ("* * * the technology is moving fast enough that by the time this [transgenic animal amendment] went anyplace that there will be such things", (16, p. 26);
- some transgenic organisms pose hazards ("* * * if you're injecting DNA into an animal * * * you've potentially created something that might be harmful, so you shouldn't let it wild. You couldn't let it out into the wild." (16, p. 39).

Summary

Gene transfer technology has now moved beyond recombinant DNA techniques. The NIH should delay no longer in developing Guidelines that reflect current scientific knowledge so that the public and the environment are protected from potential hazards of the new gene transfer technologies. There is no scientific rationale for limiting oversight to one subset of genetically novel organisms.

We urge the RAC to recommend to the NIH Director that the Guidelines be updated and expanded to encompass all organisms possessing the same degree of genetic novelty as organisms produced by recombinant DNA techniques as currently defined.

We look forward to the RAC's consideration of this request at the January, 1989, meeting. Please call (797–6892) if you have any questions.

Sincerely,

Jane Rissler,

National Biotechnology Policy Center."

References

1. U.S. Department of Health, Education, and Welfare, National Institutes of Health. 1976. Recombinant DNA Research: Guidelines. **Federal Register** 41:27902–27943.

2. U.S. Department of Health, Education, and Welfare, National Institutes of Health. 1977. Environmental impact statement on NIH Guidelines for Research Involving Recombinant DNA Molecules, Part One. DHW Publication No. (NIH) 1489, Bethesda, MD.

3. U.S. Department of Health and Human Services, National Institutes of Health. 1986. Guidelines for Research Involving Recombinant DNA Molecules. **Federal Register** 51:16958–16985.

4. Boynton, J.E., N.W. Gillham, E.H. Harris, J.P. Hosler, A.M. Johnson, A.R. Jones, B.L. Randolph-Anderson, D. Robertson, T.M. Klein, K.B. Shark, and J.C. Sanford. 1988. Chloroplast transformation in *Chlamydomonas* with high velocity microprojectiles. *Science* 240:1534–1538.

5. Hammer, R.E., V.G. Pursel, C.E. Rexroad, R.J. Wall, D.J. Bolt, K.M. Ebert, R.D. Palmiter, and R.L. Brinster. 1985. Production of transgenic rabbits, sheep and pigs by microinjection. *Nature* 315:680–682.

6. Johnston, S.A., P.A. Anziano, K. Shark, J.C. Sanford, and R.A. Butow. 1988. Mitochondrial transformation in yeast by bombardment with microprojectiles. *Science* 240:1538–1541.

7. Klein, T.M., T. Gradziel, M.E. Fromm, and J.C. Sanford. 1988. Factors influencing gene delivery into *Zea mays* cells by high-velocity microprojectiles. *Bio/Technology* 6:559–563.

8. Klein, T.M., E.D. Wolf, R. Wu, and J.C. Sanford. 1987. High-velocity microprojectiles for delivering nucleic acids into living cells. *Nature* 327:70–73.

9. McCabe, D.E., W.F. Swain, B.J. Martinell, and P. Christou. 1988. Stable transformation of soybean *(Glycine max)* by particle acceleration. *Bio/Technology* 6:923–926.

10. Morikawa, H., K. Sugino, Y. Hayashi, J. Takeda, M. Senda, A. Hirai, and Y. Yamada. 1986. Interspecific plant hybridization by electrofusion in *Nicotiana*. *Bio/Technology* 4:57–60.

11. Nishiguchi, M., W.H.R. Langridge, A.A. Szalay, and M. Zaitlin. 1986. Electroporation-mediated infection of tobacco leaf protoplasts with tobacco mosaic virus RNA and cucumber mosaic virus RNA. *Plant Cell Reports* 5:57–60.

12. Sanford, J.C., T.M. Klein, E.D. Wolf, and N. Allen. 1987. Delivery of substances into cells and tissues using a particle bombardment process. *Particulate Science and Technology* 5:27–37.

13. Toneguzzo, F. and A. Keating. 1986. Stable expression of selectable genes introduced into hematopoietic stem cells by electric field-mediated DNA transfer. *Proceedings National Academy of Science* 83:3496–3499.

14. U.S. Department of Health and Human Services, National Institutes of Health. 1988. Recombinant DNA Research Guidelines and Advisory Committee Meeting; Notices. **Federal Register** 53:12753–4.

15. U.S. Department of Health and Human Services, National Institutes of Health, Working Group on Transgenic Animals, Recombinant DNA Advisory Committee. 1988. Minutes of meeting, March 28, 1988. *Recombinant DNA Technical Bulletin* 11:25–30.

16. U.S. Department of Health and Human Services, National Institutes of Health, Recombinant DNA Advisory Committee. 1988. Transcript of the June 3, 1988, meeting. StenoTech, Inc., Gaithersburg, MD.

OMB's "Mandatory Information Requirements for Federal Assistance Program Announcements" (45 FR 39592) requires a statement concerning the official government programs contained in the Catalog of Federal Domestic Assistance. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers not only virtually every NIH program but also essentially every Federal research program in which DNA recombinant molecule techniques could be used, it has been determined to be not cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the Catalog of Federal Domestic Assistance are affected.

Dated: December 23, 1988.

William F. Raub,

Acting Director, National Institutes of Health.

[FR Doc. 88–30076 Filed 12–29–88; 8:45 am]

BILLING CODE 4140–01–M

federal register

Friday
December 30, 1988

Part VIII

Department of Transportation

Federal Aviation Administration

14 CFR Part 71

Proposed Establishment of an Airport Radar Service Area; San Jose, CA; Notice of Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 88-AWA-3]

Proposed Establishment of an Airport Radar Service Area; San Jose, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish an Airport Radar Service Area (ARSA) at San Jose International Airport, CA. This location is a public airport with an operating control tower served by a Level V Radar Approach Control Facility and a Level III Limited Terminal Radar Approach Control in a Tower Cab (TRACAB). Establishment of this ARSA would require that pilots maintain two-way radio communication with air traffic control (ATC) while in the ARSA. Implementation of ARSA procedures at this affected location would promote the efficient control of air traffic and reduce the risk of midair collision in terminal areas.

DATE: Comments must be received on or before February 13, 1989.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket [AGC-204], Airspace Docket No. 88-AWA-3, 800 Independence Avenue, SW., Washington, DC 20591.

The official docket may be examined in the Rules Docket, weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m. The FAA Rules Docket is located in the Office of the Chief Counsel, Room 916, 800 Independence Avenue, SW., Washington, DC.

The informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

FOR FURTHER INFORMATION CONTACT: Betty Harrison, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9254.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 88-AWA-3." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-230, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2A which describes the application procedure.

Background

On April 22, 1982, the National Airspace Review (NAR) plan was published in the Federal Register (47 FR 17448). The plan encompassed a review of airspace use and procedural aspects of the ATC system. Among the main objectives of the NAR was the improvement of the ATC system by increasing efficiency and reducing complexity. In its review of terminal airspace, NAR Task Group 1-2 concluded that TRSA's should be replaced. Four types of airspace configurations were considered as replacement candidates. Model B, subsequently redesignated ARSA, became the recommendation by a consensus.

In response, the FAA published NAR Recommendation 1-2.2.1, "Replace Terminal Radar Service Areas with Model B Airspace and Service" in Notice 83-9 (July 28, 1983; 48 FR 34286) proposing the establishment of ARSA's at the Robert Mueller Municipal Airport, Austin, TX, and the Port of Columbus International Airport, Columbus, OH. ARSA's were designated at these airports on a temporary basis by SFAR No. 45 (October 28, 1983; 48 FR 50038) in order to provide an operational confirmation of the ARSA concept for potential application on a national basis.

Following a confirmation period of more than a year, the FAA adopted the NAR recommendation and, on February 27, 1985, issued a final rule (50 FR 9252; March 6, 1985) defining an ARSA and establishing air traffic rules for operation within such an area. Concurrently, by separate rulemaking action, ARSA's were permanently established at the Austin, TX, and Columbus, OH, airports and also at the Baltimore/Washington International Airport, Baltimore, MD, (50 FR 9250; March 6, 1985). The FAA has stated that future notices would propose ARSA's for other airports at which TRSA procedures were in effect.

Additionally, the NAR Task Group recommended that the FAA develop quantitative criteria for proposing to establish ARSA's at locations other than those which are included in the TRSA replacement program. The task group recommended that these criteria take into account, among other things, traffic mix, flow and density, airport configuration, geographical features, collision risk assessment, and ATC capabilities to provide service to users. This criteria has been developed and is being published via the FAA directives system.

The FAA has established ARSA's at 125 locations under a paced implementation plan to replace TRSA's with ARSA's. This is one of a series of notices to implement ARSA's at locations with TRSA's or locations without TRSA's which warrant implementation of an ARSA.

Related rulemaking

This notice proposes an ARSA designation at a location not identified as a candidate for an ARSA in the preamble to Amendment No. 71-10 (50 FR 9252). Other candidate locations will be proposed in future notices published in the Federal Register.

The Current Situation at the Proposed ARSA Locations

San Jose International Airport is a public airport with an operating control tower served by a Level V Radar Approach Control Facility and a Level III Limited Terminal Radar Approach Control in a Tower Cab (TRACAB). The airport operations at this airport are quite varied as to the mix of aircraft. Speeds range from the extremely slow to the maximum speed allowed under regulations, with maneuverability varying from the extremely maneuverable to the slower maneuvering aircraft. Although most aircraft landing at San Jose International Airport are sequenced with the aid of radar, airspace and operating rules are not established by regulation. Participation by pilots operating under visual flight rules (VFR) is voluntary, although pilots are urged to participate. This level of service is known as Stage II and is provided at some locations not identified as TRSA's. The NAR Task Group recommended and the FAA adopted the establishment of numerical criteria to allow airports such as San Jose International with safety, traffic and other needs to become candidates for ARSA's regardless of the presence of a TRSA.

San Jose International Airport is rapidly becoming more heavily used by numerous air carriers and air taxis. The 2,843,696 passengers boarded annually far surpasses that of 250,000 annually adopted as being necessary for ARSA candidacy.

The NAR Task Group stated that, because there are different levels of service offered in terminal areas such as San Jose International Airport, users are not always sure of what restrictions or privileges exist, or how to cope with them. Stage II services offered at San Jose International Airport include traffic advisories and sequencing to the runway but do not include conflict resolution in the terminal airspace. Participation in this program is strictly voluntary. The only service available outside the airport traffic area is separation for instrument flight rule (IFR) traffic and VFR traffic advisories as an additional service. Some believe that the voluntary nature of Stage II at airports with moderate activity levels does not adequately address the problems associated with nonparticipating aircraft operating in relative proximity to the airport and associated approach and departure courses. There is strong advocacy among user organizations that terminal radar facilities should provide all pilots the same service in the same way, to the extent feasible, within standard size airspace designations.

Certain provisions of FAR § 91.87 add to the problem identified by the task group. For example, aircraft operating under VFR to or from a satellite airport and within the airport traffic area (ATA) of the primary airport are excluded from the two-way radio communications requirement of § 91.87. This condition is acceptable until the volume and density of traffic at the primary airport dictates further action.

The Proposal

The FAA is considering an amendment to § 71.501 of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to establish an ARSA at San Jose International Airport, CA, which is a public airport with an operating control tower served by a Level V Radar Approach Control Facility and a Level III Limited Radar Approach Control in a tower cab (TRACAB). The proposed location is depicted on a chart in Appendix 1 of this notice.

Section 91.88 of the Federal Aviation Regulations (14 CFR Part 91) defines an ARSA and prescribes operating rules for aircraft, ultralight vehicles, and parachute jump operations in airspace designated as an ARSA. The ARSA rule provides in part that, prior to entering the ARSA, any aircraft arriving at any airport in an ARSA or flying through an ARSA must: (1) Establish two-way radio communications with the ATC facility having jurisdiction over the area; and (2) while in the ARSA, maintain two-way radio communications with that ATC facility. For aircraft departing from the primary airport within the ARSA, two-way radio communications must be maintained with the ATC facility having jurisdiction over the area. For aircraft departing a satellite airport within the ARSA, two-way radio communications must be established with the ATC facility having jurisdiction over the area as soon as practicable after takeoff and thereafter maintained while operating within the ARSA.

All aircraft operating within an ARSA are required to comply with all ATC clearances and instructions and any FAA arrival or departure traffic pattern for the airport of intended operation. However, the rule permits ATC to authorize appropriate deviations from any of the operating requirements of the rule when safety considerations justify the deviation or more efficient utilization of the airspace can be attained through such deviations. Ultralight vehicle operations and parachute jumps in an ARSA may only be conducted under the terms of an ATC authorization.

The FAA adopted the NAR task group recommendation that each ARSA be of the same airspace configuration insofar as is practicable. The standard ARSA consists of airspace within 5 nautical miles of the primary airport extending from the surface to an altitude of 4,000 feet above that airport's elevation, and that airspace between 5 and 10 nautical miles from the primary airport, from 1,200 feet above the surface to an altitude of 4,000 feet above that airport's elevation. Proposed deviation from the standard has been necessary at some airports due to adjacent regulatory airspace, international boundaries, topography, or unusual operational requirements.

Definitions, operating requirements, and specific airspace designations applicable to ARSA's may be found in Federal Aviation Regulations § 71.14 and § 71.501 (14 CFR Part 71), and § 91.1 and § 91.88 (14 CFR Part 91).

For the reasons discussed under "Regulatory Evaluation," the FAA has determined that this proposed regulation is not a "major rule" under Executive Order 12291 and is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979).

Regulatory Evaluation

The FAA has conducted a Regulatory Evaluation of the proposed establishment of this additional ARSA site. The major findings of that evaluation are summarized below, and the evaluation is available in the regulatory docket.

a. Costs

Costs which potentially could result from the establishment of an additional ARSA site fall into the following categories:

(1) Air traffic controller staffing, controller training, and facility equipment costs incurred by the FAA.

(2) Costs associated with the revision of charts, notification of the public, and pilot education.

(3) Additional operating costs for circumnavigating or flying over the ARSA.

(4) Potential delay costs resulting from operations within an ARSA.

(5) The need for some operators to purchase radio transceivers.

(6) Miscellanous costs.

It has been the FAA's experience, however, that these potential costs do not materialize to any appreciable degree, and when they do occur, they are transitional, relatively low in magnitude, or attributable to specific implementation problems that have been experienced at a very small

minority of ARSA sites. The reasons for these conclusions are presented below.

The FAA expects that the additional ARSA site proposed in this notice can be implemented without requiring additional controller personnel above current authorized staffing levels, because participation in radar services at this location is already quite high, and the separation standards permitted in the ARSA will allow controllers to absorb the slight increase in participating traffic by handling all traffic much more efficiently. Further, because controller training will be conducted during normal working hours and these facilities already operate the necessary radar equipment, the FAA does not expect to incur any appreciable implementation costs. Essentially, the FAA will modify its terminal radar procedures at the proposed ARSA site in a manner that will make more efficient use of existing resources.

No additional costs are expected to be incurred because of the need to revise sectional charts to incorporate the new ARSA airspace boundaries. Changes of this nature are routinely made during charting cycles, and the planned effective dates for newly established ARSA's are scheduled to coincide with the regular 6-month chart publication intervals.

This rulemaking proceeding and process will satisfy much of the need to notify the public and educate pilots about ARSA operations. The informal public meetings being held at each location where an ARSA is being proposed provides pilots with the best opportunity to learn both how an ARSA works and how it will affect their local operations. The expenses associated with these public meetings are considered costs attributable to the rulemaking process; however, any public information costs following establishment of a new ARSA are strictly attributable to the ARSA. The FAA expects to distribute a Letter to Airmen to all pilots residing within 50 miles of an ARSA site explaining the operation and configuration of the ARSA finally adopted. The FAA also has issued an Advisory Circular on ARSA's. The combined Letter to Airmen and prorated Advisory Circular costs have been estimated to be approximately $500 for each ARSA site. This cost is incurred only once upon the initial establishment of an ARSA.

Information on ARSA's following the establishment of additional sites will also be disseminated at aviation safety seminars conducted throughout the country by various district offices. These seminars are regularly provided by the FAA to discuss a variety of aviation safety issues and, therefore, will not involve additional costs strictly as a result of the ARSA program. Additionally, no significant costs are expected to be incurred as a result of the follow-on user meetings that will be held at each site following implementation of the ARSA. These meetings, which will allow users to provide feedback to the FAA on local ARSA operations, are being held at public or other facilities which are being provided free of charge or at nominal cost. Further, because these meetings are being conducted by local FAA facility personnel, no travel, per diem, or overtime costs will be incurred by regional or headquarters personnel.

The FAA anticipates that some pilots who currently transit a TRSA without establishing radio communications or participating in radar services may choose to circumnavigate the mandatory participation airspace of an ARSA rather than participate. Some minor delay costs will be incurred by these pilots because of the additional aircraft variable operating cost and lost crew and passenger time resulting from the deviation. Other pilots may elect to overfly the ARSA or transit below the 1,200 feet above ground level (AGL) floor between the 5- and 10-nautical-mile rings. Although this will not result in any appreciable delay, a small additional fuel burn will result from the climb portion of the altitude adjustment, which will be offset somewhat by the descent.

The FAA recognizes that the potential exists for delays to develop at some locations following establishment of an ARSA. The additional traffic that the radar facilities will be handling as a result of the mandatory participation requirement may, in some instances, result in minor delays to aircraft operations. The FAA does not expect such delay to be appreciable. The FAA expects that the greater flexibility afforded controllers in handling traffic as a result of the separation standards allowed in an ARSA will keep delay problems to a minimum. Those that do occur will be transitional in nature, diminishing as facilities gain operating experience with ARSA's and learn how to tailor procedures and allocate resources to take fullest advantage of the efficiencies that an ARSA will permit. This has been the experience at most of the locations where ARSA's have been in effect for the longest period of time and is the recurring trend at the locations that have been more recently designated.

The FAA does not expect that any operator will find it necessary to install radio transceivers as a result of establishing the ARSA proposed in this notice. Aircraft operating to and from primary airports already are required to have two-way radio communications capability because of existing airport traffic areas and, therefore, will not incur any additional costs as a result of the proposed ARSA. Further, the FAA has made an effort to minimize these potential costs throughout the ARSA program by providing airspace exclusions, or cutouts, for satellite airports located within 5 nautical miles of the ARSA center where the ARSA would otherwise have extended down to the surface. Procedural agreements between the local ATC facility and the affected airports have also been used to avoid radio installation costs.

At some proposed ARSA locations, special situations might exist where establishment of an ARSA could impose certain costs on users of that airspace. However, exclusions, cutouts, and special procedures have been used extensively throughout the ARSA program to alleviate adverse impacts on local fixed base and airport operators. Similarly, the FAA has eliminated potential adverse impacts on existing flight training practice areas, as well as on soaring, ballooning, parachuting, ultralight and banner towing activities, by developing special procedures to accommodate these activities through local agreements between ATC facilities and the affected organizations. For these reasons, the FAA does not expect that any such adverse impact will occur at the candidate ARSA site proposed in this notice.

b. Benefits

Much of the benefit that will result from ARSA's is nonquantifiable and is attributable to simplification and standardization of ARSA configurations and procedures. Further, once experience is gained in ARSA operations, the flexibility allowed air traffic controllers in handling traffic within an ARSA will enable them to move traffic efficiently and with increased safety.

Some of the benefits of the ARSA cannot be specifically attributed to individual candidate airports, but rather will result from the overall improvements in terminal area ATC procedures realized as ARSA's are implemented throughout the country. ARSA's have the potential of reducing both near and actual midair collisions at the airports where they are established. Based upon the experience at the Austin and Columbus ARSA confirmation sites, the FAA estimates that near midair collisions may be reduced by approximately 35 to 40 percent. Further,

the FAA estimates that implementation of the ARSA program nationally may prevent approximately one midair collision every 1 to 2 years throughout the United States. The quantifiable benefits of preventing a midair collision can range from less than $100,000, resulting from the prevention of a minor nonfatal accident between general aviation aircraft, to $300 million or more, resulting from the prevention of a midair collision involving a large air carrier aircraft and numerous fatalities. Establishment of an ARSA at the site proposed in this notice will contribute to these improvements in safety.

c. Comparison of Costs and Benefits

A direct comparison of the costs and benefits of this proposal is difficult for a number of reasons. Many of the benefits of the rule are nonquantifiable, and it is difficult to specifically attribute the standardization benefits, as well as the safety benefits, to individual candidate ARSA sites.

The FAA expects that any adjustment problems that may be experienced at the ARSA location proposed in this notice will only be temporary, and that once established, the ARSA will result in an overall improvement in efficiency in terminal area operations. This has been the experience at the vast majority of ARSA sites that have already been implemented. In addition to these operational efficiency improvements, establishment of the proposed ARSA site will contribute to a reduction in near and actual midair collisions. For these reasons, the FAA expects that establishment of the ARSA site proposed in this notice will produce long term, ongoing benefits that will far exceed the costs, which are essentially transitional in nature.

International Trade Impact Analysis

This proposed regulation will only affect terminal airspace operating procedures at selected airports within the United States. As such, it will have no affect on the sale of foreign aviation products or services in the United States, nor will it affect the sale of United States aviation products or services in foreign countries.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. Small entities are independently owned and operated small businesses and small not-for-profit organizations. The RFA requires agencies to review rules that may have a significant economic impact on a substantial number of small entities.

The small entities that potentially could be affected by implementation of the ARSA program include the fixed-base operators, flight schools, agricultural operators and other small aviation businesses located at satellite airports within 5 nautical miles of the ARSA center. If the mandatory participation requirement were to extend down to the surface at these airports, where under current regulations participation in radar services and radio communcation with ATC is voluntary, operations at these airports might be altered, and some business could be lost to airports outside of the ARSA core. The FAA has proposed to exclude many satellite airports located within 5 nautical miles of the primary airport at candidate ARSA sites to avoid adversely impacting their operations and to simplify coordinating ATC responsibilities between the primary and satellite airports. In some cases, the same purposes will be achieved through Letters of Agreement between ATC and the affected airports that establish special procedures for operating to and from these airports. In this manner, the FAA expects to eliminate any adverse impact on the operations of small satellite airports that potentially could result from the ARSA program. Similarly, the FAA expects to eliminate potentially adverse impacts on existing flight training practice areas, as well as soaring, ballooning, parachuting, ultralight, and banner towing activities, by developing special procedures that will accommodate these activities through local agreements between ATC facilities and the affected organizations. The FAA has utilized such arrangements extensively in implementing the ARSA's that have been established to date.

Further, because the FAA expects that any delay problems that may initially develop following implementation of an ARSA will be transitory, and because the airports that will be affected by the ARSA program represent only a small proportion of all the public use airports in operation within the United States, small entities of any type that use aircraft in the course of their business will not be adversely impacted.

For these reasons, the FAA certifies that the proposed regulation, if adopted, will not result in a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required under the terms of the RFA.

List of Subjects in 14 CFR Part 71

Aviation Safety, Airport Radar Service Areas.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) as follows:

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE AND REPORTING POINTS

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.501 [Amended]

2. § 71.501 is amended as follows:

San Jose, CA [Revised]

That airspace extending upward from the surface to and including 4,000 feet MSL within a 5-mile radius of the San Jose International Airport (lat. 37°21'41"N., long. 121°55'36"W.), excluding that airspace below 2,000 feet MSL on the 025° bearing from the airport at 5 miles extending southeastbound until intercepting a point on the 142° bearing from Oakland at 30 miles (interchange of U.S. Interstate 101 and 280) then via the 142° bearing from Oakland until intersecting the 5-mile radius of the airport; and that airspace within a 10-mile radius of the airport extending upward from 1,500 feet MSL to and including 4,000 feet MSL on the 142° bearing from Oakland clockwise to the 160° bearing from the airport, and that airspace within a 10-mile radius of the airport on the 160° bearing from the airport clockwise to the 303° bearing from the airport extending upward from 2,000 feet MSL to and including 4,000 feet MSL, excluding that airspace west of the 161° bearing from Oakland, and that airspace within a 10-mile radius of the airport on the 303° bearing clockwise to U.S. Highway 680 extending upward from 1,500 feet MSL to and including 4,000 feet MSL, excluding that airspace beyond 7 miles on the 341° bearing from the airport extending clockwise until U.S. Highway 680.

Issued in Washington, DC, on December 27, 1988.

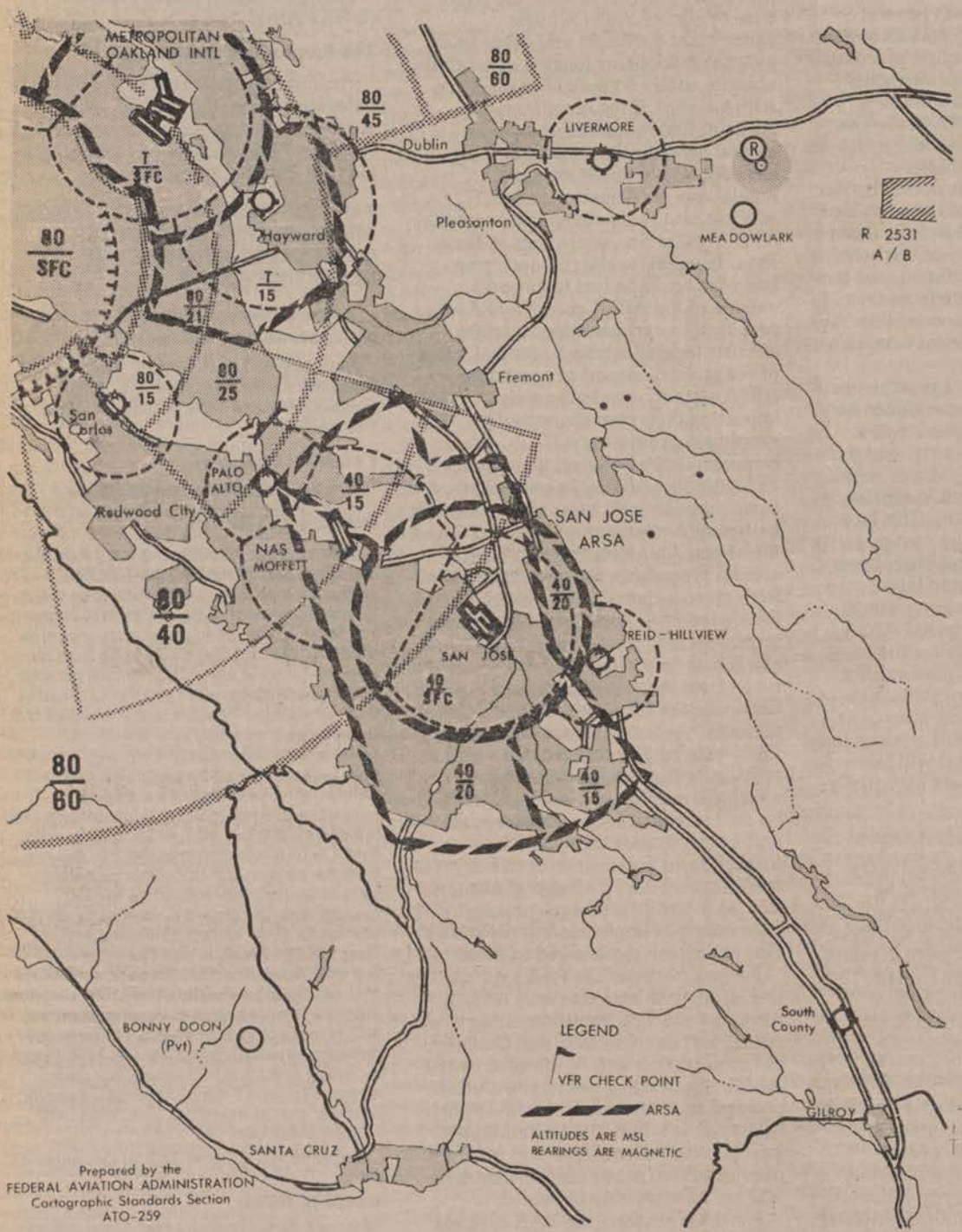
Harold W. Becker,

Manager, Airspace-Rules and Aeronautical Information Division.

AIRPORT RADAR SERVICE AREA

(NOT TO BE USED FOR NAVIGATION)

SAN JOSE, CALIFORNIA
SAN JOSE INTERNATIONAL AIRPORT
FIELD ELEV. 56' MSL



[FR Doc. 88-30090 Filed 12-29-88; 8:45 am]

BILLING CODE 4910-13-C

federal register

Friday
December 30, 1988

Part IX

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Part 28
Federal Acquisition Regulation (FAR); Requirements for Bid Guarantees; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 28

Federal Acquisition Regulation (FAR); Requirements for Bid Guarantees

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering changes to FAR 28.101 to clarify existing policy regarding the requirement for bid guarantees.

COMMENTS: Comments should be submitted to the FAR Secretariat at the address shown below on or before February 28, 1989, to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4041, Washington, DC 20405.

Please cite FAR Case 88–61 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523–4755.

SUPPLEMENTARY INFORMATION:

A. Regulatory Flexibility Act

The proposed rule does not appear to have a significant impact on a substantial number of small entities and analysis of the proposed revision indicates that it is not a "significant revision" as defined in FAR 1.501, i.e., it does not alter the substantive meaning of any coverage in the FAR having a significant cost or administrative impact on contractors or offerors, or have significant effect beyond the internal operating procedures of the issuing agencies.

Accordingly, and consistent with section 1212 of Pub. L. 98–525 and section 302 of Pub. L. 98–577 pertaining to publication of proposed regulations (as implemented in FAR Subpart 1.5, Agency and Public Participation) solicitation of agency and public views on the proposed revision is not required. Since such solicitation in not required, the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) does not apply.

B. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed change does not impose recordkeeping information collection requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 28

Government procurement.

Dated: December 22, 1988.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Therefore, it is proposed that 48 CFR Part 28 be amended as set forth below:

PART 28—BONDS AND INSURANCE

1. The authority citation for 48 CFR Part 28 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

2. Section 28.101–1 is amended by revising paragraphs (a) and (c) to read as follows:

28.101–1 Policy on use.

(a) A contracting officer shall not require a bid guarantee unless a performance bond or a performance and payment bond is also required (see 28.101 and 28.103). Except as provided in paragraph (c) of this subsection, bid guarantees shall be required whenever a performance bond or a performance and payment bond is required.

* * * * *

(c) The chief of the contracting office may waive the requirement to obtain a bid guarantee when a performance bond or a performance and payment bond is required if it is determined that a bid guarantee is not in the best interest of the Government for a specific acquisition (e.g., overseas construction, emergency acquisitions).

[FR Doc. 88–30067 Filed 12–29–88; 8:45 am]

BILLING CODE 6820–61–M

federal register

Friday
December 30, 1988

Part X

Environmental Protection Agency

40 CFR Part 260 et al.

Hazardous Waste Management System; Identification and Listing; Proposed Rule and Request for Comments

40 CFR Part 261

Hazardous Waste Management System; Identification and Listing; Tentative Petition Denial

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260, 261, 262, 264, 265, 270, 271, and 302

[FRL-3448-2]

Hazardous Waste Management System: Identification and Listing of Hazardous Waste; Standards for the Management of Specific Hazardous Wastes and Specific Types of Hazardous Waste Management Facilities; Requirements for Authorization of State Hazardous Waste Programs; and Designation, Reportable Quantities, and Notification

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule and request for comments.

SUMMARY: The Environmental Protection Agency (EPA) is today proposing to amend its regulations under the Resource Conservation and Recovery Act (RCRA) by listing as hazardous three additional wastes from wood preserving operations that use chlorophenolic, creosote, and/or inorganic (arsenical and chromium) preservatives, and by listing as hazardous one waste from surface protection processes that use chlorophenolics. Wastes from wood preserving and surface protection processes at facilities that previously used chlorophenolics are also included within the scope of the new listings. Bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol is already listed as a hazardous waste (EPA waste K001). K001 wastes are not included in today's proposed listings. Comments are not solicited regarding K001 wastes. Comments received that address such wastes will not receive any response.

As stated above, the proposed listings would regulate as hazardous wastes generated from wood preserving and surface protection processes at facilities that previously used chlorophenolics and have changed to another preservative. These wastes are included due to the potential for them to be contaminated by hazardous constituents from chlorophenolic wastes. The Agency recognizes that facilities exhibiting cross-contamination can be cleaned or can have equipment replaced, resulting in the removal of any contamination. Consequently, the Agency is proposing an equipment cleaning or replacement performance standard for wood preserving and surface protection facilities that have changed formulations. Once the standard is met, the waste generated at that facility from processes that do not use chlorophenolic formulations will no longer meet the listing description. However, the waste may meet the description of another listing or it may exhibit a hazardous waste characteristic.

The Agency is proposing to add three compounds to the list of hazardous constituents in Appendix VIII of Part 261. Finally, EPA is proposing amendments to regulations promulgated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) at 40 CFR Part 302 that would designate the wastes proposed for listing as CERCLA hazardous substances and would establish the reportable quantities applicable to these wastes.

The effect of listing these four wastes will be to subject them to the hazardous waste regulations of 40 CFR Parts 262 through 266, 270, 271, and 124 of this chapter; the notification requirements of section 3010 of RCRA; and the notification requirements under CERCLA section 103.

DATES: EPA will accept public comments on this proposed rule until February 28, 1989. Comments received after the close of the comment period will be marked "late" and may not be considered. Any person may request a public hearing on this proposed amendment by filing a written request with EPA, to be received no later than January 17, 1989.

ADDRESSES: Comments on the RCRA proposal should be sent in triplicate to:

EPA RCRA Docket Clerk (OS-332), 401 M Street, SW., Room S-205, Washington, DC 20460.

All comments must be marked "Docket Number F-88-WPWP-FFFFF."

Comments on the CERCLA proposal should be sent in triplicate to:

Emergency Response Division, Docket Clerk, ATTN: Docket No. RQ, Room LG-100, U.S. EPA, 401 M Street, SW., Washington, DC 20460.

Copies of materials relevant to this proposed rulemaking are located at U.S. EPA, 401 M Street, SW., Washington, DC 20460. The RCRA portions are located in the sub-basement; the public must make an appointment in order to review them by calling (202) 475-9327. The CERCLA portions are contained in Room LG-100; for an appointment call (202) 382-3046. Both dockets are available for inspection from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays. The public may copy 100 pages from the docket at no charge; additional copies are $0.15 per page.

Requests for a public hearing should be addressed to Mr. Devereaux Barnes, Director, Characterization and Assessment Division (OS-300), Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: The RCRA/CERCLA Hotline at (800) 424-9346 or, in the Washington, DC area, (202) 382-3000. For technical information on the RCRA portion of the proposal, contact Mr. Edwin F. Abrams, Listing Section, Office of Solid Waste (OS-333) at (202) 382-4787. For technical information on the CERCLA portion of the proposal, contact Ms. Ivette Vega, Response Standards and Criteria Branch, Emergency Response Division (OS-210) at (202) 475-7369. Both are available at U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

I. Background
II. Summary of the Regulation
A. Overview of the Proposal
B. Description of the Industry
1. Wood Preservatives and Surface Protectants
2. Wood Preserving and Surface Protection Processes
a. Wood Preserving Processes
b. Surface Protection Processes
C. Description of Wastes
1. Types of Waste Included in Today's Proposed Listing
a. Wastewaters
b. Process Residuals
c. Drippage and Drippage Residuals
2. Quantities of Waste Generated
3. Waste Management Practices
D. Basis for Listing
1. Summary of Basis for Listing
2. Waste Characterization and Constituents of Concern
a. Wastes from Chlorophenolic Wood Preserving Processes (F032)
b. Wastes from Chlorophenolic Surface Protection Processes (F033)
c. Wastes from Creosote Wood Preserving Processes (F034)
d. Wastes from Inorganic Wood Preserving Processes (F035)
3. Health Effects of Concern
4. Constituents Proposed for Addition to Appendix VIII
5. Mobility and Persistence of Wastes from Wood Preserving and Surface Protection Processes
E. Basis for Designating F032 and F033 as Toxic (T) Rather than Acute Hazardous (H)
F. Technical Standards for Drip Pads
1. Part 264 Technical Standards for Drip Pads

a. Requirements for Containment Systems (40 CFR 264.571)
b. General Operating Requirement (40 CFR 264.572)
c. Inspection Requirements (40 CFR 264.573)
d. Closure Requirements (40 CFR 264.574)
2. Part 265 Interim Status Standards
G. Equipment Cleaning or Replacement Standards for Wood Preserving and Surface Protection Facilities
1. Applicability
2. Equipment Cleaning or Replacement Performance Standard
3. Equipment Cleaning or Replacement Requirements
4. Previous Equipment Cleaning or Replacement Provision
5. Testing Requirement
6. Notification, Review, and Approval
H. Test Methods for Compounds Added to Appendices VII and VIII of 40 CFR Part 261
I. Applicability of RCRA Rules for Recycled or Reclaimed Hazardous Waste
III. State Authority
A. Applicability of Rules in Authorized States
B. Effect on State Authorization
1. HSWA Provisions
2. Non-HSWA Provisions
3. Special Provisions for Drip Pad Standards Applicable to F032 and F033
IV. CERCLA Designation And Reportable Quantities Adjustment
V. Compliance Cost And Economic Impact Analysis
A. Description of Affected Population
1. The Wood Preserving Industry
2. The Surface Protection Industry
B. Regulatory Assumptions Used in this Analysis
1. Compliance Practices that Contribute to Incremental Costs
2. Compliance Practices that Do Not Contribute to Incremental Costs
C. Cost and Economic Impacts
1. Facility Costs of Compliance
2. National Costs of the Proposed Rule
a. Methodology
b. Results
3. Economic Impact Analysis
a. Methodology
(1) Price Impacts
(2) Industry Impacts
(3) Employment Impacts
b. Results
(1) Price Impacts
(2) Industry Impacts
(3) Employment Impacts
4. Limitations
VI. Regulatory Flexibility Analysis
A. Methodology
B. Results
C. Conclusions
D. Regulatory Options Considered by the Agency
VII. Paperwork Reduction Act
VIII. Compliance Procedures And Deadlines
A. Section 3010 Notification
B. Compliance Dates
1. F032 and F033
2. F034 and F035
a. Interim Status in Unauthorized States
b. Interim Status in Authorized States
3. Drip Pad Permitting and Interim Status Standards
a. Unauthorized States
b. Authorized States
4. Application of Phasing of Regulations
List of Subjects
IX. References
Appendix: Environmental Contamination with Wood Preserving and Surface Protection Wastes

I. Background

Pursuant to section 3001 of Subtitle C of the Resource Conservation and Recovery Act (RCRA), this notice proposes to list as hazardous three wastes generated from wood preserving processes that use either chlorophenolic, creosote, and/or inorganic (chromium and arsenical) preservatives. In addition, the Agency is also proposing to list as hazardous one waste that is generated from surface protection processes using chlorophenolic formulations. Certain wastes from the wood preserving industry are currently regulated as hazardous or have been proposed for regulation under RCRA previously. The following discussion provides a brief overview of prior regulatory actions affecting wastes from the wood preserving and surface protection industries. Also provided is a brief summary of the Agency's basis for listing as hazardous the wastes covered by this proposed rule.

On May 19, 1980, EPA promulgated an interim final rule which listed as hazardous numerous wastes from specific and non-specific sources (see 45 FR 33084). Among others, EPA listed as hazardous one waste that is generated by wood preserving processes: EPA hazardous waste number K001—bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol.

The Agency concurrently proposed to add wastewaters from wood preserving processes to the list of hazardous wastes from specific sources (see 45 FR 33137). Later that year, EPA decided to reopen the comment period on both the K001 listing and the proposed listing for wastewaters from wood preserving processes that use creosote and/or pentachlorophenol, after receiving additional information about those wastes (see 45 FR 77435, November 12, 1980). EPA provided a notice announcing the extended comment period on November 24, 1980 (see 45 FR 77466). While the Agency reopened the comment period on K001, the K001 listing remained in effect and was not suspended.

Also, on May 19, 1980, EPA promulgated final regulations for identifying hazardous wastes by their characteristics (i.e., the hazardous waste characteristics rules). These rules included the Extraction Procedure (EP) Toxicity Characteristic (see 45 FR 33137). Wastes exhibiting this characteristic are subject to regulation under Subtitle C of RCRA. Wastes from wood preserving processes that use inorganic preservatives can contain significant concentrations of arsenic and chromium which may cause solid wastes to be considered characteristically hazardous pursuant to 40 CFR 261.24. Consequently, the EP Toxicity Characteristic caused many wood preserving wastes to be subject to the hazardous waste regulations.

On June 13, 1986, as part of its regulations implementing the Hazardous and Solid Waste Amendments of 1984, the Agency proposed to amend the Extraction Procedure (EP) Toxicity Characteristic (40 CFR 261.24) by adding 38 additional organic compounds and introducing a new leaching procedure: The Toxicity Characteristic Leaching Procedure (51 FR 21648). Among these 38 organics are cresols and pentachlorophenol. If the proposed toxicity characteristic is made final, it may cause a number of wastes generated by the wood preserving and surface protection processes to be designated as characteristically hazardous because these toxicants—namely creosols and pentachlorophenol—are commonly present in wastes generated from wood treatment processes using creosote and chlorophenolic preservatives.

This proposed rule complies with a consent decree filed July 27, 1988, which settled several elements of a civil action filed on March 25, 1985 in U.S. District Court for the District of Columbia (Environmental Defense Fund and National Wildlife Federation v. Thomas *et. al.* No. 85-0974). One portion of this consent decree reads as follows:

On or before December 31, 1988, EPA will take the following action with respect to pentachlorophenol wastes from the wood preserving industry:

Either

(A) EPA will issue a Notice of Proposed Rulemaking in the **Federal Register** proposing regulations with regard to such wastes (with such Notice of Proposed Rulemaking stating that the Agency shall use its best efforts either to promulgate these regulations in final form or to withdraw the proposed regulations by June 30, 1990);

Or

(B) EPA will publish in the **Federal Register** a notice announcing that the Agency has made a determination not to

propose such regulations. Such a determination shall constitute final agency action.

Although EPA believes that the rule proposed today appropriately responds to the consent decree, the Agency acknowledges that the consent decree neither requires that EPA regulate nor mandates a specific statutory framework under which any regulations must be promulgated. The Agency will continue to evaluate the benefits of using other statutes, including FIFRA, to control the wastes proposed today for listing as hazardous. The Agency specifically solicits comments on the use of FIFRA or other statutes.

Furthermore, while EPA also believes that similar risks ascribe to creosote and inorganic preservatives, thereby justifying their inclusion in the proposed rule, the consent decree is silent with respect to them.

Today, EPA is proposing to amend Part 261.31 by adding four waste streams from wood preserving and surface protection processes that use organic and/or inorganic preservatives to the list of hazardous wastes from non-specific sources. The wastes (which are more fully described later) include wastewaters (including those proposed for listing on may 19, 1980, i.e., wastewaters from pentachlorophenol and creosote processes), process residuals, spent preservative formulations, and drippage from treated wood. Table 1 lists the constituents of concern that are present in the proposed listed wastes. The proposed listings do not include wastes already listed as K001, but would supplement the existing K001 listing and increase the quantity of waste from wood preserving processes regulated under Subtitle C of RCRA.

TABLE 1.—CONSTITUENTS OF CONCERN

	F032	F033	F034	F035
Chlorophenols:				
2,4,6-Trichlorophenol		X		
2,3,4,6-Tetrachloropenol		X		
Pentachlorophenol	X	X		
PAHs:				
Benz(a) anthrancene	X		X	
Benzo(a)pyrene	X		X	
Benzo(k)floranthene			X	
Dibenz(a,h)anthrancene	X		X	
Indeno(1,2,3-c,d)pyrene	X		X	
Naphthalene			X	
Dioxins and Furans:				
Tetrachlorodibenzo-*P*-dioxins	X	X		
Pentachlorodibenzo-*P*-dioxins	X	X		
Hexachlorodibenzo-*P*-doxins	X	X		
Heptachlorodibenzo-*P*-dioxins	X	X		
Tetrachlorodibenzofurans	X	X		
Pentachlorodibenzofurans	X	X		
Hexachlorodibenzofurans	X	X		
Heptachlorodibenzofurans	X	X		
Inorganics				
Arsenic	X		X	X
Chromium	X		X	X
Lead				X

Note: X indicates that constituents have been found to be present at levels of regulatory concern in individual waste numbers.

The Agency notes that the scope of K001 is not affected in any way by today's proposal. EPA is not soliciting comments in the K001 listing and will not respond to any such comments received. In a separate notice, also published today, EPA has responded to a petition from the American Wood Preservers Institute (published elsewhere is this issue) requesting that the Agency reconsider its interpretation that K001 waste may form from application of certain wood preserving wastewaters to spray irrigation fields and that the Agency more clearly define K001 sludge. (If the Agency finds that K001 sludges can form on spray irrigation fields, the petition further requests a suspension of the management standards of 40 CFR Part 264 in order to permit affected facilities to assess for the presence of K001 and to come into compliance or obtain an exclusion pursuant to CFR 260.22).

The use of chlorophenolic formulations in processes that preserve or protect wood has caused environmental contamination. Wastes generated from these processes contain high concentrations of chlorinated phenols that are contaminated with polychlorinated dibenzo-*P*-dixions (PCDDs) and polychlorinated dibenzofurans (PCDFs). While only one chlorophenol is a known carcinogen, the Agency has data confirming the systemic toxicity of at least three others. All of the PCDDs and PDDFs, except for octahomologues, are carcinogenic in low doses. The toxicity of these and other compounds found in wastes from wood preserving and surface protection processes that use chlorophenolics is discussed later in this preamble. Past mismanagement of these wastes has resulted in off-site contamination of soils and ground water with PCDFs, PCDDs, and chlorinated phenols. Such contamination is evidence that these substances are sufficiently persistent and mobile in the environment to meet the listing criteria of 40 CFR 261.11 (the basis for listing these wastes is described below).

Creosote is an oily distillate of coal that contains a mixture of compounds including aromatic hydrocarbons, phenolics, and other organics. Wastes from the preservation of wood with creosote contain high concentrations of polynuclear hydrocarbons (PAHs). Four PAHs commonly found in creosote wastes are known carcinogens while four others are known to be systemic toxicants. Past mismanagement of these wastes has led to off-site contamination of ground water, surface, water, and soils. Such contamination is evidence that PAHs are sufficiently persistent and mobile to present a substantial hazard to human health and the environment and meet the listing criteria of 40 CFR 261.11 (the basis for listing these wastes is described below).

Wastes from the preservation of wood with inorganic formulations of arsenic and/or chromium typically contain high concentrations of these toxic metals, as well as lead. Lead is believed to be a contaminant of the arsenic component. Because of the known toxicity and/or carcinogenicity of these metals, the EPA has previously promulgated drinking water standards for them. Contamination of ground water and soils with arsenic, chromium, and lead from past mismanagement of those wastes is evidence that these toxic constituents are sufficiently persistent and mobile to meet the listing criteria of 40 CFR 261.11 (the basis for listing these wastes in described below).

Because wastes from wood preserving and surface protection are capable of posing a threat to human health and the environment when improperly treated, stored, transported, disposed, or otherwise handled, the Agency is proposing that these wastes be listed as hazardous and subject to the requirements of 40 CFR Parts 124, 260 through 266, 268, 270, and 271.

II. Summary of The Regulation

A. Overview of the Proposal

This notice proposes to add four wastes from wood preserving and surface protection processes to the list of hazardous wastes from non-specific sources (40 CFR 261.31). The four wastes are:

F032—Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes at facilities that currently use or have previously used chlorophenolic formulations (except wastes from processes that have complied with the cleaning or replacement procedures set forth in § 261.35 and do not resume or initiate use of chlorophenolic formulations). This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.

F033—Wastewaters, process residuals, protectant drippage, and discarded spent formulations from wood surface protection processes at facilities that currently use or have previously used chlorophenolic formulations (except wastes from processes that have complied with the cleaning or replacement procedures set forth in § 261.35 and do not resume or initiate use of chlorophenolic formulations).

F034—Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes that currently use creosote formulations. This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.

F035—Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes that currently use inorganic preservatives containing arsenic or chromium. This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.[1]

[1] While wood preserving processes that currently use inorganic preservatives do not generate K001 sludges per se, EPA believes that there may be numerous facilities that previously used chlorophenolic and/or creosote preservatives and have changed to inorganic preservatives in recent years without thoroughly cleaning process equipment. At such facilities there may be K001 wastes that were generated prior to changing preservatives, but that have not yet been actively managed. These sludges are K001 waste and are not included in the F035 listing.

EPA has found that these wastes typically and frequently contain toxic constituents, including some that are carcinogenic, that, when mismanaged, pose a substantial present or potential threat to human health and the environment. In addition, the Agency has compiled evidence to demonstrate that the toxic constituents are mobile and persistent in the environment and are capable of reaching receptors in harmful concentrations. The information that supports these findings is summarized in this preamble and is presented, in detail, in the Background Document and other materials which are available in the RCRA Docket for this proposal.

Upon promulgation of these proposed listings, all wastes meeting the descriptions would become hazardous waste. Waste generated prior to promulgation, however, would not be subject to numerous Subtitle C requirements until they are actively managed.

The scope of the F032 listing covers wastes from pressure and non-pressure processes using pentachlorophenol (PCP) as well as other chlorophenolic formulations. In addition, this listing covers wastes from creosote and inorganic processes at facilities that currently use or previously used pentachlorophenol (or other chlorophenolic formulations) because the wastes may be cross-contaminated with chlorinated dioxins and/or dibenzofurans.

Note.—This listing excludes, as do F034 and F035, those wastes already covered by K001.

The agency has concluded that cross-contamination is highly likely to occur under two circumstances: First, when creosote or inorganic processes are located at a facility where chlorophenolic processes are or were employed; and second, when creosote processes or inorganic processes use the equipment previously used for chlorophenolic processes. A discussion on the extent of cross-contamination at facilities which use chlorophenolics (or which previously used chlorophenolics) is presented later in this preamble.

The Agency is proposing equipment cleaning or replacement procedures for generators of F032 wastes which no longer use chlorophenolic preservatives. These procedures are designed to decontaminate and remove the dioxin and dibenzofuran contaminants from process equipment. Once the procedures are carried out to the specified standard, wastes generated in processes using non-chlorophenolic formulations will no longer meet the listing description of F032; however, these wastes may still be hazardous (i.e., they may still meet the listing description of F034 or F035 or exhibit one or more of the characteristics). Notification, recordkeeping, and reporting requirements are also included in the proposed rule and would have to be met. Generators should note that residues from the decontamination process will be regulated hazardous wastes and must be managed as F032.

The scope of the F033 listing would cover wastes from wood surface protection processes that currently use or previously used chlorophenolics, including those processes presently using a preservative that is not among those addressed by today's proposal. Surface protection facilities that currently use chlorophenolic formulations may be able to change to surface protection chemicals that are not regulated by this proposed listing. Wastes from these processes, however, would continue to be regulated under RCRA due to the cross-contamination resulting from residues that remain on-site (e.g., in process equipment) after the change in formulation is made. The Agency recognizes that cross-contamination of wastes may be avoided and is therefore proposing to apply the same equipment cleaning or replacement procedures and recordkeeping, notification, and reporting requirements to F033 wastes as would be applicable to F032 wastes. If these procedures are employed, wastes from surface protection facilities generated in processes that use non-chlorophenolic formulations may no longer meet the listing description. (EPA notes that this provision would not prevent the Agency from taking action to list wastes from surface protection processes using non-chlorophenolic formulations in the future, if such a listing is deemed necessary). In addition, wastes from non-chlorophenolic surface protection processes may also be regulated under RCRA as hazardous wastes if they exhibit any of the characteristics of a hazardous waste.

The scope of the F034 listing would cover all wastes generated by pressure and non-pressure wood preserving processes currently using creosote that are not contaminated by constituents from processes using chlorophenolic preservatives. This listing would not include wastes that are included in the K001 or F032 listings.

The scope of the F035 listing would cover all wastes generated by pressure and non-pressure wood preserving processes currently using inorganic preservatives containing arsenic or

chromium that are not contaminated by constituents from processes using chlorophenolic preservatives. This listing would not include wastes that are included in the K001 or F032 listings.

Each listing includes excess preservative or protectant that drips or exudes from treated wood while it is stored or held at the wood preserving or surface protection facility after treatment (this includes long- and short-term storage areas, such as "kick-back" areas). This residual has been included in the listings because of its high concentrations of toxic constituents and the documented incidence of mismanagement by the industry. EPA has found many cases where such drippage or "kick-back" has been disposed of directly on the ground, resulting in widespread soil, surface water, and ground water contamination. Drippage may be washed off treated wood or may be carried away by rainwater and spread to nearby streams or other surface water bodies.

As a result of the proposed listing, generators of treated wood drippage would be subject to applicable hazardous waste requirements. Because information on waste management practices for treated wood drippage indicates that drip pads are often being installed at new wood preserving and surface protection facilities for purposes of drippage management, today's proposal includes provisions for establishing a new type of hazardous waste management unit: drip pads at wood preserving and our surface protection facilities.

Of course, generators may choose to install other types of waste management units to handle drippage (i.e., tanks or surface impoundments). In all anticipated cases, generators would become owners and operators of hazardous waste treatment, storage, and disposal facilities as a result of the proposed listing. Today's rule also includes a proposed amendment to the 90-day accumulation rule for generators that operate drip pads at wood preserving and surface protection facilities. Under this proposed amendment, generators who remove drippage from drip pads within 90 days would not be required to obtain RCRA Part B permits for their drip pads, provided that the pads comply with the proposed Part 365 technical standards for drip pads and certain other requirements (this aspect of the proposal is discussed in detail later in this preamble).

Residuals from the treatment, storage, or disposal of wood preserving and surface protection wastes that are included in today's proposed listing would also be classified as hazardous wastes by the "derived from" rule (40 CFR 261.3(c)(2)(i)). These "derived-from" wastes would include any treatment residual other than K001 bottom sediment sludges because the listing definition specifically excludes K001. For example, oil skimmings, oil absorbent materials, and ash or other residuals from treatment are subject to today's proposed listings.

In response to suggestions made by representatives of the wood preserving industry, EPA considered regulating wastes from wood preserving and surface protection processes under authorities provided by other statutes such as the Clean Water Act, the Toxic Substances Control Act (TSCA), and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Agency chose however, to propose regulating wastes from wood preserving and surface protection under RCRA. We are soliciting comment today supporting that decision, presenting contrary views, or presenting any pertinent information.

B. Description of the Industry

A wide variety of chemicals are currently used to preserve wood. Those most commonly used are pentachlorophenol, creosote, and inorganic arsenical and/or chromate salts (inorganics). Wood preservatives are used to delay deterioration and decay of wood caused by organisms such as insects, fungi, and marine borers. Surface discoloration (sapstaining) during short-term storage can be adequately controlled by a superficial application of preservative but, for long-lasting effectiveness, penetration of preservative to a uniform depth is required. This deep penetration is usually accomplished by forcing preservative into the wood under pressure, so that "pressure treated" is often used as a synonym for "preserved."

Preserved wood production and treatment chemical consumption are summarized in Table 2. In 1985, three major product groups accounted for 89 percent of the total production of preserved wood in the United States: (1) Lumber and timbers, mostly preserved with inorganic preservatives; (2) railroad cross ties, switch ties and bridge ties, almost all preserved with creosote; and (3) poles, 60 percent preserved with pentachlorophenol, 23 percent with creosote, and 17 percent with inorganic preservatives. The remainder of 1985 production consisted of fence posts, piling, plywood, crossarms, and other products (Micklewright, 1987).

TABLE 2.—PRESERVED WOOD PRODUCTION AND TREATMENT CHEMICAL CONSUMPTION, 1985

	Preservative type		
	Cresote solutions	Pentachlorophenol	Inorganics
Number of plants	122	113	448
Products treated:			
Crossties, switch and bridge ties (million cubic meters)	2.7	0.008	0
Lumber and timbers (million cubic meters)	0.21	0.08	7.7
Poles (million cubic meters)	0.5	1.3	0.38
Other (million cubic meters)	0.27	0.1	1.2
Total volume of wood preserved (million cubic meters)	3.7	1.5	9.3
Treating chemical consumed:			
Creosote and creosote/coal tar (million liters)	390	.....	.....
Petroleum solvent (million liters)	49	153	.....
Pentachlorophenol (million kg)	.....	11	.....
Inorganic salts (million kg)	.....	.....	56

Source: Micklewright (1987).

The distribution of preservative use by the wood preserving industry is summarized in Table 3. Seventeen percent of the plants treat with more than one preservative. Wastes generated at these plants can be contaminated with constituents of all preservatives used at the plant.

TABLE 3.—DISTRIBUTION OF PRESERVATIVE USE, 1985

Plants treating with	No. of plants
Creosote	53
Creosote/Pentachlorophenol	24
Creosote/Inorganics	21
Pentachlorophenol/Inorganics	24
Pentachlorophenol	25
Inorganics	379
Creosote/Pentachlorophenol/Inorganics	24
Total	[1] 550

[1] An additional 17 plants treated wood using non-pressure processes.

Source: Micklewright (1987).

The American Wood Preservers Institute (AWPI) reported 567 plants that produced preserved wood in 1985 (14 additional wood preserving facilities have recently been identified by AWPI). Approximately 60 percent of these plants are in the southeast and southcentral portions of the United States and account for 64 percent of the production of treated wood. Most plants that treat with creosote and/or pentachlorophenol are more than 25 years old; several operating plants are more than 75 years old.

Most surface protection takes place at sawmills, where cut lumber is dip- or spray-treated to prevent sapstain formation during short-term storage. The distinction between wood preservation and surface protection is not only the process used, but also the depth to which the preservation penetrates and the duration of the protection.

In 1983, lumber production in sawmills was approximately 87 million cubic meters or 36.8 billion board feet (Lumber Production and Mill Stocks, 1983, as cited in DPRA, 1986). Approximately 10 percent of this production, or 8.7 million cubic meters (3.7 billion board feet), was surface protected, the majority with aqueous solutions of sodium pentachlorophenate. The Agency believes that there may be up to 500 sawmills currently surface protecting wood with chlorophenate formulations and a total of 1,500 sawmills that have protected wood with chlorophenates within the past ten years.

1. Wood Preservatives and Surface Protectants

Pentachlorophenol is one of a group of synthetic organic compounds called chlorophenols that are commercially manufactured by reacting chlorine with phenol. Standard petroleum oils, similar to #2 heating oil, are most frequently used as solvents in preparing formulations of pentachlorophenol. Kerosene, mineral spirits, butane, alcohols, and liquefied petroleum gas (LPG) are also used as solvents by a small number of facilities. Pentachlorophenol formulations applied to wood typically contain 5 percent total pentachlorophenol; however, concentrations may range from 2 to 9 percent. Pentachlorophenol has been found to be contaminated with all PCDD and PCDF homologues except tetrachlorodibenzo-*p*-dioxins (TCDDs) (Palmer, 1986 and USEPA, 1987).

Tetrachlorophenol in its water soluble chlorophenate form is often used in sapstain control formulations. Commercial tetrachlorophenol has been found to be contaminated with all ten homologues of polychlorinated dibenzo-*p*-dioxins (PCDDs) and dibenzofurans (PCDFs).

Creosote generically refers to mixtures of relatively heavy residual oils (liquid and solid aromatic hydrocarbons) obtained from the distillation of wood, coal tar, or crude petroleum. Only creosotes from coal tars are accepted for use as wood preservatives. The majority of creosote-based formulations consist of coal tar creosote or blends of creosote and crude coal tar.

The inorganic preservatives of concern in this listing consist of arsenical and chromate salts dissolved in water. The most commonly used inorganic preservatives include chromated copper arsenate (CCA), ammoniacal copper arsenate (ACA), acid copper chromate (ACC), chromated zinc chloride (CZC), and fluor-chrome-arsenate-phenol (FCAP). In a 1984 survey of the wood preserving industry (USEPA, 1987), 83 percent of wood preserved with inorganic preservatives was reportedly preserved with CCA. For treatment purposes, CCA is typically diluted in water to 1 to 2 percent total CCA concentration, but treatment concentrations can range from 0.9 to 8 percent total CCA in various treating solutions (USEPA, 1987).

Production of wood treated with inorganic preservatives has more than doubled since 1980. This increase is due to the increased use of treated lumber for decks, porches, and other exterior, weather-exposed structures. The use of inorganic preservatives, particularly CCA, is increasing; as a result, most new wood preserving plants are CCA plants and facilities that treat exclusively with inorganic preservatives are (on average) only 10 years old.

Water solutions of the sodium or potassium salts of pentachlorophenol (pentachlorophenates) are used extensively in the sawmill industry for surface protection. Chlorophenate formulations are produced by dissolving chlorophenols in a slightly alkaline (above pH 7) sodium hydroxide solution. Commercial chlorophenates have been found to contain PCDDs and PCDFs. Generally, these commercial concentrates are diluted to 0.5 to 1 percent total pentachlorophenate and applied to the wood by dipping or spraying.

An estimated 300 to 500 sawmills use an approximate total of 680 kkg (1.5 million pounds) of sodium pentachlorophenate to prevent sapstaining of approximately 8.7 million cubic meters (3.7 billion board feet) of lumber annually.

2. Wood Preserving and Surface Protection Processes

a. Wood preserving processes. Creosote, pentachlorophenol, and inorganic wood preservatives are all applied to wood by similar processes. More than 99 percent of the wood preserved in the United States is produced by pressure treatment processes, which employ a combination of air pressure, hydrostatic pressure, and vacuum (Micklewright, 1987). Pressure treatment takes place in sealed pressure vessels known as cylinders or retorts. A limited quantity of wood is preserved using non-pressure treatment processes in which the preservative is allowed to diffuse into the wood; typical non-pressure processes involve soaking the wood in open tanks at ambient pressure.

The prerservative penetration required to preserve wood adequately can only be achieved if the wood has been properly conditioned; that is, if the moisture content of the freshly-cut wood is reduced to a point where the preservative can penetrate and be retained by the wood. Conditioning is required before pressure and non-pressure preservation processes, but is not used for surface protection in which a superficial application of preservative is adequate. Conditioning is the major source of wastewater in the wood preserving industry.

Moisture reduction methods include drying wood in yards, at ambient temperatures (air seasoning); kiln drying; steaming the wood at elevated pressure in a retort followed by application of a vacuum; heating the stock in a preservative bath under reduced pressure in a retort (Boulton process); and heating of the unseasoned wood in a solvent under pressure (vapor drying).

Air seasoning and kiln drying generate minimal amounts of wastewater. Thus, facilities that use these conditioning methods, principally non-pressure treaters and facilities that use inorganic preservatives, generate little wastewater. Wastewater from air seasoning and kiln drying is often contaminated with preservative by mixing the wastewater with other wastes later in the process. Boultonizing, steam conditioning, and vapor drying (conditioning methods used by pressure treaters) produce wastewater consisting of the water that is driven out of the wood in the same cylinder or retort that is later used for preserving the wood. Steam conditioning also produces a considerable volume of steam condensate. The volume of wood

conditioning water varies according to wood type, preservative formulation, conditioning method, and other factors. In general, from 64 to 1,200 liters of water may be generated per cubic meter (0.5 to 9 gallons per cubic foot) of wood (USEPA, 1987).

After the moisture content of the wood has been reduced by conditioning, the wood is preserved either by simple non-pressure methods or by pressure processes. Non-pressure processes include brushing, spraying, dipping, soaking, and thermal processes. These processes involve the repeated use of preservative in a treatment tank with fresh preservative solution added to replace consumptive loss. The continual reuse of preservative leads to the accumulation of wood chips, sand, stones, and other debris contaminated with various hazardous constituents in the bottom of the treating tanks. This contaminated debris is the major source of process waste for non-pressure processes.

There are two basic types of pressure treatment processes, distinguished by the sequence in which vacuum and pressure are applied. The first method is referred to in the industry as the "empty-cell" process. It is used to obtain relatively deep penetration with limited absorption of preservative. There are a number of empty-cell processes; generally, air pressure is applied to the wood as preservative is pumped into the treating cylinder or retort. Once the desired level of retention has been achieved, the unused preservative is drained off and the excess preservative is vacuum pumped away from the wood.

The second method, known as the "full-cell" process, results in higher retention of preservative but limited penetration compared to the empty-cell process. A high vacuum is created in the treating cylinder and preservative is pumped in without breaking the vacuum. Once full, pressure is applied until the wood will retain no more preservative. There is no difference in the types of wastes generated by full- and empty-cell processes, although wood treated by the full-cell process may produce more drippage than wood treated by the empty cell process. (The terms "empty" and "full" are measures of the level of preservative retained by the wood cells.)

Typical pressure processes involve recycling of preservatives from work, storage, and mixing tanks to the pressure treating vessel. Fresh preservative solution is added to replace consumptive loss. Preservative formulation lost with wastewater or through drippage into the door sumps is also sometimes collected and fed back into the process. The continual reuse of preservative formulation leads to accumulation of contaminated sawdust, wood chips, sand, dirt, stones, tar, and polymerized oils. This material comprises the bulk of wood preserving process residuals (not including wastewater) and is collected in treating cylinders and tanks; in holding, work, storage, and mixing tanks; in door sumps; and in filters and separators used to prepare preservative solutions for reuse.

After both pressure and non-pressure treatment, some unabsorbed preservative formulation adheres to the treated wood surface. Eventually, this liquid drips from the wood or is washed off by precipitation. If the wood has been pressure treated, excess preservative will also exude slowly from the wood as it gradually returns to atmospheric pressure (a phenomenon commonly called kick-back). Preservative formulation (especially pentachlorophenol and creosote formulations) may continue to exude ("bleed") from pressure and non-pressure treated wood for long periods, even after the wood is shipped off-site and installed for its intended end use (Arsenault, 1976). Drippage from pressure treated wood may be minimized by steaming the wood after treatment to wash off adhering preservative or by applying a final vacuum to the wood charge before it is removed from the retort.

Management of drippage varies from facility to facility and often depends on the production schedule. A facility producing near its capacity generally removes a charge from the treating cylinder and transfers it to storage quickly. In these cases, most drippage and kick-back will occur in the treated wood storage yard. At facilities operating on slower schedules, a charge may be allowed to drip in the retort for an extended period. Other facilities have drip pads over which trams of freshly-treated wood are allowed to sit for one to three days. Drippage may be routed to a sump and reused in the treatment process or may be discarded.

b. Surface protection processes. The surface protection of wood involves the application by spraying or dipping of sapstain control agents to wood. Spraying can be performed manually or with a continuous conveyor belt system where the wood passes through a spray box. The chlorophenolic spray is often contained by means of flexible brushes or curtains positioned at either end of the box. The boxes may be kept at a negative pressure with an exhaust vent to remove the chorophenolic aerosols. After spraying or dipping, the excess or free liquid is drained from the wood into a catch basin, where it is routed to a screen or filter to remove sawdust and other particles before it is returned to the supply tank for reuse. As the freshly-treated wood is moved from the treatment area to the storage area it continues to drip.

Dip tanks may also be used to apply surface protection chemicals to large bundles of wood or to individual pieces of wood in the production line. The wood can be dipped using transport chains, forklift mechanisms for large jobs, or sequential submerging techniques. Solution used in the dip tanks for sapstain control is occasionally recycled, otherwise it is continually replenished. Recycled solution is pumped through a filter or screening device to remove sawdust and debris before it is returned to the storage/mixing tanks. At smaller-scale facilities, sawdust and other debris simply accumulate on the tank bottom.

C. Description of Wastes

Wastes from wood preserving and surface protection processes consist of wastewaters, process residuals (including discarded preservative) and drippage.

1. Types of Waste Included in Today's Proposed Listing

a. Wastewaters. Wastewaters include wastewater generated from steam conditioning the wood in treatment cylinders prior to applying the preservative. Other sources of wastewater include, but are not limited to, preservative formulation recovery and regeneration wastewater, water used to wash excess preservative from the surface of preserved wood (especially poles), and condensate from drying kilns used to dry preserved or surface protected wood. Operations that involve the rinsing of drums, storage tanks, the process area, and equipment also generate wastewater. Finally, water, including rainwater, that accumulates in door and retort sumps and rainwater falling on or in the immediate vicinity of the treating cylinder and work tank area is also included in the proposed listing. (Storage area rainwater is not included in the listing definition. However, it may become subject to regulation when it is disposed together with drippage covered by the listing). Water from the process area is often collected and treated with other process wastewaters and hence, may become a process waste, subjecting mixtures of rainwater and other wastes or wastewaters to the "mixture" rule (see 40 CFR 261.3(a)(2). Collected

rainwater is included in the effluent guidelines definition of wood preserving process wastewater. Wastewaters are not already covered under the scope of the K001 listing.

Wastewaters from wood preserving and surface protection processes are currently subject to permitting requirements under the National Pollutant Discharge Elimination System (NPDES) or the national pretreatment regulations, both promulgated under authority of the Clean Water Act, as amended. Upon promulgation of today's proposed listing, wastewaters from wood preserving and surface protection would also be subject to regulation under Subtitle C of RCRA, except as excluded under 40 CFR 261.4.

Section 261.4 provides exemptions from treatment as a RCRA solid waste for several types of materials, including wastes that are mixed with domestic sewage as they pass through a sewer system to a Publicly Owned Treatment Works —POTW— (see 40 CFR 261.4(a)(1)) and wastes that constitute industrial wastewater discharges subject to regulations under section 402 of the Clean Water Act (see 40 CFR 261.4(a)(2)). Wastewaters discharged to sewers and eventually to POTWs by wood preserving and surface protection facilities would therefore be exempt from regulations under Subtitle C of RCRA once discharged. They may be subject to RCRA requirements prior to discharge however, and they would be subject to applicable Clean Water Act pretreatment regulations. Similarly, treated effluent from wastewater treatment plants discharged from NPDES-permitted wood preserving and surface protection facilities would qualify for exemption under § 261.4(a)(2) (but would remain subject to all NPDES permit provisions). The exemption would not extend to activities that occur prior to wastewater discharge at NPDES-permitted facilities. Hence, tanks and other units in which listed wastewaters are collected, stored, accumulated, treated, and/or disposed at wood preserving and surface protection facilities would be subject to regulation under Subtitle C of RCRA. Under 40 CFR 261.4, however, tanks that constitute wastewater treatment tanks (in accoradance with the definition of "wastewater treatment units" of 40 CFR 260.10) are exempt from RCRA Subtitle C requirements.

b. Process residuals. Materials such as sawdust, wood chips, sand, dirt, and stones that are attached to the wood when it enters the retort (in the case of pressurized preservation processes), the dip tank, or the spary booth (for surface protection processes) can be washed off the wood during the process. These materials will form a residue in the retort or dip tank. They may also settle out of the preservative solution elsewhere in the process (e.g., in work tanks or sumps) or be removed during filtration of the preservative prior to its reuse. Tar and emulsified or polymerized oils may also settle out in the treating cylinder, treating tank, or dip tank during wood preserving operations using creosote or pentachlorophenol. All of these wastes are considered process residuals. Specifically, process residuals include, but are not limited to: Precipitated preservative solution; tar; emulsified polymerized oils; spent or discarded formulation; treating cylinder, treating tank, and dip tank sediments; filter, screening, or exhaust residuals from spray booths; hand spraying residuals; residuals from drying kilns used to dry preserved or surface protected wood; residuals from holdings, work, storage, mixing, or other tanks; residuals that accumulate in secondary containment surrounding tanks; door or cylinder sump residuals; residuals from recycling and regeneration of preservative; leaks from process equipment; and residuals from maintenance and cleaning of process equipment. Process residuals are not already covered under the scope of the K001 listing.

c. Drippage and drippage residuals. Drippage and drippage residuals may accumulate on designated drip areas, on pathways over which treated wood is transported, and in treated wood storage yards. Drippage and drippage residuals include free drippage of preservative from treated wood, preservative that is washed off treated wood by precipitation, and residuals from collecting and recycling presevative that drips off or is washed off treated wood. Drippage and drippage residuals are not already covered under the scope of K001 listing.

2. Quantities of Waste Generated

Table 4 presents estimates of the quantities of waste generated annually by wood preserving and surface proctection processes. These estimates were prepared using production normalized waste generation rates and estimates of production of preserved and surface protected wood. The waste generation rates were derived from data collected in the 1984 survey of the wood preserving industry conducted by EPA (USEPA, 1987), from data supplied independently by the industry, and from data collected in a sampling effort carried out jointly by EPA and the State of Oregon at four Oregon sawmills. Production estimates, in terms of preservative used at a given facility, were obtained from the AWPI Wood Preserving statistics report for 1985 (Micklewright, 1987). In addition, the production of surface protected wood was estimated to be 8.7 million cubic meters per year (3.7 billion board feet per year). The assumptions and data used to generate this estimate are provide in detail in the Background Document for this proposed listing.

TABLE 4.—ESTIMATED NATIONWIDE WASTE QUANTITIES (M^3/YR.)

Waste	F032	F033	F034	F035
Wastewater[1]	351,000	[2] 500,000	348,100	(?)
Process Residuals[4]	1,800	600	1,400	400
Drippage and drippage residuals	700	8,700	600	1,900
Total	353,500	9,300	350,100	2,300

[1] Wastewater treatment residuals covered under the K001 listing are not included in these estimates. Wastewaters from process area runoff and from contamination or mixing of nonprocess area runoff with listed wastes also are not included in these estimates.

[2] Surface protection processes do not usually generate process wastewater. Precipitation that falls in the process area is included in the F033 listing. Precipitation that falls in other areas of the facility (e.g., on storage yards) is not included in the F033 listing. However, it may become subject to regulation when mixed with other listed materials such as preservative drippage. Assuming a one-quarter acre process area per plant and 40 inches of rain fall par year, about 1,000 cubic meters per year per plant of surface protection wastewaters, consisting of run-off from process areas, are potentially generated. With 300 to 500 surface protection facilities nationwide, this amounts for 300 to 500,000 m^3/yr of wastewaters.

These wastewaters are often collected in catch basins and sumps and conveyed through ditches and conduits. Sediment and sludges collect in these devices at a rate of approximately 4.84×10^{-4} m^3 of material per $meter^3$ surface-protected wood. Assuming production of 8.7 million m^3/yr of surface-protected wood, 4,200 m^3 of sump, catch basin, and drainage ditch sediments are generated annually.

[3] Inorganic wood preserving processes typically have no net generation of process wastewater because the water is recycled back to the work tank and is ued in mixing new preservative formulation. The wastewater, if disposed, would contain significant concentrations of the constituents of concern and is included in the proposed listing. The agency was unable to identify any reliable estimates of the quantity of wastewater recycled in inorganic processes annually.

[4] Estimates do not include quantities for spent discarded preservative. EPA anticipates that quantities of preservative discarded or spilled annually are small by comparison to other waste streams. Reliable quantitative estimates are not presently available to EPA.

Source: USEPA, 1987.

The waste estimate for F032 includes wastes from chlorophenolic wood preserving processes, and wastes from creosote, inorganic, and other processes at facilities that treat with chlorophenolics. Wastes from creosote and inorganic processes at facilities that formerly used chlorophenolics are not included in the volume estimates for F032 (they are instead included in either F034 or F035) because current EPA data on preservative use cannot be disaggregated by historical preservative use. To the extent that preservation facilities may have switched from chlorophenolics to other formulations, the total quantity of F032 may be slightly underestimated and the quantities of F034 and F035 overestimated.

An estimated 699,000 cubic meters per year of wastewaters are generated by the wood preserving industry. Further, an estimated, 4,200 cubic meters of process residuals, and 11,900 cubic meters of drippage per year are generated. By comparison, wastewater treatment residuals covered under the K001 listing are generated at a rate of 10,000 cubic meters per year; these are not included in the estimates in Table 4.

3. Waste Management Practices

To support this proposed listing, EPA has compiled information on the waste management practices currently used by the industry. Two principal information sources were used: The 1984 survey conducted by EPA (USEPA, 1987) and a survey conducted by the American Wood Preservers Institute (AWPI) (Lindenheim, 1987). Management practices reported for wastewaters, wastewater treatment residuals, and process residuals are summarized in Table 5. Management practices reported for drippage at wood preserving facilities are summarized in Table 6.

TABLE 5—WASTE MANAGEMENT PRACTICES FOR WASTES PROPOSED FOR LISTING AS REPORTED BY SURVEYED FACILITIES (PERCENT) [1]

Waste management practice	Pentachlorophenol and creosote wastewaters [2] [Percent]	Pentachlorophenol wood preserving process residuals [Percent]	Creosote process residuals [Percent]	Inorganic process residuals [Percent]
Discharged to POTW	63			
Discharged to surface water	3			
Reuse, returned to process	10			
Removed by waste contractor [3]	3	70	63	[4]84
Thermal evaporation in tanks	3			
Storage in surface impoundments	13	7	7	0
Storage in Tanks	0	3	7	5
Burned in boiler/wood burner		3	13	0
Landfill		13	7	7
Reclaimed for reuse				2
Land treatment			3	
Not specified	8	10	3	2

[1] Totals may exceed 100 percent because many facilities reported more than one waste management practice.
[2] Wastewaters from inorganic processes are typically recycled and no other waste management practice data were reported.
[3] Ultimate management practice was not reported but is believed to be principally disposal in landfills.
[4] Includes wastes removed by preservative chemical suppliers.
Source: Background Document.

TABLE 6—MANAGEMENT PRACTICES FOR DRIPPAGE AT WOOD PRESERVING FACILITIES, BY PRESERVATIVE USED

	Pentachlorophenol only and creosote plus pentachlorophenol	Creosote only	Inorganics only	Creosote plus/or pentachlorophenol, plus inorganics
Number of plants surveyed	15	25	82	15
Percent with surfaced drip pad	47	40	91	73
Percent reusing drippage from surfaced drip pad	86	100	91	47
Percent with surfaced storage yard	13	12	38	13
Percent allowing drippage in storage yard directly to ground [1]	87	88	62	87

[1] Calculated by difference (100%—% with surfaced storage yard).
Source: (Lindeheim, 1987).

Sixty-three percent of the 86 facilities surveyed in 1984 by EPA that reported managing wastewater discharged their wastewater to Publicly Owned Treatment Works (POTWs). Typically, they also reported that wastewater

discharged to POTWs was pretreated by oil/water separation in tanks prior to discharge. Ten percent of the facilities reported using some type of aeration wastewater treatment process and 3 percent reported using both aeration and activated carbon filtration wastewater treatment processes. Thirteen percent of the facilities reported storage or disposal of process wastewater in land-based units (i.e., land treatment units, evaporation ponds, and surface impoundments).

Wood preserving facilities generally manage their process residuals by contracting with a commercial waste removal company for their disposal. Some suppliers of inorganic preservatives also provide this service for their customers. Residuals from pentachlorophenol and creosote treating processes are also managed by storage in surface impoundments or burning on-site in an industrial boiler or wood burner. These practices were not reported for inorganic process residuals.

Forty to 50 percent of the facilities that use pentachlorophenol and/or creosote have a surfaced drip pad, while 91 percent of the facilities that use inorganic preservatives have a surfaced drip pad. This larger fraction is believed to be due to the fact that inorganic plants are generally newer than other wood preserving facilities and are specifically designed for recovery and reuse of preservative drippage. Drip pads are used to route to collection areas or devices, excess preservative that drips from the treated wood when it is removed from the treating cylinder. Facilities that do not have surfaced drip pads generally allow excess preservative to drip directly onto the ground. Most of the facilities that have surfaced drip pads report reusing the collected drippage. AWPI did not report the management practices used by facilities that do not reuse collected drippage.

Only 12 to 13 percent of the facilities treating with pentachlorophenol and/or creosote have surfaced storage pads (i.e., long-term storage yards) while 38 percent of facilities treating with inorganic preservatives have some surfaced storage area. Thus, the Agency concludes that at the remainder of the facilities (about 88 percent of pentachlorophenol and creosote facilities and 62 percent of inorganic facilities), any preservative that drips off stored, treated wood (and any preservative that is washed off by precipitation) is disposed of on the ground.

No survey data were available to describe waste management practices at sawmills that surface-protect wood. Some data, however, were obtained from the facilities sampled by EPA in conjunction with the State of Oregon. Three of the four sawmills sampled by EPA reported their practices for managing process residuals. Two of the facilities contract with a commercial waste disposal company to transport their dip tank sludges and spray booth residuals to a solid waste landfill. The third sawmill reported that its dip tank sludge is burned in an on-site boiler with waste wood. Disposal in on- or off-site landfills, burning in on-site boilers, or incinerating off-site are believed to be common management practices for all surface protection process residuals (presumably, ash from boilers and incinerators is disposed in landfills).

In contrast, spills and releases of surface protection chemicals and drippage and drippage residuals are typically allowed to fall or remain on the ground. Some facilities have installed concrete pads contiguous to the dip tanks and sloping toward sumps that collect drippage. Alternatively, a charge of lumber may be suspended over the dip tank to allow excess preservative to drip back into the tank. However, surface-protected wood is generally stacked over the ground during storage and air seasoning. Thus, the preservative that drips or is washed off the wood is disposed of on the ground.

D. Basis for Listing

1. Summary of Basis for Listing

Each of the four wastes from wood preserving and surface protection processes meet the criteria for listing as hazardous presented in 40 CFR 261.11(a)(3); consequently, EPA is proposing that they be added to the list of hazardous wastes from non-specific sources appearing at 40 CFR 261.31. The wastes contain high concentrations of toxic constituents. (As discussed later, all the constituents of concern are carcinogens and/or systemic toxicants, many of which appear on the list of hazardous waste constituents at 40 CFR Part 261, Appendix VIII. EPA is also proposing to add to Appendix VIII the three compounds that are constituents of concern in wood preserving wastes but do not already appear on Appendix VIII). Tables 7, 8, 9, and 10 list the constituents of concern in wood preserving wastes and the range of levels at which they are present in the wastes. Table 11, 12, 13, and 14 present the average waste concentrations (based on process residual and sludge data, which EPA believes are representative of all the listed wastes) and demonstrate that toxic constituents are present in wastes from wood preserving and surface protection processes at levels that far exceed the health-based levels of concern. From these waste concentrations, hypothetical ground water concentrations resulting from mismanagement of the wastes have been projected assuming three dilution and attenuation scenarios. For all three levels, nearly all constituents of concern exceed established Agency health-based numbers.

BILLING CODE 6560-50-M

TABLE 7
F032 PENTACHLOROPHENOL WASTES FROM WOOD PRESERVING:
CONSTITUENTS OF CONCERN AND
RANGE OF DETECTED CONCENTRATIONS

	WASTEWATERS (PPM)	PROCESS SLUDGES OR RESIDUALS (PPM)	PRESERVATIVE FORMULATIONS (DRIPPAGE) (PPM)
Pentachlorophenol	0.01-310	40-34,000	14,000-52,000
Benz(a)anthracene	0.03-10	5.1-2,800	75
Benzo(a)pyrene	0.007-10	54-1,100	50
Dibenz(a,h)anthracene	0.1-1	50-310	7
Indeno(1,2,3-c,d)-pyrene	0.006-10	16-130	4 T
Arsenic	0.003-33	NA	NA
Chromium	0.004-14	NA	NA

	WASTEWATERS (PPB)	PROCESS SLUDGES OR RESIDUALS (PPB)	PRESERVATIVE FORMULATIONS (DRIPPAGE) (PPB)
TCDDs	0.001-8	0.001-5	1
PeCDDs	0.008-20	0.2-2	30-70
HxCDDs	0.03-200	0.06-5,000	100-5,000
HpCDDs	0.009-80	0.5-140,000	9,000-100,000
TCDFs	0.0006-2	0.01-35	1-30
PeCDFs	0.001-300	0.08-1,000	100-1,000
HxCDFs	0.001-10	0.01-13,000	200-10,000
HpCDFs	0.002-50	0.3-16,000	100-13,000

Source: Background Document.
NA - Not Analyzed (No Data Collected).
T - Trace. Analytical data support qualitative analysis (i.e., identification) but not quantitative analysis. Concentration cited is the detection limit of the analytical method used.

TABLE 8

F033 PENTACHLOROPHENOL WASTES FROM SURFACE PROTECTION:
CONSTITUENTS OF CONCERN AND
RANGE OF DETECTED CONCENTRATIONS

	SUMP, CATCH BASIN AND DRAINAGE DITCH SEDIMENTS (PPM)	PROCESS SLUDGES OR RESIDUALS (PPM)	PRESERVATIVE FORMULATIONS (DRIPPAGE) (PPM)
Pentachlorophenol[1]	1 - 310	880 - 160,000	40 - 1,900
2,3,4,6-Tetrachlorophenol	0.1 - 130	570 - 4,000	300 - 950
2,4,6-Trichlorophenol	0.1 U	3	0.4 - 1.0

	SUMP, CATCH BASIN AND DRAINAGE DITCH SEDIMENTS (PPB)	PROCESS SLUDGES OR RESIDUALS (PPB)	PRESERVATIVE FORMULATIONS (DRIPPAGE) (PPB)
TCDDs	0.007 - 0.01	6 - 30	0.4 - 3
PeCDDs	0.09 - 0.6	30 - 1,000	1 - 200
HxCDDs	0.2 - 400	400 - 7,000	10 - 10,000
HpCDDs	0.9 - 4,000	2,000 - 42,000	20 - 70,000
TCDFs	0.03 - 70	80 - 4,000	4 - 1,000
PeCDFs	0.07 - 20	400 - 11,000	30 - 8,000
HxCDFs	0.03 - 600	1,000 - 12,000	50 - 28,000
HpCDFs	0.4 - 600	800 - 9,000	4 - 50,000

[1] In the analysis, a pH adjustment causes all pentachlorophenate to be converted to pentachlorophenol. The analysis measures pentachlorophenol.

[2] Wastewaters from surface protection with pentachlorophenate consist essentially of the used preservative formulation. These data therefore also represent what EPA believes are the constituents and constituent concentrations for wastewaters from surface protection with pentachlorophenate.

Source: Background Document.

U - Compound was analyzed for but not detected. Value listed is the lowest detection limit reported.

TABLE 9
F034 CREOSOTE WASTES:
CONSTITUENTS OF CONCERN AND
RANGE OF DETECTED CONCENTRATIONS

	WASTEWATERS (PPM)	PROCESS SLUDGES OR RESIDUALS (PPM)	UNUSED FORMULATION (DRIPPAGE) PPM
Benz(a)anthracene	0.03 - 10	280 - 7,500	1,600 - 2,600
Benzo(a)pyrene	0.007 - 10	1,800 - 3,000	400 - 600
Benz(k)fluoranthene	0.02 - 4	2,300	21,400
Dibenz(a,h)anthracene	0.1 - 1	140 - 680	100 - 400
Indeno(1,2,3-c,d)pyrene	0.006 - 10	100 - 300	1,000
Naphthalene	0.1 - 400	700 - 64,000	13,000 - 180,000
Arsenic	0.003 - 30	NA	NA
Chromium	0.004 - 10	NA	NA

NA - Not analyzed (no data collected).

Source: Background Document.

TABLE 10

F035 INORGANIC WASTES:
CONSTITUENTS OF CONCERN AND RANGE
OF DETECTED CONCENTRATION

	PROCESS SLUDGES OR RESIDUALS (ppm)	UNUSED PRESERVATIVE[1] (ppm)
Arsenic	5,300 - 760,000	5,500
Chromium	70 - 33,000	6,200
Lead	5 - 290	NR

[1] Presently, EPA does not have reliable waste characterization data for wastewaters from inorganic processes. The Agency believes that the data for unused preservative are representative of both drippage and process wastewaters from inorganic processes.

NR - Not reported.

Source: Background Document.

TABLE 11

BASIS FOR LISTING: HEALTH EFFECTS OF THE CONSTITUENTS OF CONCERN IN F032

HAZARDOUS CONSTITUENT	AVERAGE WASTE CONC. DETECTED[1] (ppm)	HEALTH-BASED WATER CONCENTRATION LIMITS (ppm)	BASIS[2]	ESTIMATED DRINKING WELL CONCENTRATIONS[3] (ppm)			CALCULATED CONCENTRATION TO HEALTH-BASED LIMIT RATIOS[4]		
				DA 100	DA 1,000	DA 10,000	DA 100	DA 1,000	DA 10,000
Benz(a)anthracene	900	1.1×10^{-5}	RSD (Class B_2)	9	0.9	0.09	820,000	82,000	8,200
Benzo(a)pyrene	500	3.0×10^{-6}	RSD (Class B_2)	5	0.5	0.05	1,700,000	170,000	17,000
Dibenzo(a,h)anthracene	200	7.1×10^{-7}	RSD (Class B_2)	2	0.2	0.02	2,800,000	280,000	28,000
Indeno(1,2,3-c,d)pyrene	70	2.0×10^{-3}	RSD (Class C)	0.07	7×10^{-3}	7×10^{-4}	350	35	3.5
Pentachlorophenol[5]	20,000	1	RfD	200	20	2	200	20	2
Arsenic	2,000	0.05	MCL	20	2	0.2	400	40	4
Chromium	3,000	0.05	MCL	30	3	0.3	600	60	6
DIBENZO-P-DIOXINS[6]									
TCDDs	3×10^{-3}	2.3×10^{-8}	RSD (Class B_2)	3×10^{-5}	3×10^{-6}	3×10^{-7}	1,3000	130	13
PeCDDs	1×10^{-3}	4.5×10^{-10}	RSD (Class B_2)	1×10^{-5}	1×10^{-6}	1×10^{-7}	22,000	2,200	220
HXCDDs	2	5.6×10^{-9}	RSD (Class B_2)	0.02	0.002	2×10^{-3}	3,600,000	360,000	36,000
HpCDDs	30	2.3×10^{-7}	RSD (Class B_2)	0.3	0.03	0.003	1,300,000	130,000	13,000
DIBENZOFURANS[6]									
TCDFs	2×10^{-3}	2.3×10^{-8}	RSD (Class B_2)	2×10^{-5}	2×10^{-6}	2×10^{-7}	870	87	9
PeCDFs	0.5	2.3×10^{-9}	RSD (Class B_2)	5×10^{-3}	5×10^{-5}	5×10^{-5}	2,200,000	220,000	22,000
HxCDFs	3	2.3×10^{-8}	RSD (Class B_2)	0.003	3×10^{-3}	3×10^{-4}	1,300,000	130,000	13,000
HpCDFs	4	2.3×10^{-7}	RSD (Class B_2)	0.004	4×10^{-3}	4×10^{-4}	170,000	17,000	1,700

TABLE 11 (CONCLUDED)

BASIS FOR LISTING: HEALTH EFFECTS OF THE CONSTITUENTS OF CONCERN IN F032

---

1 Average concentrations calculated from process residuals or process sludge data.

2 Reference Dose (RfD), Risk Specific Dose (RSD), and Maximum Contaminant Level (MCL) are explained later in the preamble, as are the classes of RSDs. Class A, B, and C carcinogens are based on exposure limits at a 10^{-6} risk level.

3 Calculated for three dilution/attention (DA) levels.

4 Ratio obtained by dividing assumed drinking well concentration column by health-based water concentration limit column, for all three dilution/attenuation (DA) levels.

5 This health-based water concentration limit may change following EPA review of the NTP carcinogen study.

6 Waste concentrations presented for dioxins and furans are for the total congener category specified (e.g., the concentration indicated for PeCDD is for all isomers of PeCDDs found). The health-based water concentration limit for each congener category is based on extrapolation using toxicity equivalency factors relative to the toxicity of 2,3,7,8-TCDD. (See Risk Assessment Forum, 1986).

Source: Background Document.

TABLE 12

BASIS FOR LISTING: HEALTH EFFECTS OF THE CONSTITUENTS OF CONCERN IN F033

HAZARDOUS CONSTITUENT	AVERAGE WASTE CONC. DETECTED[1] (ppm)	HEALTH-BASED WATER CONCENTRATION LIMITS (ppm)	BASIS[2]	ESTIMATED DRINKING WELL CONCENTRATIONS[3] (ppm)			CALCULATED CONCENTRATION TO HEALTH-BASED LIMIT RATIOS[4]		
				DA 100	DA 1,000	DA 10,000	DA 100	DA 1,000	DA 10,000
Pentachlorophenol[5]	20,000	1	RfD	200	20	2	200	20	2
2,4,6-Trichlorophenol	3	1.8×10^{-3}	RSD (Class B2)	0.03	0.003	3×10^{-4}	20	2	0.2
2,3,4,6-Tetrachlorophenol	3,000	1	RfD	30	3	0.3	30	3	0.3
DIBENZO-P-DIOXINS[6]									
TCDDs	2×10^{-2}	2.3×10^{-8}	RSD (Class B_2)	2×10^{-4}	2×10^{-5}	2×10^{-6}	8,700	870	87
PeCDDs	0.3	4.5×10^{-10}	RSD (Class B_2)	0.003	3×10^{-4}	3×10^{-5}	6,700,000	670,000	67,000
HxCDDs	3	5.6×10^{-9}	RSD (Class B_2)	0.03	0.003	3×10^{-4}	5,400,000	540,000	54,000
HpCDDs	20	2.3×10^{-7}	RSD (Class B_2)	0.2	0.02	0.002	870,000	87,000	8,700
DIBENZOFURANS[6]									
TCDFs	1	2.3×10^{-9}	RSD (Class B_2)	0.01	0.001	1×10^{-4}	4,300,000	430,000	43,000
PeCDFs	3	2.3×10^{-9}	RSD (Class B_2)	0.03	0.003	3×10^{-4}	4,300,000	430,000	43,000
HxCDFs	6	2.3×10^{-8}	RSD (Class B_2)	0.06	0.006	6×10^{-4}	2,600,000	260,000	26,000
HpCDFs	3	2.3×10^{-7}	RSD (Class B_2)	0.03	0.003	3×10^{-4}	130,000	13,000	1,300

[1] Average concentrations based on process sludge or process residual data.

[2] Reference Dose (RfD), Risk Specific Dose (RSD), and Maximum Contaminant Level (MCL) are explained later in the preamble, as are the classes of RSDs. Class B carcinogens are based on exposure limits at a 10^{-6} risk level.

TABLE 12 (CONCLUDED)

BASIS FOR LISTING: HEALTH EFFECTS OF THE CONSTITUENTS OF CONCERN IN F033

[3] Calculated for three dilution/attenuation (DA) levels.

[4] Ratio obtained by dividing assumed drinking well concentration column by health-based water concentration limit column for all three dilution/attenuation (DA) levels.

[5] This level health-based water concentration limit may change following EPA review of the NTP carcinogen study.

[6] Waste concentrations presented for dioxins and furans are for the total congener category specified (e.g., the concentration indicated for PeCDDs is for all isomers of PeCDDs found). The health-based water concentration limit for each congener category is based on extrapolation using toxicity equivalency factors relative to the toxicity of 2,3,7,8-TCDD. (See Risk Assessment Forum, 1986).

Source: Background Document.

TABLE 13

BASIS FOR LISTING: HEALTH EFFECTS OF THE CONSTITUENTS OF CONCERN IN F034

HAZARDOUS CONSTITUENT	AVERAGE WASTE CONC. DETECTED[1] (ppm)	HEALTH-BASED WATER CONCENTRATION LIMITS (ppm)	BASIS[2]	ESTIMATED DRINKING WELL CONCENTRATIONS[3] (ppm)			CALCULATED CONCENTRATION TO HEALTH-BASED LIMIT RATIOS[4]		
				DA 100	DA 1,000	DA 10,000	DA 100	DA 1,000	DA 10,000
Benz(a)anthracene	4,000	1.1×10^{-5}	RSD (Class B_2)	40	4	0.4	3,600,000	360,000	36,000
Benzo(k)fluoranthene	2,000	4.0×10^{-3}	RSD (Class B_2)	20	2	0.2	5,000	500	50
Benzo(a)pyrene	2,000	3.0×10^{-6}	RSD (Class B_2)	20	2	0.2	6,700,000	670,000	67,000
Dibenz(a,h)anthracene	400	7.1×10^{-7}	RSD (Class B_2)	4	0.4	0.04	5,600,000	560,000	56,000
Indeno(1,2,3-c,d)pyrene	200	2.0×10^{-3}	RSD (Class C)	0.5	0.05	5×10^{-3}	1,000	100	10
Naphthalene	40,000	14	RfD	400	40	4	30	3	0.3
Arsenic	2,000	0.05	MCL	20	2	0.2	40	4	0.4
Chromium	3,000	0.05	MCL	30	3	0.3	60	60	6

[1] Average concentrations based on process residuals or process sludge data.

[2] Reference Dose (RfD), Risk Specific Dose (RSD), and Maximum Contaminant Level (MCL) are explained later in the preamble, as are the classes of RSDs. Class B and C carcinogens are based on exposure limits at a 10^{-6} risk level.

[3] Calculated for three dilution/attenuation (DA) levels.

[4] Ratio obtained by dividing assumed drinking well concentration column by health-based water concentration limit column for all three dilution/attenuation levels.

Source: Background Document.

TABLE 14

BASIS FOR LISTING: HEALTH EFFECTS OF THE CONSTITUENTS OF CONCERN IN F035

HAZARDOUS CONSTITUENT	AVERAGE WASTE CONC. DETECTED[1] (ppm)	HEALTH-BASED WATER CONCENTRATION LIMITS (ppm)	BASIS[2]	ESTIMATED DRINKING WELL CONCENTRATIONS[3] (ppm)			CALCULATED CONCENTRATION TO HEALTH-BASED LIMIT RATIOS[4]		
				DA 100	DA 1,000	DA 10,000	DA 100	DA 1,000	DA 10,000
Arsenic	100,000	0.05	MCL	1,000	100	10	2,000	200	20
Chromium	10,000	0.05	MCL	100	10	1	2,000	200	20
Lead[5]	80	0.05	MCL	0.8	0.08	0.008	20	2	0.2

[1] Concentrations based on process sludge or residual data.

[2] Reference Dose (RfD), Risk Specific Dose (RSD), and Maximum Contaminant Level (MCL) are explained later in the preamble, as are the classes of RSDs.

[3] Calculated for three different dilution/attenuation (DA) levels.

[4] Ratio obtained by dividing assumed drinking well concentration column by health-based water concentration limit column for all three dilution/attenuation (DA) levels.

[5] The MCL for lead is currently undergoing EPA review.

Source: Background Document

BILLING CODE 6560-50-C

In the past, EPA's selection of constituents of concern for listed hazardous wastes has relied on comparisons of maximum reported waste constituent concentrations with health-based levels of concern. In this case, the Agency has found, as is shown in Tables 11, 12, 13 and 14, that the concentrations of constituents of concern in wood perserving wastes are so high that even projections of ground water contamination levels based on average waste concentrations (rather than maximum concentrations) exceed health-based levels of concern.

Tables 11, 12, 13, and 14 summarize the Agency's analysis of the hazards posed by the constituents of concern. In this analysis, EPA examined projected ground water concentrations for the constituents of concern assuming three dilution and attenuation factors: 100, 1,000, and 10,000. These three levels encompass a broad range of dilution/attenuation factors. The drinking water well concentrations calculated for dilution/attenuation levels of 100, 1,000, and 10,000 assume that the concentration of each constituent of concern in the well water are 1 percent, 0.1 percent, and 0.01 percent, respectively. The tables show that, in the vast majority of cases, the constituents of concern are likely to appear in ground water at concentrations that exceed the health-based levels of concern by one to four orders of magnitude using the extremely liberal dilution and attenuation factor of 10,000. Thus, even if the Agency did not evaluate the hazard conservatively, these wastes clearly would contain concentrations of constituents of concern far in excess of safe levels.

Damage cases, described below and in an appendix to this preamble, further demonstrate that the constituents of concern in the wastes proposed for listing are sufficiently mobile and persistent for past mismanagement to have resulted in contamination of ground water, surface water, and soils.

After considering all of the factors of 40 CFR 261.11(a)(3), because these wastes contain high concentrations of highly toxic constituents that are mobile and persistent and are unlikely to degrade in the environment before reaching receptors, and because past mismanagement of these wastes has already resulted in serious environmental damage and risk to human health, EPA is proposing that F032, F033, F034, and F035 be added to the list of hazardous wastes from non-specific sources.

2. Waste Characterization and Constituents of Concern

The following section summarizes the information concerning waste characterization and constituents of concern that EPA has gathered to support this proposed listing. EPA has selected constituents of concern based on two principal factors: Their known toxicity and their relevant concentrations in the waste. Other constituents were detected in these waste streams but were not selected as constituents of concern; data on these can be found in the Background Document for today's proposal.

a. Wastes from chlorophenolic wood preserving processes (F032). Table 7 lists the constituents of concern found in wastes from wood preserving operations using chlorophenolic formulations as well as the concentration ranges of these constituents. Pentachlorophenol averaged 15 mg/l in wastewaters with a maximum concentration of 310 mg/l. Twenty-one different polynuclear aromatic hydrocarbon (PAH) compounds (only some of which are constituents of concern) were found in wastewaters from wood preserving operations using pentachlorophenol and/or creosote. The PAH contaminants are believed to be derived from the use of petroleum carrier solvents for the pentachlorophenol formulation and/or the current or past use of creosote wood preserving processes. Arsenic concentrations in wastewaters from facilities that are treated with pentachlorophenol and/or creosote and inorganic preservatives ranged from 0.003 to 33 mg/l, averaging 5 mg/l. Chromium concentrations ranged from 0.004 mg/l to 14 mg/l, averaging 2 mg/l. The Agency believes that pentachlorophenate may be used to preserve wood, although its use is not extensive. Wastes from wood preservation processes that use pentachlorophenate are expected to contain the same chlorophenolic constituents as wastes from pentachlorophenol processes.

The average pentachlorophenol concentration for process sludges was about 1.6 percent. No analyses were available of preservative formulation as it drips from treated wood. Instead, in-use pentachlorophenol wood preserving formulation was sampled to obtain data indicative of constituent concentrations in drippage because EPA believes that drippage either will be or will substantially resemble preserving formulations. The average pentachlorophenol concentration was 26,000 mg/l (2.6%); the maximum concentration was 52,000 mg/l (5.2%). All ten PCDD/PCDF homologue groups were detected in non-wastewater pentachlorophenol treating wastes. However, 2,3,7,8–TCDD was not detected in nine analyzed samples of F032 wastes (process residuals and preservative formulation believed typical of drippage). Total TCDDs were detected in eight of 20 analyzed samples. Calculated equivalent 2,3,7,8–TCDD concentrations for all cogener groups detected averaged 200 ppb for process sludges residuals and 300 ppb for in-use treating solutions.

Within hazardous waste listing F032, the Agency is proposing to include wastes generated at facilities that previously used chlorophenolic formulations and wastes generated from creosote, inorganic, and other processes located within the same facility as a chlorophenol process. Process sludges and wastewater residuals gradually accumulate in wood preserving, surface protection, and wastewater treatment equipment. Periodically (annually, semianually, monthly, or perhaps more frequently, depending on the size and operating practices of the facility) the accumulated residuals are removed from the equipment and then disposed. The Agency has information (which is available in the docket to this rule making) that wood preserving facilities regularly change the preservatives used in a particular piece of process equipment without removing accumulated materials or in any way cleaning the equipment.

EPA has gathered considerable evidence that F032 waste (from inorganic and creosote processes that is either generated from equipment that has been previously used in chlorophenolic processes or generated at facilities that have used or currently use processes on the same site) is contaminated by the constituents of concern from the chlorophenolic processes. Such cross-contamination is documented by the waste characterization data available in the Background Document. These data show that constituents unique to chlorophenolic wastes from chlorophenolic processes were identified in wastes that came from creosote and inorganic processes. The Background Document for this listing presents many cases that describe cross-contamination. The cross-contamination is further documented by information on the wastes and their management practices collected by EPA through site visits and surveys. Based on this information, EPA has concluded that a serious and significant degree of cross-contamination exists due to

common practices in the industry. EPA has therefore included wastes from inorganic and creosote processes that may be cross-contaminated with chlorophenolic wastes in the F032 listing.

Following are a few examples identified by EPA where cross-contamination as a result of normal operating practices has occurred. More examples are provided in the Background Document.

At a U.S. Army depot in Memphis, Tennessee, wood products were dipped or steeped in a 5,000 gallon vat of pentachlorophenol solution. Treating solution was stored in a ⅜-inch steel underground storage tank which subsequently leaked. After a number of years, the wood treatment process was discontinued and an investigation of the site undertaken. Various surfaces in the treatment area were sampled and analyzed for PCDD and PCDF content. Chips from the treatment building cinderblock walls and concrete floor contained 24.7 ppb and 42.3 ppb of toxic equivalent 2,3,7,8–TCDD, respectively. The storage tank was emptied, cleaned and sandblasted. After sandblasting, a 100 cm^2 wipe of the inside of the storage tank showed 1.3 ppb toxic equivalent 2,3,7,8–TCDD. The tank was hydroblasted and retested. The toxic equivalent 2,3,7,8–TCDD concentration in a 100 cm^2 wipe was then 0.13 ppb. These data demonstrate that process equipment used for preserving wood with pentachlorophenol can be contaminated even after accumulated residuals are removed.

In addition, as part of EPA's general sampling and analysis effort, sediment was collected from a treating cylinder that had been used to treat wood with pentachlorophenol until 2 to 4 months prior to the sampling episode. At that time, the preservative used in the cylinder was replaced with creosote, but the cylinder was not cleaned. The sediment in this wood treating cylinder contained material that had accumulated during pentachlorophenol wood preserving operations and materials that had accumulated during creosote wood preserving operations. Analysis of the sediment showed 140 mg/kg of pentachlorophenol. Pentachlorophenol has never been found as a constituent of creosote or of creosote wood preserving formulations. Cross-contamination must therefore have occurred.

The major cause of cross-contamination at facilities using more than one type of preservative is mixing of the wastes generated from the various processes. Indeed, plants visited by EPA that use more than one type of preservative comingled wastes, and all plants using both creosote and chlorophenolic formulations comingled wastewaters.

One facility surveyed by EPA reported that wastewater from its pentachlorophenol wood preserving operations was routed to an oil-water separator. The oil fraction was returned to the pentachlorophenol work tank while the separated water was used to make up CCA treating solution. In addition, this facility has one vacuum pump used to create a vacuum on both the CCA retort and the pentachlorophenol retort. Cooling and sealing water from the pump was also used to make up CCA treating solution. A second facility reported using the wastewater (after oil/water separation) from its pentachlorophenol treatment operation to make up its ACA treating solution. These practices resulted in cross-contamination of inorganic wood preserving wastes with chlorophenolic, PCDD, and PCDF constituents.

EPA has also obtained reports of other practices leading to cross-contamination of wastes, such as the use of common equipment for moving treated wood, untreated wood, and waste material and the use of common tramcars for holding wood in the treating cylinders. Also, creosote process wastes have become contaminated with chlorophenolic, PCDD, and PCDF constituents at facilities that use a common oil-water separator for chlorophenolic and creosote wastewaters when the recovered oil is recycled back to the creosote process.

Cross-contamination has occurred even when treating cylinders or tanks are dedicated to the application of one preservative formulation. For example, a California wood preserving facility that treated wood with pentachlorophenol and creosote in dedicated retorts measured wastewater contaminant concentrations of pentachlorophenol in the creosote wastewaters of 32 mg/l (Palmer, 1986). This cross-contamination is believed to be the result of using other equipment in common and interconnecting piping. Thus, cross-contamination may occur at facilities that attempt to segregate chlorophenolic from non-chlorophenolic wastes if the processes, process equipment, and process areas are not adequately segregated.

The Agency's principal concern regarding cross-contamination is that it may result in wastes from creosote and inorganic processes containing dioxins and dibenzofurans that are not normally present in wastes generated by these processes. EPA recognizes that the presence of dioxin contaminants in a hazardous waste may reduce the availability of hazardous waste treatment, storage, or disposal facilities that can or will accept the waste.

Since cross-contamination can be eliminated through proper cleaning and replacement of contamination equipment, today's proposal includes standards for equipment cleaning and replacement. Generators of F032 who change to another preservative and who comply with the equipment cleaning and replacement standards will generate wastes that do not meet the F032 listing once cleaning and replacement is complete and provided that the generator does not resume using chlorophenolic formulations. Generators should note that after successful cleaning and replacement, their wastes may continue to be subject to regulation under Subtitle C of RCRA either because they meet the listing descriptions of F034 or F035 or because they exhibit one or more of the characteristics of hazardous waste. The equipment cleaning and replacement standards are discussed in detail elsewhere in this preamble.

b. Wastes from chlorophenolic surface protection processes (F033). Table 8 lists the constituents of concern found in wastes from surface protection operations using chlorophenates as well as the concentration ranges of these constituents. Although no wastewater is directly generated from surface protection processes, precipitation that comes into contact with process areas can become contaminated with surface protection chemicals. This contaminated precipitation is collected in sumps and catch basins and may be conveyed back to the process, to wastewater treatment (or, more commonly, to offsite discharge via natural drainage or earthen ditches).

No information quantifying the amount of wastewater generated at surface protection facilities was collected by the agency during its study of the industry. The quantity of precipitation falling on the process area at a surface protection facility is estimated to be approximately 1,000,000 liters (270,000 gallons) per year, assuming an annual rainfall of 100 cm (40 inches) and a process area of 1,000 m^2 (0.25 acre). For 300 to 500 surface protection facilities, this amounts to 300 to 500 million liters (80 to 130 million gallons) per year.

Limited data were available to characterize the concentration of constituents of concern in surface protection wastewater. One sample of water taken from a drain near a dip tank contained 14 ppm tetrachlorophenols

and 6 ppm pentachlorophenol. At another facility, a sample of wastewater collected from a ditch which drained the dip tank area to a creek contained 0.3 ppm pentachlorophenol. The complete data set, including all constituents detected, can be found in Appendix D of the Background Document.

In process sludges or residuals (such as working tank or retort sediments), the concentration of pentachlorophenol averaged 20,000 mg/kg, (2.0 percent). Tetrachlorophenols are present in the preservative formulation, either as the active ingredient or a contaminant of pentachlorophenates. The average total isomer tetrachlorophenol concentration was 17,000 mg/kg (1.7 percent).

The pentachlorophenol concentration in sludges that accumulate in catch basins, sumps, and drainage ditches averaged 95 mg/kg while the concentration of 2,3,4,6-tetrachlorophenol averaged 40 mg/kg. No analyses of preservative formulation as it drips from surface-protected wood were available. Instead, in-use chlorophenate surface protection formulation was sampled to obtain data representative of constituent concentrations in drippage. Wastewater from surface protection processes consists principally of used preservative formulation (i.e., the formulation in the dip tank). EPA, therefore, believes that in-use chlorophenate surface protection characterization data are also representative of wastewaters from surface protection with chlorophenate formulations. The average pentachlorophenol concentration was 810 mg/l with an average 2,3,4,6-tetrachlorophenol concentration of 520 mg/l.

All ten PCDD/PCDF homologue groups, including 2,3,7,8–TCDD, were detected in surface protection wastes. 2,3,7,8–TCDD was detected in 3 of 15 samples of F033 wastes analyzed for 2,3,7,8–TCDD (catch basin and drainage ditch sediments, process residuals and preservative formulation). Total TCDDs (including 2,3,7,8–TCDD and all other homologues) were detected in 7 of 16 samples of F033 wastes analyzed for TCDDs. The average 2,3,7,8–TCDD concentration in process sludges was 8 ug/1 (ppb). The 2,3,7,8–TCDD concentration measured in one sample of sediment from a surface drainage ditch was 7 ppt. Total equivalent 2,3,7,8–TCDD concentrations were also calculated from sampling data for the various types of surface protection wastes. The equivalent concentration averaged 700 ppb for process sludges or residuals, 4 ppb for sludges that accumulate in sumps and catch basins and 700 ppb for in-use surface protection solutions. The sampling data and Toxicity Equivalent Factors used to calculate these averages from sampling data are provided in the Background Document.

The Agency anticipates that as a result of today's proposed listings, many sawmills that generate no hazardous waste except the residuals from chlorophenolic surface protection processes will change preservative formulations to avoid becoming hazardous waste generators.

Generators of F033 wastes should note that the listing includes cross-contaminated wastes, similar to the F032 listing. Therefore, although a generator may change preservatives to one that has not been evaluated as part of this listing, the wastes from the new preservative would continue to be F033 wastes due to the potential for cross-contamination. As for F032 cross-contaminated wastes, in order to provide generators who are able to change preservatives with an opportunity to eliminate the potential for cross-contamination and hence, to have their wastes generated from processes using non-chlorophenolic formulations no longer be F033 waste, EPA is proposing standards for equipment cleaning and replacement as part of today's proposed rule. Generators who change to another preservative (that is, one not subject to the listing) and who comply with the equipment cleaning and replacement standards will generate wastes in these processes that are not F033-listed waste. Generators should note, however, that their wastes will remain subject to the hazardous waste characteristic rules and, should they exhibit one or more characteristics of hazardous waste, would continue to be subject to regulation under Subtitle C of RCRA. The Agency notes also that the equipment cleaning and replacement standard does not in any way affect any future listing determinations that EPA may make regarding other surface protection formulations not covered by today's listing. Should the agency promulgate a listing for such other preservatives in the future, wastes generated, although in compliance with the equipment cleaning and replacement standard could again be subject to Subtitle C regulations.

c. Wastes from creosote wood preserving processes (F034). Table 9 lists the constituents of concern found in wastes from wood preserving operations using creosote as well as the concentration ranges of these constituents. Pentachlorophenol, PCDDs, and PCDFs derive solely from wood preserving operations using chlorophenolics and are not present in wastes at facilities that have never used chlorophenolic formulations. Twenty-five different PAH compounds (not all of which are defined as constituents of concern) were found in wastewaters from wood preserving operations using creosote. Naphthalene, the most frequently detected compound, averaged 56 mg/1 in wastewaters. Phenanthrene, also frequently detected, averaged 54,000 mg/kg (5.4 percent), in process sludges or residuals.

No analyses of creosote preservative formulations were available, either as they drip from treated wood or as in-use formulations. However, initial free drippage from creosote-treated wood is expected to have the same composition as unused creosote formulations (mixtures of creosote and coal tar). Literature data on creosote formulations, presented in the Background Document for today's proposal, were available for eleven PAH compounds with phenanthrene at 180,000 mg/kg (18 percent) present at the highest concentration.

Toxic metals concentrations in wastes from creosote processes are variable and depend on the extent of cross-contamination at a particular facility. Data describing the extent of cross-contamination between creosote and inorganic processes are provided in the Background Document developed in support of this proposed listing.

d. Wastes from inorganic wood preserving processes (F035). Table 10 lists the constituents of concern found in wastes from wood preserving processes using only inorganic formulations of arsenic and chromium. It also lists the concentration ranges of these metals in the wastes. Arsenic concentrations in process residuals averaged 150,000 mg/kg (15 percent); chromium concentrations averaged 14,000 mg/kg (1.4 percent). Lead was also present in samples of process sludges, at an average concentration of 80 mg/kg. Lead found in wood preserving wastes is believed to be a contaminant of the arsenic component of the preservative formulation. This listing applies only to wastes from facilities that presently use inorganic preservatives and are not using or have not previously used chlorophenolic preservatives as previously discussed (those wastes from inorganic facilities where chlorophenolics have been used are covered under the proposed F032 listing). Consequently, the constituents of concern for F035 do not include pentachorophenol, PCDDs, or PCDFs. PAH compounds derive from creosote

and from petroleum oils used as pentachlorophenol carriers and may be present in residuals from inorganic treating facilities that have always previously used creosote preservatives or are presently using both inorganics and creosote preservatives on the same site.

Information available to EPA indicates that wastewaters from arsenical or chromium wood preserving processes are typically recycled. These wastewaters are proposed to be listed as hazardous waste and will be subject to regulation when they are not recycled (See generally, the Solid Waste Redefinition Rule, 50 FR 663, January 4, 1985).

No analyses of inorganic preservative formulations, either as they drip from treated wood or as in-use formulations, were available. However, initial drippage from wood treated with inorganic preservatives is expected to have the same composition as unused preservative solution, as specified by the American Wood Preservers Association. A 2.5 percent solution of CCA–C, the most commonly used inorganic preservative, has approximately 5,500 mg/1 arsenic and 6,200 mg/1 chromium. Data supporting these concentration estimates are provided in the Background Document developed to support this proposed listing.

3. Health Effects of Concern

The Agency has obtained data demonstrating that the constituents found in the wastes generated by the preservation and surface protection of wood with chlorophenolics, creosote, and inorganic formulations are systemic toxicants and/or carcinogens. These toxic constituents are present in concentrations capable of causing adverse health effects as shown by Tables 11, 12, 13 and 14. The tables demonstrate that even if only 0.01 percent of the average constituent levels in the waste reaches environmental receptors, the exposure concentrations are often four orders of magnitude higher than the health-based levels of concern. If the Agency assumes more conservative dilution and attenuation factors (projecting that a larger portion of the waste disposed would reach environmental receptors) the exposure concentrations would be even higher. Given such high concentrations in the waste, the potential for exposure to harmful concentrations of the constituents of concern is extremely high.

For the purpose of listing waste as hazardous under RCRA, the Agency routinely uses three basic methods to indicate measures of toxicity: (1) Maximum Contaminant Levels (MCLs); (2) Risk Specific Doses (RSDs) for known carcinogens; and (3) Reference Doses (RfDs) for systemic toxicants. Based on different criteria, each of these methods give the maximum doses or levels of exposure that are acceptable.

MCLs are final Drinking Water Standards promulgated under Section 1412 of the Safe Drinking Water Act of 1974, as amended in 1984, for both carcinogenic and non-carcinogenic compounds. In setting MCLs, EPA considers a range of pertinent factors (for example, see 52 FR 25697–98, July 8, 1987).

For many carcinogenic constituents for which MCLs are not promulgated, the Agency has developed oral RSDs. The RSD is a dose that corresponds to a specified level of risk of an individual contracting cancer over a 70-year lifetime because of the presence of the toxicant in drinking water. To develop an RSD, a risk level must be specified. EPA specifies the risk level of concern on a weight-of-evidence scheme based on the quality and adequacy of experimental data and the kinds of responses induced by a suspect carcinogen. The carcinogenic constituents of concern in F032, F033, F034, and F035 for which no MCLs exist are either probable human carcinogens (Class B_2), based on a combination of sufficient evidence in animals and inadequate data in humans, or possible human carcinogens (Class C), based on limited animal evidence in the absence of human data. (Details on the other classes of carcinogens are given in the Background Document.) The oral RSDs for carcinogenic agents are presented at the 10^{-6} risk level for Class A and B carcinogens and the 10^{-5} risk level for Class C carcinogens. This is consistent with the risk levels used to delist specific wastes.

Oral Reference Dose Numbers (RfDs) are established for non-carcinogenic constituents. An RfD is an estimate of a daily exposure to a substance for the human population (including sensitive subgroups) that appears to be without an appreciable risk of deleterious effects during a lifetime. If frequent exposures that exceed the RfD occur, the probability that adverse effects may be observed increases. The method for estimating the RfD for non-carcinogenic end points was described in the proposed rule for the Toxicity Characteristic (51 FR 21648, June 13, 1986).

The hazardous constituents of concern have carcinogenic or other chronic systemic effects on laboratory animals or humans and have been determined to be present in the wastes from wood preserving and surface protection processes in sufficient concentrations to pose a substantial threat to human health and the environment. As outlined here, EPA has established RfDs, RSDs, or MCLs for all of the constituents of concern in wood preserving wastes. A brief summary of the toxicity of these constituents is presented in this preamble. A more detailed discussion is included in the Background Document to today's proposal.

The concentration limits for the constituents of concern in Tables 11, 12, 13, and 14 are based on two assumptions. First, that the average person has a mass of 70 kg and, second, that a person drinks, on average, 2 liters of water daily.

All the chlorophenols of concern (see Table 1) for F032, F033, and F034 are chronic systemic toxicants. One of them 2,4,6-trichlorophenol is also a Class B_2 carcinogen (based on animal toxicity data) with an RSD of 1.8×10^{-3} ppm; it has caused lymphomas, leukemias, and carcinomas in rats and mice, and has been determined to be mutagenic.

2,3,4,6-tetrachlorophenol is a systemic toxicant and has been assigned an RfD of 1 ppm. This is supported by subchronic oral and reproductive studies in animals; significant biochemical and clinical pathological changes have been reported.

Previous studies of pentachlorophenol have shown it to be highly toxic to humans. Based on available data, EPA has established an RfD for pentachlorophenol of 1 ppm. Pentachlorophenol causes contact dermatitis, damage to vision, and, on ingestion, lung, liver, and kidney damage. Inhalation of pentachlorophenol results in acute poisoning, centering on the circulatory system with accompanying heart failure. Oral doses of 29 ppm have been reported to be lethal to humans. Data from a recent National Toxicology Program bioassay, (McConnell, 1988), however, provide evidence that pentachlorophenol is also a carcinogen.[2]

The polynuclear aromatic hydrocarbon constituents of concern in F032, F033, and F034 (see Table 1) are all chronic systemic toxicants; some are also carcinogenic. Naphthalene has an RfD of 14 ppm, pyrene an RfD of 4 ppm,

[2] The NTP bioassay would change the previously established health-based number of 1 ppm for pentachlorophenol. The final rule may be revised following Office of Solid Waste's review of the study.

and benzo(k)fluoranthene an RfD of 0.004 ppm.

Benz(a)anthracene is a Class B_2 carcinogen; various studies on mice have resulted in sarcomas, bladder carcinomas, and malignant skin tumors. The RSD, by ingestion, at the 10^{-6} risk level, is 1.1×10^{-5} ppm.

Benzo(a)pyrene is also a Class B_2 carcinogen; its RSD, by ingestion, at the 10^{-6} risk-level, is 3×10^{-6} ppm in drinking water. In animals, it has caused stomach, skin, and lung tumors, lung adenomas, and local tumors following direct injection. In humans, clear association between exposure and occurrence of lung cancer has been shown for several mixtures containing benzo(a)pyrene. Skin exposure has resulted in benign and reversible skin lesions.

Dibenz(a,h)anthracene is also a Class B_2 carcinogen. Its RSD, by ingestion, at the 10^- risk level is 7×10^{-7} ppm. Via various routes of exposure, dibenz(a,h)anthracene has increased the occurrence in mice of lung, skin, and mammary carcinomas, subcutaneous sarcomas, pulmonary adenomas, and hemangioendotheliomas. Indeno(1,2,3-cd)pyrene is a Class C carcinogen; it has an RSD of 0.002 ppm. Specifically, skin carcinomas and papillomas in mice have resulted from subcutaneous injection of and skin painting with indeno(1,2,3-cd)pyrene.

Each of the inorganic constituents of concern in F032,, F033, F034, and F035 (arsenic, chromium, and lead) has an MCL of 0.05 ppm. Arsenic is a proven carcinogen (Class A), has caused skin and lung cancer in humans and, through occupational exposure, may cause precancerous lesions. Chromium compounds are acute systemic toxicants, mainly affecting the skin and mucous membranes. Lead is an accumulative poison; it can cause a number of human physiological effects including kidney damage and reproductive disorders. (The MCL for lead is currently being reviewed by the Agency.)

To date, EPA has established health-based numbers for only two of the PCDD constituents of concern: 2,3,7,8-tetrachlorodibenzo-*p*-dioxin and hexachlorodibenzodioxin. Only limited data exist on the other congeners. These congeners differ in the number of chlorine atoms they contain and the relative positions of these chlorine atoms on the dioxin or furan molecules. The similarity in structure that some of these congeners display indicates that they are often present together as a complex mixture. The congener 2,3,7,8-TCDD is the most widely studied constituent of concern. It is a Class B_2 carcinogen, its RSD, at the 10^{-6} risk level, corresponds to a water concentration limit of 2.3×10^{-10} ppm. Exceptionally low doses of this compound elicit a wide range of toxic responses in animals (e.g., adverse reproductive effects, thymic atrophy, and a wasting syndrome leading to death).

For those PCDD congeners and PCDFs that do not have established RSDs, EPA is proposing to use the health-based numbers for 2,3,7,8-TCDD as an indicator of their relative toxicity. This is determined by using the toxicity equivalence factors (TEFs) assigned to the relevant congener and applied to risk levels associated with 2,3,7,8-TCDD. Limited data suggest that other PCDD congeners have toxic effects similar to those of 2,3,7,8-TCDD. Further, data indicate that some PCDF congeners exhibit 2,3,7,8-TCDD-like toxicity.

Briefly, to determine TEFs, concentration data are first obtained on the PCDDs and PCDFs present in the mixture. Then, reasoning on the basis of the structure-activity relations and results of short-term tests, the toxicity of each of the components is estimated and expressed as an equivalent amount of 2,3,7,8-TCDD. Combined with estimates of exposure and known toxicity information on 2,3,7,8-TCDD, the risks associated with the mixture of PCDDs and PCDFs can be assessed. The Agency believes that, in the absence of toxicological data on all the PCDDs and PCDFs and, as an interim measure, this method provides a reasonable estimate of the toxicity (see Risk Assessment Forum, 1986).

4. Constituents Proposed for Addition to Appendix VIII

The majority of the constituents of concern present in the wood preserving and surface protection wastes already appear on the list of hazardous constituents (409 CFR Part 261, Appendix VIII). This action proposes to add three more constituents of concern from such wastes which are not presently listed on Appendix VIII to that appendix, specifically: benzo(k)-fluoranthene, heptachlorodibenzofurans, and heptachlorodibenzo-*p*-dioxins. The known health effects of these waste constituents are summarized in the following discussion.

Benzo(k)fluoranthene is classified by EPA as a Class B_2 carcinogen. Available toxicity data (USEPA, 1987) demonstrate that it is carcinogenic to animals and, according to the International Agency for Research on Cancer (IARC), benzo(k)fluoranthene is a probable human carcinogen.
Benzo(k)fluoranthene has been evaluated in dermal studies with mice, in mouse-skin initiation-promotion assays using TPA as a promoter, and in a subcutaneous injection study of mice. It has been shown to be active as an initiator and produced injection site sarcomas in the subcutaneous study. Benzo(k)fluoranthene has also been shown to be mutagenic in standard mutagenicity tests with *Salmonella typhimurium* strains TA100 and TA98.

Heptachlorodibenzo-*p*-dioxins and heptachlorodibenzofurans are members of the large family of chlorinated dioxins and furans. Certain of these chemicals, most notably, 2,3,7,8-TCDD, have been shown to be highly toxic. The Agency's Carcinogen Assessment Group (CAG) has completed quantitative analyses demonstrating that 2,3,7,8-TCDDs and 2,3,7,8-HxCDDs are among the most potent animal carcinogens ever evaluated by the Agency. Limited experimental data, supplemented by structure/activity analyses indicate other chlorinated dioxins and furans, such as heptachlorodibenzo-*p*-dioxin and heptachlorodibenzofuran may have toxic effects similar to 2,3,7,8-TCDD at very low doses (EPA, 1987). EPA has therefore concluded that there is sufficient evidence to conclude that heptachlorodibenzo-*p*-dioxin and heptachlorodibenzo-furan are constituents of concern in hazardous wastes and should be added to 40 CFR 261 Appendix VIII.

5. Mobility and Persistence of Wastes from Wood Preserving and Surface Protection Processes

The toxic constituents from wood preserving and surface protection processes have been found to migrate from the wastes and, further, they have been found to have sufficient mobility and persistence in the environment to contaminate ground water (including drinking water), surface waters and sediments, and surface soils. The solubilities and projected ground water mobility of the selected organic constituents of wood preserving wastes are presented in Table 15.

TABLE 15.—GROUNDWATER MOBILITY AND PERSISTENCE OF CONSTITUENTS OF CONCERN

Constituents of concern	Water solubility (ppm)	Log [1] K_{ow}	K_{oc} [2]	Mobility [3]		Persistence [3]
				Slightly [4] contaminated medium	Highly [5] contaminated medium	
CHLOROPHENOLS						
2,4,6-Trichlorophenol	800	3.61	2,000	low	high	high.
2,3,4,6-Tetrachlorophenol	—	4.1	4,050	low	high	high.
Pentachlorophenol [6]	14	5.04	16,000	low	high	high.
POLYNUCLEAR AROMATIC HYDROCARBONS						
Benz(a)anthracene	0.057	5.61	20,000	low	high	high.
Benzo(a)pyrene	0.038	6.06	550,000	low	high	high.
Benzo(k)fluoranthene	0.0043	6.06	550,000	low	high	high.
Dibenz(a,h)anthracene	0.0005	6.84	3,300,000	low	high	high.
Indeno(1,2,3-c,d)pyrene	0.0005	6.50	1,600,000	low	high	high.
Naphthalene	31.7	3.29	940	low	high	high.
POLYCHLORINATED DIBENZO-*P*-DIOXINS AND DIBENZOFURANS						
Tetrachlorodibenzo-*p*-dioxins [7]	0.0002	6.84	3,300,000	low	high	high.
Pentachlorodibenzo-*p*-dioxins [8]	0.0001	9.65	1,700,000	low	high	high.
Hexachlorodibenzo-*p*-dioxins [9]	0.000004	10.44	11,500,000	low	high	high.
Heptachlorodibenzo-*p*-dioxins [10]	0.000002	11.50	17,000,000	low	high	high.

[1] K_{ow} = Octanol-water partition coefficient; See Background Document for Data Sources.
[2] K_{oc} = Soil sorption coefficient. See Background Document for Data Sources.
[3] Qualitative relative evaluation of mobility and persistence, based on water solubility, log K_{ow}, and K_{oc}.
[4] Slightly contaminated medium represents a mismanagement scenario where release of hazardous constituents does not result in saturation of the underlying soil by organic hazardous constituents.
[5] Highly contaminated medium represents a mismanagement scenario where release of hazardous constituents results in saturation of the underlying soil by organic hazardous constituents.
[6] Solubility of pentachlorophenol is dependent on pH. Value indicated represents a pH of 4.74.
[7] Data based on properties of 2,3,6,7-Tetrachlorodibenzo-*p*-dioxin.
[8] Data based on properties of 1,2,3,4,7-Pentachlorodibenzo-*p*-dioxin.
[9] Data based on properties of 1,2,3,4,7,8-Hexachlorodibenzo-*p*-dioxin.
[10] Data based on properties of 1,2,3,4,6,7,8-Heptachlorodibenzo-*p*-dioxin.
Source: Background Document.

The subsurface transport of toxic constituents from their disposal site through the unsaturated soil zone to, and then within, ground water may take place by several mechanisms. The toxicants may exist as water soluble substances that are transported by advection (i.e., with the moving water phase), the least complex transport mechanism. Such aqueous-phase transport is believed to be the predominant mechanism for the metal constituents of wood preserving wastes.

A second mechanism for the transport of wood preserving wastes is migration in a discrete oil (or other nonaqueous solvent) phase. Subsurface investigations at many of the sites described in the damage cases (found in the docket supporting this listing) have revealed the presence of a discrete oil or creosote phase. These phases may exist as oil sludges, lenses, or a floating oil layer on the water table. Because the oil and creosote differ from ground water in their chemical and physical properties, including density, these nonaqueous phases may migrate in the subsurface independent of ground water flow. For example, dense materials will tend to migrate vertically through an aquifer until buoyancy is achieved or a vertical barrier is encountered. These materials may also migrate laterally faster or slower than the rate of ground water flow because of the effects of differing chemical and physical properties on attenuation mechanisms.

Investigations of many wood preserving facilities have revealed that toxic organic constituents of wood preserving wastes are present in ground water at concentrations that far exceed their solubility. For example, in seven out of eight measurements of heptachlorodibenzo-*p*-dioxins (HpCDDs) in ground water from three different facilities, the measured HpCDD concentration exceeded its reported solubility (0.002 ppb) by many orders of magnitude. The HpCDD concentration at one site was 4.2 ppb; at a second site, ground water collected at a depth interval of 62 to 155 feet below the surface contained 2.6 ppb of HpCCD.

The reported solubility of pentachlorophenol is 14 ppm. Ground water samples from five sites contained over 20 ppm of pentachlorophenol. The concentration at one site was 210 ppm. Although exact reasons for these phenomena are not fully understood, they are believed primarily to result from the oily nature of these wastes and solvent-assisted transport.

Creosote constituents have also been measured in ground water at concentrations above their solubilities. At one site, benz(a)anthracene and benzo(a)pyrene were all measured at concentrations about ten times their reported solubility (measured concentrations were 0.35 and 0.08 ppm, respectively). Again, this is believed primarily to be due to the oily nature of these wastes.

It should be stressed that these ground water samples did not contain a separate oil phase (contaminant concentrations in subsurface oil phases are, in general, much higher than those described above.) Clearly, the distinct aqueous phase and oil phase transport mechanisms do not fully explain the migration of toxic constituents of organic wood preserving wastes. The actual mechanism or mechanisms at work are not fully understood; hypotheses include transport of the organics as oil micelles (microdroplets) or emulsions suspended in water, transport of the organics sorbed onto humic acids or colloidal solids which are suspended in ground water, pH effects, and cosolvent effects, perhaps from lignins and terpenes that leach from wood during treatment. Although the exact transport mechanisms have not been fully elucidated, it is clear from available data that the toxic constituents in wood preserving wastes are highly mobile and can therefore

reach environmental receptors at hazardous concentrations.

The mobility parameters summarized in Table 15 distinguish between low- and high-contaminated soil medium. At low contamination levels, leaching of water soluble constituents from the waste to the ground water predominates with less water soluble constituents being adsorbed by the surrounding soil, or migrating through other less well-understood mechanisms. However, as the contamination level of the soil medium increases, the soil becomes saturated, eliminating further adsorption of the non-polar constituents and creating a separate organic phase. This organic phase dissolves the non-polar constituents and facilitates transport from the site.

The Agency considers a compound to be persistent if it persists in the environment long enough to be detected since, if a chemical can be detected in ground water, exposure to humans is possible. All the constituents of concern in waste streams, F032, F033, F034, F035 are adequately persistent to result in human exposure if they are released into ground water. The principal processes that limit the persistence (half-life) of chemicals in ground water are hydroloysis and biodegradation. None of the constituents are expected to hydrolyze in water between pH 2 and 12 at ambient temperature at a rate fast enough to be a factor in limiting human exposure. This is because none of the constituents of concern have structural components that would be expected to react with water under those conditions.

Biodegradation is probably the most important degradation mechanism for each of the organic constituents of concern. Under certain aerobic conditions (i.e., condition in which oxidizing microorganisms are capable of metabolism), organic hazardous constituents are expected to be biodegradable as shown under controlled laboratory conditions. Little is known, however, about the degradation of these compounds in the real world or in anaerobic environments. Under anaerobic conditions (i.e., those in which microorganisms capable only of oxidative metabolism, cannot survive), these compounds may persist for very long periods. In ground water therefore, where microbial life and oxygen are limited, to biodegradation of these constituents is expected to be slow or non-existent.

To substantiate the mobility and persistance of these compounds, over 100 cases of environmental contamination with wood preserving and surface protection wastes are described in the docket supporting this proposed rulemaking. Selected cases describing environmental contamination with pentachlorophenol, creosote, and inorganic wood preserving wastes and pentachlorophenate surface protection wastes are presented in an appendix to this preamble.

E. Basis for Designating F032 and F033 As Toxic (T) Rather Than Acute Hazardous (H)

EPA has previously listed wastes from the manufacture of pentachlorophenol—namely, F021 (wastes from the production or manfacturing use of pentachlorophenol, or of intermediates used to produce its derivatives) and F027 (discarded unused formulations containing tri-, tetra-, or pentachlorophenol or discarded unused formulations containing compounds derived from these chlorophenols)—as acute hazardous waste. EPA promulgated the listing for F021 and F027 on January 14, 1985 (see 50 FR 1978), as part of an action that involved listing seven different acute dioxin-containing wastes.

Today's action proposes to designate wastes from wood preserving and surface protection processes that use or may be contaminated with pentachlorophenol (F032 and F033, repectively) as toxic (T) rather than as acute hazardous (H) waste. EPA's decision to designate F032 and F033 as toxic is based primarily on new information regarding the toxicity of commerical pentachlorophenol products contaminated with concentrations of hexachlorodizbenzodioxin (HxCDD). This new information also may affect the Agency's basis for designating F021 and F027 as acute hazardous. Consequently, EPA may, in the future, consider changing the designation of F021 and F027 from acute hazardous to toxic. Any such action would be the subject of a separate rulemaking in the future. The agency is not soliciting comments on the basis for, or listing of, hazardous wastes F020 through F023, or F026 through F028 as part of this proposal, and will not respond to any comments received regarding these listings.

In the preamble that accompanied the January 14, 1985 rule, the Agency stated that "The principal basis for listing the pentachlorophenol wastes as acute hazardous is the presence of substantial concentrations of HxCDDs and HxCDFs (hexachlorodibenzofurans) * * *" (50 FR 1980). On the basis of the toxicity data available at the time of promulgation (i.e., that HxCDDs are about 4 percent as toxic as tetrachlorodibenzodioxins (TCDDs), equal in potency to Aflatoxin B1, and 1,000 times more potent than ethylene dibromide), EPA concluded that HxCDD is one of the most potent carcinogens ever identified by the Agency. The Agency concluded therefore, that "* * * because these wastes contain the potent carcinogen HxCDD at levels of regulatory concern, they meet the criteria of 40 CFR 261.11(a)(2), and are properly listed as acute hazardous wastes * * *" (50 FR 1982). In making this finding, the Agency relied on toxicity data for HxCDD, provided by a bioassay conducted by the National Cancer Institute in 1983 as a surrogate for the toxicity of mixtures of pentachlorophenol and HxCDD found in pentachlorophenol wastes.

In April of this year, the National Toxicology Program (NTP) released a draft report on the results of a study of the toxicity of purified and technical grade pentachlorophenol containing measured levels of HxCDD as well as other dioxin homologues in lower concentrations (McConnell, 1988). EPA's Carcinogen Assessment Group (CAG) has reviewed the NTP report, found the study to be valid according to its established criteria, and concluded that the data from the study are valid for use in calculating $Q1^*$ values for the mixtures studied.

The NTP draft report states that the purified pentachlorophenol tested was DOW EC–7 which contained 0.19 ppm HxCDD. The technical grade pentachlorophenol tested was a composite mixture of equal parts of products made by Monsanto, Reichhold, and Vulcan; it contained 10.1 ppm. HxCDD. The DOW EC–7 was also reported to contain tetrachlorodibenzodioxin at greater than 0.04 ppm, heptachlorodibenzodioxin at 0.53 ppm, octachlorodibenzodioxin at 0.69 ppm, heptachlorodibenzofuran at 0.13 ppm, and octachlorodibenzofuran at 0.15 ppm. NTP reported that the technical grade mixture contained the following additional dioxins and furans: Heptachlorodibenzodioxin at 296 ppm, octachlorodibenzodioxin at 1,386 ppm, pentachlorodibenzofuran at 1.4 ppm., hexachlorodibenzofuran at 9.9 ppm, heptachlorodibenzofuran at 88 ppm, and octachlorodibenzofuran at 43 ppm (McConnell, 1988).

The results of the study demonstrate that both grades of pentachlorophenol tested show significant increases in liver and kidney tumors in male B6C3F1 mice and increases in vascular tumors in female mice of the same strain. Using linear low dose extrapolation, a report completed for Vulcan Materials Co. in May of 1988 finds that, using the Crump

Global 86 Multistage Procedure, the purified pentachlorophenol exhibits a $Q1^*$ for humans of 0.245 (mg/kg/day)-1 and the technical grade pentachlorophenol exhibits a $Q1^*$ of 0.788 (mg/kg/day)-1 (Litt, 1988). These values are approximately four to five orders of magnitude lower than the $Q1^*$ of 11,000 (mg/kg/day)-1 for HxCDD calculated from the data in the NCI bioassay that served as EPA's basis for selecting HxCDD both as the basis for listing F021 and F027 and as the basis for designating F021 and F027 as acute hazardous waste.[3] The data also demonstrate that pentachlorophenol is itself carcinogenic.

Based on the recent data provided by NTP, EPA has concluded that the assumption that HxCDD can serve as a reasonable surrogate to indicate the toxicity of pentachlorophenol wastes may not be appropriate. The new data indicate that the purified and technical grades of pentachlorophenol (with concentrations of HxCDD and other dioxins and furans generally two orders of magnitude higher than the concentrations found in F032) exhibit significantly lower carcinogenic potentcy than EPA had anticipated when listing F021 and F027. Moreover, the $Q1^*$ values generated from the liver tumor data reported by NTP are comparable to, or lower than, those exhibited by the constituents of other wastes that have been listed as toxic hazardous waste by EPA. For example, five waste streams from the production of inorganic pigments (K002, K003, K004, K005, and K006) are listed for their Chromium VI content. EPA's CRAVE presently reports a $Q1^*$ for Chromium VI of 41 $(mg/kg/day)^{-1}$. EPA Hazardous Waste No. K019, heavy ends from the distillation of ethylene dichloride in its production, is listed for a number of carcinogenic chlorinated organic chemicals. The most potent of these, ethylene dichloride has a $Q1^*$ of 1.2 $(mg/kg/day)^{-1}$ for inhalation exposures and 0.6 $(mg/kg/day)^{-1}$ for oral exposures. As a third example, EPA Hazardous Waste No. K041 (wastewater treatment sludge from the production of toxaphene) is listed on the basis of its toxaphene concentration, which has an EPA CRAVE-calculated $Q1^*$ of 1.1 $(mg/kg/day)^{-1}$ (Ratcliff, 1988). All of these wastes are listed as toxic on the basis of carcinogens that are as potent as or more potent than the mixtures of pentachlorophenol studied by NTP.

Waste characterization data obtained by EPA for F032 wastes indicate that these wastes contain a median HxCDD concentration of 5,000 ppb (or 5 ppm), less than one-half the maximum concentration reported for the NTP composite. Other dioxin homologues, including tetrachlorodibenzodioxins, pentachlorodibenzodioxins, and heptachlorodibenzodioxins, are also typically present in F032 and F033 wastes at concentrations one to two orders of magnitude lower than the HxCDD concentrations. Pentachlorophenol concentrations in F032 and F033 wastes range from 0.01 ppm to 160,000 ppm (median: 80,000 ppm). EPA therefore believes it may be appropriate to assume that the toxicity of the mixtures tested by NTP is similar to the toxicity of F032 and F033 wastes. The Agency solicits comments on this assumption.

Although the NTP test mixtures differ from the typical make-up of F032 and F033 wastes, the concentrations of all of the dioxin homologues reported by NTP for their test materials are considerably higher than those documented for dioxin homologues in F032 and F033. Because the Agency has concluded that the new toxicity data indicate that mixtures of pentachlorophenol and dioxin homologues are dominated, in terms of their carcinogenic potency, by pentachlorophenol, EPA further concludes that a designation of toxic rather than acute hazardous is warranted for F032 and F033. Available data show that pentachlorophenol is likely to be the principal determinant of the relative toxicity of the waste. The cited references and further discussions of EPA's analyses appear in the docket.

In listing a waste as hazardous, EPA is not concerned solely with the toxicity of individual waste constituents. Rather, EPA must base listing decisions on a consideration of both the potential toxicity of a waste and the mobility and persistence of waste constituents (i.e., their probability of reaching environmental receptors in significant concentrations). The Agency does not now have data that demonstrate conclusively how pentachlorophenols or the dioxin and furan constituents of F032 and F033 would move in the environment and what their relative ground water concentrations would be in a representative environmental setting. EPA has noted, however, that considerable ground water contamination has been documented at wood preserving facilities. Data reviewed by EPA show that both the pentachlorophenol and the dioxin and furan constituents eventually migrate to the ground water. EPA believes that exposures to ground water consumed as drinking water contaminated with F032 or F033 wastes would involve simultaneous ingestion of pentachlorophenol, dioxins, and dibenzofurans at relative concentrations similar to those present in the waste. EPA solicits comment on this assumption. The Agency believes that the health risks associated with such exposures are best represented by the data from the NTP study.

EPA specifically requests comment on the appropriate designation of F032 and F033 as toxic rather than acute hazardous. Information received on this issue may result in the Agency reevaluating its proposal to designate F032 and F033 as toxic. Again, the Agency is not soliciting comment regarding existing F listings; ample opportunity for public comment concerning the appropriate designation of F021 and F027 will be provided if and when a proposal to change the designation is deemed appropriate.

F. Technical Standards for Drip Pads

The amendments proposed today include additional standards applicable to drip pads in treated wood storage yards and in kick back areas used in managing hazardous waste at wood preserving and surface protection facilities. These standards are intended to provide for proper handling of treated wood drippage.

At many wood preserving facilities, treated wood is stored in open, unpaved storage yards where excess preservative drips from the wood or is washed away by rain. The drippage and contaminated rainwater are often allowed to run onto the ground and may be collected in ditches or ponds, or they are allowed to run into nearby surface water, thereby contributing to soil, surface water, and ground-water contamination. The hazards posed by contamination from drippage that mixes with other wastes or is contained in rainwater result from this practice of allowing excess preservative to drip or wash from treated wood to the ground in wood storage yards and are part of the basis for including treated wood drippage in the proposed listings.

Available data show that considerable surface water, soil, and ground water contamination presently exists at wood preserving and surface protection-sites. These data show that soils and sediments from accumulated mixtures of drippage and waste or

[3] In its own evaluation of the NTP reports, EPA has calculated similar $Q1^*$ values using the data reported for liver tumors. EPA has also calculated $Q1^*$ values using the data for hemangiosarcomas reported by NTP and may determine that these data provide a more accurate estimate of the carcinogenicity of the two pentachlorophenol mixtures. EPA's calculations are available in the public docket for this rule.

rainwater may contain significant concentrations of the constituents of concern, including pentachlorophenol, PCDDs, and PCDFs. The data indicate that significant environmental contamination (and potential threat to human health and the environment) results where storage residuals (from drippage) from wood preserving and surface protection are allowed to accumulate in surface impoundments, ditches, or other collection units and they support EPA's decision to include drippage and drippage residual in the proposed listings.

Generators of F032, F033, and F035 drippage (and any water or wastes that become mixed with drippage) must manage it in accordance with Subtitle C requirements. Generators who dispose of drippage on the ground must conduct such disposal in accordance with Subtitle C requirements, including the prohibition on disposing liquids in landfills (see 40 CFR 264.314 and 265.314). Generators of treated wood drippage will therefore become owners and operators of hazardous waste treatment, storage, and/or disposal facilities subject to the 40 CFR Part 264 permitting standards, the 40 CFR Part 265 interim status standards, and associated standards for permit applications and other requirements. Under the existing Part 264 and 265 standards, generators may operate either tanks or land disposal units to manage their treated wood drippage. Today's proposal would add Part 264 permitting and Part 265 interim status standards for drip pads. In the event that drippage is collected and is moved from the drip pad within 90 days following generation, generators may avail themselves of the 90-day accumulation standards of 40 CFR 262.34, and would not need Part B permits for their drip pads or tanks (consistent with § 264.1(g)(3), 265.1(c)(7), and 270.1(c)(2)(i)) provided that they comply with the Part 265 standards, as required by 40 CFR 262.34.

EPA recognizes that, at some wood preserving facilities, concrete pads have been installed to route drippage in kick back and storage areas to collection areas or devices. EPA believes that most drip pads are constructed so that drippage runs off the pad, which is sloped, and collects in a sump or in some other depressed area (other than land) associated with (or part of) the pad. The drippage then accumulates in this collection area or device until removed for recycling, disposal, storage, or treatment.

These associated collection areas or devices generally will meet the definition of a hazardous waste storage tank (see 40 CFR 260.10) and are therefore subject to applicable standards under 40 CFR Parts 264 and 265 Subparts J. EPA does not believe, however, that the drip pads themselves meet the definition of a tank. These pads resemble floors, which are neither tanks nor "ancillary equipment" for tanks, and are not currently subject to regulation.

Because no management standards currently apply to drip pads, EPA is proposing to designate drip pads as a new hazardous waste management unit and to impose standards for the operation of these pads. EPA is thus proposing to add a definition to § 260.10 for drip pads at wood preserving and surface protection facilities and add to Part 264 technical permitting standards and Part 265 interim status standards for drip pads at wood preserving and surface protection facilities. EPA is also proposing amendments to the 90-day accumulator rule of § 262.34 that will allow generators who operate drip pads at wood preserving and surface protection facilities to operate their drip pads without obtaining a RCRA Part B permit, provided that they: (1) Remove collected drippage from the drip pad and associated collection area or device within 90 days following generation, (2) comply with the Part 264 technical standards for drip pads at wood preserving and surface protection facilities, (3) label or mark each drip pad with the words "Hazardous Waste", (4) mark each drip pad with the date on which accumulation began in a manner that is visible for inspection, and (5) comply with the requirements for 40 CFR Part 265, Subparts C and D and § 265.15 for preparedness and prevention, contingency plan and emergency procedures, and inspections. EPA does not solicit, and will not respond to, any comments regarding the basis for, scope, or applicability of the existing regulation at 40 CFR 262.34.

The proposed Part 264 technical standards specify design and operating requirements for drip pads at wood preserving and surface protection facilities. The standards include requirements for containment systems, inspections, and for preventing trackage of drippage from kick back, drip, and storage areas. The standards would also require that generators operating drip pads at wood preserving and surface protection facilities comply with all of the general requirements of Part 264 Subparts A through H. The specific technical requirements are discussed in detail later in this section.

1. Part 264 Technical Standards for Drip Pads (40 CFR Part 264, Subpart T)

The technical standards for drip pads have been designed to provide substantial protection, and resemble to a large degree the existing standards for hazards waste tanks. The drop pad standards add a novel requirement to prevent the tracking of hazardous waste off the pad by equipment or personnel. The standard for preventing tracking of waste off of drip pads is included because information available to EPA shows that tracking can cause soil contamination and may be a significant mechanism by which cross-contamination occurs at facilities that use more than one preservative at a single location. The Agency requests comment on all aspects of the proposed technical standards.

a. Requirements for containment systems (40 CFR 264.571). The proposed standards for drip pads at wood preserving and surface protection facilities require that drip pads be constructed of a curbed, impervious base (e.g., concrete) that is sloped or otherwise designed to drain accumulated liquids resulting from drippage and precipitation. Drip pads and associated collection areas or devices (systems) that are exposed to rain must have sufficient capacity to contain the water from a 25-year/24-hour storm event. The pad must also be surrounded by a dike or berm to prevent water from running onto it. Accumulated materials must be removed from the associated collection system at intervals sufficient to prevent overflow onto the drip pad. The standards for containment systems further require that drip pads be maintained in good condition (i.e., without cracks or visible signs of leakage). Any pad that is visibly cracked or otherwise not capable of containing drippage must be repaired or promptly removed from service.

b. General operating requirement (40 CFR 264.572). In order to prevent hazardous waste or hazardous constituents from being tracked from treated wood drip pads, the proposed standards include a general operating requirement which specifies that drip pads must be operated and maintained such that tracking of drippage off-site is prevented. To comply with this requirement, generators must have equipment (e.g., forklifts, tram cars, etc.) that is dedicated for use on each drip pad and that does not leave the pad. Personnel working on drip pads should decontaminate any clothing or shoes before they are taken off a drip pad site. During the course of EPA's data and

information collection activities to support this proposal, Agency personnel received descriptions of and observed wood preserving facilities that have already initiated such practices in order to prevent releases of wood preserving chemicals (This information is available in the docket for this rulemaking). The Agency therefore anticipates that many wood preserving facilities are already using practices that meet this requirement.

c. Inspection requirements (40 CFR 264.573). Today's proposed standards for drip pads require that owners and operators inspect their drip pads at least weekly for signs of cracking or deterioration that could lead to releases of hazardous waste. The inspection standard specifies that the entire surface of all drip pads be inspected weekly. This requirement is intended to ensure that portions of the drip pad that are covered by treated wood for extended periods of time are inspected regularly for signs of deterioration. At facilities where treated wood is held for more than one week, owners and operators may need to move wood periodically so that all parts of the drip pad can be inspected on schedule. Under the general requirements of Part 264, owners and operators would also be required to maintain records of their inspections.

d. Closure requirements (40 CFR 264.574). At closure, owners and operators of drip pads would be required to remove all hazardous waste and hazardous waste residues from the drip pad. The base and any contaminated soil would also have to be decontaminated at closure.

2. Part 265 Interim Status Standards (40 CFR Part 265, Subpart T)

The interim status standards for drip pads at wood preserving and surface protection facilities include all of the same requirements as the proposed Part 264 standards.

G. Equipment Cleaning or Replacement Standards for Wood Preserving and Surface Protection Facilities

1. Applicability

As stated previously, documented cases of cross-contamination following a changeover of wood preserving or surface protection formulations require that both past and current use of a formulation be included in the listing descriptions. The Agency realizes that generators can take measures following a changeover of formulation to abate cross-contamination. Consequently, the Agency is proposing equipment cleaning and replacement procedures that, if adhered to, would cause waste at these facilities generated in processes that do not use chlorophenolic formulations to no longer meet the listing description of F032. Such wastes, however, may meet the description of the other wood preserving hazardous waste listings, such as F034 or F035 or exhibit one or more of the hazardous waste characteristics. Further, equipment cleaning or replacement procedures apply to facilities engaged in surface protection processes that currently use or previously used chlorophenolics. Once the procedures are adhered to, wastes from processes that do not use chlorophenolics would no longer meet the listing description of F033. Consequently, these wastes would only be regulated under Subtitle C of RCRA if they exhibit one or more of the characteristics of hazardous waste. Generators should note that the wastes generated from equipment cleaning and replacement, pursuant to this section, must be treated as listed F032 or F033 waste.

EPA believes that the cleaning procedures are necessary in order to allow wastes known not to contain PCDDs and PCOFs to be handled in accordance with their potential hazard. The Agency is concerned with these wastes in particular, because of the small number of permitted and interim status facilities (and hence low capacity) able to receive dioxin-containing wastes. The existing capacity shortage and the reported tendency of hazardous waste handlers to turn away any hazardous waste that may contain chlorinated dioxins, regardless of its regulatory status under RCRA, has raised concerns about growing quantities of waste for which there may be no viable treatment or disposal option. EPA is proposing the equipment cleaning and replacement standards for generators of F032 and F033 wastes as one measure that can be taken to avoid exacerbating the existing capacity shortage. Today's proposal does not include provisions for equipment cleaning and replacement to alleviate cross-contamination between creosote and inorganic preservative processes because the hazardous constituents of F034 and F035 do not raise the same concerns. F034 and F035 thus are listed by process rather than by facility. EPA solicits comment however, concerning the potential benefits of a facility-based listing description for F034 and F035 and of applying the equipment cleaning and replacement provisions to such listings.

2. Equipment Cleaning or Replacement Performance Standard

The performance standards require that the owner or operator of the facility must clean or replace all equipment that may have come into contact with chlorophenolic formulations or constituents originally present in the formulations. This must be done in a manner that eliminates the release of hazardous waste, hazardous constituents, leachate, or hazardous waste decomposition products from prior use of chlorophenolics to the environment (as detailed in the cleaning and replacement requirements). If equipment cleaning and replacement procedures have been completed satisfactorily, it can be demonstrated that the wastes generated will no longer meet the listing description of F032 or F033 because there will be no cross-contamination from the previous use of chlorophenolics.

3. Equipment Cleaning or Replacement Requirements

Generators must follow the equipment cleaning or replacement standard according to a plan written by the generator or his representative. Once the plan is carried out, it must be signed by the generator and a copy of the certified plan must be submitted to the Regional Administrator along with other information, as explained below.

The plan must stipulate methods to remove all visible residues from equipment including, but not limited to, sumps, tanks, piping systems, drip pads, forklifts, and trams. Further, the plan must detail the use of solvent rinsing to remove non-visible contaminants. Rinsing must continue until no chlorophenolics or dioxins are detected in the final rinse using the testing method required. Alternatively, the plan may describe methods to replace all the process equipment that may have come into contact with chlorophenolic formulations. The standard requires that all residues from the cleaning operations and all discarded equipment that has not been decontaminated must be handled as either F032 or F033 depending upon the type of process for which the equipment was used.

4. Previous Equipment Cleaning or Replacement Provision

If it can be documented that pervious equipment or replacement procedures have been conducted, and that they meet the proposed standards of § 261.35, this information, verified by the owner or operator, may be used to fulfill the equipment cleaning or replacement requirements. If this alternative is used, the generator must document (by providing records of all the formulations and existing processes used on-site) that no further cross-contamination could

have occurred following the cleaning or replacement. Further, generators must submit documentation of prior equipment cleaning or replacement and continued use of non-chlorophenolic formulations to the EPA Regional Administrator, along with a certification of its authenticity, and must receive the Regional Administrator's written approval before the generator can be considered to have complied with the equipment cleaning and replacement standards and the wastes can be considered to no longer meet the listing discription of F032 or F033. The Regional Administrator will review the information submitted to determine whether all necessary equipment has been cleaned or replaced and that cleaning has been verified through adequate and appropriate testing, as required by § 261.35.

5. Testing Requirement

The procedure also specifies certain testing and recordkeeping requirements. Following equipment cleaning, SW–846 Method 8290 must be used to analyze for dioxins and dibenzofurans (Method 8290 has been proposed for addition to SW–846 but has not been added in final form. EPA expects that Method 8290 will be final before this proposed rule becomes effective. A description of Method 8290 is available in the docket for this rule). Once the contaminants are no longer detected in the solvent rinse using these methods, the equipment is judged clean and the equipment cleaning or replacement standard has been met.

6. Notification, Review, and Approval

Generators intending to use the equipment cleaning or replacement procedures so that their wastes will not meet the F032 or F033 listing decription must submit a notification of their intent to clean and replace equipment to the Regional Administrator 30 days before cleaning and replacement activities commence. Within 30 days following completion of equipment cleaning and replacement activities, generators must submit copies of all records and the cleaning and replacement plan together with a signed certification to the Regional Administrator. Under the proposed rule, the Regional Administrator will review all documentation provided and make a determination concerning whether the generator has fully complied with the equipment cleaning and replacement standards.

In the event that the Regional Administrator notifies the generator of a tentative determination that the requirements for equipment cleaning and replacement have not been met, the generator will be allowed 30 days to provide any additional information that would support a change in the determination. After receipt of any additional information, the Regional Administrator must notify the generator of the final determination within 30 days. A determination that all equipment cleaning and replacement requirements have been met becomes effective immediately and the subject wastes would then no longer meet the listing description of F032 or F033, provided that the generator does not resume or initiate use of chlorophenolic formulations. They may, however, continue to be RCRA hazardous waste either because they meet other listing descriptions (e.g., F034 or F035) or because they exhibit one or more of the characteristics of hazardous waste.

H. Test Methods for Compounds Added to Appendices VII and VIII of 40 CFR Part 261

In order to analyze for the constituents of concern present in today's proposed listed wastes, appropriate analytical procedures must be specified. Tables 1 and 2, in 40 CFR Part 261, Apendix III list the analytical methods authorized by the Agency for organic and inorganic compounds. These procedures are described in EPA Publication SW–846: "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," (U.S. EPA, 1986), a copy of which is included in the docket for this proposal. The detection limits required for these analyses are those specified by SW–846.

The majority of the wood preserving and surface protection constituents of concern already have analytical methods assigned to them in Part 261. Today's proposal will add benzo(d)fluoranthene to Appendix III. Benzo(k)-fluoranthene can be analyzed for using method numbers 8100, 8250, 8270, or 8310.

Today's proposal also adds heptachlorodibenzo-*p*-dioxins and heptachlorodibenzofurans to the list of hazardous constituents of 40 CFR Part 261, Appendix VIII. These two chemicals belong to the family of PCDDs and PCDFs already listed in Appendix III. Method 8290, listed on Appendix III as the method of analysis for PCDDs and PCDFs, should be used to analyze for heptachlorodibenzo-*p*-dioxins and heptachlorodibenzofurans. EPA notes that Method 8290 has been proposed for addition to SW–846. EPA expects that the method will be added in final form before the effective date of this proposed rule. A description of Method 8290 is available in the docket for this proposed rule.

The test methods are designed for use in detecting specified substances by applicants who wish to conduct waste evaluations in support of delisting petitions (40 CFR 260.22), and by owners or operators of hazardous waste management facilities who must conduct ground water or incinerator monitoring (See, e.g., 40 CFR 264.99 and 264.341).

I. Applicability of RCRA Rules for Recycled or Reclaimed Hazardous Waste

EPA recognizes that certain wastes from wood preserving and surface protection processes are recycled or reused at the generating site. For example, information on waste management practices collected by EPA shows that drippage from wood preserving, particularly drippage collected in kick-back areas, is often recycled back to the process. Wastewaters generated by inorganic wood preserving processes also are commonly recycled on-site by return them to the process.

Secondary materials that are used or reused directly either as a feedstock or as an effective substitute for commercial chemical products are also not considered to be solid wastes provided that the reuse is not use constituting disposal or use as a fuel (See 50 FR 665, January 4, 1985).

On January 8, 1988, EPA proposed amendments to the Definition of Solid Waste (see 53 FR 519) regarding regulation of recycled materials under Subtitle C or RCRA. These proposed amendments constituted EPA's response to a ruling made by a panel of the District of Columbia Circuit Court of Appeals in the matter of *American Mining Congress v. EPA*, 824 F.2d 1177 (DC Cir. 1987). The amendments propose to exclude from being solid wastes certain in-process recycled materials from the petroleum refining industry and certain other sludges, by-products, and spent materials that are reclaimed as part of continuous, on-going manufacturing processes. Under the proposed amendment, secondary materials that are reclaimed and returned to the original processes in which they were generated are excluded from Subtitle C regulation if any storage that occurs before recycling takes place in tanks and the return process takes place through a "closed loop" that is "* * * entirely connected with pipes or other comparable enclosed means of conveyance" (see 53 FR 529).

Information available to EPA regarding the manner in which process residuals are reclaimed in wood

preserving and surface protection processes indicates that these materials are not typically reused directly. In addition, recycling does not take place in closed-loop systems of the type anticipated by the proposed amendment. EPA therefore believes that most on-site recycling at wood preserving and surface protection facilities would not quality for either the existing or the proposed exclusion.

Generators should note that, under 40 CRF 261.6 (b) and (c), any recyclable materials that are hazardous waste are subject to the applicable requirements of Parts 262 and 263 (standards for generators and transporters of hazardous wastes, respectively). Storage of recyclable materials also is subject to all of the applicable requirements of Part 264, and generators are required to comply with the notification requirements of section 3010 of RCRA and the requirements of 40 CFR 265.71 and 265.72 for use of the manifest and manifest discrepancies. While generation, storage, and transportation of recyclable materials are regulated the same as other hazardous waste, the actual recycling process does not need a RCRA permit.

Additionally, EPA has previously promulgated regulations for recyclable materials that are used in a manner constituting disposal (see 40 CFR 266.20 through 266.23) and standards for hazardous waste burned for energy recovery (see 40 CFR 266.30 through 266.35). Generators should note that, to the extent that the wastes proposed for listing today are recycled in ways that constitute disposal or are burned for energy recovery in boilers or industrial furnaces that are exempt from regulation under Subpart O of Part 264, the appropriate standards of Part 266 apply.

III. State Authority

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (See 40 CFR Part 271 for the standards and requirements for authorization.) Following authorization, EPA retains enforcement authority under sections 3008, 7003 and 3013 of RCRA, although authorized States have primary enforcement responsibility.

Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in the State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in the State which the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law, however.

In contrast, under section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by the HSWA take effect in authorized States at the time that they take effect in nonauthorized States. EPA is directed to carry out those requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, the HSWA applies in authorized States in the interim.

Certain portions of today's rule are proposed pursuant to section 3001(e) of RCRA, a provision added by HSWA. Therefore, the Agency is proposing to add these requirements to Table 1 in 40 CFR 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA and that take effect in all States, regardless of their authorization status. States may apply for either interim or final authorization for the HSWA provisions identified in Table 1, as discussed in the following section of this preamble.

B. Effect on State Authorization

As noted previously, certain portions of today's rule are being proposed pursuant to provisions added by HSWA, while others are being proposed pursuant to pre-HSWA authority. The addition of F032 and F033 to the list of hazardous wastes from non-specific sources and the equipment cleaning and replacement standards for F032 and F033 wastes are proposed pursuant to section 3001(e) of RCRA, a provision added by HSWA. These standard will therefore take effect in all States (authorized and non-authorized) on the effective date. Permitting and interim status drip pad standards associated with F032 and F033 wastes will take effect on the effective date pursuant to 40 CFR 264.1(f)(2) and proposed § 265.1(c)(4)(iii) (see below). The addition of F034 and F035 to the list of hazardous wastes from non-specific sources and the addition of test methods to Appendix III of Part 261 are not immediately effective in authorized States since the requirements are not pursuant to the HSWA. The permitting and interim status standards for drip pads associated with F034 and F035 wastes will therefore only become effective in authorized States when F034 and F035 become hazardous waste in each authorized State and when the State is authorized for the drip pad standards.

1. HSWA Provisions

As noted above, EPA will implement the addition of F032 and F033 to the list of hazardous wastes from non-specific sources (and the standards for equipment cleaning and replacement) in authorized States until the States modify their programs to adopt these rules and the modification is approved by EPA. Because this portion of the rule is proposed pursuant to HSWA, a State submitting a program modification may apply to receive either interim or final authorization under section 3006(g)(2) or 3006(b), respectively, on the basis of requirements that are substantially equivalent to or equivalent to EPA's. The procedures and schedule for State program modifications for either interim or final authorization are described in 40 CFR 271.21. It should be noted that all HSWA interim authorizations will expire January 1, 1993 (see § 271.24(c)).

40 CFR 271.21(e) requires that States having final authorization must modify their programs to reflect Federal program changes, and must subsequently submit the modifications to EPA for approval. The deadline by which States must modify their programs to adopt this proposed regulation will be determined by the date of promulgation of the final rule in accordance with § 271.21(e)(2). Once EPA approves the modification, the State requirements become Subtitle C RCRA requirements.

States with authorized RCRA programs may already have requirements similar to those proposed in today's rule. Such State regulations have not been assessed against the Federal regulations being proposed today to determine whether they meet the tests for authorization. Thus, a State is not authorized to implement their regulations as RCRA requirements until the State program modification is submitted to EPA and approved. Of course, States with existing standards may continue to administer and enforce their standards as a matter of State law. In implementing the Federal program, EPA will work with States under cooperative agreements to minimize duplication of efforts. In many cases, EPA will be able to defer to the States in

their efforts to implement their programs rather than take separate actions under Federal authority.

States that submit their official applications for final authorization less than 12 months after the effective date of these standards are not required to include standards equivalent to these standards in their application. However, States must modify their programs by the deadlines set forth in § 271.21(e). States that submit official applications for final authorization 12 months after the effective date of these standards must include standards equivalent to these standards in their application. 40 CFR 271.3 sets forth the requirements States must meet when submitting final authorization applications.

2. Non-HSWA Provisions

Other portions of today's proposed rule will not be effective in authorized States since the requirements will not be imposed pursuant to the Hazardous and Solid Waste Amendments of 1984. These portions include the addition of F034 and F035 to the list of wastes from non-specific sources, the permitting and interim standards for drip pads that handle F034 and F035 wastes, and the addition of test methods to 40 CFR Part 261, Appendix III. Just these requirements will be applicable in those States that do not have interim or final authorization. In authorized States, these requirements will not be applicable until the States revise their programs to adopt equivalent requirements under State law.

40 CFR 271.21(e)(2) requires that States that have final authorization must modify their programs to reflect Federal program changes and must subsequently submit the modifications to EPA for approval. The deadline by which the States must modify their programs to adopt this proposed regulation will be determined by the date of promulgation of the final rule in accordance with § 271.21(e). Once EPA approves the modification, the State requirements become Subtitle C RCRA requirements.

States with authorized RCRA programs may already have requirements similar to those proposed in today's rule. These State regulations have not been assessed against the Federal regulations being proposed today to determine whether they meet the tests for authorization. Thus, States are not authorized to carry out their regulations as RCRA requirements until State program modifications are submitted to EPA and approved. Of course, States with existing standards may continue to administer and enforce their standards as a matter of State law.

States that submit their official application for final authorization less than 12 months after the effective date of these standards are not required to include standards equivalent to these standards in their application. However, States must modify their programs by the deadlines set forth in § 271.21(e). States that submit official applications for final authorization 12 months after the effective date of those standards must include standards equivalent to these standards in their applications. 40 CFR 271.3 sets forth the requirements States must meet when submitting final authorization applications.

3. Special Provision for Drip Pad Standards Applicable to F032 and F033

Under 40 CFR 264.1(f)(2), EPA may issue permits in authorized States if the subject regulated unit was not regulated under RCRA at the time of the State's authorization and the standards for permitting the unit were promulgated after the State received final authorization. At the time that today's rule is promulgated, EPA will therefore, under 40 CFR 264.1(f)(2), issue permits for drip pads used in association with F032 and F033 wastes in authorized States.

Similarly, EPA is proposing to add § 265.1(c)(4)(iii) to be able to impose Federal interim status standards on drip pads that handle F032 and F033 wastes. This section, which is an exact corollary to § 264.1(f)(2), would subject to interim status standards a waste listed under HSWA and therefore hazardous within the State until the State becomes authorized for the listed waste and for the management standards.

The standards for drip pads as they apply to F032 and F033 thus will become applicable in both authorized and unauthorized States upon promulgation. EPA will not implement the standards for permitting drip pads as they apply to F034 and F035 wastes in authorized States. These standards will become effective in authorized States when the State modifies its program in accordance with 40 CFR 271.21(e), presumably at the same time as the F034 and F035 listing become applicable in authorized States.

IV. CERCLA Designation and Reportable Quantities Adjustment

The wastes proposed to be listed as hazardous in today's notice will, on the effective date of the final rule, automatically become hazardous substances under section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. CERCLA section 103(a) requires that persons in charge of vessels or facilities from which a hazardous substance has been released in a quantity that is equal to or greater than its reportable quantity (RQ) immediately notify the National Response Center (at (800) 424–8802 or at (202) 426–2675) of the release.

Under section 102(b) of CERCLA, new RCRA hazardous waste listings with constituents that have not been previously designated as hazardous under CERCLA have the statutorily-imposed RQ of 1 pound unless or until adjusted by regulation. In order to coordinate the RCRA and CERCLA rulemakings with respect to new waste listing, the Agency today is proposing regulatory amendments under CERCLA authority in connection with the proposed listing of wastes F032, F033, F034, and F035. The Agency is jointly proposing with the waste listings to: (1) Designate wastes F032, F033, F034, and F035 as hazardous substances under section 102(a) of CERCLA; and (2) adjust the RQs of wastes F032, F033, F034, and F035 based on the application of a proposed RQ adjustment methodology.

The Agency is proposing adjustments from the statutory RQs established under CERCLA section 102 based upon the adjustment methodology described in previous final rules (50 FR 13456 (April 4, 1985), and 51 FR 34534 (September 29, 1986)) and a proposed rule (52 FR 8140, March 16, 1987). The proposed RQs for newly listed hazardous wastes are based on the RQs of the hazardous constituents of the newly listed hazardous wastes identified under RCRA. Thus, if a newly listed hazardous waste has only one constituent of concern, and that constituent is a CERCLA hazardous substance, the waste will have a proposed RQ that is the same as the RQ for the constituent (whether statutory or finally adjusted). If the hazardous waste has more than one constituent of concern and all constituents are CERCLA hazardous substances, the lowest RQ assigned to any of the constituents will be the proposed RQ for the hazardous waste.

If the waste has both CERCLA and non-CERCLA constituents, the proposed RQ for the waste will be the lowest RQ of any of the constituents. The non-CERCLA constituents will be evaluated and given an RQ value for the purpose of adjusting the RQ of the hazardous waste (however, constituents cannot be assigned RQs until they are designated as CERCLA hazardous substances). If the RQ value for any of the non-CERCLA constituents is lower than the RQ values for the CERCLA constituents, the waste will be proposed for

adjustment at this lower level. If the waste has only non-CERCLA constituents the RQ will be proposed for adjustment at the level of the lowest RQ value of any constituent.

EPA has previously adjusted RQs for wastes on the basis of hazardous constituents that are not CERCLA hazardous substances by attributing an RQ to such constituents in order to assign an appropriate RQ to the waste stream (see 48 FR 23565, May 25, 1983). In other words, the Agency derives the RQ for a waste stream based upon the lowest RQ of all of the hazadous constituents known to be in the waste, regardless of whether the constituents are CERCLA hazardous substances. EPA is proposing to use this adjustment methodology for the wastes proposed for listing today. The "RQ" developed for non-CERCLA substances is used for ranking purposes only; no releases of such constituents need be reported to the National Response Center.

The proposed RQs apply to the waste streams, not just to the CERCLA hazardous substances. CERCLA does not require persons in charge of vessels or facilities to analyze wastes to determine the concentrations of individual hazardous constituents in a mixture; however, if a person has completely analyzed the waste and determines that the amount released of each constituent is below its respective RQ, no notification is required (see 40 CFR 302.6(b)). (See also 50 FR 13463 dealing with mixtures of hazardous substances.) This does not mean that the hazardous waste stream will have an RQ other than the one listed on Table 302.4 of 40 CFR Part 302 for that hazardous waste stream. This has been a source of confusion for the regulated community and will be clarified in future rulemakings.

Table 16 lists the proposed RQs for hazardous wastes that are proposed to be designated as CERCLA hazardous substances as well as the RQs for each hazardous constituent of the hazardous wastes. Hazardous waste streams F032, F034, and F035 contain constituents with RQs of 1 pound. Therefore, the proposed RQ for each of these hazardous wastes is 1 pound. For hazardous waste stream F033, the lowest RQ for a constituent with an established RQ is 10 pounds. Therefore, the proposed RQ for waste stream F033 is 10 pounds.

TABLE 16.—PROPOSED RQS FOR CERCLA HAZARDOUS SUBSTANCES

Hazardous substance	Constituent	RQ (lbs)	Future final RQ (lbs)
Waste No. F032.		1	
	Arsenic	1	1
	Benz (a) anthracene	1	10
	Benzo (a) pyrene	1	1
	Chromium	1	5,000
	Dibenz (a,h) anthracene.	1	1
	Indeno (1,2,3-cd) pyrene.	1	100
	Lead	1	100
	Naphthalene	100	
	Pentachlorophenol	10	10
	Phenol	1,000	
	Tetrachlorodibenzo-p-dioxins.	**	
	Pentachlorodibenzo-p-dioxins.	**	
	Hexachlorodibenzo-p-dioxins.	**	
	Heptacholorodibenzo-p-dioxins.	**	
	Tetrachlorodibenzofurans.	**	
	Pentachlorodibenzofurans.	**	
	Hexachlorodibenzofurans.	**	
	Heptachlorodibenzofurans.	**	
Waste No. F033.		10	
	Pentachlorophenol	10	10
	2,3,4,6-Tetrachlorophenol.	10	
	2,4,6-Trichlorophenol	10	10
	Tetrachlorodibenzo-P-dioxins.	**	
	Pentachlorodibenzo-p-dioxins.	**	
	Hexachlorodibenzo-p-dioxins.	**	
	Heptachlorodibenzo-p-dioxins.	**	
	Tetrachlorodibenzofurans.	**	
	Pentachlorodibenzofurans.	**	
	Hexachlorodibenzofurans.	**	
	Heptachlorodibenzofurans.	**	
Waste No. F034.		1	
	Arsenic	1	1
	Benz (a) anthracene	1	10
	Benzo (k) fluoranthene	1	5,000
	Benzo (a) pyrene	1	1
	Biphenyls	**	
	Chromium	1	5,000
	Dibenz (a,h) anthracene.	1	1
	Indeno (1,2,3-cd) pyrene.	1	100
	Lead	1	100
	Naphthalene	100	
Waste No. F035.		1	
	Arsenic	1	1
	Chromium	1	5,000
	Lead	1	100

** indicates that no RQ is being assigned to the generic broad class.

The Agency notes that only the proposed RQs for the waste streams are open to comment. Consequently, the Agency is not soliciting comments on the RQs for the constituents of concern, nor will it respond to any such comments received.

Each hazardous waste having the characteristics identified under or listed pursuant to section 3001 of RCRA meets the statutory definition of a hazardous substance contained in CERCLA section 101(14). Under CERCLA section 102(a), the EPA Administrator has the authority to designate as a CERCLA hazardous substance any substance referred to in section 101(14). In order to clarify that the RCRA hazardous wastes proposed to be listed in today's rule are subject to CERCLA authority, EPA also proposes to designate hazardous wastes F032, F033, F034, and F035 as hazardous substances under CERCLA section 102(a).

V. Compliance Cost and Economic Impact Analysis

Executive Order No. 12291 requires EPA to prepare an analysis of the costs and economic impacts associated with a proposed regulation. The results of this analysis are used to determine whether the regulation will result in: (1) Incremental annual costs that exceed $100 million, (2) significant increases in costs or prices for consumers or individual industries, or (3) significant adverse effects on competition, employment, investment, innovation, or international trade. If a proposed rule meets any of these criteria, it is a "major rule," as defined by Executive Order No. 12291 and a Regulatory Impact Analysis must be completed before the rule is promulgated.

Today's proposed regulation is not a "major" rule because it will not have an annual economic effect of more than $100 million. This section of the preamble discusses the results of the cost and economic impact analyses undertaken to assess the effects of the proposed rule (DPRA Inc., 1988b). The draft Cost and Economic Impact

Analysis is available in the public docket for this proposal.

A. Description of Affected Population

1. The Wood Preserving Industry

Those facilities in the wood preserving industry that use chlorophenolic formulations, creosote formulations, or inorganic formulations containing arsenic and/or chromium are subject to the proposed rule. The wood preserving industry produces about 380 million cubic feet of preserved wood per year. Approximately 70 percent of the wood preserving production is treated with arsenical compounds; the balance is treated with creosote (21 percent) and pentachlorophenol (9 percent).

In 1985, 567 plants produced preserved wood in the U.S. The American Wood Preservers Institute reports that 14 additional plants have come into operation since 1985. Approximately 60 percent of all wood preserving plants are located in the southeast and southcentral portions of the U.S. These plants account for 64 percent of annual U.S. production. Most plants that treat with creosote and/or pentachlorophenol are more than 25 years old; several operating plants are more than 75 years old. The use of inorganic preservatives is presently increasing and, as a result, most new wood preserving plants are CCA plants. Facilities that treat with inorganic preservatives exclusively are, on average 10 years old.

2. The Surface Protection Industry

The surface protection industry consists of approximately 6,000 sawmills. EPA estimates that approximately 1,500 sawmills have used sodium pentachlorophenate to control sapstain; these facilities are subject to the proposed rule. Of these 1,500 sawmills, the Agency estimates that approximately 250 to 300 sawmills currently use chlorophenolic solutions to control sapstain. Sapstain control (surface protection) can also be accomplished using: (1) Water storage of logs, (2) rapid processing of sawn lumber and kiln-drying, or (3) use of chemicals other than sodium pentachlorophenate. Surface protection facilities that have never used chlorophenolic solutions are not subject to the proposed rule.

B. Regulatory Assumptions Used in this Analysis

As described previously, today's proposed rule would add four wastes from the wood preserving and surface protection industries to the list of hazardous wastes from non-specific sources. Each of the hazardous waste listings identifies four components: wastewaters, process residuals, preservative drippage, and discarded spent preservative formulations. Specific practices required for each component under the proposed rule are discussed below. These required practices form the regulatory basis for compliance cost and economic impact analysis.

1. Compliance Practices that Contribute to Incremental Costs

As a result of the proposed rule, generators of F032, F033, F034, and F035 wastes will be required to collect and manage treated wood drippage. Generators may choose to use tanks or surface impoundments, as well as drip pads to manage drippage wherever it is generated at wood preserving and surface protection facilities, including kick-back areas and treated wood storage yards. EPA believes that because many wood preserving and surface protection plants have drip pads in kick-back areas and some have installed or are installing drip pads in treated wood storage yards, most generators will choose to maintain drip pads throughout their facilities. Drip pads are likely to be concrete pads. They must have berms that effectively prevent off-site migration of drippage and drippage residuals. Drip pads will likely have drainage systems with a sump for collecting drippage and runoff mixed with drippage. Drippage will be managed either by being disposed of or by being recycled.

Process residuals from plants using creosote and inorganic preservatives are assumed to be disposed of and managed in permitted RCRA facilities. Process residuals from facilities using pentachlorophenol are assumed to be incinerated in permitted RCRA incinerators.

Unlike wood preserving facilities, surface protection facilities may switch to alternative chemicals that are not hazardous to comply with the proposed rule, and thereby avoid all compliance costs except the cost of decontaminating their facilities and the incremental cost (if any) of using alternative methods to achieve sapstain control. Surface protection facilities that continue to use sodium pentachlorophenate or choose not to comply with the equipment cleaning and replacement standards must manage process residuals as Subtitle C hazardous wastes.

Surface protection facilities that do not currently use chlorophenolic solutions, but have used sodium pentachlorophenate in the past, will be required to decontaminate their facilities to prevent contamination of sawed wood, production equipment, and wastes with pentachlorophenate residuals, or manage their waste in accordance with Subtitle C requirements. This analysis assumes that decontamination will be accomplished by solvent rinsing until no dioxins or dibenzofurans are detectable.

Wood preserving and surface protection facilities that continue to produce wastes subject to the proposed rule, but that do not already have RCRA permits, will be required to obtain them. The Agency has only identified 25 wood preserving facilities that do not already have a RCRA permit or that will be required to obtain a permit and to comply, for the first time, with interim status standards. Because RCRA-permitted and interim status facilities are subject to corrective action standards, these newly permitted facilities will be subject to corrective action as a result of the proposed rule. Accordingly, the potential cost of corretive action for these facilities is attributed to the proposed rule. However, corrective action costs for those wood preserving facilities that are already permitted or subject to interim status standards are attributable to the corrective action regulations, and not to this rule.

2. Compliance Practices That Do Not Contribute to Incremental Costs

Some of the wastes defined in today's proposed rule are already regulated as characteristic hazardous waste under RCRA. Further, many of the facilities affected by today's proposal may already generate EPA waste K001. Because wood preserving and surface protection plants with these wastes already manage their wastes in regular units, this analysis does not include the costs associated with regulating these types of wastes under the proposed rule.

For example, the majority of wastewaters generated by wood preserving plants using creosote and pentachlorophenol are co-managed with K001 wastes in permitted RCRA units. Wastewaters from plants using only inorganic formulations are generally recycled with zero discharge. Generation of discarded spent preservative formulation is negligible for all segements of the wood preserving industry. Accordingly, this analysis did not include the incremental costs and benefits of managing these wood preserving waste stream components as hazardous wastes.

Surface protection facilities that currently use chlorophenolic solutions can curtail generation of listed wastes by switching to alternate chemicals or

methods of sapstain control and complying with the standards for equipment cleaning and replacement. This analysis assumes that affected surface protection plants will decontaminate their equipment and switch to didecyl dimethyl ammonium chloride (DDAC), residuals of which are not regulated as hazardous waste. Another option would be to replace contaminated equipment. Because the cost of decontamination is likely to be less than equipment replacement, this analysis assumes that in general, generators will prefer equipment decontamination to replacement.

C. Costs and Economic Impacts

The cost and economic impact analysis has three components: (1) Estimation of compliance costs for model facilities that represent the affected industry; (2) estimation of national costs of the proposed rule on the basis of model facility costs; and (3) an assessment of effects on prices, employment, and the regulated industries.

1. Facility Costs of Compliance

Facility costs were estimated using a three-step process. First, "model" small, medium, and large facilities were developed to represent segments of the industry expected to have different compliance costs. Criteria for small, medium, and large facilities were developed based on the distribution of firms by size (i.e., by numbers of employees) and the size at which the adverse economic impacts appear to rise and fall substantially. Small facilities were defined to be those having fewer than 10 employees; medium facilities were defined as those having more than 10 and fewer than 20 employees; and large facilities were defined as those having more than 20 employees. The model facilities are described in detail in the draft Cost and Economic Impact Analysis. In the second step of the analysis, compliance activities were determined for each of the model facilities and engineering estimates were prepared for each activity. Finally, in the third step of the analysis, the resources required to pay for the compliance practices resulting from the proposed rule were estimated.

Individual facility compliance costs were estimated based on an analysis of the cash flow and waste management practices of model plants. Each model facility is characterized by its annual sales, the number of employees, the volume of waste generated, and its waste management practices. Both the size (annual production) of a facility and the preservatives used affect the cost of complying with the proposed rule.

Compliance cost estimates for each model facility include the cost of managing the residuals described above, plus initial administrative expenses, additional closure costs, and, for four model facilities which represent the estimated 25 facilities that do not currently have RCRA permits and are not subject to interim status standards, corrective action costs.

This analysis uses annual revenue requirements to measure the combined effects of different types of incremental costs attributable to the proposed rule. The annual revenue requirement (ARR) is the additional revenue required by a facility to cover the incremental costs of compliance with the proposed rule, assuming that these costs are financed and discounted over a set period of time. A 20-year period and an 11.3 percent nominal discount rate are used in this analysis.

Table 17 shows the ARRs for each model wood preserving and surface protection facility. Individual wood preserving facilities are projected to incur total incremental annual costs ranging from $24,000 to $608,000 as a result of the proposed rule. In general, larger facilities will have higher total costs than small facilities. The ARRs for model facilities subject to corrective action regulations as a result of the proposed rule are substantially higher than those for similar facilities that are already permitted or currently subject to interim status requirements, because the corrective action costs are substantially higher than compliance costs. The model plant with the highest ARR, $608,000, is a medium-size creosote plant not presently subject to Subtitle C requirements. The Agency believes that there are six creosote plants (five small- and one medium-size) and 19 pentachlorophenol plants (18 small- and 1 medium-size) that would be subject to corrective action as a result of the proposed rule. Again, for purposes of this analysis, EPA has defined small plants as those with fewer than 10 employees, medium plants as those with at least 10 but fewer than 20 employees, and large plants as those with 20 or more employees.

TABLE 17—ANNUAL REVENUE REQUIREMENT FOR MODEL WOOD PRESERVING AND SURFACE PROTECTION FACILITIES AFFECTED BY THE PROPOSED RULE [1,2]

Model facility type (wood preserving)	Permitted ARR [Dollars]	No Permit ARR [Dollars]
Creosote:		
Small	24,000	369,000
Medium	46,000	608,000
Large	91,000	N/A
Pentachlorophenol:		
Small	30,000	375,000
Medium	41,000	386,000
Large	82,000	N/A
Inorganic:		
Small	25,000	N/A
Medium	45,000	N/A
Large	97,000	N/A
Multiple preservatives (medium size assumed):		
Creosote/pentachlorophenol	104,000	N/A
Pentachlorophenol/inorganic	56,000	N/A
Inorganic/creosote	45,000	N/A
All three preservatives	127,000	N/A
Surface protection facilities currently using pentachlorophenate 12 months a year: [3]		
Small	9,000	N/A
Medium	32,000	N/A
Large	100,000	N/A
Large Northwest	360,000	N/A
Surface protection facilities currently using pentachlorophenate 6 months a year:		
Small	6,000	N/A
Medium	18,000	N/A
Large	51,000	N/A

[1] These costs include engineering, corrective action, administrative, and closure costs.

[2] The Annual Revenue Requirement (ARR) shown here does not reflect anticipated price increases that could offset the net revenue requirements for model facilities.

[3] ARRs for surface protection facilities are based on switching to a more expensive alternative chemical, DDAC.

NOTE.—N/A indicates that there are no unpermitted facilities in this preservative and facility size category.

Table 17 shows that the ARRs for eight model surface protection facilities range from $6,000 to $360,000, depending on the size of the facility and the number of months a year the facility uses sapstain-treating chlorophenolic solutions. In general, these costs are lower than compliance costs for wood preserving facilities of comparable size.

2. National Costs of the Proposed Rule

a. Methodology. The national costs of today's proposed rule were estimated using a four-step approach. First, total compliance costs were estimated for each model facility type. Next, the universe of affected facilities was categorized into groups based on preservatives used and size. Third, for

each model facility type, per-facility compliance costs were multiplied by the number of facilities represented by each model plant type. Fourth, total costs were estimated for the affected facilities in the wood preserving and surface protection industries by adding the total costs for each facility category.

b. Results. The results of this analysis indicate that the aggregate annualized cost of the proposed rule to the wood preserving industry is estimated to be approximately $43 million (1988 dollars). The aggregate annualized cost of compliance for the surface protection industry is estimated to be approximately $11 million. The total estimated cost of compliance with the rule is approximately $54 million (1988 dollars). Because the aggregate annual impact of the proposed rule is less than the $100 million threshold set by Executive Order 12291, the Agency has determined that today's rule is not a major rule.

3. Economic Impact Analysis

The economic impact analysis assesses the impact of the proposed rule on: (1) prices, (2) individual segments of the wood preserving and surface protection industries (including small entities), and (3) employment levels. The methodology used to assess these impacts is briefly described below. Readers requiring a more detailed understanding are referred to the draft Cost and Economic Impact Analysis.

a. Methodology—(1) Price Impacts. The price of treated wood products can be expected to change as a result of the proposed rule. Incremental potential price changes for preserved and surface protected wood products are estimated using a three-step methodology. First, the price increase required to maintain current profits is calculated for each of the model facilities. Second, the ability of each of the model facility categories to raise the price of their products is assessed using model plant estimates and existing market data. Third, the price of treated wood products is estimated based on the results of the first two steps.

(2) Industry impacts. The economic impact of the proposed rule on individual segments of the wood preserving industry were assessed using a three-step approach. First, the ratios of estimated annual compliance costs for model facilities to sales and pre-tax profits (following estimated price increases) were calculated. Second, these ratios were compared with two economic impact test criteria. The first test is whether a model facility's incremental ARR exceeds one percent of annual sales. The second test is whether a model facility's reduction in profits exceeds 20 percent of projected pre-tax profits. If a model facility is projected to exceed both of these ratio thresholds, it is considered "significantly" impacted by the proposed rule. If a model facility is projected to exceed only one of these thresholds, it is not considered to be "significantly" affected by the proposed rule.

In the third step, the number of actual facilities represented by each of the affected model facilities were estimated. As part of this process, the number of small entities subject to substantial economic impacts was estimated.

(3) Employment impacts. Employment impacts were assumed to result from facility closures. Facility closures are difficult to predict for many reasons. For example, the Agency does not have information on the resources potentially available to individual firms that operate more than one wood preseving facility. The potential for facility closures was evaluated by subjecting each of the model plants identified in the industry impacts analysis to additional financial tests. The first test is whether the ratio of the ARR to the estimated cash from operations is greater than 0.5 for a model facility. The second test is whether the capital compliance costs exceed annual investment. These financial tests were designed for the Agency to assess the potential for firm closures as a result of implementation of the small quantity generator regulations (ICF Inc. and DPRA Inc., 1985). A range of potential employment effects, corresponding to the range of results of all of the financial tests for model facilities, was developed.

b. Results—(1) Price impacts. Industry data suggest that large facilities are the price leaders in the industry. Because of the large market share held by large wood preserving firms, this analysis assumes that prices could be increased to cover the estimated incremental compliance costs of the large inorganic and creosote plants. Thus, the wholesale price of creosote-preserved wood would rise 3 cents from $7.20 per cubic foot to $7.23. The wholesale price of inorganic-preserved wood would rise 5 cents from $3.97 per cubic foot to $4.02.

The Agency is not aware of any one large facility that uses pentachlorophenol exclusively; therefore, this analysis assumes that medium-sized plants are the price leaders in this segment and that product prices would rise to cover the incremental costs of medium-sized pentachlorophenol plants. The wholesale price of pentachlorophenol-preserved wood would rise 12 cents from $4.84 per cubic foot to $4.96. For a number of reasons discussed in the Cost and Economic Impact Analysis, incremental costs of corrective action would not be transferred to customers in the form of higher prices. As a result, projected price increases will vary by the preservative that is used in each industry segment.

In contrast to the wood preserving industry, the surface protection industry is unlikely to transfer any of its incremental costs to consumers in the form of higher prices. This is principally because most surface protection facilities do not need to use any chemicals to prevent sapstain, and therefore could generally undersell facilities that attempted to increase their prices to recover incremental regulatory costs.

The price increases described above were not considered significant, and therefore the proposed rule will not have a major impact on prices for consumers or other industries using preserved or surface protected wood.

(2) *Industry impacts.* The effect of the proposed rule on different segments of the wood preserving and surface protection industries is examined by comparing the projected ARR/Sales ratio and the expected reduction in profits with the criteria for identifying "significantly affected facilities" that were presented earlier. ARR/Sales and revised reduction in profits (in percent) for each of the model plants (after projected price changes are taken into account) are shown in Table 18.

Table 18 shows that the unpermitted/non-interim status model facilities, assumed to incur corrective action costs as a result of the proposed rule, are projected to incur much greater adverse economic impacts than the other affected facilities. This analysis indicates that all small single preservative facilities are projected to incur significant adverse economic effects as a result of the proposed rule. Facilities using pentachlorophenol alone seem likely to sustain the greatest economic impact of all model facilities already subject to Subtitle C requirements.

TABLE 18.—ARR/SALES AND REDUCTION IN PROFITS FOR MODEL WOOD PRESERVING AND SURFACE PROTECTION PLANTS FOLLOWING EXPECTED PRICE INCREASES

[in percent]

Model plant type (wood preserving)	Permitted ARR/sales	Facilities reduction in profit	Unpermitted ARR/sales	Facilities reduction in profit
Creosote:				
Small	1.3	37	20	820
Medium	0.6	4	8	130
Large	0.5	0	N/A	N/A
Pentachlorophenol:				
Small	3.6	52	45	1,870
Medium	2.3	0	22	390
Large	1.8	0	N/A	N/A
Iinorgranic [1]:				
Small	2.1	38	N/A	N/A
Medium	1.6	6	N/A	N/A
Large	1.3	0	N/A	N/A
Multiple preservatives:				
C/P Medium [2]	1.4	4.4	N/A	N/A
P/I Medium	1.3	6.4	N/A	N/A
I/C Medium	0.8	2.7	N/A	N/A
P/I/C Medium	1.1	1.0	N/A	N/A
Surface protection facilities (that currently use chlorophenolics 12 months a year):				
Small	1.5	57	N/A	N/A
Medium	1.0	22	N/A	N/A
Large	1.0	29	N/A	N/A
Very Large	0.9	28	N/A	N/A
Surface protection facilities (that currently use chlorophenolics 6 months a year):				
Small	1.0	39	N/A	N/A
Medium	0.5	12	N/A	N/A
Large	0.5	15	N/A	N/A

[1] Impact based on model inorganic plants that may have previously used pentachlorophenol. Plants that have never used pentachlorophenol would incur slightly lower impacts.

[2] Multiple preservative plants were assumed to be medium-sized plants in this analysis.

Note.—N/A indicates that all facilities in this category have RCRA permits and would not require corrective action as a result of the proposed rule. Criteria: Model Plants are "significantly" affected if: ARR/Sales Exceeds 1% and ARR/Profit Exceeds 20%.

Table 18 also shows that the small surface protection model facility that treats for sapstain control throughout the year is significantly impacted by the proposed rule. The Agency estimates that approximately 50 to 75 small surface protection facilities use chlorophenolic solutions to control sapstain 12 months, a year, and would incur signifcant adverse economic effects as a result of the proposed rule.

Thus, the proposed rule will significantly impact all small, single preservative wood preserving facilities. Nevertheless, since large, medium and multiple preservative facilities produce the overwhelming majority of all types of preserved wood, the proposed rule is not expected to have a significant impact on the wood preserving industry. Because most sawmill production is not treated with any sapstain control agent, the proposed rule is also not expected to have a significant impact on the sawmilling industry.

(3) *Employment Impacts.* Two additional tests on model facilities identified as subject to "significant adverse impacts" in the Industry Impact section (above) are used to help assess the potential for facility closures and consequent employment impacts. The capital cost of compliance was compared with annual investment to assess the potential for incremental capital requirements to contribute to firm closures. The annual revenue requirement was compared with the cash from operations to further assess the potential for incremental revenue requirements to contribute to firm closures. Table 19 shows the results of these tests.

Table 19 indicates that the 25 facilities represented by the model facilities incurring corrective action costs are judged to have a higher likelihood of closure than the other facilities. The number of employees in the 25 actual facilities represented by these model facilities is estimated to be between 150 and 200. The potential employment impacts could thus range as high as 200 jobs, if all of the facilities that fail all of these tests close as a result of the proposed rule. Even if that should happen, the balance of the industry is expected to absorb the loss of production from these facilities by expanding production at many other facilities currently operating at less than full capacity. New jobs that may be created at these larger facilities would partially offset the potential employment impact from possible plant closings. Based on these findings, the employment impact of the proposed rule is not considered significant.

TABLE 19.—ADDITIONAL TESTS FOR ECONOMIC IMPACT OF PROPOSED RULE

Model plants	RCRA status	ARR/CFO	CCA/AI	No. plants
Small penta.	Permitted	0.2	9:1	1
Small creo-sote.	Permitted	0.1	4:1	23
Small penta.	No permit	3.1	9:1	18
Small creo-sote.	No permit	1.3	4:1	5
Medium creo-sote.	No permit	0.5	1.6:1	1
Medium penta.	No permit	1.3	5:1	1
Small inor-ganic.	Permitted	0.1	6:1	184

Criteria for Significantly Impacted: ARR/Cash from Operations (CFO) > 0.5 or Compliance Capital Cost/Annual Investment (CCC/AI) > 1:1.

4. Limitations

An important limitation on the analysis of potential employment effects is the absence of information on firm assets. If firms have additional

resources that can be used to help cover compliance costs, this analysis may overestimate the potential economic impact of the proposed rule. The Agency requests additional information on the financial status of the wood preserving industry to refine its analysis of employment effects.

The economic impact analysis described above does not take into account the effects that other regulations may have on the economic performance of regulated entities. For example, corrective action costs for firms that already generate and manage K001 waste are not an incremental cost of today's proposed rule, but may adversely impact the economic performance of the industries. Many facilities that generate K001 could incur corrective action costs at the same time as they incur costs associated with today's proposed rule. The economic impact of corrective action on these firms could be substantial. The cumulative effect of these and other rules is outside the scope of the draft Cost and Economic Impact Analysis.

VI. Regulatory Flexibility Analysis

The Agency is required, under the regulatory Flexibility Act (RFA), to assess whether a substantial number of small businesses are significantly affected by a proposed rule. EPA determines whether a rule will have a "significant economic effect" on small entities based on: The ratio of incremental compliance costs to the value of sales, the ratio of compliance costs to profits, and the number of facility closures that could result from the proposed rule. Based on EPA's guidelines for conducting Regulatory Flexibility Analyses (RFAs), a "substantial number" of small entities was defined to be 20 percent or more of the small businesses in the regulated industry.

The wood preserving industry is characterized by the presence of many small companies. Approximately 45 percent of the companies in the wood preserving industry have fewer than 10 employees, approximately 20 percent have been 10 and 19 employees, and only approximately 35 percent have 20 or more employees. In 1982, nearly 60 percent of the approximately 6,000 domestic sawmills had fewer than 10 employees. Fifteen percent of these facilities had been ten and 19 employees, and approximately 25 percent of the sawmills had 20 or more employees.

EPA guidance for compliance with the RFA provides the Agency with some flexibility in selecting a quantitative cut-off point for defining small entities. In accordance with Agency guidance, EPA based its small entity definition on the distribution of firms by size in the affected industries, and the size at which the adverse economic impacts appear to rise or fall substantially (USEPA, 1982). As discussed below, EPA has examined several possible definitions for small businesses for purposes of the regulatory flexibility analysis and has consulted with the Small Business Administration concerning these definitions. The Agency specifically requests comments on the alternatives evaluated (or any others) for defining small business entities in the wood preserving and surface protection industries.

In accordance with the Regulatory Flexibility Act (RFA), the Agency undertook a preliminary analysis to determine whether the proposed rule will cause a significant impact on small businesses. This analysis has two principal components: (1) Determining whether any small business segments would incur significant impacts as a result of the rule, and (2) determining whether a significant number of small businesses would sustain a significant economic impact.[4] The analysis indicates that, based on the Agency's guidelines for Regulatory Flexibility Analysis, today's rule will significantly affect a substantial number of small entities in the wood preserving and surface protection industry.

A. Methodology

The first component of the RFA analysis is based on the financial performance criteria used in the Economic Impact Analysis reported above, and additional guidance provided in the Regulatory Flexibility Act and EPA policies on implementation of the RFA (Russell, 1982).

Second, the number of small entities projected to incur significant impacts was estimated by assuming that the distribution of small entities within the impacted industry segments is similar to the distribution of small entities in the regulated industries. Readers requiring a more detailed explanation of the methodology that was used are referred to the Cost and Economic Impact Analysis.

B. Results

The Industry Impact Analysis, provided previously, indicates that small wood preserving facilities using pentachlorophenol are expected to incur the greatest adverse economic impacts as a result of the proposed rule. Small creosote and inorganic model wood preserving plants also exceed the ratio tests used in this analysis, and are projected to be significantly affected. Small surface protection facilities that currently use sodium pentachlorophenate for 12 months a year, but are expected to switch to alternative chemicals, also exceed these ratio thresholds, and are expected to be significantly impacted. Accordingly, the Agency has determined that the proposed rule is likely to cause a significant economic impact for a significant fraction of small businesses in the wood preserving industry.

All of these plants, represented by the small model facilities, are susceptible to adverse economic impacts. The Agency's review of the wood preserving industry suggests that there are approximately 232 small wood preserving facilities that would be significantly affected. The Agency concludes that these facilities comprise at least 20 percent and up to 100 percent of the small businesses in the wood preserving industry. By contrast, the Agency estimates that there are 50 to 70 small surface protection plants that use chlorophenolic solutions for surface protection for 12 months a year. The Agency believes these comprise up to 5 percent of the small businesses in the surface protection industry.

C. Conclusions

Historically, the Agency has used a criterion of 20 percent for assessing whether a significant number of small businesses are affected. As a result of this analysis, the Agency has determined that a significant number of the small businesses in the wood preserving industry are likely to incur significant economic impacts as a result of the proposed rule. The 50 to 75 surface protection facilities that may be significantly affected by today's proposed rule represent less than 5 percent of the small businesses in that industry. The Agency has determined that a significant number of the small businesses in the surface protection industry are not likely to incur significant impacts as a result of the proposed rule.

D. Regulatory Options Considered by the Agency

The Agency has considered a number of regulatory options in light of the potential economic impacts of the proposed rule on small businesses. These options are based on the Cost and Economic Impact Analysis summarized in Section V. In particular, the Agency

[4] For this analysis, small businesses in the wood preserving and sawmilling industries were defined as those with fewer than ten employees.

solicits comments on the best approach to defining small businesses. The Agency is evaluating whether it is preferable to establish a small business cut-off based on an annual sales threshold or on number of employees. The goal of the annual sales threshold is to establish a true "economic" threshold; however, data upon which to establish such a threshold are not readily available. If alternative regulatory options were made available to small businesses, an employee-based cut-off has clear implications because it may create incentives for firms to lay-off employees in order to avoid compliance with regulatory standards. However, data on number of employees are more readily available. A secondary issue the Agency is considering is whether to establish thresholds for defining small businesses for the entire wood preserving industry, or whether to establish separate thresholds for specific sectors.

EPA conducted the option analysis in order to fulfill its obligation under the Regulatory Flexibility Act. Two of the options examined involve exempting certain small business entities from the requirements for operating hazardous waste drip pads in treated wood storage yards. These options were selected for examination because available information on waste management practices shows that most wood preserving and surface protection facilities already have drip pads in kick-back areas. Most do not have drip pads in treated wood storage yards. Moreover, treated wood storage yards are quite large (many acres) at most facilities. EPA therefore concluded that installation of drip pads in treated wood storage yards would account for a large portion of the compliance costs. The Agency notes that under RCRA, EPA does not normally make regulatory decisions on the basis of economic considerations. EPA therefore believes that options providing exemptions from certain requirements for small business entities in this case would be inconsistent with its statutory mandate under RCRA. As an alternative, EPA considered using a risk-based determination in conjunction with an exemption for small businesses. Under such an option the exemption would be granted based on a consideration of the relative hazard posed by an individual facility.

Of the remaining options, two involve a delay in the effective date of the regulations and the third involves no special provisions for small businesses. All six options are discussed briefly below.

Option 1 is full application of the proposed rule to all wood preserving and surface protection plants, regardless of size. Because this option has the same requirements for all wood preserving facilities, it will provide the greatest environmental benefits. However, this option is expected to cause adverse economic impacts for more small, single preservative wood preserving firms than the other regulatory options. Option 1 is consistent with EPA's RCRA mandate.

Option 2 involves allowing all small wood preserving and surface protection facilities to comply with the proposed rule on a delayed schedule. Under this option, small businesses would be allowed up to 5 years following the effective date of the rules to come into compliance. Although this option does not reduce the economic impact of the rules, EPA believes that the delay may provide time for small businesses to investigate a variety of compliance options and to seek any financial assistance required to fund compliance expenditures. Option 2 is also consistent with RCRA.

Option 3 involves allowing small businesses up to 10 years following the effective date of the rules to come into compliance. This option would provide an even longer period of time to investigate and select compliance alternatives. EPA believes that this 10-year period may be sufficient to allow for developing technological changes or chemical changes to the wood preserving process that may affect compliance costs. Option 3 is consistent with RCRA.

Option 4 would permit firms that use only arsenical formulations to obtain an exemption from the proposed requirement for operating drip pads in treated wood storage yards if they met the definition of small businesses. The agency is considering two approaches to defining small businesses under this option. The definition would apply either to firms with an annual sales of less than $1,170,000 per year, the estimated annual sales level corresponding to the small model arsenic facility developed in the Cost and Economic Impact Analysis; or to firms with less than seven employees, the size of many small facilities that exclusively use arsenic. Option 4 is inconsistent with EPA's authority under RCRA.

Option 5 would permit any small wood preserving firm to obtain an exemption from the proposed requirements for operating drip pads in treated wood storage yards. Option 5 is also inconsistent with EPA's authority under RCRA.

Option 6 would allow small businesses to apply to EPA for an exemption based on a demonstration that the quantities of drippage generated at an individual facility do not exceed an established de minimis level. Under this option, the Agency would need to develop guidance concerning the establishment of de minimis levels, taking into consideration the constituent concentrations in drippage, the size of wood storage yards, the quantities and rates of treated wood production, and a variety of other site-specific factors. While this option has the advantage of being consistent with EPA's RCRA authority, it also has significant disadvantages. EPA would need to conduct studies to develop methods for evaluating drippage rates and establishing de minimis levels. Additionally because the determination would be site-specific, the cost of developing the information required to support an exemption may be prohibitive to small businesses.

There are a number of approaches that can be taken to define small businesses under Options 2, 3, 5, and 6. Approaches based on annual sales are briefly noted below:

a. An annual sales level of $1,230,000, which is the weighted average of sales, for the proportion of small model plants that use each preservative.

b. Annual sales of less than $4,000,000, which would encompass about 65 percent of the industry.

c. An annual sales level for small plants and for those using the specific preservatives, i.e., creosote firms with annual sales less than $1,800,000, pentachlorophenol firms with annual sales less than $810,000 and arsenical firms with annual sales less than $1,170,000.

d. An annual sales level less than the sales level at which firms are projected to meet the criteria for incurring significant adverse economic impacts. Assuming that the economic impact criteria, ARR/Sales and ARR/Pretax Profits, are linearly related to the number of employees at a firm, the cut-off sales levels (at which significant economic impacts are accrued in each segment) would be $3.8 million for firms using creosote, $1.4 million for firms using pentachlorophenol, and $2.0 million for firms using arsenic.

There are a number of factors to consider in evaluating these approaches. The first two approaches are easier to implement—they involve only one cut-off for the whole industry. The third and fourth approaches more reasonably take into account differences in average size and profitability between the three

segments of the wood preserving industry. In particular, the fourth approach would more equitably confer relief to specific segments of the industry at the point that they incur adverse economic impacts. However, this approach would also result in larger creosote facilities being eligible for an exemption than with the other regulatory options.

The Agency is also considering (solely for meeting the requirements of the Regulatory Flexibility Act) an employee-based cut-off to defining small business. For the most part, these options parallel those for annual sales thresholds and are described below:

a. Firms with ten or fewer employees.

b. Firms with twenty or fewer employees, which would encompass about 65 percent of the industry.

c. Firms with fewer employees than the number of employees in the applicable model plant in the Cost and Economic Impact Analysis, i.e., creosote firms with fewer than ten employees, pentachlorophenol firms with fewer than eight employees, and arsenic firms with fewer than seven employees would be eligible for relief.

d. Firms with fewer employees than the number of employees at model facilities estimated to have economic impacts; i.e., creosote firms with fewer than 19 employees, pentachlorophenol firms with fewer than 12 employees, and arsenic firms with fewer than ten employees.

e. Firms with fewer than 500 employees, an exemption based on the Small Business Adminstration (SBA) definition of small business for the wood preserving industry (500 employees). The SBA definition is based on the size (in number of employees) at which firms can alter the price of preserved wood. This approach would result in over 99 percent of the firms in the industry being eligible for the exemption. This approach does not take into account differences in the typical size of firms in each segment of the industry; nor does it take into account differences in the significance of the economic impacts that may accure to firms in different segments as a result of the proposed rule.

Similar considerations to those noted for the different sales thresholds also apply to approaches based on number of employees. The major exception is that an employee-based cut-off may create incentives to lay off employees. The Agency solicits comment on all the approaches described above or any others that may be more appropriate.

As noted previously, EPA believes that only Options 1, 2, 3, and 6 are consistent with its RCRA mandate and therefore represent feasible regulatory options. As a result, the Agency anticipates that the only relief it can provide to small businesses is a delay in the effective date of the requirements for drip pads in treated wood storage yards. The Agency solicits comments on the options presented here and on any other options.

Based on a more detailed analysis of these options and on comments received, the Agency will continue to evaluate the impacts on the wood preserving industry.

VII. Paperwork Reduction Act

The reporting, notification, or recordkeeping (information) provisions in this rule will be submitted for approval to the Office of Management and Budget (OMB) under section 3504(b) of the Paperwork Reduction Act of 1980, U.S.C. 3501 *et seq.* Any final rule will explain how its reporting, notification, or recordkeeping provisions respond to any OMB or public comments.

VIII. Compliance Procedures and Deadlines

A. Section 3010 Notification

Not later than 90 days from publication of the rule finalizing these listings, all persons who generate, transport, treat, store, or dispose of waste which are covered by today's proposed regulation will be required to notify EPA (for F032 and F033 wastes) or either EPA or a State authorized by EPA to operate the hazards waste program (for F034 or F035 wastes) of their activities pursuant to section 3010 of RCRA. Persons who previously have notified EPA or an authorized State that they generate, transport, treat, store, or dispose of hazardous wastes and have received an identification number (see 40 CFR 262.12, 263.11, and 265.11) need not re-notify. Notification instructions are set forth in 45 FR 12746, February 26, 1980. Persons without EPA identification numbers are prohibited from generating, transporting, treating, storing, or disposing of hazardous wastes.

The Agency views the section 3010 notification requirement to be necessary in this case because it is believed that many persons that manage the wastes proposed for listing today have not previously notified EPA and received an EPA identification number.[5]

[5] Under Solid Waste Disposal Amendments of 1980, (Pub. L. 96-452) EPA was given the option of waiving the notification requirement under section 3010 of RCRA following revision of the section 3001 regulations, at the discretion of the Administrator. Notification is not being waived in this case.

B. Compliance Dates

1. F032 and F033

Because HSWA requirements are applicable in authorized States at the same time as in unauthorized states, EPA will regulate F032 and F033 until States are authorized to regulate these wastes. Thus, once these regulations become effective in a final Agency rule, EPA will apply those Federal regulations to these wastes and to their management in both authorized and unauthorized States. Facilities that treat, store, or dispose of F032 and F033, but that have not received a permit pursuant to section 3005 of RCRA and are not operating pursuant to interim status, might be eligible for interim status under HSWA (see section 3005(e)(1)(A)(ii) of RCRA, as amended). In order to operate pursuant to interim status, the eligible facilities will be required to submit a section 3010 notice pursuant to 40 CFR 270.70(a) within 90 days from the publication of the rule finalizing these listings, and will be required to submit a Part A permit application within 6 months of such publication.

Under section 3005(e)(3), within 18 months of such publication, land disposal facilities qualifying for interim status under section 3005 (e)(1)(A)(ii) also will be required to submit a Part B permit application and certify that the facility is in compliance with all applicable ground water monitoring and financial responsibility requirements. If the facility fails to do so, interim status will terminate on that date.

All existing hazardous waste management facilities (as defined in 40 CFR 270.2) that treat, store, or dispose of F032 and F033 and that are currently operating pursuant to interim status under section 3005(e) of RCRA, will be required to file with EPA an amended Part A permit application within 6 months of such publication.

Under current regulations, a hazardous waste management facility that has received a permit pursuant to section 3005 would not be able to treat, store, or dispose of F032 and F033 until a permit modification allowing such activity is approved in accordance with § 270.42. Note that EPA has recently amended the permit modification requirements for newly listed or identified wastes. See 53 FR 37912 *et seq.* (September 28, 1988).

2. F034 and F035

a. Interim status in unauthorized states. Facilities that treat, store, or dispose of F034 and F035 wastes in *unauthorized* States, but that have not received a permit pursuant to section

3005 of RCRA and are not operating pursuant to interim status, might be eligible for interim status under HSWA (see section 3005(e)(1)(A)(ii) of RCRA, as amended). In order to operate pursuant to interim status, the eligible facilities will be required to submit a section 3010 notice pursuant to 40 CFR 270.70(a) within 90 days from the publication of the rule finalizing these listings, and to submit a Part A permit application within 6 months of such publication. Within 18 months of such publication, under section 3005(e)(3), land disposal facilities qualifying for interim status under section 3005(e)(1)(A)(ii) also will be required to submit a Part B permit application and certify that the facility is in compliance with all applicable ground water monitoring and financial responsibility requirements. If the facility fails to do so, interim status will terminate on that date.

All existing hazardous waste management facilities (as defined in 40 CFR 270.2) that treat, store, or dispose of F034 and F035 and that are currently operating pursuant to interim status under section 3005(e) of RCRA, will be required to file with EPA an amended Part A permit application within 6 months of such publication.

Under current regulations, a hazardous waste management facility that has received a permit pursuant to section 3005 would not be able to treat, store, or dispose of F034 and F035 until a permit modification allowing such activity were approved in accordance with § 270.42. Note that EPA has recently finalized amendments to the permit modification requirements for newly listed or identified wastes. See 53 *FR* 37912 et seq. (September 28, 1988).

b. Interim status in authorized states. Until a State is authorized to regulate F034 and F035 (i.e., until F034 and F035 become hazardous waste under authorized State law), no permit requirements would apply and facilities would not need to seek RCRA interim status or a RCRA permit. Any facility treating, storing or disposing of these wastes on or before the effective date of authorization of the State to regulate these wastes under RCRA might qualify for interim status under applicable State law. Note that in order to be no less stringent than the Federal program, the State "in existence" date for determining interim status eligibility could not be after the effective date of EPA's authorization of the State to regulate these wastes. Any eligible existing facility also would be required to provide the required 3010 notification as described above and to provide the State's equivalent of a Part A permit application as required by authorized State law.

Finally, RCRA section 3005(e)(3) or any authorized State analog would apply to land disposal facilities qualifying for State interim status.

3. Drip Pad Permitting and Interim Status Standards

a. Unauthorized states. The drip pad standards would apply in unauthorized States as of the effective date of EPA's final rule adopting these standards. The effective date for small businesses will depend on which, if any, of the regulatory options, discussed above in Section VI.E, is chosen.

b. Authorized states. The standards for permitting drip pads associated with F032 and F033 wastes would be applicable in authorized States in accordance with 40 CFR 264.1(f)(2) and proposed § 265.1(c)(4)(iii), as discussed previously. The standards, as they apply to F034 and F035 wastes, would not apply after Agency publication of rule, until the State is authorized to regulate these wastes as hazardous (and presumably to implement the drip pad requirements). States could not obtain authorization for these requirements prior to the effective date of EPA's regulations, which, for small businesses, will depend on the adoption of regulatory options specified in Section VI.E. However, States may impose requirements that are more stringent or broader in scope than EPA's regulations; States may choose to impose such standards prior to authorization as a matter of State law.

4. Application of Phasing of Regulations

If EPA selects to phase implementation in regard to small business entities and the Regulatory Flexibility Act, EPA will authorize States choosing not to delay regulation of small businesses but will make the effective date of authorization as it applies to small businesses consistent with the schedule selected for the Federal program.

List of Subjects

40 CFR Part 260

Administrative practice and procedure, Confidential business information, Hazardous materials, Recycling, Reporting and recordkeeping, Waste treatment and disposal.

40 CFR Part 261

Hazardous materials, Waste treatment and disposal, Recycling.

40 CFR Part 262

Administrative practice and procedures, Hazardous materials, Reporting and recordkeeping.

40 CFR Part 264

Hazardous materials, Packing and containers, Reporting requirements, Security measures, Surety bonds, Waste treatment and disposal.

40 CFR Part 265

Air pollution control, Hazardous materials, Packaging and containers, Reporting requirements, Security measures, Surety bonds, Waste treatment and disposal, Water supply.

40 CFR Part 270

Administrative practice and procedures, Air pollution control, Hazardous materials, Reporting requirements, Waste treatment and disposal, Water pollution control, Water supply, Confidential Business Information.

40 CFR Part 271

Administrative practice and procedure, Confidential Business Information, Hazardous materials transportation, Hazardous waste, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 302

Air pollution control, Chemicals, Hazardous materials, Hazardous materials transportation, Hazardous substances, Intergovernmental relations, Natural resources, Nuclear materials, Pesticides and pests, Radioactive materials, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control.

Lee Thomas,

Administrator.

Date: December 23, 1988.

IX. References

Risk Assessment Forum. *Interim Procedures for Estimating Risks Associated with Exposures to Mixtures of Chlorinated Dibenzo-p-Dioxins and -Dibenzo-furans (CDDs and CDFs).* Washington, DC: U.S. Environmental Protection Agency, 1986. EPA/625/3–87/012.

Micklewright, James T. *Wood Statistics, 1985, A Report to the Wood Preserving Industry in the United States.* American Wood Preservers' Institute, January, 1987.

Development Planning and Research Associates, Inc. (DPRA). *Draft Final Preliminary Cost and Economic Impact Analysis of Listing Hazardous Wastes Under RCRA for the Wood Preserving and*

Sawmilling Industries. Prepared for Economic Analysis Branch, Office of Solid Waste, U.S. Environmental Protection Agency, November, 1986.

Development Planning and Research Associates, Inc. (DPRA). *Draft Regulatory Impact Analysis for the Listing of Certain Wood Preserving and Sawmilling Industry Wastes as Hazardous Under RCRA.* Prepared for Economics Analysis Branch, Office of Solid Waste, U.S. Environmental Protection Agency, August, 1988.

U.S. Environmental Protection Agency (USEPA). *Final Engineering Analysis of Wastes from Wood Preservation and Surface Protection Processes.* Prepared for Waste Characterization Branch, Office of Solid Waste, July, 1987.

Arsenault, R.D. *Pentachlorophenol and Contaminated Chlorinated Dibenzodioxins in the Environment.* Proceedings of the American Wood Preservers' Association. Vol. 76, Page 1, 1976.

U.S. Environmental Protection Agency (USEPA). *Test Methods for Evaluating Solid Waste. Volume IA: Laboratory Manual Physical/Chemical Methods.* Washington, DC: Office of Solid Waste and Emergency Response. November, 1986, 3rd Edition.

Palmer, Frank. *Environmental Residues—California,* Draft Report. 1986.

McConnell, E.E., DVM, Chemical Manager. *NTP Technical Report on the Toxicology and Carcinogenisis Studies of Pentachlorophenol (CAS No. 87–86–5) in B6C3F1 Mice.* Peer Review Draft. National Toxicology Program. Research Triangle Park, North Carolina. April, 1988. NTP TR 349.

Ratcliff, L. March 1988. Summary of CRAVE Work Group Verified Carcinogenic Slope Factors and Unit Cancer Risks. USEPA.

Lindenheim, Victor. Personal Communication with Edwin F. Abrams, Office of Solid Waste, U.S. Environmental Protection Agency regarding AWPI Survey, 1987.

Russell, Milton. *Additional Guidance on Implementation of the Regulatory Flexibility Act.* U.S. EPA, Office of General Counsel, 1982.

AWPI Letter to Dr. John H. Skinner (Past Director, EPA's Office of Solid Waste). Walter G. Talarek, AWPI, January 10, 1985.

Litt, Bertram D. *Pentachlorophenol Carcinogenicity Risk Issue: Comparison of Findings from NTP Bioassay of PCP with NCI Bioassay of HxCDD* for Vulcan Materials Company. May 18, 1988. Washington, DC.

U.S. E.P.A. Health and Environmental Effects Profile for Benzo(k)fluoranthene. August, 1987.

DPRA Incorporated. *Preliminary Cost and Economic Impact Analysis for Listing Wood Preserving Waste.* August, 1988b.

U.S. E.P.A. *EPA Implementation of the Regulatory Flexibility Act.* February 9, 1982.

ICF Inc. and DPRA Inc. *Economic Analysis of Resource Conservation and Recovery Act Reguions for Small Quantity Generators.* June, 1985.

Russell, Milton. *Additional Guidance on Implementation of the Regulatory Flexibility Act.* 1982.

Appendix—Environmental Contamination from Wood Preserving and Surface Protection Wastes

Past mismanagement of the wastes listed in today's notice (F02, F033, F034, and F035) has resulted in significant environmental damage which the Agency has documented extensively. As shown in Table 20, a total of 36 wood preserving and surface protection facilities representing all of the proposed listings are on the National Priority List.

The following examples typify the many cases that EPA has identified regarding environmental contamination. They demonstrate that wastes from wood preserving and surface protection processes are capable of persisting and moving in the environment to reach environmental receptors in potentially harmful concentrations. The Background Document to today's proposal contains further examples of damage cases.

A. Environmental Contamination with Wastes from Pentachlorophenol Wood Preserving Processes

At a facility located in southwestern Montana (that is included on the National Priorities List (NPL)) poles were pressure treated with pentachlorophenol dissolved in diesel oil. Untreated retort condensate was discharged through an unlined ditch to an unlined pit. Ground water approximately 15 feet below the surface has been found to be contaminated with a floating oil layer that contains 650 ppm pentachlorophenol and 200 ppb 2,3,7,8-TCDD toxic equivalents. This ground water is hydraulically connected to a creek 0.4 miles downgradient from the site. Approximately 49,000 gallons of oil has been recovered from interceptor trenches and recovery wells. The total 2,3,7,8-TCDD toxic equivalent concentration of the recovered oil was 700 ppb. Soils in the process area were contaminated at a depth of 12 to 24 inches with pentachlorophenol (5,250 ppm) and PCDDs and PDCFs (total 2,3,7,8-TCDD equivalent concentration was 20 ppb). Off-site soils were also contaminated, presumably by runoff carrying drippage from contaminated surface soils. Off-site surface soils contained a total 2,3,7,8-TCDD equivalent concentration of 26 ppb. This case clearly demonstrates that unless properly managed on-site, ground water and soil contamination can result from the wastes generated from wood preserving processes using pentachlorophenol.

Contamination of residential drinking water wells with pentachlorophenol, PCDDs, and PCDFs has also been demonstrated at a 50 acre site in southern Montana. Wood preserving operations at this facility began in the late 1940s. Pentachlorophenol dissolved in oil was applied to wood by pressure and non-pressure methods (the site was added to the NPL in 1984). In the past, the facility discharged pentachlorophenol-contaminated ground water to an adjacent creek through a ditch. Soils and shallow ground water were contaminated via leaking pipes and a deteriorated wastewater sump. Two contaminant plumes have been identified. The first plume consists of pentachlorophenol dissolved in oil that floats on top of the water table. This plume oozed from the ground in a pasture downgradient from the facility. There is also a plume of pentachlorophenol dissolved in ground water that has contaminated two drinking water wells on neighboring property with PCDDs and PCDFs. One well contained 0.8 ppt and the other 2 ppt total 2,3,7,8-TCDD toxic equivalents.

B. Environmental Contamination with Wastes from Pentachlorophenate Surface Protection Processes

During 1986 and 1987, Environment Canada conducted a 4-month field study at five sawmills and two lumber export terminals (Krahn, Shrimpton, and Glue, 1987). The object of the study was to measure the extent to which rainfall could be contaminated with chlorophenols leached from treated lumber. The studied sites represented typical lumber handling and treatment methods including dip tanks and low pressure and high pressure spray systems. Leachate dripping directly from the wood and yard was analyzed for 2,3,4,6-tetrachlorophenol and pentachlorophenol.

It was found that leaching from treated lumber began after 1.0 to 1.5 mm of continuous rainfall. Dip treated lumber leached up to 160 mg/1 and generated drippage averaging 0.3 to 0.5 mg/1 total chlorophenols. Low pressure sprayed lumber leached up to 580 mg/1 total chlorophenols. High pressure sprayed lumber leached up to 9.8 mg/1 and generated average yard runoff with up to 2 mg/1 total chlorophenols. Chlorophenols were found to leach from treated lumber under all conditions of exposure to rainfall. Conditions studied included up to 8 days of drying, 13 consecutive days of rainfall and 18 days of alternating wet and dry periods. This study documents that drippage of preservative formulation from surface protected wood and preservative is washed off treated wood by precipitation, and, thus, can migrate into the environment.

A sawmill located in northwest Oregon documents the contamination of on-site soils, ground water, and surface water sediments with chlorophenols, PCDDs, and PCDFs. In 1983, the Oregon Department of Environmental Quality detected chlorophenols in water samples collected near the mill. The chlorophenols apparently derived from the application of an anti-sapstain (surface protection) solution containing tetrachlorophenol and pentachlorophenol to lumber intended for export. At this mill, a continuous processing line is used to dip-treat cut lumber. A roller system moves bundles of lumber to the dip tank, the wood is submerged for less than a minute, then allowed to drip into the dip tank for a few minutes. Next, excess preservative is mechanically shaken off the lumber and the wood transported to a storage yard.

Soil samples collected in 1983 from the dip tank area were found to contain 940 ppm total chlorophenols (pentachlorophenol plus tetrachlorophenols) at the surface. In the path over which the treated lumber was transported to the storage yard, the total chlorophenols concentration was 2,520 ppm

at a depth of 6 to 8 inches. Soil in the treated wood storage yard was also contaminated. At a depth of three feet the total chlorophenol concentration was 1.4 ppm.

Drainage from the dip tank area to an on-site creek contained 0.3 ppm pentachlorophenol. Ground water near the dip tank was found to contain 0.1 ppm total chlorophenol, demonstrating that drips and spills from surface protection processes can contaminate surface water and ground water.

Samples collected during 1985 were analyzed for PCDDs and PCDFs as well as chlorophenols. Sediment collected from the on-site creek near the dip tank contained 2 ppt 2,3,7,8-TCDD. The total 2,3,7,8-TCDD equivalent concentration was 500 ppt. The average toxic equivalent concentration found in three other creek sediment samples was 300 ppt. This contamination is attributed to runoff from spills and drips of chlorophenate preservative solution near the dip-treating area. Soil that received drippage from the paved treated wood storage year was also contaminated. The concentration of total chlorophenols was 63 ppm. The total 2,3,7,8-TCDD equivalent concentration was 4,000 ppt (4 ppb).

Contamination of on-site soils with PCDDs and PCDFs was also documented in a study conducted by the California State Water Resources Control Board. Soil samples were collected in the area of treatment operations at three northern-California sawmills. Presumably, these soils were contaminated by spills, leaks and especially drippage from lumber dipping operations. Concentrations of up to 10,100 ppm total chlorophenols (pentachlorophenol and tetrachlorophenol) were measured in the soil. Tetrachlorodibenzo-*p*-dioxin was not measured above the analytical detection limits, but all other PCDD and PCDF homologues were detected. The maximum total 2,3,7,8-TCDD toxic equivalent concentration was 40 ppb.

C. Environmental Contamination with Wastes from Creosote Wood Preserving Processes

The contamination of ground water, surface water and sediments, and on-site soils with toxic constituents from creosote wood preserving wastes has been demonstrated by a facility located in southeastern Wyoming that was added to the NPL in 1982. The facility began operations in the 1880s, and has been treating railroad ties with creosote since 1928. The facility is located on the flood plain of a river used for irrigation and recreation. Wood preserving wastewaters were disposed of in unlined surface impoundments. Sludges that were cleaned out of the wood treating retorts were buried in the porous alluvial soils on which the facility was built.

As a result of past operating and waste disposal practices, it is estimated that 250,000 cubic yards of soil are saturated with 5 million gallons of oily material. The contamination has attained greatest depth around the treating area, surface impoundments and buried waste. The oily contamination in the alluvium is bordered by a fringe of contamination dissovled in gound water, which extends into the bebrock. Measured ground water concentrations of contaminants include 100 ug/1 fluoranthene and 1,400 ug/1 pyrene, compounds that are major constituents of creosote. Free oil also was observed discharging from the saturated alluvium to the river and creosote constituents were measured in river water and sediments.

A facility located in northwestern Ohio also demonstrates the contamination of ground water and surface soils with creosote constituents. Wood has been treated with creosote at this facility since the early 1900s. Process wastes and wastewater treatment residuals (listed waste K001) were disposed of in at least one unlined sludge disposal pit, approximately 13 feet deep. At a depth of 25 feet, ground water in a monitoring well installed adjacent to this pit was contaminated with 71 mg/l anthracene, 58 mg/l naphthalene, 24 mg/l pyrene and other compounds which are major constituents of creosote. The depth at which this contamination was detected indicates that the creosote constituents are migrating through the blue-clay soil that underlies the sludge disposal pit. The volatile organic compounds benzene, toluene, and ethylbenzene were also measured in the ground water, at concentrations of 3 mg/l, 0.6 mg/l and 0.3 mg/1, respectively.

At this same facility, creosote-treated wood was stored on-site in a 7 acre storage yard. Soil from a low area in which drainage from the treated wood storage yard collected was sampled and analyzed. Pyrene (230 mg/kg), chrysene plus benz(a)anthracene (120 mg/l), and fluoranthene (110 mg/kg) were detected, along with other creosote constituents, indicating that creosote that had dripped from treated wood was carried out of the storage yard by surface runoff.

D. Environmental Contamination with Wastes from Inorganic Wood Preserving processes

Contamination of ground water has been demonstrated at a California facility where on-site soils and surface drippage with arsenic and chromium from wood preserving wastes occurred (The facility was added to the NPL in 1982). Wood was treated on an 18 acre site in the San Joaquin Valley, California, since 1936. At various times, the facility used pentachlorophenol, FCAP, CCA, and copper-8-quinolinate. Excess preservative that dripped from treated wood was allowed to run into drainage and percolation ditches. Wastewater was allowed to drain into dry wells, while retort sludges and other wastes were placed in a 50-foot diameter unlined pond and in a sludge pit with hydraulic conductivity with ground water. These waste management practices resulted in contamination of ground water and soils on-site. Arsenic and chromium have been measured in the ground water at concentrations of 0.05 and 9 mg/1, respectively, compared to maximum contamination levels (MCLs) of 0.05 mg/l for each metal. The contaiminated aquifer is used as drinking water by 10,000 people. Surface soil concentrations range to 9,800 mg/kg arsenic and 10,100 mg/kg of total chromium. At a depth of 10 to 20 feet, both arsenic and chromium are present at up to 4 mp/kg. The arsenic concentration measured in standing water in the treatment area was 10 mg/l and chromium was present at 0.8 mg/l, demonstrating that soil contaminants can be transferred to the standing water. Vineyards that border two sides of the site have received runoff contaminated with drippage and other solid wastes.

Data from another case demonstrate that contaminated runoff from storage yards used to hold wood treated with CCA can be contaminated with drippage containing arsenic and chromium. The facility, located in northwestern Alabama, was sampled in 1985 when CCA was the only preservative used. Although no wastewater was generated from the actual CCA treating process, runoff from the yard used to store CCA-treated wood was collected in a drainage pond. No water from the tank or retort area, tracks in front of the retort or any wastewater treatment system drained into the pond. Water in the pond contained 4 mg/l arsenic and 0.79 mg/l chromium. Pond sediments contained 1,200 mg/kg arsenic and 1,900 mg/kg of chromium, demonstrating that metal contaminants can be washed off treated wood and/or the soil on which inorganic preservative has dripped. Ground water near the drainage pond was not sampled. However, ground water 71 feet below an evaporation pond that had been used to treat wastewater from a discontinued steam conditioning and pentachlorophenol treatment process, contained chromium at a concentration slightly higher than the drinking water standard of 0.05 mg/l. Presumably the metal contaminants originated from pentachlorophenol wastewater cross-contaminated with chromium and arsenic that had infiltrated into the ground water below the evaporation pond.

Several cases of off-site contamination of ground water have been documented. A surface impoundment (that had been used to store process wastes) was closed in 1977 by draining the pond, spreading its contents over the site, mixing the waste with soil and placing the waste mixture in the impoundment. A wet-weather spring sediment sample showed 2 mg/kg arsenic and 12 mg/kg chromium, further evidence of ground-water contamination.

At a facility located in central South Carolina (also on the NPL), FCAP and CCA wood preserving solutions dripped onto the ground in the loading yard and drip shed over 20 years of operation. The State reported that high levels of chromium were detected in many neighboring private wells, at concentrations up to 80 mg/l.

At a small site outside of Baltimore, Maryland, tank overflows have resulted in the overland flow of CCA treating solution. The facility had a surfaced drip pad which did not contain all preservative dripping from treated wood, and allowed drippage to overflow onto the ground. As a result, surface soils are contaminated with up to 5,700 mg/kg arsenic and 3,100 mg/kg chromium. Ground water on-site is also contaminated (800 mg/l arsenic, 130 mg/l chromium) and high chromium concentrations were reported in a neighbor's well.

As a 7.5 acre site one-half mile from the Russian River in northern California (added

to the NPL in 1982), soils and ground water on-site were severely contaminated as a result of past operating practices, including spills and leaks from the facility's CCA preservative and wastewater recycling system. Concentrations of chromium in ground water near the process area reached 120 mg/l. Ground water contamination migrated off-site. Contaminant levels in the plume were 0.5 mg/l arsenic and 0.6 mg/l chromium, compared to MCLs of 0.05 mg/l for both metals. Ground water in the area supplies domestic, agricultural, and industrial users.

Environmental contamination from wood preserving operations that use inorganic preservatives can be long-lasting. This is documented by a site in Texas on the Texas-Arkansas border. A wood preserving facility operated on this 61 acre site from 1939 to 1961 and used pentachlorophenol, creosote, and CCA. Wood preserving wastes were stored in a surface impoundment on the site where ground water is 10 feet below the surface. In 1984, a housing development and a sand and gravel pit occupied the site. A sediment sample from a creek adjacent to the site contained 4 mg/kg arsenic and 3 mg/kg chromium, presumably contaminated by drippage carried by surface runoff. Ground water leachate collected in the quarry area contained 440 mg/l arsenic (chromium concentration was not reported), 23 years after wood preserving operations on the site were discontinued.

For the reasons set out in the preamble, 40 CFR Parts 260, 261, 262, 264, 265, 270, 271, and 302 are proposed to be amended as follows:

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

1. The authority citation for Part 260 continues to read as follows:

Authority: 42 USC 6905, 6912(1), 6921 through 6927, 6930, 6934, 6935, 6937, 6938, and 6939.

2. Section 260.10 is amended by adding the definition of "Drip Pad", in alphabetical order, as follows:

§ 260.10 Definitions.

* * * * *

"Drip Pad" is a curbed, impermeable base installed to assist collection of drippage and accumulated precipitation in drip or kick-back areas at wood preserving facilities or in treated wood storage yards.

* * * * *

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

3. The authority citation for Part 261 continues to read as follows:

Authority: 42 USC 6905, 6912(a), 6921, 6922, and 6938.

4. Section 261.31 is amended by adding the following hazardous waste listing in alphanumeric order to read as follows:

§ 261.31 Hazardous wastes from non-specific sources.

* * * * *

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
	* * * * * *	
F032	Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes at facilities that currently use or have previously used chlorophenolic formulations (except wastes from processes that have complied with the cleaning or replacement procedures set forth in § 261.35 and do not resume or initiate use of chlorophenolic formulations). This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.	(T)
F033	Wastewaters, process residuals, pretectant drippage, and discarded spent formulations from wood surface protection processes at facilities that currently use or have previously used chlorophenolic formulations (except wastes from processes that have complied with the cleaning or replacement procedures set forth in § 261.35 and do not resume or initiate use of chlorophenolic formulations).	(T)
F034	Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes using creosote formulations. This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.	(T)
F035	Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes using inorganic preservatives containing arsenic or chromium. This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.	(T)
	* * * * * *	

5. Section 261.35 is added to read as follows:

§ 261.35 Equipment cleaning or replacement standards for hazardous wastes listed in §§ 261.31 and 261.32 of this chapter.

(a) *Applicability.* Equipment cleaning or replacement standards are applicable to generators of the listed hazardous wastes F032 and F033. Wastes from wood preserving and surface protection facilities generated in processes that do not resume or initiate use of chlorophenolic formulations will not meet the listing definition of F032 and F033, respectively, once the conditions in § 261.35 (b) through (f) are met. These wastes may, however, continue to meet another hazardous waste listing description or may exhibit one or more of the hazardous waste characteristics.

(b) *Equipment cleaning or replacement performance standard.* The owner or operator must clean or replace all equipment that may have come into contact with chlorophenolic formulations or constituents thereof, in a manner that:

(1) Minimizes or eliminates the escape of hazardous waste, hazardous constituents, leachate, contaminated drippage, or hazardous waste decomposition products to the ground and surface waters, and to the atmosphere, and

(2) Complies with the equipment cleaning or replacement requirements of this section.

(c) *Equipment cleaning or replacement requirements.* Generators must either clean or replace all process equipment that may have come into contact with chlorophenolic formulations or constituents thereof, including, but not limited to, treatment cylinders, sumps, tanks, piping systems, drip pads, fork lifts, and trams by conducting the following activities:

(1) The generator must prepare and sign a written equipment cleaning or replacement plan that describes the equipment to be cleaned or replaced, how the equipment will be cleaned or replaced in accordance with § 261.35(b) and (c), and the appropriate solvent chosen for use in § 261.35(c)(3);

(2) The generator must remove all visible residues, including free and attached residues, from process equipment;

(3) The generator must rinse the process equipment with an appropriate solvent until dioxins and dibenzofurans are not detected in the final solvent rinse when tested in accordance with the testing requirements of § 261.35(e); and

(4) The generator must manage all residues from the cleaning process and any discarded equipment as F032 (for wood preserving operations) or F033 (for surface protection operations).

(d) *Previous equipment cleaning or replacement provision.* Generators that can document previous equipment cleaning or replacement which was performed in accordance with the requirements in § 261.35(c) and which occurred after a change in preservative or surface protectant may use this documentation to fulfill the equipment cleaning or replacement requirements in § 261.35(c). Wastes from wood preserving and surface protection facilities generated in processes that do not resume or initiate use of chlorophenolic formulations, for which generators submit information from previous equipment cleaning or replacement activities, will no longer meet the listing definition of F032 or F033 provided that the conditions listed in paragraphs (d) (1), (2), and (3) of this section have been met and provided that the generator does not resume or initiate use of chlorophenolic formulations. The wastes may, however, continue to meet another hazardous waste listing description or may exhibit one or more of the hazardous waste characteristics.

(1) The generator must submit to the Regional Administrator the required documentation together with the following statement signed by the generator or his authorized representative:

I certify under penalty of law that all process equipment required to be cleaned or replaced under 40 CFR 261.35 was cleaned or replaced as represented in the accompanying materials. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

(2) The Regional Administrator finds, after a review of the material provided by the generator, that the procedures used for equipment cleaning or replacement meet the requirements of § 261.35 (b) and (c), and

(3) The Regional Administrator notifies the generator, in writing, of this finding.

(e) Testing and Documentation Requirements.

(1) Any person seeking to meet the equipment cleaning requirements of § 261.35(c) must test the rinsate from the final solvent rinse and demonstrate that dioxins and furans are not detected when tested according to the method specified in § 261.35(e)(2).

(2) Dioxin and dibenzofuran concentrations must be determined using SW–846 Method 8290.

(3) Generators seeking to meet the equipment cleaning or replacement requirements of § 261.35 (c) and (d) must collect the following information for submission to the Regional Administrator:

(i) The name and address of the facility;

(ii) Formulations previously used and the date on which their use ceased in each process at the facility;

(iii) For F033, a statement certifying whether the facility currently uses a surface protection formulation that has no listed hazardous wastes associated with it;

(iv) Formulations currently used in each process at the facility;

(v) The equipment cleaning or replacement plan;

(vi) The name and address of the person conducting any cleaning operations required under § 261.35(c);

(vii) The dates of the cleaning or replacement;

(viii) The name and address of the laboratory facility performing the sampling and testing;

(ix) The dates of sampling and testing;

(x) A description of the sample handling and preparation techniques, including techniques used for extraction, containerization, preservation, and chain of custody of the samples;

(xi) A description of the tests performed, the date the tests were performed, and the results of those tests;

(xii) The name and model numbers of the instrument used in performing the tests; and

(xiii) QA/QC documentation.

(f) Notification, Review, and Approval.

(1) Generators intending to use the equipment cleaning or replacement procedures so that their wastes do not meet the listing description of F032 or F033 must notify the Regional Administrator 30 days prior to equipment cleaning or replacement.

(2) Within 30 days following completion of all equipment cleaning or replacement activities, generators must submit to the Regional Administrator copies of all information required under § 261.35(e), a copy of the equipment cleaning and replacement plan required under § 261.35(c)(1), and the following statements signed by the generator or his authorized representative:

I certify under penalty of law that all process equipment required to be cleaned or replaced under 40 CFR 261.35 was cleaned or replaced in accordance with the requirements of 40 CFR 261.35. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

(3) The Regional Administrator will review the information provided to determine whether the generator has complied with the requirements of § 261.35 (b) and (c).

(4) In the event that the Regional Administrator provides written notification of a tentative determination that the requirements of § 261.35 (b) and (c) have not been met, the generator may provide any appropriate additional information addressing the basis for the tentative determination within 30 days of receipt of the written notification.

(5) Within 30 days following receipt of additional information from the generator, the Regional Administrator will provide written notification of his final determination.

(6) Upon issuance of a final determination that the requirements of § 261.35 (b) and (c) have been met, the subject wastes will be considered to no longer meet the listing descriptions of F032 or F033, provided that the generator does not resume or initiate use of chlorophenolic formulations. The waste will continue to be regulated hazardous waste if it meets another listing description or exhibits one or more of the characteristics of hazardous waste.

Appendix III—[Amended]

6. In Part 261, Appendix III, Table 1 is amended by adding the following compound in alphabetical order as follows:

TABLE 1—ANALYSIS METHODS FOR ORGANIC CHEMICALS CONTAINED IN SW-846

Compound	Method numbers
• • • • •	
Benzo(k)fluoranthene	8100, 8250, 8270, 8310
• • • • •	

7. In Part 261, Appendix VII is amended by adding the following waste streams in alphanumeric order as follows:

Appendix VII—Basis For Listing Hazardous Waste

EPA hazardous waste No.	Hazardous constituents for which listed
*	* * * * *
F032	Benz(a)anthracene, benzo(a)pyrene, dibenz(a,h)-anthracene, indeno(1,2,3-cd)pyrene, pentachlorophenol, arsenic, chromium, tetra-, penta-, hexa-, heptachlorodibenzo-*p*-dioxins, tetra-, penta-, hexa-, heptachlorodibenzofurans.
F033	Pentachlorophenol, 2,3,4,6-tetrachlorophenol, 2,4,6-trichlorophenol, tetra-, penta-, hexa-, heptachlorodibenzo-*p*-dioxins, tetra-, penta-, hexa-, heptachlorodibenzofurans.
F034	Benz(a)anthracene, benzo(k)fluoranthene, benzo(a)pyrene, dibenz(a,h)anthracene, indeno(1,2,3-cd)pyrene, naphthalene, arsenic, chromium.
F035	Arsenic, chromium, lead.
*	* * * * *

8. In Part 261, Appendix VIII is amended by adding the following hazardous constituents in alphabetical order as follows:

Appendix VIII—Hazardous Constituents

Common name	Chemical abstracts name	Chemical abstracts No.
*	* * * *	*
Benzo(k)fluoranthene	Same	207-08-9
*	* * * *	*
Heptachlorodibenzofurans		
Heptachlorodibenzo-*p*-dioxins		
*	* * * *	*

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

9. The authority citation for Part 262 continues to read as follows:

Authority: 42 U.S.C. 6906, 6912, 6922, 6924, 6925, and 6937.

10. Section 262.34 paragraph (a)(1) is revised to read as follows:

§ 262.34 Accumulation time.

(a) * * *

(1) The waste is placed in containers and the generator complies with Subpart I of 40 CFR Part 265, or the waste is placed in tanks and the generator complies with Subpart J or 40 CFR Part 265, except § 265.197(c), and § 265.200, or the waste is placed on drip pads and the generator complies with Subpart T of 40 CFR Part 265. In addition, such a generator is exempt from all the requirements of Subparts G and H of 40 CFR Part 265, except for §§ 265.111 and 265.114.

* * * * *

PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

12. The authority citation for Part 264 continues to read as follows:

Authority: Secs. 1006, 2002, 3004, and 3005 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6924, and 6925).

13. The table of contents for Part 264 is amended to add Subpart T and §§ 264.570, 264.571, 264.572, 264.573, and 264.574 as follows:

* * * * *

Subpart T—Drip Pads

Sec.
264.570 Applicability.
264.571 Containment.
264.572 General Operating Requirement.
264.573 Inspections.
264.574 Closure.

14. Part 264 is amended by adding Subpart T as follows:

Subpart T—Drip Pads

§ 264.570 Applicability.

The requirements of this Subpart apply to owners and operators of facilities that use drip pads to assist collection, storage, or treatment of treated wood drippage that meets the listing description of Hazardous Waste Numbers F032, F033, F034, or F035 of 40 CFR 261.31.

§ 264.571 Containment.

Drip pads must meet the following requirements:

(a) Drip pads must be constructed of a curbed base having an impermeable surface capable of containing drippage and accumulated precipitation while routed to an associated collection area or device (system);

(b) Drip pads must be maintained such that they remain free of cracks, corrosion, or other deterioration that could cause hazardous waste to leak from the drip pad;

(c) The drip pad and associated collection system must be designed and operated to collect and drain liquid resulting from drippage or precipitation in order to prevent run-off; and must be designed and maintained so as to be capable of containing precipitation from a 25-year/24-hour storm event if exposed to rainfall;

(d) Run-on onto the drip pad and associated collection system must be prevented unless the system has sufficient excess capacity to contain any run-on that might enter the system; and

(e) Drippage and accumulated precipitation must be removed from the associated collection system as necessary to prevent overflow onto the drip pad.

(f) As specified in the permit, if the owner or operator detects a condition that could lead to a release of hazardous waste, the condition must be repaired within a reasonably prompt period of time following discovery, or the pad must be removed from service.

(**Note:** See § 264.571(f) for remedial action required if deterioration or leakage is detected.)

§ 264.572 General operating requirement.

Drip pads must be operated and maintained in a manner to prevent tracking of hazardous waste or hazardous waste constituents off the drip pad by personnel or equipment.

§ 264.573 Inspections.

Drip pads must be inspected thoroughly for visual signs of deterioration or cracking. Facility inspection programs must involve inspection of the entire drip pad surface at least weekly.

(**Note:** See § 264.571(f) for remedial action required if deterioration or leakage is detected.)

§ 264.574 Closure.

At closure, all hazardous waste and hazardous waste residues must be removed from the drip pad. The pad and any soil containing or contaminated with hazardous waste or hazardous waste residues must be decontaminated or removed.

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

15. The authority citation for Part 265 remains as follows:

Authority: Secs. 1006, 2002(a), 3004, 3005, and 3015 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6924, 6925, and 6935).

15. The table of contents for Part 265 is amended by adding Subpart T consisting of §§ 265.440, 265.441, 265.442, 265.443 and 265.444 as follows:

Subpart T—Drip Pads

Sec.
265.440 Applicability.
265.441 Containment.
265.442 General operating requirement.
265.443 Inspections.
265.444 Closure.

16. Section 265.1 is amended to add paragraph (c)(4)(iii), to read as follows:

§ 265.1 Purpose, scope, and applicability.

(c) * * *
(4) * * *

(iii) To a person who treats, stores, or disposes of hazardous waste in a State authorized under Subpart A or B of Part 271 of this chapter at a facility which was not covered by standards under this part when the State obtained authorization and for which EPA promulgates standards under this part after the State is authorized. This paragraph will apply only until the State is authorized to implement interim status standards for such facilities under Subpart A of Part 271 of this chapter.

17. Part 265 is amended by adding Subpart T as follows:

SUBPART T—DRIP PADS

§ 265.440 Applicability.

The requirements of this Subpart apply to owners and operators of facilities that use drip pads to assist collection, storage, or treatment of treated wood drippage that meets the listing description of Hazardous Waste Numbers F032, F033, F034, or F035, of § 261.32 of this chapter.

§ 265.441 Containment.

Drip pads must meet the following requirements:

(a) Drip pads must be constructed of a curbed base having an impermeable surface capable of containing drippage and accumulated precipitation while routed to an associated collection area or device (system);

(b) Drip pads must be maintained such that they remain free of cracks, corrosion, or other deterioration that could cause hazardous waste to leak from the drip pad;

(c) The drip pad and associated collection system must be designed and operated to collect and drain liquid resulting from drippage or precipitation in order to prevent run-off; and must be designed and maintained so as to be capable of containing precipitation from a 25-year/24-hour storm event if exposed to rainfall;

(d) Run-on onto the drip pad and associated collection system must be prevented unless the system has sufficient excess capacity to contain any run-on that might enter the system; and

(e) Drippage and accumulated precipitation must be removed from the associated collection system as necessary to prevent overflow onto the drip pad.

(f) If the owner or operator detects a condition that could lead to a release of hazardous waste, the condition must be repaired within a reasonably prompt period of time following discovery or the pad must be removed from service.

§ 265.442 General operating requirement.

Drip pads must be operated and maintained in a manner to prevent tracking of hazardous waste or hazardous waste constituents off the drip pad by personnel or equipment.

§ 265.443 Inspections.

Drip pads must be inspected thoroughly for visual signs of deterioration or cracking. Facility inspection programs must involve inspection of the entire drip pad surface at least weekly.

(Note: See § 265.342(f) for remedial action required if deterioration or leakage is detected.)

§ 265.444 Closure

At closure, all hazardous waste and hazardous waste residues must be removed from the drip pad. The pad and any soil containing or contaminated with hazardous waste or hazardous waste residues must be decontaminated or removed.

PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

18. The authority citation for Part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6925, 6927, 6939, and 6974.

19. Subpart B of Part 270 is amended by adding § 270.22 to read as follows:

§ 270.22 Special Part B information requirements for drip pads.

Except as otherwise provided by § 264.1 of this chapter, owners and operators of hazardous waste treatment, storage, or disposal facilities that collect, store, or treat hazardous waste on drip pads must provide the following additional information:

(a) A description of the drip pad and associated collection system sufficient to demonstrate compliance with the requirements of §§ 264.353 and 264.354. This information must include the following at a minimum:

(1) Basic design parameters, dimensions, and construction materials.

(2) How the design promotes collection and drainage of drippage and materials mixed with drippage to an associated collection area or device (system).

(3) The capacity of the drip pad and associated collection system.

(4) For drip pads and associated collection systems exposed to precipitation, a demonstration that the design capacity of the drip pad and associated collection system is capable of containing the precipitation from a 25 year/24 hour storm event.

(5) For drip pads and associated collection systems protected from precipitation, a description of the structures or structure that will provide protection from precipitation, including basic design parameters, dimensions, and construction materials.

(6) A description of structures that will prevent run-on to the drip pad and associated collection system or a demonstration that the capacity is sufficient to contain any run-on that might enter the drip pad or collection system.

(7) The interval at which drippage and other materials will be removed from the associated collection system and a statement demonstrating that the interval will be sufficient to prevent overflow onto the drip pad.

(b) A description of operating practices and procedures that will be followed to ensure that hazardous waste or waste constituents are not tracked off the drip pad by personnel or equipment.

(c) A plan demonstrating how the owner or operator will ensure that all portions of the drip pad are inspected weekly for signs of deterioration or cracking, including provisions for moving any treated wood that is stored on a pad for more than one week.

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE MANAGEMENT PROGRAMS

20. The authority citation for Part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

§ 271.1 [Amended]

21. Section 271.1(j) is amended by adding the following entry to Table 1 in chronological order by date of publication:

TABLE 1.—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Promulgation date	Title regulation	Federal Register reference	Effective date
•	•	•	•
[Insert date of publication].	The listing of wastes from the wood preserving and surface protection processes. [2].	xx *FR* xx.....	[Insert effective date.]
•	•	•	•

• • • • •

[2] These regulations implement HSWA only to the extent that they apply to the listing of Hazardous Wastes Nos. F032 and F033 and the equipment cleaning and replacement procedures. Listings of Hazardous Waste Nos. F034 and F035, test methods for benzo(k)fluoranthene, and technical standards for drip pads do not implement HSWA.

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

22. The authority citation for Part 302 continues to read as follows:

Authority: Sec. 102 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9602; secs. 311 and 501(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1321 and 1361.

§ 302.4 [Amended]

23. In § 302.4, amend Table 302.4 by adding the waste streams F032, F033, F034, and F035.

(a) * * *

TABLE 302.4—LIST OF HAZARDOUS SUBSTANCES AND REPORTABLE QUANTITIES

[See footnotes at end of table 302.4]

Hazardous substance	CASRN	Regulatory synonyms	Statutory RQ	Statutory Code	Statutory RCRA waste number	Final RQ Category	Final RQ Pounds (Kg)
* * *	*	*	*	*	*	*	
F032 Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes at facilities that currently use or have previously used chlorophenolic formulations (except wastes from processes that have compiled with the cleaning or replacement procedures set forth in § 261.35 and do not resume or initiate use of chlorophenolic formulations). This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.			*	4	F032	X	1 (0.454)
F033 Wastewaters, process residuals, protectant drippage, and discarded spent formulations from wood surface protection processes at facilities that currently use or have previously used chlorophenolic formulations (except wastes from processes that have compiled with the cleaning or replacement procedures set forth in § 261.35 and do not resume or initiate use of chlorophenolic formulations).			10	4	F033	X	1 (0.454)
F034 Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes that currently use creosote formulations. This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.			1 *	4	F034	X	1 (0.454)
F035 Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes using inorganic preservatives containing arsenic or chromium. This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.			1 *	4	F035	X	1 (0.454)

[FR Doc. 88-30078 Filed 12-29-88; 8:45 am]
BILLING CODE 6560-50-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SW-FRL-3500-6]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Tentative Petition Denial

AGENCY: Environmental Protection Agency.

ACTION: Tenative determination to deny petition for rulemaking; request for comments.

SUMMARY: The U.S. Environmental Protection Agency (EPA or Agency) today is issuing a tentative determination to deny a petition from the American Wood Preservers Institute (AWPI), to: (1) Reconsider the Agency's interpretation that EPA hazardous waste K001 may form from application of wood preserving wastewaters to spray irrigation fields and (2) more clearly define K001 by specifying the concentrations of listing constituents that identify a wood preserving wastewater treatment sludge as K001. If EPA finds that K001 can form in spray irrigation fields, the petitioner requests that owners or operators of such facilities be given six months from the date of EPA's response to comply with the regulations. EPA also has determined tentatively to deny this request. The Agency has, however, provided in this **Federal Register** notice a description of how EPA Hazardous Waste K001 applies to spray irrigation fields. This guidance is intended to provide additional assistance to generators in indentification of K001.

The Agency bases today's tentative determination to deny the petition on (1) the listing description, (2) the information provided in the docket supporting the K001 listing and (3) EPA's examination of the data submitted by the petitioner, to support their claim that spray irrigation fields used for the land treatment of wood preserving wastewaters do not generate wastewater treatment sludges and that any wastes that are so generated do not contain significant concentrations of the constituents of concern specified for K001 in 40 CFR Part 261, Appendix VII. It is the Agency's tentative determination that the K001 Background Document and the data submitted by the petitioner support the conclusion that wastewater treatment sludges that meet the K001 listing description may be generated, treated or otherwise managed in spray irrigation fields. Therefore, the Agency believes that the K001 listing applies to sludge that forms in spray irrigation fields used for the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol. Further, the Agency believes it provided adequate notice to wood preservers who use spray irrigation fields of the description of K001 by publication of a notice of the listing in the **Federal Register** and by providing opportunities for public comment on the listing. For this reason, the Agency does not propose to give these facilities additional time to come into compliance with RCRA regulations. Accordingly, the Agency tentatively denies the AWPI petition.

DATES: EPA is requesting public comments on today's tentative determination to deny the petition from AWPI. Comments will be accepted until February 28, 1989. Comments postmarked after this date will be stamped "late" and may not be considered

Any person may request a hearing on this tentative determination by filing a request with Mr. Devereaux Barnes, whose address appears below, by January 17, 1989. The request must contain the information prescribed in 40 CFR 260.20(d).

ADDRESSES: Comments on this tentative determination should be sent in triplicate to the EPA RCRA Docket Clerk (WH–562), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. All comments must be marked "Docket Number F–88WPDP–FFFFF".

Requests for a hearing should be addressed to Mr. Devereaux Barnes, Director, Characterization and Assessment Division (OS–330), Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

The RCRA regulatory docket for this tentative determination is located at the U.S. Environmental Protection Agency, 401 M Street, SW. (sub-basement), Washington, DC 20460. The public must make an appointment in order to review the docket by calling (202) 475–9327. The docket is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. The public may copy a maximum of 100 pages of material from any one regulatory docket at no cost. Additional copies cost 15 cents per page.

FOR FURTHER INFORMATION CONTACT: The RCRA Hotline, toll free at (800) 424–9346, or at (202) 382–3000. For technical information concerning this notice, contact Mr. Edwin F. Abrams, Listing Section, Office of Solid Waste (OS–333), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 382–4787.

SUPPLEMENTARY INFORMATION: The contents of today's notice are listed in the following outline:

I. Background
A. Identification and listing of Hazardous Wastes
B. American Wood Preservers Institute Petition
C. RCRA Regulations Governing Petitions
II. Summary of the Determination
III. Analysis of EPA's Tentative Determination
A. Formation of EPA Hazardous Waste K001 as a Result of Spray Irrigation
B. Guidance For Determining When EPA Hazardous Waste K001 Forms in Spray Irrigation Fields
C. Six-Month Suspension.
IV. References

I. Background

A. Identification and Listing of Hazardous Wastes

Section 3001 of RCRA directs EPA to promulgate criteria for identifying the characteristics of a solid waste that make the waste hazardous and to promulgate criteria listing specific wastes as hazardous. Following the identification of these criteria, the Agency is also required to promulgate regulations identifying the characteristics of hazardous wastes and listing particular hazardous wastes. Any wastes identified as hazardous are subject to regulation under Subtitle C.

On May 19, 1980, the Agency promulgated rules listing specific wastes that have been found to be hazardous based upon the criteria set out in 40 CFR 261.11(a). See 40 CFR Part 261, Subpart D. These criteria require EPA to evaluate a number of factors, including the waste's chemical constituents, whether those constituents that are hazardous are present in the waste in significant concentrations, and whether these constituents have the potential to migrate from the waste, persist in the environment, and cause substantial harm when they reach human or environmental receptors.

Under section 3001 of RCRA, EPA listed K001, and other wastes, as hazardous wastes. K001 is defined as bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol. This listing was made effective pursuant to an interim final regulation, promulgated on May 19, 1980 (45 FR 33084). EPA concurrently proposed to regulate as hazardous the wastewaters from wood preserving processes using creosote and/or pentachlorophenol (45 FR 33136, May 19, 1980). The Agency, however, did not finalize the listing of wood preserving wastewater (45 FR 74884, November 12, 1980). (In a separate part of today's **Federal Register**, EPA is again proposing to regulate these wastewaters.)

B. American Wood Preservers Institute Petition

AWPI is an industry trade association representing approximately 80 member companies in the wood preserving industry. Over half of its members use creosote and pentachlorophenol in their wood preserving processes. On January 10, 1985, AWPI sent a letter to John H. Skinner, then the Director of the Office of Solid Waste at EPA, requesting reconsideration of EPA's interpretation that sludges generated in spray irrigation fields used to treat wood preserving wastewaters are bottom sediment sludges described as EPA Hazardous Waste No. K001.

Although the AWPI letter was not sent to the EPA Administrator (nor was it sent by certified mail) as prescribed by the rulemaking petition procedures in 40 CFR 260.20, the caption of the letter, "Petition for Reconsideration of Decision to Classify Wood Preserving Spray Irrigation Fields as Hazardous Waste Land Treatment Units and for Clear Definition of K001 Sludge," and information included in the request manifested AWPI's intent to have the letter serve as a petition for rulemaking under that section. The Agency has therefore treated the AWPI January 10, 1985 letter as a rulemaking petition.

In the petition, AWPI asserts that EPA has incorrectly interpreted the scope of the K001 listing. AWPI further alleges that this incorrect interpretation appears in a letter written in November of 1984, by John Skinner, then Director of the Office of Solid Waste (OSW), to James Scarbrough, a Region IV Branch Manager. In this November 1984 interpretation, the Director of OSW confirmed the regulatory status of land treatment units used to treat wastewaters by spray irrigation, plow injection, or flooding. Mr. Skinner concluded that such land treatment units used to treat wastewaters from wood preserving operations using creosote or pentachlorophenol can generate K001. Therefore, such units, when generating, treating, storing, or disposing of K001, are subject to the hazardous waste regulations, including appropriate permitting standards, found in 40 CFR Parts 262, 263, 264, 265, 268, 270, 271 and 124.

In its petition, AWPI argues that the application of wastewaters from wood preserving processes to spray irrigation fields does not result in the production of K001 or other sludge, and that the waste produced in a spray irrigation field is physically and chemically different than K001. AWPI further claims that the chemical and biological interactions between the wastewater and the soil in the spray irrigation field would result in a different material from the K001 produced from wastewater treatment by trickling filters or surface impoundments. AWPI also points out that the wastewater itself is not a listed waste and asserts that a properly designed and operated spray irrigation field does not allow migration of

constituents outside the unit and, therefore, cannot be a hazardous waste land management unit.

In addition, AWPI requested guidance regarding the K001 listing, including a description of the physical and chemical composition of K001, and an identification of the constituents of concern in K001 and of the levels of concern for the hazardous constiuents of K001. AWPI believes this additional information is needed in order for wood treaters to determine if their spray irrigation fields produce a sludge and, if so, whether this sludge is indeed K001. without this information, AWPI maintains its member facilities will be unable to prove to EPA that they do not generate K001 and will be unable to delist the waste if they do generate it.

Finally, if the petition to reinterpret the scope of the listing is denied, AWPI requests a six-month suspension of the effective date of the K001 listing and associated RCRA requirements for spray irrigation fields. AWPI argues that a suspension is necessary for their member facilities to come into compliance with RCRA because the Agency's interpretation of the K001 listing is analogous to a new or revised regulation. AWPI also requests that the Agency formally notify all facilities that use spray irrigation fields to treat wood preserving wastewaters of the Agency's final decision on AWPI's petition.

C. RCRA Regulations Governing Petitions

EPA's process for addressing rulemaking petitions under RCRA is specified in 40 CFR 260.20. Under 40 CFR 260.20, which implements section 7004(a) of RCRA, any person may petition the Administrator to modify or revoke any provision of Parts 260 through 265 and 268 or Title 40 of the Code of Federal Regulations. Persons submitting a rulemaking petition must include a statement of the need and justification for the proposed action, including supporting data, tests, studies, or other information.

Section 260.20 requires the Administrator to publish in the **Federal Register** a tentative determination on the petition and solicit public comment. The tentative determination may be in the form of an advance notice of proposed rulemaking, a proposed rule, or a tentative determination to deny the petition. Upon written request of any interested person, the Administrator may at his or her discretion, hold an informal public hearing to consider oral comments. After evaluating all public comments, EPA will make a final decision by publishing in the **Federal Register** a regulatory amendment or a denial of the petition.

This notice constitutes EPA's tentative determination to deny AWPI's petition.

II. Summary of the Determination

EPA has tentatively determined to deny AWPI's requests (1) to consider its interpretation that K001 may form from application of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol to spray irrigation fields, (2) to define K001 in terms of the concentrations of listing constituents that cause it to be hazardous, and (3) to grant a six-month suspension of the effective date of the Subtitle C hazardous waste management regulations for wood preserving spray irrigation fields that contain K001 following formal notification to generating facilities of the petition denial. EPA believes that the existing information and the K001 listing description clearly indicate that K001 may form in spray irrigation fields, and this listing, which has been effective since 1980, already applies to facilities generating or managing K001.

EPA has, in this tentative determination, provided additional guidance for determining when EPA Hazardous Waste K001 forms in spray irrigation fields, so that wood preservers who generate this waste in spray irrigation fields may more easily identify it. This guidance is found in Section III. B. of this notice.

The K001 listing is a broad, generic listing and includes sludges generated in spray irrigation fields that treat wastewaters from wood preserving processes that use creosote and/or pentachlorophenol. The listing description for K001 bottom sediment sludges is not based on a concentration criterion for hazardous constituents in the wastes. Instead, all bottom sediment sludges generated from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol are listed, regardless of the concentrations of constituents in the sludges. Under 40 CFR 261.11(b), the Agency has the authority to list classes or types of waste that typically or frequently are hazardous. A waste is not required to contain any minimum concentration of toxic constituents in order to meet the listing description.

Contrary to AWPI's allegation, the toxic constituents that are the basis for the K001 listing have been identified in 40 CFR Part 251, Appendix VII, since 1980. However, it is not necessary to show that a particular waste contains any or all of the listing constituents in order to establish that the waste is hazardous. The listing establishes a presumption that a waste is hazardous based upon the constituents that typically are present in all wastes of this general category. The actual presence and concentrations of toxic constituents in wastes meeting the listing description are only relevant, however, as to whether EPA should grant petitions to delist specific wastes that already are considered hazardous waste K001. Delisting is the only means to refute the presumption that a waste meeting the listing description is hazardous and contains hazardous levels of particular constituents of concern. Accordingly, if any sludge is formed or managed in spray irrigation fields as a result of spray application of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol, then the sludge is K001 unless delisted. As explained in Section III. B. of this notice, the presence of listing constituents may be helpful, however, in demonstrating the presence of K001.

A six-month suspension of the effective date of the Subtitle C hazardous waste management regulations for K001 generated or managed in spray irrigation fields and the formal notification of affected facilities are not warranted. The sludge generated in spray irrigation fields treating wood preserving wastewaters has been listed as a hazardous waste since November 19, 1980. The November 1984 letter from John Skinner to James Scarbrough was not a new or revised regulation and did not impose any new requirements. Any facility generating or managing K001 as a result of treatment of wood preserving wastewaters in spray irrigation fields has been required to be in compliance with RCRA since November 19, 1980.

III. Analysis of EPA's Tentative Determination

A. Formation of EPA Hazardous Waste K001 as a Result of Spray Irrigation

EPA Hazardous Waste No. K001 is defined as "bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol." The RCRA definition of sludge, found at 40 CFR 260.10, is "* * * any solid, semi-solid, or liquid waste generated from a municipal, commercial or industrial wastewater treatment plant * * * exclusive of the treated effluent from a wastewater treatment plant." The K001 listing is generic, i.e., it is intentionally broad enough to encompass *any* waste meeting the listing description. Bottom sediment sludge generated during the treatment of wastewaters from wood

preserving processes that use creosote and/or pentachlorophenol is encompassed by the listing wherever such sludge is formed.[1]

The Background Document describes typical treatment of wood preserving wastewaters as "* * * evaporation, combined biological *and irrigation process* (sic) or incineration." (Background Document at 37, emphasis added). The following specific wastewater treatment practices that generate K001 are also described in the Background Document:

—Sedimentation in the bottom of wastewater treatment ponds or lagoons (Background Document at 13, 36, 37);
—Flocculation (Background Document at 21, 24);
—Sand filtration (Background Document at 24);
—Primary oil water separation (Background Document at 24);
—Evaporation, with or without the addition of heat (Background Document at 2, 26);
—Adsorption of wood preserving oils by the addition of clays, resins, alum, lime, or polymer (Background Document at 21); and
—Adsorption of pentachlorophenol and high molecular weight toxic pollutants onto the biomass resulting from biological treatment (Background Document at 24).

K001 bottom sediment sludge, therefore, includes wastewater treatment residuals generated by any of these mechanisms in any wastewater treatment unit, including spray irrigation fields.

Wastewater treatment removes undesirable contaminants from wastewater, or destroys or inactivates contaminants contained in wastewater. The contaminants found in wood preserving wastewaters are: Large particles, such as sand and sawdust; fine particles, such as suspended clay; oil and grease, which may be present as a discrete floating or sinking layer or present as large or fine particles; and dissolved constituents, such as pentachlorophenol; polynuclear aromatic hydrocarbons (PAHs), which are creosote constituents; and wood sugars.

Wastewater treatment mechanisms that destroy or inactivate contaminants, such as ultraviolet photolysis and hydrolysis, have only limited application to wood preserving wastewater. All other physical/chemical mechanisms used to treat wood preserving wastewaters transfer the contaminants of the wastewater to another medium, thus forming a sludge. The mechanisms used to treat wood preserving wastewater and how each mechanism generates sludge are described below.

Biological treatment uses microorganisms to digest and degrade wastewater contaminants. While contaminants are removed from the wastewater, a sludge in the form of expended microorganisms (which may or may not be contaminated with toxicants) is generated.

Sedimentation is the separation from water, by gravitational settling, of suspended materials that are heavier than water. It is used to remove large particles and oils (e.g., creosote) that are heavier than water from wood preserving wastewater in devices such as sumps, holding tanks, and ponds.

Granular bed filtration is an operation used to remove fine particulates from water. In this operation, wastewater flows by gravity or pressure through a bed of granular material, such as sand, anthracite coal, and/or various types of gravel. The size of the granular material is much larger than the size of the particles captured by the filter. Particles that are larger than the pore space of the filtering medium are strained out of the wastewater mechanically. Smaller particles are captured in the depth of the filter bed by mechanisms such as sedimentation, impaction, and interception. Because the particles are captured in the spaces between the granules within the bed, there may be no visible sludge layer. However, the small particles captured within the bed do constitute sludges.

Coagulation and flocculation are two mechanisms used together to remove small dispersed particles from water. Coagulation refers to the addition of chemicals (lime, alum, ferric chloride, synthetic polyelectrolyte polymers) to an aqueous suspension of fine particles in order to change the electrical charge on the exterior of the particles, a process called destabilization. Once the particles are destabilized, they flocculate, or combine into large agglomerates. The flocculated particles can be removed from the wastewater by some other mechanism such as sedimentation, floatation, or filtration.

Adsorption used for wastewater treatment is the process of accumulating dissolved contaminants on a solid surface called an adsorbent. Activated carbon is an adsorbent used to remove dissolved pentachlorophenol and PAHs from wood preserving wastewaters. Activated carbon is effective because pentachlorophenol and PAHs have relatively low polarities, as does the activated carbon. Dissolved substances will adsorb to solid materials of similar polarity. Other solid surfaces of low polarity, such as waste biomass in a biological treatment system and organic matter in soil, also act as adsorbents for pentachlorophenol and PAHs in wood preserving wastewater. The dissolved constituents that sorb onto the activated carbon may not be visible but nevertheless constitute a sludge.

Ion exchange is a process in which ions held by electrostatic forces to charged functional groups on the surface of a solid (such as soil or a synthetic resin) are exchanged for ions of similar charge in a solution (such as wastewater) in which the solid is immersed (Weber, p. 261). An example of the use of ion exchange for wastewater treatment is the recovery of ionic forms of precious metals from plating wastes. Again, in ion exchange, the ions exchanged onto the solid surface may not be visible, but spent ion exchange resin is considered to contain a sludge.

Evaporation is a physical process in which water is removed from its contaminants and, thus, is distinguished from other wastewater treatment mechanisms that remove contaminants from water. Wastewater evaporation can be accomplished at ambient temperatures or heat may be added to speed up the process. Highly volatile dissolved constituents will evaporate with the water but other dissolved constituents, suspended solids, and oils will form a sludge in the evaporation unit as water is removed.

All of the mechanisms described above operate in spray irrigation fields that treat wood preserving wastewaters. The technical studies supplied by AWPI, in support of its argument that K001 does not form in spray irrigation fields, confirm the fact that these fields are used for the land treatment of wastewaters from pentachlorophenol and/or creosote wood preserving processes. In the context of these studies, it is clear that spray irrigation of wastewaters is not merely a means of disposal, but also a treatment method used to reduce the concentration of contaminants in the wastewater. Further, EPA believes this wastewater

[1] The K001 listing definition refers to wood preserving wastewater treatment sludges as "bottom sediment sludges," a reference to the fact that wood preserving wastes commonly accumulate by gravity sedimentation on the bottoms of wastewater surface impoundments and tanks. In the Background Document prepared in support of the K001 listing, the Agency did not limit the listing to the type of device or the physical mechanism by which bottom sediment sludges are generated. It is clear, as discussed below, that bottom sediment sludge produced from treating wood preserving wastewaters by spray irrigation is included in the scope of the K001 listing.

treatment may generate sludge by the mechanisms described above. As previously explained, such sludge would meet the K001 listing description.

AWPI, however, claims that the application of wastewaters from wood preserving processes to spray fields does not result in the production of K001. AWPI states that K001 is precipitated solid or semisolid matter produced by wastewater treatment, and that: (1) The waste generated in a spray irrigation field and K001 are not physically and chemically alike and (2) spray irrigation field waste and K001 are produced by different "wastewater-soil chemical and biological interactions" (AWPI at 2).

The agency does not agree that the wasewater treatment mechanisms that occur in a spray irrigation field differ from the wastewater treatment mechanisms that form K001 in other wastewater treatment units. Additionally, the Agency does not agree that the waste generated in a spray irrigation field and K001 generated in other wastewater treatment units are physically and chemically different.[2] On the contrary, the Agency believes that the contaminants removed from wood preserving wastewater in surface impoundments, sand filters, and other wastewater treatment units that AWPI accepts as generating K001 are similar or identical to the contaminants removed from wood preserving wastewater in a spray irrigation field. The only issue is whether sludge in fact forms in the spray irrigation fields. The Agency believes that the same mechanisms that operate in surface impoundments and sand filters may operate in spray irrigation fields to produce sludges.

In one of the technical studies supplied by AWPI, Quagliotti presents detailed descriptions of the treatment mechanisms that he believes are occurring in spray irrigation fields (Quagliotti at 7–24). Under the scenario presented by Quagliotti, soil filtration (i.e., granular bed filtration) and adsorption act to retain wastewater contaminants "in the surface soil matrix for a long enough period to allow material decomposition" (Id. at 17). As described above, filtration and adsorption are wastewater treatment mechanisms that form bottom sediment sludge.

Other wastewater and sludge treatment mechanisms that Quagliotti believes occur in spray irrigation fields are: biological degradation, both aerobic and anaerobic; chemical degradation, including precipitation, hydrolysis and polymerization; photochemical degradation; evaporation; and volatilization (which plays a minor role in spray irrigation fields due to the adsorption of wastewater contaminants to soil). Two mechanisms Quagliotti considers to play a major role in wastewater treatment in spray irrigation fields, biological degradation and evaporation, are treatment mechanisms that generate bottom sediment sludge, as described above. Further, precipitation and polymerization, two of the mechanisms Quagliotti includes in the term chemical degradation, also form such sludge. It is clear that the treatment of wood preserving wastewaters by application to spray irrigation fields, as described by Quagliotti, can generate sludge meeting the K001 listing description.

In the other technical study supplied by AWPI, Koppers Company, a member facility of AWPI, evaluated the spray irrigation field at its Florence, South Carolina facility, as part of a wastewater treatability study. The conclusion of the evaluation was "the field appears to be quite adequate to serve as a wastewater treatment process." This conclusion was based on characteristics of the soil in the field, which were believed to be "generally sufficient to adsorb pentachlorophenol and PAHs * * *".

Other studies performed by the wood preserving industry were also designed to show contaminant removal from wastewater by biological degradation, filtration, and adsorptive processes, all sludge-forming wastewater treatment mechanisms (see NCASI, 1985; Gaudy et. al., 1971; and Fisher, 1971). Sludges formed by these methods from wood preserving wastewates in spray irrigation fields meet the K001 bottom sediment sludge listing description.

Koppers Company, moreover, acknowledged in a Corrective Action Consent Order, dated June 4, 1986, that K001, bottom sediment sludge, in fact, is collected in spray irrigation fields as a result of wood preserving wastewater treatment. (See Findings of Fact, *In the Matter of Koppers Company, Inc.*, Docket No. VW–86–R–001 at 4.)

AWPI also asserts that K001 is solid or semi-solid material that "has *some identifiable thickness* on the bottom of a collection unit" (AWPI petition, at 9, emphasis added). At the same time, AWPI asserts that no sludge, K001 or other, forms in spray irrigation fields because it has never been observed (Id. at 2, 12). In short, AWPI claims that the criterion for the generation of a bottom sediment sludge in a spray irrigation field should be the generation of a distinct, visible layer of material on top of the soil.

The Agency disagrees that an observable sludge layer is a necessary criterion that must be used to establish the presence of bottom sediment sludge, although it would be a sufficient (and easily implemented) criterion. Using visible accumulation of matter from wastewater as a necessary criterion for sludge formation would preclude from regulation many wastewater treatment sludges that were included in the listing Background Document as specific examples of the sources of K001. For example, as described previously, no visible sludge is formed during grandular bed filtration, such as sand filtration, because the fine particulate separated from wastewater in this process is captured in the depth of the filter bed. However, sand filtration units are specifically described in the K001 listing Background Document at 24). Also, dissolved constituents that have adsorbed to a solid material often are not visible, although saturated solid adsorbent (e.g., spent activated carbon) contains waste meeting the listing definition. (Adsorption is described on page 21 of the Background Document as a process that also generates the listed bottom sediment sludge, K001.)

The petitioner also argues that spray irrigation fields are not included in the definition of K001 because the concentration of 40 CFR Part 261, Appendix VII listing constituents are significantly reduced over time by the spray irrigation process.

The petitioner fails to recognize and to appreciate the difference between treating constituents in the wastewater and treating constituents in sludge that has formed from the wastewater, i.e., treating hazardous waste.

The Agency recognizes that land treatment of wastewaters is normally intended to remove constituents from wastewater, by processes such as adsorption, and to degrade such constituents before or after removal, by processes such as biological treatment. The petitioner has not attempted to demonstrate that all wastewater contaminants are destroyed in the wastewater, precluding the formation of sludge. Nor has the petitioner attempted to demonstrate that no treatment of *sludge*, once formed, occurs when constituents are destroyed. The Agency does not believe that any such

[2] The Agency recognizes, however, that bilogical treatment in spray irrigation fileds may in some cases effectively degrade the constituents removed from the land-treated wastewaters. Thus, K001 formed in spray fields may in some instances contain lower concentrations of particular constituents than are typically present in other K001 sludges.

demonstration could be forthcoming. The Agency reminds the petitioner, however, that any destruction of hazardous constituents contained in K001, whether in spray irrigation fields or elsewhere, is treatment of a listed hazardous waste. As such, a treatment permit and compliance with Subtitle C treatment regulations are required.

Finally, the petitioner contends that a properly designed and operated spray irrigation unit does not allow migration of any hazardous constituents beyond the unit's boundaries (AWPI Petition at 10). Although proper design and operation of a spray irrigation unit may not allow migration of any hazardous constituents from the unit, wastes are evaluated and included on the RCRA hazardous waste lists based on several criteria, including the potential of the hazardous constituents to migrate from the waste *if improperly managed.* Therefore, the ideal or actual design and operation of wood preserving wastewater treatment units is irrelevant to whether the wastewater treatment sludge is hazardous and to whether the wastewater treatment unit is required to comply with the Subtitle C treatment regulations.[3]

B. Guidance for Determining When EPA Hazardous Waste K001 Forms in Spray Irrigation Fields

In its petition, AWPI claims that the Agency's definition of EPA Hazardous Waste K001 is so vague that it does not provide clear guidance to wood treaters as to whether their spray field contains a waste sludge and, if so, whether that sludge is Hazardous Waste K001. The petitioner argues that without clear guidance on the identify of K001, including identification of the concentration of those constituents in the sludge which cause the listing, wood perservers are not able to demonstrate that K001 is not formed in their spray irrigation units, nor are they able to delist the sludges in such units (AWPI petition at 10).

Bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol was listed as a hazardous waste because it typically and frequently meets the criterion for listing found at 40 CFR 261.11(a)(3). (Under Section 261.11(b), the Agency has the authority to list classes or types of wastes that typically or frequently are hazardous.) K001 contains a number of the toxic constituents identified by EPA in 40 CFR Part 261, Appendix VIII. In addition, the Agency determined that this waste is capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed. This determination was not challenged during the public comment period following the proposed listing of EPA Hazardous Waste K001.

The presence, generally, of Appendix VIII hazardous constituents in wood preserving bottom sediment sludge is documented in the Background Document supporting the K001 listing. The concentrations of these constituents typically and frequently found in these sludges were sufficient to meet the § 261.11(a)(3) criterion and are described in the Background Document. Moreover, the 19 hazardous constituents for which K001 was listed are found in 40 CFR Part 261, Appendix VII, entitled "Basis for Listing Hazardous Waste." Appendix VII was publishd on November 12, 1980 (45 FR 74884, 74891) in the same **Federal Register** document as the publication of the Interim Final K001 listing. Therefore, the petitioner's request that the Agency identify the constituents of concern in K001 has been satisfied since 1980.

AWPI also requests that EPA clarify the concentrations of hazardous constituents that would cause waste generated in spray irrigation fields to be K001, presumably so wood preservers may test their fields to determine if they contain wastes meeting the K001 listing description. Again, the listing description for K001 wastewater treatment sludges, while based on the typical and frequent presence of constituents of concern at hazardous concentrations, does not contain particular concentrations of hazardous constituents in specific wastes. There are no minimum concentrations for the 19 toxic constituents for which K001 was listed below which the waste fails to meet the listing description. Instead, the entire class of bottom sediment sludges generated from wastewaters from wood preserving processes that use creosote and/or pentachlorophenol are listed as hazardous.

A waste, therefore, may meet a general listing description and accordingly be regulated as a hazardous waste without having the hazardous properties for which it was listed. It is precisely for this reason that the Agency developed procedures to exclude from the lists of hazardous wastes (or "delist") specific wastes from particular facilities. See 40 CFR 260.20 and 260.22. Until a petition for exclusion is granted, however, wastes meeting the listing description are hazardous and must be treated as such pursuant to Subtitle C of RCRA.

In order to determine if their spray irrigation fields contain materials that meet the listing description of K001, wood preservers need only determine if "bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol" has been generated and stored, treated, or disposed of in their fields. Wood preservers need not measure the concentrations of hazardous constituents in their spray irrigation fields. For the purpose of clarity, however, EPA will explian how wood preservers may determine if K001 is forming in their spray irrigation fields.

Wastewater treatment consists of the removal of contaminants from wastewater. Bottom sediment sludges are generated during wastewater treatment as described above in Section III.A. Spray irrigation treatment of wood preserving wastewater may generate sludge by the following mechanisms: The simple evaporation of water; sedimentation and/or filtration of particulate matter; adsoprtion of dissolved constituents to solid or organic matter in the soil; in exchange of any dissolved cations in the wastewater with soil cations; conversion of dissolved constituents to biomass through the action of microorganisms; and sedimentation, filtration, adsorption, or biodegradation of free or emulsified oils contained in the wastewater. Therefore, if wood preservers test their wastewater from processes using creosote and/or pentachlorophenol (by methods specified in *Test Methods for Evaluating Solid Waste,* SW–846, 3rd Edition, 1987, or by other EPA-approved methods) and find particulate matter, dissolved constituents (such as chlorophenols, PAHs, or wood sugars) or oil and grease, they should presume that the wastewater will form bottom sediment sludge (K001) when applied to a field by spray irrigation. Alternatively, having found contaminants in the wastewater, the wood preserver could attempt to demonstrate why none of the sludge-generating mechanisms described above would occur in the particular field to which the wastewater is applied.

If the wastewater that is applied to a spray irrigation field is tested (by methods specified in SW–846 or by other EPA-approved methods) and

[3] The fact that a *particular* waste might be managed property does not mean that the waste does not meet the listing description and is not hazardous. The Agency has previously evaluated the potential hazards posed by the plausible mismanagement of the hazardous constituents found in K001, as described in the Background Document supporting the K001 listing, and found them to be significant.

determined to contain no particulate matter, dissolved constituents, or oil and grease, a wood preserver may presume that no treatment of this wastewater will occur as a result of the spray irrigation process. No treatment will occur because there are no contaminants present that can be removed (*i.e.* treated) during spray application. If no wastewater treatment occurs, no bottom sediment sludge can be generated and the spray irrigation field can contain no waste materials that meet the listing description of Hazardous Waste K001.

Wood preservers may also identify the presence of K001 by testing their spray irrigation fields. If any of the K001 listing constitutents found in 40 CFR Part 261, Appendix VII, are present above the background concentration of the soils before the wastewaters were first applied, and the presence of these constituents cannot be traced conclusively to sources other than treatment of wastewaters from processes using creosote and/or pentachlorophenol, the wood preserver should presume that the spray irrigation field contain bottom sediment sludge that meets the K001 listing description.

For example, EPA Region IV collected soil samples from a spray irrigation field used to treat wastewater from wood preserving proceses using creosote and pentachlorophenol. At the same time, a background soil sample was collected from a location outside of the boundaries of the wood preserving facility. Nine K001 listing constituents were detected in the sprayfield soil, all at concentrations above the concentrations measured in the background soil. For example, pentachlorophenol was detected at 32 mg/kg in the sprayfield soil, but it was not detected in the background soil. Chrysene was present in the sprayfield soil at 210 mg/kg but the concentration in the background soil was only 0.33 mg/kg. (USEPA, Transmittal of RCRA Waste Sampling Investigation Report, December 1, 1986.) Because of these analytical results and the knowledge that the wastewater applied to the spray irrigation field is derived from wood preserving processes using pentachlorophenol and/or creosote, the wood preserver should presume that the field contains bottom sediment sludge that meets the K001 listing description.

If, however, a spray irrigation field is tested and no listing constituents are found to be present above background soil concentrations, the wood preserver cannot necessarily conclude that K001 does not form or has never formed in the spray irrigation field. The lack of such concentrations may demonstrate successful treatment *of the sludge* (rather than the wastewater). In addition, the listing constituents may have been converted to different chemical species by bioligical degradation, chemical degradation, or photodegradation. Similarly, sludge may be present in the field, but may not be detectable, because of dilution with a large volume of soil. Sludge also may have been formed in the spray irrigation field but may have been washed off or washed through the soil.

Finally, testing a spray irrigation field and finding no listing constitutents present above soil background concentrations may simply result from the presence of high background concentrations. This is a likely scenario at wood preserving facilities where preservative solutions drip or have dripped from treated wood as it is moved from the treatment area to storage yards or preservative is dispersed over the treating facility area by aerosols from pressure treating equipment. (See, e.g., Quagliotti at 58–59).

If a wood preserver tests a spray irrigation field and finds K001 listing constitutents are not present above soil background concentrations, the wood preserver may believe that the spray irrigation field, although containing wastes that meet the listing description of K001, presents no risk to human health or the environment. The wood preserver may then petition EPA to exclude from regulation or "delist" the wastewater treatment sludge contained in their particular spray irrigation field. Under 40 CFR 260.20 and 260.22, the Agency must consider the factors for which the waste was originally listed; then, the Agency must examine factors other than those for which the waste was listed (including additional Appendix VIII constitutents) in cases where the Administrator has a reasonable basis to believe that such other factors could cause the waste to be hazardous. Additional information is provided in a guidance document entitled, "Petitions to Delist Hazardous Waste, A Guidance Manual" (April 1985, Office of Solid Waste). Further information on delisting is available by contacting the Assistance Branch of the Permits and State Programs Division, Office of Solid Waste.

AWPI also claims that spray irrigation effectively would be banned if wood preservers were required to determine that no sludge forms in the irrigation fields or if they were required to delist any sludge that does form in order to avoid the need to comply with the Subititle C treatment and permit requirements (AWPI Petition at 11). AWPI is also concerned that wood preservers who treat and dispose of their wastewater by spray irrigation might lack alternative dispposal options. Additionally, AWPI is concerned that spray irrigation fields operated by wood preservers might need alteration in order to comply with Subtitle C requirements and that, after modification, the disposal of the K001 that forms in the spray irrigation fields might be banned by the land disposal restrictions mandated by HSWA 1984 (*Id.* at 13; *see also id.* at 11).

The Agency agrees with many of these comments. Most treatment of hazardous sludge (not treatment of the wastewater) will, as a matter of law, sujbect the facility to the RCRA treatment standards and permit requirements. If K001 forms, the facility is required to obtain appropriate storage, treatment, or disposal permits (unless accumulated pursuant to 40 CFR Section 262.34).

With regard to the applicability of the land disposal restriction rules, EPA has developed treatment standards for K001 that must be met before K001 is land disposed (i.e., placed into a land-based unit), unless placement occurs in a no-migration unit. All generators and treaters of K001 are subject to this standard, wherever K001 is generated, even if this makes spray irrigation more costly or less practicable.

As applied to spray irrigation fields, K001 generated in the fields *prior* to the effective date of the land disposal restrictions, August 8, 1988, will not be subject to the restriction unless the K001 in the field is managed so as to create an act of placement after the effective date (for example, if sprayfield soil containing K001 is excavated and removed to a landfill). Treatment *in situ* is not normally considered to trigger the land disposal restrictions, since it does not involve "placement." *See* RCRA section 3004(k). Generation on the land *after* the effective date, however, does constitute disposal, *see id.*, and the waste consequently must meet the treatment standard at the time of placement (or the irrigation field must satisfy the no-migration standard). The facility might be able to demonstrate, by measuring the concentrations of the constituents of the wastewater applied to the field, that spray irrigation sludges will not exceed BDAT levels when generated. EPA will consider any such demonstration on a case-by-case basis. Testing the sludges in the spray irrigation fields will not suffice, however, since subsequent treatment or

accumulation of sludges in the field may alter the concentrations originally present in the sludge when it is generated.

C. Six-Month Suspension

In the petition, AWPI requests that if the Agency does not reinterpret the scope of the K001 listing so as to exclude wood preserving spray irrigation fields, then EPA should suspend the applicability of the Subtitle C regulations for such units until six months after the Agency has responded to the AWPI petition and has formally notified all affected facilities of the petition denial. EPA believes that AWPI's arguments in support of such a request have no merit and, consequently, the Agency tentatively denies the request for a six-month suspension.

Bottom sediment sludge generated in spray irrigation fields treating wood preserving wastewaters has been EPA listed hazardous waste K001 since November 19, 1980. No modifications have been made to the K001 listing since that time. The "Skinner memo" was not a new or revised regulation and did not impose any new requirements on the regulated community. The memo merely provided interpretive guidance to Regional employees on the scope of the existing K001 listing. Accordingly, any facility generating or managing K001 as a result of treatment of wood preserving wastewaters in spray irrigation fields has been required to be in compliance with RCRA since November 19, 1980. EPA does not believe it is appropriate to extend the compliance date for six months when these facilities may have been out of compliance for over eight years.

Date: December 23, 1988.

Lee M. Thomas,

Administrator.

IV. References

USEPA. Hazardous Waste Guidelines and Regulations. Supplemental Proposed Rule. 44 FR 49402 (August 22, 1979).

USEPA. Hazardous Waste Management System: Identification and Listing of Hazardous Waste. Final Rule, Interim Final Rule, and Request for Comments. 45 FR 33084 (May 19, 1980).

USEPA. Hazardous Waste Management System; Identification and Listing of Hazardous Wastes. Final Rule and Interim Final Rule. 45 FR 74884 (November 12, 1980).

USEPA. *Listing Background Document-Wood Preserving.* Washington, DC November, 1980.

Quagliotti, John A., Jr. An Investigation of Spray Irrigation Treatment Systems at the Koppers' Green Spring and Susquehanna Plants. Monroeville Science & Technology Center, Monroeville, PA. January 24, 1983.

Koppers Company, Inc., Water Quality Engineering Section, Environmental Resources Department. *Wastewater Treatability Study, Report for Koppers Company, Inc., Florence, South Carolina Wood Treating Plant.* February 1985.

USEPA. Regulatory Status of Sludges from Land Treatment of Wood Preserving Wastewaters. Memorandum from John H. Skinner, Director, Office of Solid Waste, USEPA, to James H. Scarbrough, Chief Residuals Management Branch, Air and Waste Management Division, Region IV, USEPA. November 23, 1984.

AWPI. Petition for Reconsideration of Decision to Classify Wood Preserving Spray Irrigation Fields as Hazardous Waste Land Treatment Units and for Clear Definition of K001 Sludge. Letter from Walter G. Talarek, General Counsel American Wood Preservers Institute, to Dr. John Skinner, Director, Office of Solid Waste, USEPA. January 10, 1985.

Consent Order, *In re Koppers Company, Inc.*, USEPA Docket No. VW-86-R-001 (June 4, 1986).

Metcalf and Eddy, Inc. *Wastewater Engineering: Treatment, Disposal, Reuse, Second Edition.* New York, 1972.

Sundstrom, Donald W. and Herbert E. Klei. *Wastewater Treatment.* Englewood Cliffs, NJ, 1979.

Weber, Walter J., Jr. *Physicochemical Processes for Water Quality Control.* New York, 1972.

NCASI. "The Land Application of Wastewater in the Forest Products Industry," *Technical Bulletin No. 459.* May 1985.

Gaudy, A.F., R. Scudder, M.M. Neeley, J.J. Perot, and L.E. Crane. "Studies on the Treatment of Wood Preserving Wastes," *American Wood Preservers' Association: Proceedings.* 1971.

Fisher, C.W. "Soil Percolation and/or Irrigation of Industrial Effluent Waters—Especially Wood Treating Plant Effluents," *Forest Products Journal 21,* pp. 76-79. September 1971.

USEPA. Transmittal of the RCRA Waste Sampling Investigation Report; Southern Wood Piedmont Company; Spartanburg, South Carolina, EPA ID #SCD049690001 ESD Project #86-436. Memorandum from Steve Hall, Hazardous Waste Section, USEPA, Region IV to Alan Antley, Chief, Waste Compliance Section, USEPA, Region IV. December 1, 1986.

[FR Doc. 88-30077 Filed 12-29-88; 8:45 am]

BILLING CODE 6560-50-M

federal register

Friday
December 30, 1988

Part XI

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 25 and 52

Federal Acquisition Regulation (FAR); Implementation of the Procurement Provisions of the U.S.-Canada Free Trade Agreement; Interim Rule with Request for Comments

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 25 and 52

[Federal Acquisition Circular 84-41]

Federal Acquisition Regulation (FAR); Implementation of the Procurement Provisions of the U.S.-Canada Free-Trade Agreement

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comment.

SUMMARY: Federal Acquisition Circular (FAC) 84-41 amends the Federal Acquisition Regulation (FAR) to revise Subpart 25.4, and sections 25.101, 25.105, and 52.225-3 concerning Canadian products.

DATE: *Effective date:* January 1, 1989.

Comment date: Comments should be submitted to the FAR Secretariat on or before February 28, 1989, to be considered in the formulation of a final rule. Please cite FAC 84-41, in all correspondence on this subject.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523-4755.

SUPPLEMENTARY INFORMATION:

A. Background

The United States-Canada Free-Trade Agreement and the United States-Canada Free-Trade Implementation Act of 1988 necessitate changes to the Federal Acquisition Regulation.

B. Determination To Issue an Interim Rule

A determination has been made under authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) to issue the regulations in FAC 84-41, as an interim rule. This action is necessary because of the approval of the United States-Canada Free-Trade Agreement which takes effect January 1, 1989.

DoD, GSA, and NASA have determined that compelling reasons exist to promulgate an interim rule without prior opportunity for public comment. However, pursuant to Pub. L. 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in formulating a final rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) does not apply because this interim rule does not impose any reporting or recordkeeping requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

D. Regulatory Flexibility Act

This interim rule amends Parts 25 and 52 and may have a significant economic impact on a substantial number of small entities. The actual impact is not known. Publication of this rule will afford the public the opportunity to comment on its economic impact on small entities and such comments will be considered in the formulation of the final regulatory flexibility analysis and the final rule. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be submitted to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Initial Regulatory Flexibility Analysis may be obtained from the FAR Secretariat.

List of Subjects in 48 CFR Parts 25 and 52

Government procurement.

Dated: December 27, 1988.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Federal Acquisition Circular

[Number 84-41]

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 84-41 is effective January 1, 1989.

Alfred G. Volkman,

Acting Deputy Assistant Secretary of Defense for Procurement.

Richard G. Austin,

Acting Administrator, GSA.

December 20, 1988.

S.J. Evans,

Assistant Administrator for Procurement (NASA).

Federal Acquisition Circular (FAC) 84-41 amends the Federal Acquisition Regulation (FAR) as specified below:

Implementation of the Procurement Provisions of the U.S.-Canada Free-Trade Agreement

FAR 25.105(e) is added and section 25.101, Subpart 25.4, and the clause at 52.225-3 are revised to include requirements with respect to acquisitions from Canada.

Therefore, 48 CFR Parts 25 and 52 are amended as set forth below:

PART 25—FOREIGN ACQUISITION

1. The authority citation for 48 CFR Parts 25 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

2. Section 25.101 is amended in the definition "Domestic end product," by adding a sixth sentence to read as follows:

25.101 Definitions.

* * * * *

"Domestic end product," * * * On acquisitions above $25,000 in value, components of Canadian origin are treated as domestic.

* * * * *

3. Section 25.105 is amended by adding paragraph (e) to read as follows:

25.105 Evaluating offers.

* * * * *

(e) The evaluation in paragraph (a) of this section shall not be applied to offers of Canadian end products above $25,000 (see 25.402(a)(3)). For the definition of "Canadian end product," see 25.401.

4. Section 25.400 is amended by removing the word "and" at the end of paragraph (a) and a period at the end of paragraph (b); by inserting at the end of paragraph (b) "; and" ; and by adding paragraph (c) to read as follows:

25.400 Scope of subpart.

* * * * *

(c) Acquisitions involving offers of Canadian end products under the United States-Canada Free-Trade Agreement, as approved by Congress in the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 2112 note).

5. Section 25.401 is amended by alphabetically adding the definition "Canadian end product" to read as follows:

25.401 Definitions.

"Canadian end product," as used in this subpart, means (a) an unmanufactured end product mined or produced in the territory of Canada or other territories to which the customs laws of Canada apply; or (b) an end product manufactured in the territory of Canada or other territories to which the customs laws of Canada apply, if the cost of the components mined, produced or manufactured either in the territory of Canada, or other territories to which the customs laws of Canada apply, or in the

United States, exceeds 50 percent of the cost of all the components.

* * * * *

6. Section 25.402 is amended by revising the fourth sentence in paragraph (a)(1); by redesignating paragraphs (a)(3) and (a)(4) as (a)(4) and (a)(5); and by adding a new paragraph (a)(3) to read as follows:

25.402 Policy.

(a)(1) * * * When the value of the proposed acquisition is estimated to be below the Trade Agreements Act threshold, the restrictions of the Buy American Act or the Balance of Payments Program shall be applied to foreign offers, except as noted in subparagraphs (a)(2) and (a)(3) of this section (see 25.105).

* * * * *

(a)(3) As required by Section 306 of the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 2112 note), agencies shall evaluate offers of Canadian end products above $25,000 without regard to the restrictions of the Buy American Act (see Subpart 25.1) or the Balance of Payments Program (see Subpart 25.3).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Section 52.225–3 is amended by removing in the title of the clause the date "(AUG 1988)" and inserting in its place "(JAN 1989)"; and by adding in paragraph (a) a fourth sentence to read as follows:

52.225–3 Buy American Act—Supplies.

* * * * *

"Domestic end product," * * * On acquisitions above $25,000 in value, components of Canadian origin are treated as domestic.

* * * * *

[FR Doc. 88–30111 Filed 12–29–88; 8:45 am]

BILLING CODE 6820–61–M

federal register

Friday
December 30, 1988

Part XII

Department of Labor

Employment Standards Administration, Wage and Hour Division

29 CFR Part 530

Employment of Homeworkers in Certain Industries; Advance Notice of Proposed Rulemaking; Notice of Hearings

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

29 CFR Part 530

Employment of Homeworkers in Certain Industries

AGENCY: Wage and Hour Division, Employment Standards Administration, Department of Labor.

ACTION: Advance notice of proposed rulemaking; notice of hearings.

SUMMARY: The Wage and Hour Division is considering proposing revisions in Regulations, 29 CFR Part 530, which would modify the current prohibition on the employment of homeworkers in the women's apparel industry. Public hearings will be conducted to gain information about the characteristics of this industry and the kinds of enforcement mechanisms appropriate for a new regulation governing women's apparel homework.

The Department believes that changing workforce demographics indicate a demand by workers for increased workplace flexibility, including the option to work in one's own home, and that the current prohibition on homework in the women's apparel industry, because it forecloses such flexibility, should be modified. The Department believes that with the adoption of appropriate enforcement mechanisms it can effectively enforce the Fair Labor Standards Act in the women's apparel industry, and therefore seeks information regarding specific enforcement issues pertinent to this industry.

DATES: The public hearings will be held in Miami, Florida, on February 22–23, 1989, San Antonio, Texas, on March 2–3, 1989, and Chicago, Illinois, on March 8–9, 1989. The hearings will begin at 9:30 a.m. local time. Interested parties who wish to testify in person should so notify the Wage and Hour Administrator in writing no later than February 3, 1989. Oral testimony will be kept to a maximum of twenty minutes, unless different arrangements are made in advance with the Administrator. However, persons testifying are free to submit more extensive written statements for inclusion in the hearing record. Also, such persons are asked to advise the Administrator on their need, if any, for translators.

All interested parties are invited to submit written comments on this matter to the Administrator on or before March 30, 1989.

ADDRESSES: The locations for the public hearings are as follows:

Riverfront South Hall,
City of Miami Riverfront Hall,
Miami Convention Center,
400 S.E. 2nd Avenue,
Miami, Florida 33131.
Institute of Texan Cultures,
801 South Bowie,
Hemisfair, Plaza,
San Antonio, Texas 78206.
2525 Ceremonial Courtroom,
Everett McKinley Dirksen Federal Building,
219 South Dearborn,
Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Paula V. Smith, Administrator, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 523–8305. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Section 11(d) of the Fair Labor Standards Act (FLSA) provides that the Secretary of Labor is "authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act." Pursuant to this authority, the Secretary has issued regulations, published as Part 530 of Title 29 of the Code of Federal Regulations. As originally issued in the 1940's, these regulations prohibited the employment of industrial homework in seven industries: Knitted outerwear; women's apparel; jewelry manufacturing; gloves and mittens; button and buckle manufacturing; handkerchief manufacturing; and embroideries. Homework in other industries has not been prohibited under the FLSA. These regulations essentially provided that the production of goods in these restricted industries could not be carried on by employees in or about a home, apartment, tenement, or room in a residential establishment except by a certified homeworker. Under specified conditions, an employer could obtain individual certificates for employees unable to adjust to factory work because of age or physical or mental disability or unable to leave home because their presence was required to care for an invalid there. Individuals could also be employed as industrial homeworkers in the restricted industries under the supervision of a sheltered workshop without obtaining a certificate under Part 530.

In 1984, the Department published a final rule implementing an employer certification system in the knitted outerwear industry. On August 21, 1986 (51 FR 30036), the Department proposed to extend this certification system to the remaining restricted industries. Based on its analysis of the comments submitted on that proposal and its review of enforcement experience in the knitted outerwear industry, the Department issued a new proposal on March 30, 1988 (53 FR 10342). That proposal noted that many commenters had submitted specific objections to the extension of the certification program to the women's apparel industry. It also stated that the Department would continue to study the issues with respect to this industry and that any further rulemaking in women's apparel would proceed by a separate rulemaking process. Finally, the proposal included a number of additional mechanisms for enforcement of the FLSA with respect to employers of homeworkers in these industries and improvements in the recordkeeping rules (29 CFR Part 516) for all covered homeworkers. The new enforcement mechanisms included provisions for civil money penalties, bonding of employers under certain conditions, the exclusion from the program of employers in States where homework is banned, and mandatory denial or revocation of certificates for certain types of violations.

After reviewing the comments submitted on the March 1988 proposal, a final rule was published on November 10, 1988 (53 FR 45706).

In developing a new rule for women's apparel, it is likely the Department will adopt some form of certification system which incorporates some or all of the enforcement mechanisms already in place for the other restricted industries. However, consideration will also be given to possible special enforcement mechanisms to address any particular characteristics of the women's apparel industry and the Department's enforcement resources needed to assure FLSA compliance. The Department believes the current prohibition on women's apparel homework is not necessary to assure FLSA compliance provided the alternative rule is carefully designed to meet enforcement needs in this industry. Thus, the current ban will be retained only if no practical alternative can be identified.

The public hearings are for the purpose of gathering information about the characteristics of the women's apparel industry to assist the Department in developing an effective homework rule for this industry. The

Department plans to develop a rule which will achieve maximum workplace flexibility consistent with its overall responsibility for enforcing the protective provisions of the FLSA. The hearings are not intended as forums for discussions of other issues, and the witnesses are asked to focus their testimony on providing specific data in this area. In preparing testimony or written comments, the public is asked to address the following questions:

1. What differences exist between the women's apparel industry and the other restricted industries? What if any additional enforcement mechanisms should be adopted to ensure FLSA compliance among employers of homeworkers in this industry?

2. What is the size of the homeworker workforce in the women's apparel industry today? What expansion of the use of homeworkers should be anticipated if homework is permitted?

3. What are the characteristics of homeworkers and factory workers in this industry?

4. How is work distributed by manufacturers in this industry? What role is played by contractors or jobbers? What controls do manufacturers maintain over who performs the work and how much they are paid?

5. What is the range of wages paid women's apparel homeworkers and factory workers? Are piece rate wages the predominant method of payment used in homework? Are other methods used?

6. When piece rates are used, how are those piece rates being established in this industry at present? Is it feasible to require that some objective standard be met in the fixing of those rates? If so, what standards should be adopted to assure that price rates, if used, are fixed in such a way as to minimize the need for "make-up" pay in assuring that all workers receive at least the statutorily required minimum wage and overtime?

Persons who have not previously advised the Administrator that they wish to testify at the hearings will be heard as time permits following those who have been scheduled, but they may be limited to ten minutes each for their presentation.

This document was prepared under the direction and control of Paula V. Smith, Administrator, Wage and Hour Division, U.S. Department of Labor.

List of Subjects in 29 CFR Part 530

Employment, Investigation, Labor, Law enforcement, Minimum wages, Wages, Licenses.

Signed at Washington, DC on this 28th day of December 1988.

Ann McLaughlin,

Secretary of Labor.

Fred W. Alvarez,

Assistant Secretary of Employment Standards.

Paula V. Smith,

Administrator, Wage and Hour Division.

[FR Doc. 88-30144 Filed 12-29-88; 8:45 am]

BILLING CODE 4510-27-M

federal register

Friday
December 30, 1988

Part XIII

Department of Transportation

Urban Mass Transportation Administration

49 CFR Part 604

Charter Service; Amendment; Final Rule

DEPARTMENT OF TRANSPORTATION

Urban Mass Transportation Administration

49 CFR Part 604

[Docket No. 88-E]

Charter Service; Amendment

AGENCY: Urban Mass Transportation Administration (UMTA), DOT.

ACTION: Final rule.

SUMMARY: This final rule sets forth the Urban Mass Transportation Administration's ("UMTA") amendment to its Charter Service Regulation to provide additional exceptions to the general prohibition on the use of UMTA-funded equipment and facilities for charter service. This rule adds three exceptions to the regulation. The first exception would allow the incidental use of UMTA-funded equipment and facilities for direct charter service with non-profit social services agencies under certain conditions. The second exception provides an additional exception for non-urbanized areas by allowing UMTA-funded equipment and facilities operated by recipients in such areas to be used incidentally in direct charter service for certain social service agencies providing service for elderly persons. The third exception allows UMTA-funded equipment and facilities to be used on an incidental basis in any particular charter service for which the UMTA recipient and the local private operators have reached an agreement as part of the willing and able determination allowing the recipient to provide such service.

EFFECTIVE DATE: January 30, 1989.

FOR FURTHER INFORMATION CONTACT: Theodore A. Munter, Assistant Chief Counsel, Office of Chief Counsel, Room 9316, UMTA, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-1936; or, Jeanmarie Homan, Regional Counsel, Office of the Chief Counsel, Suite 100, Urban Mass Transportation Administration, 6301 Rockhill Road, Kansas City, Missouri 64131, (816) 926-5053.

SUPPLEMENTARY INFORMATION:

I. Background

A. General

On April 13, 1987 UMTA promulgated a complete revision of the regulation that governs permissible charter service by UMTA recipients (49 CFR Part 604; hereafter the "1987 Regulation"). In implementing subsections 3(f) and 12(c)(6) of the Urban Mass Transportation Act, as amended ("UMT Act"), (49 U.S.C. 1602(f) and 1608(c)(6)), the 1987 Regulation is designed to ensure that UMTA-funded equipment and facilities are used to meet mass transportation needs as intended by the UMT Act and to protect the private charter industry from subsidized and unfair competition by Federally assisted grantees.

The 1987 Regulation establishes a general prohibition on the use of UMTA-funded equipment and facilities in charter service operations but permits their incidental use where no private charter operator is determined to be willing or able to provide the service, or where additional equipment or equipment accessible to elderly or handicapped persons is needed by a private operator. Two additional exceptions exist, but only on approval by UMTA: one for hardship situations in non-urbanized areas, and the other for special events.

On December 22, 1987, the President signed the Department of Transportation and Related Agencies Appropriations Act, 1988 (Pub. L. 100-202, 101 Stat. 1329; hereafter the "FY 1988 Act"). In the conference report accompanying the FY 1988 Act, UMTA was directed to undertake a rulemaking to amend the charter service regulation to "permit non-profit social service agencies with clear needs for affordable and/or accessible equipment to seek bids for charter services from publicly funded operators." (H. Report 100-498, p. H 12787 as printed in the Congressional Record, 12/21/87). This Report suggests that "[t]hese non-profit agencies * * * be limited to government entities and those entities subject to sections 501(c) 1, 3, 5 (sic) and 19 of the Internal Revenue Code." The Report recommends, further, that "[i]n such cases, the public operator * * * be required to identify to the chartering organizations any private operator that has notified it of its willingness and ability to provide comparable charter service." UMTA notes, parenthetically, that the citation in the Report language to Internal Revenue Code 501(c)(5) was a misprint; the conferees intended to cite section 501(c)(4) of the Code.

The language of the Conference Report 100-498 (hereafter the "Conference Report") reflects a concern, shared by the Congress, UMTA, and various interested parties, that the 1987 Regulation may be adversely affecting persons who are "transportation disadvantaged-" that is, persons of limited physical or financial means who depend heavily on publicly subsidized mass transportation services to meet their needs for travel.

B. The NPRM

On May 25, 1988, UMTA published a notice of proposed rulemaking designed to carry out the directives in the Conference Report. (53 FR 18964; May 25, 1988, hereafter the "NPRM.") The final rule published today is essentially similar to the proposed rule.

In the preamble to the NPRM, UMTA discussed, at length, the Conference Report recommendations and invited the public to submit comment and data on numerous specific issues. The 60-day comment period closed on July 25, 1988.

UMTA held four public hearings during the comment period to solicit comments on the NPRM. A total of fifty-eight (58) witnesses commented at the hearings in Washington, DC; Kansas City, Missouri; Cincinnati, Ohio; and San Francisco, California. Additionally, UMTA received eighty-two (82) written comments plus one-hundred and thirty-four (134) responses to a survey conducted by the American Bus Association (ABA). The breakdown among commenter categories is as follows:

53	UMTA urban recipients and local governments
11	UMTA rural recipients
173	Private charter operators, including 134 responses to the ABA survey and 39 individual comments
4	Public Trade Associations
9	Private Trade Associations
10	State Governments
8	Nonprofit Social Service Agencies
4	Consumers
2	Public Employees and Labor Unions
274	Total

The comments describe local conditions and concerns, and reveal that the charter issues and problems vary in kind and degree in communities across the country. However, despite the diversity in local circumstances, recipients and private operators remain polarized in their view of the 1987 Regulation. Comments from most recipients and from their public trade associations, as well as from public employees, local governments, non-profit agencies, and consumers express continued opposition to the 1987 Regulation. These groups and individuals uniformly support the need for an exception to the regulation. Their evaluation of the NPRM, however, is mixed. While some recipients fully support the exception as proposed, many believe the proposed exception is too restrictive, and several considered the certification process burdensome. On the other side, the private operators

and the trade associations that represent them remain unified in their support of the 1987 Regulation and adamantly oppose the NPRM. They express concern that the proposed exception is too broad and that the certification process is unenforceable and may easily be abused.

Many commenters comment at length on the 1987 Regulation and on the proposed exception, some providing specific responses to the numerous questions UMTA posed in the NPRM. An issue-by-issue summary of the significant comments received and UMTA's response to them is set forth in the following section. A few specific comments are also noted and addressed in the Analysis of the Amendment.

II. Specific Comments and UMTA's Response

This section is in two parts. The first part considers the comments on the NPRM. The second part discusses the final action UMTA is taking in this rulemaking published today.

A. Comments on the NPRM

Comments from private operators uniformly support the 1987 Regulation and oppose any exceptions which would allow recipients to provide direct charter service. They argue that the regulation requires communication between recipients and private operators and that both the public and transit operators must be adequately educated and informed about the regulation. Generally, they indicate that communication is either good or improving, but state that the educational process is a gradual one and that the regulation must be given a chance to work before it is changed. Several commenters noted examples of private operators and recipients working together to accommodate the movement of large groups on local, short trips. They argue that consumers need to be retrained to think of contacting the private sector when they need charter service, but emphasize that again, this is part of a gradual educational process. They suggest that giving any portion of the charter market back to recipients will undermine this educational process. These commenters also point out that as the private operators build their fleets and capitalize on the new opportunities afforded under the charter regulation, they will be able to serve the general public's total needs better as compared to recipients who are restricted to limited, incidental use of their equipment to provide charter services.

A few comments from local and state recipients express relief from the pressure to provide charter service that, as one states, detracts from their real objective, which is to provide mass transit services.

Although these few seem to support the 1987 Regulation, they also support the NPRM as proposed. Most comments from public operators oppose the existing regulation and support the NPRM, but complain that the NPRM is too restrictive to address their concerns. Their national trade association, the American Public Transit Association ("APTA"), notes that public operators need to be full service transportation providers to obtain local support, a comment echoed by a substantial number of recipients. Their transit systems, these commenters state, receive local funding and are viewed as a community service, and they must be available to serve the needs of local churches, schools and social organizations, local industry, local government and the Chamber of Commerce, as well as special community celebrations, conventions and other events. In sum, local charter services are viewed by recipients as a critical part of their public mandate and as a necessary component of their efforts to solicit the support of their local taxpayers.

Although UMTA acknowledges these concerns, UMTA believes that this perception is not consistent with the statutory definition of "mass transportation" and the directives of the UMT Act. Section 12(c)(6) of the UMT Act provides that UMTA funds may be used for mass transportation purposes, and specifically excludes charter service from the definition of mass transportation. The fact that a recipient's mass transportation services are partially supported by local funds has no effect on this provision, since these local funds, like the UMTA ones, are intended for mass transportation purposes.

UMTA therefore does not view local matching funding as a justification for expanding or bypassing the prohibition on the use of UMTA funds for purposes other than mass transportation. It should be noted in this connection that when equipment and facilities are purchased solely with local funds, the Charter Service Regulation does not apply. Moreover, while section 12(c)(6) defines "mass transportation" to include "special service," the only types of service that UMTA recognizes as such are the two specifically indicated by Congress in 1968 as falling under the "special service" definition of "mass transportation." These are, namely, service exclusively for all elderly and handicapped persons in the recipient's service area, or service for workers who live in the inner city, but work in the suburbs. See, H.R. Rep. No. 1785, 90th Cong., 2d Sess., reprinted in 1968 *U.S. Code Cong. Ad. & News*, 2941. These types of special service should not be confused with charter service for local non-profit or community groups, which are subject to the general prohibition of section 12(c)(6).

UMTA is nonetheless mindful of examples cited by commenters in which the April 1987 Regulation has resulted in a loss of charter services to the community. A typical example of these problems is that cited by an urban recipient, which states that it has been unable to provide a 45 minute charter trip for a Japanese business delegation which had come to look at a potential industrial building site. The recipient states that the group had gone without service, since the recipient was unable to provide the service, and local private operators were uninterested in doing so because of the short trip duration. Another example of an unmet community need was that for a local program, which, according to the commenter, is funded by the local public and private sector, and designed to break the cycle of poverty through educational and social programs for young residents of a low-income neighborhood. The commenter states that there were many charter needs related to the program, which were not being met by the private sector, and would not be met by the amendment proposed in the NPRM. Another commenter cites the case of the organization for the developmentally disabled which, in preparing for a special event, might have a need to transport volunteers to the site of the event for a day of orientation or training. These commenters emphasize that the inability of UMTA recipients to provide charter services for these groups could have a detrimental economic and social impact on their communities.

UMTA believes that most of the problems cited may be solved through an understanding of the flexibility contained in the April 1987 Regulation. Accordingly, UMTA is including in this rulemaking the formal agreement process which has been used successfully to resolve the problems illustrated in the comments received. This process was set out in UMTA's "Charter Service Questions and Answers," 52 FR 42248, 42249, November 3, 1987. Under the process, an UMTA recipient may provide charter service when it has indicated in its public charter notice a desire to provide certain types of charter service, and concluded an agreement to this effect

with the local private operators. The mechanics of the process are discussed in detail below under the Analysis Of the Amendment. By using this process, the local public and private operators can adapt the Charter Service Regulation to local conditions and can assure full and appropraite service to the local community.

Although experience has now shown that the formal agreement process can be a successful solution to the concerns about the 1987 Regulation, UMTA is mindful of the Congressional directive to study and to promulgate additional exceptions to the Regulation. The directives in the Conference Report are threefold. They specifically direct UMTA to undertake a rulemaking to amend the Charter Service Regulation to "permit non-profit social service agencies with clear needs for affordable and/or handicapped-accessible equipment to seek bids for charter services from publicly funded operators." (H. Report 100–498, p. H 12787 as printed in the Congressional Record, 12/21/87). They also suggest that the agencies be limited to governmental entities and certain tax exempt organizations. Additionally, the Committee recommends that an "exemption" from the regulation "be provided to those public transit authorities which purchased charter rights entirely with non-federal funds prior to enactment of the Urban Mass Transportation Act of 1964." (Id.)

Third, the Committee asks UMTA to explore "the issue of whether public transit authorities that offer only standard transit buses for charter services should be permitted to compete against private operators." (Id.) In the NPRM, UMTA proposed the recommended exception, and sought public comment on each of the approaches suggested in the Conference Report.

1. Charter Rights Purchased Before Enactment of the UMT Act in 1964

In the preamble discussion to the NPRM, UMTA discusses, at length, the Committees' directive to explore the possibility of creating a blanket exemption from the regulation for recipients who purchased charter rights entirely with non-Federal funds prior to enactment of the Urban Mass Transportation Act of 1964. In that discussion UMTA expresses its reluctance to propose such a blanket exemption because, in UMTA's view, such an exemption would contravene the statutory requirements of the UMT Act. UMTA specifically invited comment on whether recipients that purchased charter rights prior to the enactment of the UMT Act should receive special treatment under the charter regulation. UMTA received fourteen (14) comments in response to its invitation. Three commenters who strongly advocate such an exemption offer little data on this issue other than their opinion that they would qualify for the exemption. Most recipients questioned at the hearings on this point state that they did not know whether they would qualify for the exemption, but admit that they are certainly looking into it. One public operator states that charter rights were an incidental part of the buy-out agreement of the private operators' business. Another recipient states that such an exemption is arbitrary and would be unfair to the public operators that may not qualify. Given the lack of data submitted on this issue, UMTA has determined that it has no legal basis to change its view that an exemption of this kind is contrary to the directives of the UMT Act.

2. Suggested Exception based on Vehicle Characteristics

The Conference Report recommended that UMTA explore "the issue of whether public transit authorities that offer only standard transit buses for charter services should be permitted to compete against private operators." In making this recommendation, Congress was seeking to determine whether a distinction could be drawn between charter services provided by public transit authorities in standard transit buses, and those provided by private operators in over-the-road coaches. If it could be established that public transit authorities using standard buses to provide short, local trips were not in competition with private operators, an exemption could presumably be created on this basis. In the NPRM, UMTA specifically asks commenters to address this issue. UMTA received a total of one hundred and seventy-two (172) comments on this issue, including one hundred and thirty-two (132) responses to the ABA survey, and forty (40) written and oral comments. Of this number, one hundred and fifty-four (154), including one hundred and twenty-nine (129) ABA survey responses and twenty-five (25) written and oral comments, respond that the public and private operators are in competition for the local, short trip charter business regardless of the equipment used. The ABA survey responses indicate that local trips average 22.3% of the private charter operators' charter trips. Private operators note that the local, short trips are the "bread-and-butter" of their business and fear that an exemption for transit coaches would foreclose them from a significant share of the charter market.

Although both private and public operators note the advantage of transit coaches as compared to the over-the-road coaches for moving large groups efficiently on short urban trips, a few private operators submit that they have been building or increasing their fleet of transit coaches and restructuring their rates and pricing policies for local, short trips since the 1987 Regulation opened this market to them. Given the substantial interest expressed on this issue and based upon the evidence submitted, UMTA has determined not to propose an exemption to the Charter Service Regulation for transit-type coaches.

In the NPRM discussion of an exemption for transit type vehicles, UMTA proposed to study recipients' charter services prior to the promulgation of the 1987 Regulation to determine whether there was an identifiable pattern of service based on vehicle comforts and amenities, trip lengths and trip durations. The evidence submitted by the private operators indicates that prior to the 1987 Regulation, UMTA recipients foreclosed the private operators from the local trip market in many areas. However, many of the private operators indicate in their comments that they welcome the opportunity to serve this market. Private operators note that short haul business is vital to them. The short, local trips often occur during the weekdays when long haul business is slow and vehicles may be idle. Further, they state that the short haul business is important to gain local recognition and to build a reputation for long haul business. Based upon these comments, UMTA has determined that a study of market data prior to the 1987 Regulation is irrelevant and inappropriate. Consequently, UMTA has chosen not to proceed with the study.

Although UMTA has determined not to propose this exception, UMTA recognizes that in some communities the local private operators may not be interested in restructuring their business to serve the local market. However, UMTA believes that an exception which would result in foreclosing all private operators from this market is not the appropriate way to address localized problems. Again, UMTA believes the existing regulation affords the flexibility needed to resolve these issues through an agreement between recipients and local private operators. Some recipients currently have formal agreements with the local private operators which specifically outline the types of charters

that the private operators cannot or do not wish to serve. One UMTA recipient, for example, has entered into an agreement with local private operators under which the recipient is allowed to provide charter service within a 50 mile radius of its service area, having a trip duration of less than three (3) hours, and for weddings, city and county agencies, and local college athletic events. By codifying the formal agreement process in this final rule, UMTA intends to emphasize its utility as an effective means of accommodating local conditions in implementing the Charter Service Regulation.

3. Proposed Exception for Non-Profit Social Service Agencies

The exception proposed in the NPRM was issued in response to concerns that the April 1987 Regulation adversely affects the transportation disadvantaged. It appeared from these allegations that the transportation disadvantaged were dependent upon public operators to serve their charter needs and that private operators were not serving this market. While the NPRM is based on this basic assumption, the comments received on the NPRM do not provide sufficient data to make a conclusive finding on this point. Of some two hundred and seventy-four comments (274), only fourteen (14) state that the local private operators are not serving the needs of the community and only half of these commenters specifically mention the needs of the transportation disadvantaged.

Comments from disadvantaged consumers and groups representing their interests are noticeably few in number. Of the total of two hundred and seventy-four (274) comments received, only two are from organizations representing the disadvantaged. One of these two commenters urges UMTA to allow small groups in rural areas to charter vans instead of larger and more costly passenger coaches. The other, a consortium of 50 social service agencies benefiting the disabled, expressed some concern that the burdens of the process could have a "chilling effect" on the agencies attempting to serve the disabled and may discourage them from sponsoring activities requiring charter service. Consequently, although the apparent intent of Congress in directing UMTA to undertake this rulemaking was to meet the charter needs of the transportation disadvantaged, evidence submitted to the docket is insufficient to draw the conclusion that the needs of this group are not being met under the April 1987 Regulation.

A few comments were received from both public and private operators describing their local experiences relevant to charter trips for the handicapped. None of these commenters describes specific incidences where service has not been provided. These commenters note that the requests for service for handicapped trips are very infrequent, explaining that handicapped groups often have their own vehicles or are generally served by specialized providers. It is also noted that special lift equipped vehicles are not designed to carry large groups of handicapped individuals, since only one or two wheelchairs can be secured in these vehicles at one time. Additionally, public vehicles often are not available for incidental charter service because they are needed throughout the day for fixed-route service. The one comment received from an association of handicapped organizations does not complain of a lack of service for their organizations, but rather requests that a lift-equipped vehicle be available for every charter to enable the handicapped to be integrated into the normal community.

Comments were also received on the issue of the cost of a private versus public charter service, but again the data submitted are insufficient to determine whether the cost of private service adversely affects the transportation disadvantaged. There is comment from both recipients and private operators comments that school bus operators provide the most reasonable charter services. Comments from recipients also indicate that some recipients have little flexibility to reduce their charter rates to accommodate the needs of disadvantaged charter groups because the rates are set under State law or local policy. On the other hand, private operators comment that they have discount rates for certain groups and run *pro bono* trips. Both recipients and private operators indicate that the major cost difference between their respective rates is attributable to the recipients' lower minimum flat rates and not their hourly rates, except in the rural areas where deadhead miles also add significant cost to short, local trips performed by private operators who are located far from the area. Based upon the comments received, it appears that the transportation disadvantaged have not suffered widespread adverse impact since promulgation of the April 1987 Regulation, except, perhaps, in rural areas.

On the one hand, the data submitted do not provide sufficient information to contradict or fully to support the basic assumption that the April 1987 Regulation may be adversely affecting the transportation disadvantaged by depriving them of access to affordable charter service. On the other hand, however, UMTA is mindful of the Congressional advice to assure that those with "clear needs" for charter service are adequately served. UMTA has therefore determined that it should amend the regulation, as proposed, with certain modifications in response to the comments received, as discussed in the following section.

B. UMTA's Final Action

In this final rule, UMTA is amending its Charter Service Regulation to provide three additional exceptions to the general prohibition on the use of UMTA-funded equipment and facilities for charter service. The first exception would allow the use of UMTA-funded equipment and facilities for direct charter service with non-profit social service agencies that are governmental entities or organizations exempt under Internal Revenue Code 501(c)(1), (3), (4) and (19), provided that the agency is contracting for service for handicapped persons; is a recipient of funds under certain U.S. Department of Health and Human Service ("USDHHS") programs; or has been State-certified according to the procedure set forth in subparagraph 604.9(b)(5)(iii) of the Charter Service Regulation. The second exception provides an additional exception for non-urbanized areas by allowing UMTA-funded equipment and facilities operated by recipients in such areas to be used incidentally in direct charter service for social service agencies that are governmental entities or organizations exempt under Internal Revenue Code 501(c)(1), (3), (4) and (19), provided that the agency is contracting for service for elderly persons. The third exception allows UMTA-funded equipment and facilities to be used on an incidental basis in any particular charter service for which the UMTA recipient and the local private operators have reached an agreement as part of the willing and able determination allowing the recipient to provide such service. The following subsections explain the basis and procedural requirements for these exceptions.

1. Identifying the Transportation Disadvantaged

In framing this exception, it is necessary to identify the persons contemplated by the Conference Report recommendation—persons having "clear needs for affordable and/or handicapped-accessible equipment" and

to define these persons in a manner familiar to the transit industry and adaptable to the charter regulation. In the NPRM, UMTA proposes an exception allowing recipients to provide direct charter service to government entities and certain tax exempt organizations contracting for transportation for the elderly and handicapped or to certain USDHHS-funded social service agencies contracting for services consistent with the agency's function and purpose.

Commenters representing both public and private interests generally support the exception for the handicapped. However, comments on the other aspects of the exception are mixed. In general, the commenters representing the recipient's interest believe the proposed exception is too restrictive. These comments indicate a view that all organizations with a public or a charitable purpose, i.e. all government entities and entities exempt from taxation under 501(c)(1), (3), (4) and 19, have a "clear need" for affordable and/or handicapped accessible equipment. In contrast, the comments from private operators generally oppose the exception as too broad. Several note that the trips for the elderly represent a substantial percentage of their business and that many elderly are neither physically nor economically disadvantaged but, more importantly, they fear the exception for the elderly would be unenforceable and easily abused.

Several commenters criticize the scope of Appendix A, which, as proposed in the NPRM, lists the covered USDHHS programs and defines which social service agencies are eligible for the exception. They express the view that the limitation to USDHHS programs is arbitrary and unfair to agencies that are funded solely under State or local programs yet serve social needs similar to the Federal programs.

In response to these comments, UMTA has modified the exception proposed in the NPRM for the elderly, limiting it to recipients in non-urbanized areas and also adding an exception for State-certified agencies. UMTA believes this is an appropriate balance of the concerns and interests expressed by groups funded under State or local programs which meet the USDHHS eligibility guidelines and serve a clientele similar to that of the groups in Appendix A. As discussed in detail, above, UMTA believes that the 1987 Regulation provides the necessary flexibility through the formal agreement process to assure that affordable and adequate charter services are available to the general public, including the transportation disadvantaged. The exception provides merely additional assurance, especially in non-urbanized areas, where implementation of the regulation has been more difficult.

UMTA is persuaded that the addition of an exception for State-certified agencies is reasonable and consistent with the intent of this amendment to the Charter Service Regulation, which is to ensure that the transportation needs of agencies serving the transportation disadvantaged are met. UMTA is also persuaded that the exception proposed in the NPRM for trips based on the eligibility standard of more than 50% elderly can be easily abused. Some of the comments from private operators described their fears of potential abuse and difficulty in implementing the proposed exception. It was noted that the population over 55 years of age is increasing annually and that many business and convention charters could carry a simple majority of passengers in this age group, thus technically qualifying for the exception, although inconsistent with its underlying intent. Private operators also noted that in the "real world" those wanting to contract with the public operator could easily claim that a trip was for elderly passengers and in many cases neither the public operator nor the private operator could confirm the veracity without checking individual identification. As enforcement of the process is largely dependent upon the compliant process, a violation of this standard cannot be determined by simple observation of a bus load of passengers and the private operators have no way to collect information necessary to provide an objective basis for making a complaint.

UMTA believes that in classifying a group of elderly persons as disadvantaged, one must take into account either adverse physical or economic circumstances. Accordingly, it is UMTA's view that elderly persons having a physical and economic disadvantage will be able to obtain charter service under the exception for the handicapped and for HHS-funded social service agencies, and that a separate exception for the elderly would be largely redundant. Further, UMTA believes that the additional assurance provided by a separate exception does not justify the risk and potential for abuse the exception affords, especially in the urban areas. In balancing the alternatives to ensure against abuse, UMTA has determined that this approach is less burdensome and more effective than increasing procedural and administrative requirements to counter the potential abuse and enforcement difficulties of the exception for the elderly proposed in the NPRM. By recognizing that the elderly may be transportation disadvantaged not because of age alone but because of physical and economic conditions, the exception promulgated today ensures that their needs are met through a mechanism which can be readily verified and enforced.

2. Procedural Requirements

The exception proposed in the NPRM required that the governmental entity or tax-exempt organization which is contracting for charter service submit a certification to the UMTA recipient that the entity or organization, and the specific charter trip in question, meet the conditions of the exception to the UMTA charter regulation. In the text of the proposed amendment, UMTA provides the working of the certification process.

UMTA received a total of one hundred and seventy-six (176) comments on this process, including the one hundred and thirty-four (134) responses to the ABA survey. Of the five (5) comments received from State Transportation Departments on this issue, four (4) submit that the certification process would be easy to implement and support the approach. Of the eighteen (18) comments from recipients and those representing their interest, fourteen (14) indicate that the certification process would be administratively burdensome. Recipients also express concern that contracting organizations may not understand the requirements, may give false certifications, or may be too intimidated by the certification requirement to use the exception effectively. They express concern, also, that they may be held responsible in situations where a contracting agency intentionally or unknowingly make a false certification.

The overwhelming majority (147 of 150) of comments from private operators and those representing their interests indicate that the proposed process is unenforceable and easily abused. These commenters urge UMTA to require a process that assures private operators prior notice and opportunity to provide the service before recipients could contract for the trip. Most advocate a process similar to the petition process for the non-urbanized area hardship exeption which requires documented notice to the private operators and UMTA approval before recipients can contact directly for charter services.

In this final rule, UMTA has decided not to alter the procedural requirements proposed. UMTA believes that a notice and petition process, as advocated by the private operators, creates an undue administrative burden on recipients and consumers, is impractical and costly to implement on a trip-by-trip basis, and would have a "chilling effect" which would undermine the assurance that UMTA intends to provide with the exception. In balancing these concerns against the legitimate fears of abuse, which focus primarily on the structure of the exception for the elderly, UMTA has determined that modifying the eligibility requirements of that exception achieves the same objective more efficiently and effectively without undermining the purpose of the exception.

Although UMTA's goal remains a simple and easily implemented exception, UMTA believes that the certification process is a necessary safeguard. However, UMTA notes the recipients' fears that they may be held responsible for ensuring that the conditions of eligibility are met by the contracting agencies, and has determined that it will not require a recipient to look beyond the certification unless the recipient has a "reasonable cause" to believe that the certification is falsified. UMTA considers an example of "reasonable cause" to be a past history of abuse, or a pattern of abuse of the certification by the contracting agency. UMTA expects that when it is brought to the attention of a recipient, either independently or through the UMTA complaint process, that a contracting agency has knowingly submitted a false certification, the recipient shall cease providing charter service to such agency. UMTA will take enforcement action against recipients which continue to provide charter service to contracting agencies that the recipients have reasonable cause to know have submitted false certifications.

In the discussion of the certification process in the NPRM, UMTA specifically requested comment on the element of the certification which requires assurance of compliance with Title VI of the Civil Rights Act of 1964 and implementing regulations thereunder. Very few commenters address this issue and while some suggest that it is perhaps unnecessary, none express objection or suggest alternatives. Consequently, UMTA has not altered the requirement in the final rule, except to add the regulatory citation application to the USDHHS funded programs.

III. Analysis of the Amendment

A. Subparagraph 604.9 (b)(5)

This exception allows all UMTA recipients to contract directly for charter services upon obtaining a certification that the contracting entity or organization and the specific charter trip in question meet the conditions of the exception. These conditions are set forth in subparagraphs (i), (ii) and (iii), which also provide the text of the certification. This exception is similar to that proposed in the NPRM, except that the condition in subparagraph (ii), allowing trips where more than 50% of the passengers on the trip will be elderly, has been removed. Moreover, subparagraph (iii) has been added to expand the exception to State-certified groups which meet the same eligibility requirements and serve a clientele similar to that of the USDHHS-funded programs listed in Appendix A.

In reviewing the comments we received to this NPRM, UMTA recognizes that there are entities that perform public welfare functions that receive no Federal assistance, but either receive, or are eligible to receive, State or local government public welfare assistance, comparable to the assistance provided by USDHHS to the programs listed in Appendix A. UMTA has therefore determined that in certain circumstances, it would be inequitable to deny the privileges of this exception to groups of persons who are transit-dependent or transportation-disadvantaged and who are participating in charter trips arranged by governmental entities or tax-exempt organizations that receive or are eligible to receive public welfare assistance from a State or local government, although those entities or organizations do not receive funding from the USDHHS.

Accordingly, UMTA has established a mechanism by which a State may petition UMTA for inclusion on Appendix A of a governmental entity or tax-exempt organization that receives no assistance from USDHHS. To be eligible for inclusion, a State must petition UMTA on behalf of the requesting entity or organization. Any tax-exempt organization that either receives or would be eligible to receive State or local public welfare assistance funding comparable to that provided by USDHHS may request the State to submit to UMTA a petition on its behalf. If the State determines it appropriate to petition UMTA on behalf of the entity or organization, the State should include with its petition the following information: (1) The name of the entity or organization, a description of its membership and constituency, and the type of public welfare activities it performs; (2) in the case of a tax-exempt organization, evidence that the organization is exempt from taxation under subsection 501(c)(1), (3), (4), or (19) of the Internal Revenue Code; (3) a certification by the entity/organization that: (a) It is a government entity or an organization exempt from taxation under subsection 501(c)(1), (3), (4), or (19) of the Internal Revenue Code; (b) it either receives or is eligible to receive, directly or indirectly, from a State or local governmental body public welfare assistance funding comparable to that provided by USDHHS to the programs listed in Appendix A; and (c) in the course of carrying out the programs for which it has been organized, it arranges for travel of groups of persons who are transit-disadvantaged or transit-dependent. UMTA will review the materials submitted, and, at its discretion, request additional information from the State or applicant. In addition, UMTA reserves the right to seek information and advice from USDHHS or other appropriate sources. When UMTA makes its decision, UMTA will inform both the State and the applicant in writing. If UMTA approves the petition, UMTA will provide the State and the applicant a written statement to the effect that an UMTA recipient may execute a contract with the entity or organization to provide charter service directly to that entity or organization.

Two commenters ask whether the certification could be submitted as a one-time submission. It is UMTA's intent that the certification be made on a trip-by-trip basis, since the qualifying conditions are trip specific as to the passengers to be transported and the purpose of each trip. UMTA does recognize situations where one contract may cover more than one trip for the same passengers and the same purposes, such as a week-long day camp program for handicapped children. Under these situations, a single certification would be acceptable.

B. Subparagraph 604.9 (b)(6)

This exception permits direct contracting to eligible entities and organizations when more than 50% of the passengers on the trip will be elderly and the other conditions of the certification are met. This exception applies only to recipients in non-urbanized areas, i.e. areas with populations of less than 50,000. Although these recipients generally receive funds under UMTA's Section 18 program, the exception applies to all recipients in

non-urbanized areas, regardless of the UMTA funding source. This procedure is consistent with the non-urbanized area hardship exception to the charter rule. This exception applies the same procedural requirements as do subparagraphs (5)(i) and (ii), which are discussed above.

In the NPRM, this exception was proposed for application to all recipients. The reasons for limiting the exception have been discussed above.

C. Subparagraph 604.9(b)(7)

This provision codifies the formal agreement process. UMTA discussed this process in its "Charter Service Question and Answers," published in the **Federal Register**, November 3, 1987, 42248, at 42249. UMTA has determined that it should codify the process as an exception in this final rule to emphasize its importance and utility in the proper implementation of the Charter Service Regulation. The exception as set forth in this final rule is consistent with this previously published guidance. Under these agreements, a recipient may operate particular charter trips contracting directly with the customer where there is a formal agreement to this effect between the recipient and all private operators responding to the recipient's notice and determined to be "willing and able". To take advantage of this exception, the recipient must complete the review process on all replies to its annual charter notice. Except for the limitations of incidental use, the recipient and the private operators may define the excepted charter service in any terms and conditions agreed to. UMTA is not a party to these agreements, nor is UMTA's concurrence or approval required. The only procedural requirement, in addition to conclusion of a formal agreement, is that notice of the agreement be published. The recipient's annual published notice must provide for this type of agreement or be subsequently amended to specifically refer to such agreement, *before* the recipient undertakes the charter trips described in the agreement.

D. Appendix A

In Appendix A, UMTA provides a list of the USDHHS programs referenced in exception (5)(ii). The scope and composition of Appendix A is identical to the listing proposed in the NPRM. In response to the comments submitted which questioned the rationale for limiting the exception to Federal programs, this final rule includes an additional provision to encompass State-certified agencies receiving funding under local and State programs similar to the Federal programs.

E. Appendix B

In this final rule UMTA has added an Appendix B to clarify the definition of the terms "elderly" and "handicapped" as used in exceptions (5) and (6). In the NPRM, UMTA explains that for purposes of these exceptions, UMTA recipients should apply the same definitions they apply for eligibility for the UMT Act half-fare provisions. UMTA received comment from private operators seeking clarification of these definitions. This is understandable as private operators can not be expected to be entirely familiar with the UMTA program. Additionally, while Section 18 recipients are familiar with UMTA definitions of these terms, they are not specifically familiar with the guidelines for the half-fare provision as this requirement is not applicable to the section 18 program.

Consequently, UMTA has added an Appendix B which sets forth and explains the definitions of "elderly" and "handicapped". This guidance is consistent with the definitional requirements for the half-fare provision. It is expected that recipients governed by the half-fare requirement will apply the same definitions for eligibility for the charter exception.

IV. Regulatory Impacts

A. Executive Order 12291

This action has been reviewed under Executive Order 12291, and UMTA has determined it is not a major rule. This rule will not result in an annual effect on the economy of $100 million or more.

B. Regulatory Evaluation

This rule is a significant rule under the Department of Transportation Regulatory Policies and Procedures because of the substantial public interest in this rulemaking. Accordingly, UMTA held four public hearings and a total of fifty-eight (58) witnesses commented at the hearings in Washington, DC; Kansas City, Missouri; Cincinnati, Ohio; and San Francisco, California. Additionally, UMTA received eighty-two (82) written comments plus one-hundred and thirty-four (134) responses to a survey conducted by the American Bus Association (ABA). The breakdown among commenter categories is set forth in the Supplementary Information section of the text. The docket of these comments is available for public review.

Although this amendment is significant for its public interest, UMTA has determined that it will have very little effect on the basic economic trends and projections identified in the Regulatory Analysis supporting the April 1987 Regulation. (April 13, 1987, at 52 FR 11932.)

At the outset of this rulemaking, UMTA did not have any empirical data on the number of charter trips this rule might affect or the cost associated with those trips. UMTA did know the transit operators revenues from *all* of their charter service amounted to only 1, 2, or 3 percent of their total revenue, whereas charter service revenue is the primary or only source of revenue for many private operators. (See the Regulatory Analysis, April 13, 1987, 52 FR 11932.) However, in the NPRM, UMTA stated that it believed that the population served by this rule, that is, the elderly, handicapped, transit dependent, and transit disadvantaged was but a small fraction of the universe of charter services. Comments to the docket from private operators indicated that charter services under the elderly exception, as proposed, may constitute anywhere from 25–90 percent of their business. However, in this final rule we have reduced the economic impact on private operators by limiting the exception for social service agencies serving the elderly to rural areas, and by subjecting the exception for other social service agencies to a test of "transportation dependency." Comments from recipients and public operators indicate that the other constituencies that would be served by the rule did constitute only a small portion of the charter business. Some commenters stated that their request for charter service for the handicapped were as few as one or two in a year.

C. Executive Order 12612

This action has been reviewed under Executive Order 12612 or Federalism and UMTA has determined that this action does not have implications for principles of federalism that warrant the preparation of a Federalism Assessment. This rule will not limit the policymaking and administrative discretion of the States, nor will it affect the States' abilities to discharge traditional State governmental functions or otherwise affect any aspect of State sovereignty.

Indeed, consistent with the fundamental principles of Federalism as described by Executive Order 12612, the programs and policies of the Urban Mass Transportation Administration are purposely structured to place primary responsibility on States and local governments for the provision of mass transportation services to their communities, and to encourage States

and local governments to achieve their objectives for mass transportation through cooperative effort. As is true for all UMTA programs and policies, this action grants maximum administrative discretion to States and local governments.

D. Regulatory Flexibility Act

In accordance with 5 U.S.C. 606(b), as added by the Regulatory Flexibility Act, Pub. L. 96–354, UMTA certifies that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Act.

E. Environmental Impacts

This proposed regulation would not adversely affect the environment.

F. Paperwork Reduction Act

This rule contains requirements regarding the collection of information and is subject to the Paperwork Reduction Act, Pub. L. 96–511, 44 U.S.C. Chapter 35. One requirement in the rule is for the protection of UMTA grantees that provide charter service under the exception provided by this rule. The rule requires that an agency wishing to take advantage of the exception must certify to the grantee that the agency is an eligible agency under the rule. The other requirement in the rule is for the benefit of State and locally funded agencies. The rule also requires that an agency receiving funding under State or local welfare programs wishing to take advantage of the exception must apply to the State and the State must certify to UMTA according to the requirements of eligibility set forth in the rule. Each of these paperwork requirements are being submitted to the Office of Management and Budget (OMB) for review as part of UMTA's request for extension of the existing operations under 49 CFR Part 604, OMB Control #2132–0543 which expires December 31, 1988.

List of Subjects in 49 CFR Part 604

Buses, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements.

Accordingly, for the reasons decribed in the preamble, Title 49, Code of Federal Regulations, Part 604, Charter Service, is amended as follows:

PART 604—[AMENDED]

1. The authority citation for Part 604 continues to read as follows:

Authority: Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1601 *et seq.*); 23 U.S.C. 103(e)(4). 142(a), and 142(c); and 49 CFR 1.51.

2. Section 604.9 is amended by adding paragraphs (b) (5), (6) and (7) to read as follows:

§ 604.9 Charter service.

(b) * * *

(5) A recipient may execute a contract with a government entity or a private, non-profit organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code to provide charter service upon obtaining a certification from that entity or organization which states that:

(i) [the entity/organization] certifies that it is a government entity or an organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; there will be a significant number of handicapped persons as passengers on this charter trip; the requested charter trip is consistent with the function and purpose of [the entity/organization]; and the charter trip will be organized and operated in compliance with Title VI of the Civil Rights Act of 1964, as amended; and, Section 19 of the Urban Mass Transportation Act of 1964, as amended, and 49 CFR Part 27; or, 45 CFR Part 80; or,

(ii) [the entity/organization] certifies that it is a government entity or an organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; [the entity/organization] is a qualified social service agency under Appendix A of 49 CFR Part 604, as a recipient of funds, either directly or indirectly, under one or more of the Federal programs listed in Appendix A; the requested charter trip is consistent with the function and purpose of [the entity/organization]; and the charter trip will be organized and operated in compliance with Title VI of the Civil Rights Act of 1964, as amended; and, Section 19 of the Urban Mass Transportation Act of 1964, as amended, and 49 CFR Part 27; or, 45 CFR Part 80.

(iii) [the entity/organization] certifies that it is a government entity or organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; [the entity/organization] either receives or is eligible to receive directly or indirectly, from a State or local governmental body public welfare assistance funds for purposes whose implementation may require the transportation of a group of transit-advantaged or transit-dependent persons; following a petition presented by the State in which the entity or organization resides, UMTA has determined in writing that an UMTA recipient may contract directly with the entity or organization for charter services; the requested charter trip is consistent with the functions and purposes of the entity or organization; and the charter trip will be organized and operated in compliance with Title VI of the Civil Rights Act of 1964, as amended; and Section 19 of the Urban Mass Transportation Act of 1964, as amended, and 49 CFR Part 27; or, 45 CFR Part 80.

(6) A recipient in a non-urbanized area may execute a contract with a government entity or a private, non-profit organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code to provide charter service upon obtaining a certification from that entity or organization which states that:

[the entity/organization] certifies that it is a government entity or an organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; more than 50% of the passengers on this charter trip will be elderly; the requested charter trip is consistent with the function and purpose of [the entity/organization]; and the charter trip will be organized and operated in compliance with Title VI of the Civil Rights Act of 1964, as amended; and, Section 19 of the Urban Mass Transportation Act of 1964, as amended, and 49 CFR Part 27; or, 45 CFR Part 80.

(7) A recipient may provide charter service directly to the customer where a formal agreement has been executed between the recipient and all private charter operators it has determined to be willing and able in accordance with this part, provided that:

(i) The agreement specifically allows the recipient to provide the particular type of charter trip;

(ii) The recipient has provided for such an agreement in its annual public charter notice published pursuant to this part before undertaking any charter service pursuant to this exception; and

(iii) If a recipient has received several responses to its annual public charter notice but ceased its review process after determining that one private operator was willing and able, it must, before concluding a formal charter agreement under this section, complete the review process to ensure that all the willing and able private operators are valid parties to the agreement.

3. 49 CFR Part 604 is amended by adding at the end thereof the following appendices A and B:

Appendix A

The following is a list of Federal assistance programs administered under the United States Department of Health and Human Services (HHS). The financial assistance under each of these HHS programs includes funding for the transportation needs of the program beneficiaries.

Program title	Agency
Project Grant and Cooperative Agreements for Tuberculosis Control Programs.	Public Health Service, HHS.

Program title	Agency
Mental Health Service for Cuban Entrants.	Public Health Service, HHS.
Mental Health Planning and Demonstration Projects.	Public Health Service, HHS.
Alcohol, Drug Abuse Treatment and Rehabilitation Block Grant.	Public Health Service, HHS.
Family Planning-Services.	Public Health Service, HHS.
Community Health Centers.	Public Health Service, HHS.
Indian Health Services—Health Management Development Program.	Public Health Service, HHS.
Migrant Health Centers Grants.	Public Health Service, HHS.
Childhood Immunization Grants.	Public Health Service, HHS.
Administration for Children, Youth and Families (ACYF)—Head Start.	Office of Human Development Services, HHS.
ACYF Child Welfare Research and Demonstration Program.	Office of Human Development Services, HHS.
ACYF Runaway and Homeless Youth.	Office of Human Development Services, HHS.
ACYF Adoption Opportunities.	Office of Human Development Services, HHS.
ACYF Child Abuse and Neglect (State Grants).	Office of Human Development Services, HHS.
ACYF Child Abuse and Neglect Discretionary.	Office of Human Development Services, HHS.
Administration for Native Americans (ANA) Native American Programs—Financial Assistance Grants.	Office of Human Development Services, HHS.
ANA Research, Demonstration and Evaluation.	Office of Human Development Services, HHS.
ANA Training and Technical Assistance.	Office of Human Development Services, HHS.
Administration of Developmental Disabilities (ADD)—Basic Support and Advocacy Grants.	Office of Human Development Services, HHS.
ADD Special Projects	Office of Human Development Services, HHS.
ADD University Affiliated Facilities.	Office of Human Development Services, HHS.
Administration on Aging (ADA) Special Programs for the Aging—Grants for Supportive Services and Senior Centers.	Office of Human Development Services, HHS Title III, Part B—
ADA Title III, Part C, Nutrition Services.	Office of Human Development Services, HHS.
ADA Grants to Indian Tribes.	Office of Human Development Services, HHS.
ADA Training, Research and Discretionary Projects and Programs.	Office of Human Development Services, HHS.
Social Service Block Grant.	Office of Human Development Services, HHS.
Medical Assistance Program Title XIX.	Health Care Financing Medicaid; Administration, HHS.
Medicare—Supplemental Medical Insurance.	Health Care Financing Administration, HHS.0
Aid to Families with Dependent Children (AFDC)—Maintenance Assistance.	Family Support Administration, HHS.
Work Incentive Program	Family Support Administration, HHS.
Community Service Block Grant (CSBG).	Family Support Administration, HHS.
CSBG Discretionary Awards.	Family Support Administration, HHS.
CSBG Discretionary Awards—Community Food and Nutrition.	Family Support Administration, HHS.
Social Security—Disability Insurance.	Social Security Administration, HHS.
Supplemental Security Income.	Social Security Administration, HHS.
Home Health Services and Training.	Public Health Service, HHS.
Coal Miners Respiratory Impairment Treatment Clinics and Services.	Public Health Service, HHS.
Preventive Health Services—Sexually Transmitted Diseases Control Grants.	Public Health Service, HHS.
Health Programs for Refugees.	Public Health Service, HHS.

Appendix B

Elderly and Handicapped

The definitions of the term "elderly and handicapped" as applied under UMTA's elderly and handicapped half-fare program (49 CFR Part 609) shall apply to this rule. This permits a broader class of handicapped persons to take advantage of the exception than would be permitted under the more restrictive definition applied to the non-discrimination provisions of the Department's § 504 program (49 CFR Part 27.5), which includes only handicapped persons otherwise unable to use the recipient's bus service for the general public.

Accordingly, for the purposes of Section 604.9(b)(6), the definition of "elderly persons" may be determined by the UMTA recipient but must, at a minimum, include all persons 65 years of age or over.

Similarly, the definition of "handicapped persons" is derived from the existing regulations at 49 CFR Part 609.3 which provide that "Handicapped persons" means those individuals who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, including those who are nonambulatory wheelchair-bound and those with semi-ambulatory capabilities, are unable without special facilities or special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected.

To assist in understanding how the definitions might be applied to administration of the charter rule, the following questions and answers previously published by UMTA for the half-fare program in UMTA C 9060.1, April 20, 1978, are reproduced:

1. *Question:* Can the definition of "elderly" or "handicapped" be restricted on the basis of residency, citizenship, income, employment status, or the ability to operate an automobile?

Answer: No. Section 5(m) is applicable to "elderly and handicapped persons." It is UMTA's policy that such categorical exceptions are not permitted under the Act.

2. *Question:* Can the eligibility of "temporary handicaps" be restricted on the basis of their duration?

Answer: Handicaps of less than 90 days duration may be excluded. Handicaps of more than 90 days duration must be included.

3. *Question:* Can the definition of "handicap" be limited in any way?

Answer: UMTA has allowed applicants to exclude some conditions which appear to meet the functional definition of "handicap" provided in Section 16 of the UMT Act. These include pregnancy, obesity, drug or alcohol addiction, and certain conditions which do not fall under the statutory definition (e.g., loss of a finger, some chronic heart or lung conditions, controlled epilepsy, etc.). Individuals may also be excluded whose handicap involves a contagious disease or poses a danger to the individual or other passengers. Other exceptions should be reviewed on a case-by-case basis.

4. *Question:* Is blindness considered a handicap under Section 5(m)?

Answer: Yes.

5. *Question:* Is deafness considered a handicap under Section 5(m)?

Answer: As a rule, no, because deafness, especially on buses, is not considered a disability which requires special planning, facilities, or design. However, deafness is recognized as a handicap in UMTA's elderly and handicapped regulation, and applicants for Section 5 assistance are encouraged to include the deaf as eligible for off-peak half-fares.

6. *Question:* Is mental illness considered a handicap under Section 5(m)?

Answer: As a rule, no, because of the difficulty in establishing criteria or guidelines for defining eligibility. However, UMTA encourages applicants to provide the broadest possible coverage in defining eligible handicaps, including mental illness.

7. *Question:* Can operators delegate the responsibility for certifying individuals as eligible to other agencies?

Answer: Yes, provided that such agencies administer the certification of individuals in an acceptable manner and are reasonably accessible to the elderly and handicapped. Many operators currently make extensive use of social service agencies (both public and private) to identify and certify eligible individuals.

8. *Question:* Can operators require elderly and handicapped individuals to be recognized by any existing agency (e.g., require that handicapped persons be receiving Social Service or Veterans' Administration benefits)?

Answer: Recognition by such agencies is commonly used to certify eligible individuals. However, such recognition should not be a

mandatory prerequisite for eligibility. For example, many persons with eligible temporary handicaps may not be recognized as handicapped by social service agencies.

9. *Question:* Can the operator require that elderly and handicapped persons come to a central office to register for an off-peak half-fare program?

Answer: UMTA strongly encourages operators to develop procedures which maximize the availability of off-peak half-fares to eligible individuals. Requiring individuals to travel to a single office which may be inconveniently located is not consistent with this policy, although it is not strictly prohibited. UMTA reserves the right to review such local requirements on a case-by-case basis.

10. *Question:* Must ID cards issued by one operator be transferable to another?

Answer: No. However, UMTA encourages consistency among off-peak procedures and the maximizing of availability to eligible individuals, especially among operators within a single urban area. Nevertheless, each operator is permitted to require its own certification of individuals using its service.

11. *Question:* Can an operator require an elderly or handicapped person to submit to a procedure certifying their eligibility before they can receive half-fare? For example, if an operator requires eligible individuals to have a special ID card, can the half-fare be denied to an individual who can otherwise give proof of age, etc, but does not have an ID card?

Answer: Yes, although UMTA does not endorse this practice.

Issued on December 23, 1988.

Alfred A. DelliBovi,

Administrator.

[FR Doc. 88-30072 Filed 12-29-88; 8:45 am]

BILLING CODE 4910-57-M

federal register

Friday
December 30, 1988

Part XIV

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 FR Parts 28, 52, and 53
Federal Acquisition Regulation (FAR); Individual Sureties; Extension of Comment Period

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 28, 52, and 53

Federal Acquisition Regulation (FAR); Individual Sureties

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule (Extension of comment period).

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering a revision to the Federal Acquisition Regulation (FAR) Parts 28, 52, and 53, Individual Sureties. FAR coverage was published as a proposed rule for public comment on November 3, 1988 (53 FR 44564). The original date for submission of comments was January 3, 1989. The Councils have decided to extend the period for public comment on FAR coverage for Individual Sureties to accommodate the requests of interested parties.

DATE: Written comments on the proposed FAR coverage for Individual Sureties should be submitted to the FAR Secretariat by February 3, 1989, for consideration in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4041, Washington, DC 20405. Please cite FAR Case 88–57 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523–4755. Please cite FAR Case 88–57.

Dated: December 23, 1988.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

[FR Doc. 88–30112 Filed 12–29–88; 8:45 am]

BILLING CODE 6820–61–M

federal register

Friday
December 30, 1988

Part XV

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 32 and 52
Federal Acquisition Regulation (FAR); Prompt Payment; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 32 and 52

Federal Acquisition Regulation (FAR); Prompt Payment

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are incorporating Pub. L. 100–496, Prompt Payment Act Amendments of 1988, into Federal Acquisition Regulation Subpart 32.9 and into related contract clauses at 52.232–5, 52.232–8, 52.232–25, 52.232–26, 52.232–27.

DATE: Comments should be submitted to the FAR Secretariat at the address shown below on or before January 30, 1989 to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4041, Washington, DC 20405.

Please cite FAR Case 88–69 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523–4755. Please cite FAR Case 88–69.

SUPPLEMENTARY INFORMATION:

A. Background

Public Law 100–496, the Prompt Payment Act Amendments of 1988, significantly changes the bill paying practices of the Federal Government. The law provides that these proposed changes will apply to contracts awarded, contracts renewed, and contract options exercised after March 31, 1989. Further, it provides that these proposed regulations be published for public comment in the **Federal Register** by February 14, 1989. Even though these proposed rules are being published prior to the date mandated by the law, no more than 30 days can be allowed for public comments in order to allow adequate time to analyze the extensive comments that are expected, make necessary revisions, and promulgate the rules in time to meet the statutory deadline.

This proposed rule contains changes to the Federal Acquisition Regulation to incorporate the required revisions. These revisions include (1) elimination of the 15-day grace period during which the Government was entitled to make invoice payments without incurring interest penalties; (2) establishment of an additional penalty if a contractor is not paid an interest penalty owed by the Government; (3) establishment of a 15-day payment period for contracts providing for "fast payment" procedures; (4) a requirement that construction contract progress payments generally be paid within 14 days; and (5) a requirement for specific provisions to be included in construction subcontracts.

B. Regulatory Flexibility Act

The revision of Parts 32 and 52 concerning Prompt Payment may have a significant economic impact on a substantial number of small entities because a significant number of small businesses are awarded prime contracts and subcontracts for construction. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat, Attn: Margaret A. Willis, Room 4041, GS Bldg., 18th & F Streets, NW., Washington, DC 20405. Comments are invited. Comments from small entities concerning the affected FAR sections will also be considered in accordance with section 610 of the Act.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96–511) is deemed to apply because the proposed rule contains information collection requirements. Accordingly, a request for approval of a new information collection requirement concerning Prompt Payment Act Amendments is being submitted to the Office of Management and Budget under 44 U.S.C. 3501, et seq. Public comments concerning this request will be invited through a subsequent **Federal Register** notice.

List of Subjects in 48 CFR Parts 32 and 52

Government procurement.

Dated: December 23, 1988.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Therefore, 48 CFR Parts 32 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 32 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

PART 32—CONTRACT FINANCING

2. Section 32.900 is revised to read as follows:

32.900 Scope of subpart.

This subpart prescribes policies, procedures, and clauses for implementing Office of Management and Budget (OMB) Circular A–125, "Prompt Payment."

32.902 [Amended]

3. Section 32.902 is amended by revising the definitions, "Discount for prompt payment" and "Proper invoice" to read as follows:

* * * * *

"Discount for prompt payment" means an invoice payment reduction voluntarily offered by the contractor, in conjunction with the clause at 52.232–8, Discounts for Prompt Payment, if payment is made by the Government prior to the due date. The due date is calculated from the date of the contractor's invoice.

* * * * *

"Proper invoice" means a bill or written request for payment which meets the minimum standards specified in the clauses at 52.232–25, Prompt Payment, 52.232–26, Prompt Payment for Fixed-Price Architect-Engineer Contracts, and 52.232–27, Prompt Payment for Construction Contracts (also see 32.905(e)), and other terms and conditions contained in the contract for invoice submission.

* * * * *

4. Section 32.903 is revised to read as follows:

32.903 Policy.

All contracts subject to this subpart shall specify payment procedures, payment due dates, and interest penalties for late invoice payment. Invoice payments and contract financing payments will be made by the Government as close as possible to (or earlier as determined by the Agency head to be necessary on a case-by-case basis), but not later than the due dates specified in the clauses at 52.232–25, Prompt Payment, 52.232–26, Prompt Payment for Fixed-Price Architect-Engineer Contracts, and 52.232–27, Prompt Payment for Construction Contracts. Payment will be based on receipt of a proper invoice or contract financing request and satisfactory

contract performance. Agency procedures shall ensure that, when specifying due dates, full consideration is given to the time reasonably required by Government officials to fulfill their administrative responsibilities under the contract. Checks will be mailed and electronic funds transfers will be transmitted on or about the same day the payment action is dated. When appropriate, Government contracts should allow the contractor to be paid for partial deliveries that have been accepted by the Government (see 32.102(d)). Discounts for prompt payment offered by the contractor shall be taken only when payments are made within the discount period specified by the contractor. Agencies shall pay an interest penalty, without request from the contractor, for late invoice payments or improperly taken discounts for prompt payment. The interest penalty shall be absorbed within funds available for administration or operation of the program for which the penalty was incurred. The temporary unavailability of funds to make a timely payment does not relieve the obligation to pay interest penalties. For contracts awarded after October 1, 1989, if the interest penalty is not paid within 10 days after it is due and the contractor makes a written demand for payment within 40 days after payment of the principal amount due, agencies shall pay an additional penalty amount.

5. Section 32.905 is amended by removing the words "5th working" and inserting "7th" wherever they appear; by revising the introductory text in paragraph (a); by revising the fourth sentence in paragraph (a)(2)(ii); by revising the introductory text of paragraph (b); redesignating paragraph (c) as (d); by adding a new paragraph (c); by redesignating paragraph (d) and (e) and revising the introductory text; and by redesignating paragraphs (e), (f), (g), and (h) as (f), (g), (h), and (i) and revising new paragraph (h) to read as follows:

32.905 Invoice payments.

(a) Except as prescribed in 32.905(b), 32.905(c), and 32.905(d), the due date for making an invoice payment by the designated payment office shall be the later of the two events described in subparagraph (a)(1) or (a)(2) of this section.

(2) * * *

(ii) * * * Except in the case of a contract for the procurement of a brand name commercial item for authorized resale (e.g., commissary items), the contracting officer may specify a longer period for constructive acceptance, if appropriate due to the nature of the supplies or services to be received, inspected, tested, and accepted by the Government.

* * * * *

(b) The due date for making payments on contracts that contain the clause at 52.232–10, Payments Under Fixed-Price Architect-Engineer Contracts, shall be as follows:

* * * * *

(c) The due date for making payments on construction contracts shall be as follows:

(1) The due date for making progress payments based on contracting officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project, shall be 14 days after receipt of a proper payment request by the designated billing office. The contracting officer may specify a longer period in the contract if required to afford the Government a practicable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance under the contract. The contracting officer or his representative shall not approve progress payment requests unless the certification and substantiation of amounts requested are provided as required by the clause at 52.232–5, Payments Under Fixed-Price Construction Contracts.

(2) The due date for payment of any amounts retained by the contracting officer in accordance with the clause at 52.232–5, Payments Under Fixed-Price Construction Contracts, shall be 30 days after approval by the contracting officer for release to the contractor. This release of retained amounts shall be based on the contracting officer's determination that satisfactory progress has been made.

(3) The due date for final payments based on completion and acceptance of all work (including any retained amounts), and payments for partial deliveries that have been accepted by the Government (e.g., each separate building, public work, or other division of the contract for which the price is stated separately in the contract) shall be as follows:

(i) Either the 30th day after receipt by the designated billing office of a proper invoice from the contractor, or the 30th day after Government acceptance of the work or services completed by the contractor, whichever is later.

(ii) On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of contractor claims), acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(4) For the sole purpose of computing an interest penalty that might be due the contractor for payments described in subdivision (c)(3)(i) of this section, Government acceptance or approval shall be deemed to have occurred constructively on the 7th day after the contractor has completed the work or services in accordance with the terms and conditions of the contract (see also 32.905(c)(5)). In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance.

(5) The constructive acceptance and constructive approval requirements described in subparagraph (c)(4) of this section are conditioned upon receipt of a proper payment request and no disagreement over quantity, quality, contractor compliance with contract requirements, or the requested amount. These requirements do not compel Government officials to accept work or services, approve contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities. The contracting officer may specify a longer period for constructive acceptance or constructive approval, if appropriate, due to the nature of the work or services involved.

(d) The payment terms on contacts for meat and meat food products, contracts for perishable agricultural commodities, and contracts for dairy products, edible fats or oils, and food products prepared from edible fats or oils are as follows:

(1) The due date on contractor invoices for meat or meat food products, as defined in section 2(a)(3) of the Packers and Stockyard Act of 1921 (7 U.S.C. 182(3)), as further defined in Pub. L. 98–181, including any edible fresh or frozen poultry meat, any perishable poultry meat food product, fresh eggs, and any perishable egg product, will be as close as possible to, but not later than, the seventh day after product delivery.

(2) The due date of contractor invoices for perishable agricultural commodities, as defined in section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)), will be as close as possible to, but not later than, the tenth day after product delivery, unless another date is specified in the contract.

(3) The due date on contractor invoices for dairy products (as defined in section 111(e) of the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4502(e)), edible fats or oils, and food products prepared from edible fats or

oils, will be as close as possible to, but not later than, the tenth day after the date on which a proper invoice has been received.

(e) A proper invoice must include the items listed in subparagraphs (e)(1) through (e)(8) of this section. If the invoice does not comply with these requirements, then the contractor must be notified of the defect within 7 days (3 days on contracts for meat and meat food products, and 5 days on contracts for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils) after receipt of the invoice at the designated billing office. The reason that the invoice is not a proper invoice must be specified. If such notice is not timely, then an adjusted due date for the purpose of determining an interest penalty, if any, will be established in accordance with 32.907–1(b):

* * * * *

(h) The designated billing office shall annotate each invoice with the date a proper invoice was received by the designated billing office. If the invoice is not so annotated, it shall be treated as if it was received on the date of the invoice.

* * * * *

6. Section 39.907–1 is amended by revising paragraphs (a)(4), (b), (c), (d), and by adding paragraph (g) to read as follows:

32.907–1 Late invoice payment.

(a) * * *

(4) The designated payment office paid the contractor after the due date.

(b) The interest penalty computation shall not include (1) the time taken by the Government to notify the contractor of a defective invoice, unless it exceeds the periods prescribed in 32.905(e), or (2) the time taken by the contractor to correct the invoice. If the designated billing office failed to notify the contractor of the defective invoice within the periods prescribed in 32.905(e), then the due date on the corrected invoice will be adjusted by the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the contractor will be based on this adjusted due date.

(c) An interest penalty shall be paid automatically by the designated payment office, without request from the contractor, if a discount for prompt payment is taken improperly. The interest penalty shall be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the contractor is paid.

(d) The interest penalty shall be 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 day after the due date, except where the interest penalty is prescribed by other Governmental authority (e.g., tariffs). The rate in effect on the day after the due date shall remain fixed during the period for which an interest penalty is calculated. This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the Federal Register semiannually on or about January 1 and July 1. The interest penalty will accrue daily on the invoice payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest penalties if not paid in the succeeding 30-day period. The interest penalty amount, interest rate and the period for which the interest penalty was computed, will be separately stated by the designated payment office on the check or accompanying remittance advice. Adjustments will be made by the designated payment office for errors in calculating interest penalties, if requested by the contractor.

* * * * *

(g) For contracts awarded on or after October 1, 1989, a penalty amount (calculated in accordance with regulations issued by the Office of Management and Budget) shall be paid, in addition to the interest penalty amount, if the contractor—

(1) Is owed an interest penalty;

(2) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(3) Makes a written demand that the agency pay such a penalty not later than 40 days after the date the invoice amount is paid.

7. Section 32.908 is revised to read as follows:

32.908 Contract clauses.

(a) If the solicitation or contract contains the clause at 52.232–10, Payments Under Fixed-Price Architect-Engineer Contracts, the contracting officer shall insert the clause at 52.232–26, Prompt Payment for Fixed-Price Architect-Engineer Contracts.

(b) The contracting officer shall insert the clause at 52.232–27, Prompt Payment for Construction Contracts, in all solicitations and contracts for construction (see Part 36).

(c) The contracting officer shall insert the clause at 52.232–25, Prompt Payment, in all other solicitations and contracts, except as indicated in 32.901 of this section.

(d) If payment may be made by electronic funds transfer, the contracting office shall use Alternative I with the clauses prescribed in paragraphs (a), (b), and (c) of this section.

8. Section 32.909 is amended by adding a fourth sentence to read as follows:

32.909 Contractor inquiries.

* * * Small business concerns may obtain additional assistance related to payment issues by contracting their local Office of Small and Disadvantaged Business Utilization.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. Section 52.232–5 is amended by removing in the title of the clause the date "(AUG 1987)" and inserting in its place the date "(APR 1989)"; by revising the second sentence in paragraph (b); by redesignating paragraphs (c), (d), (e), (f), (g), as (e), (f), (g), (h), and (i), and removing in the second sentence of the new paragraph (g) the reference "paragarph (c)" and inserting in its place "paragarph (e)"; and by adding new paragraphs (c) and (d) to read as follows:

52.232–5 Payments under Fixed-Price Construction Contracts

* * * * *

(b) * * * The Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested by the Contracting Officer, to provide a basis for determining progress payments. * * *

* * * * *

(c) Along with each request for progress payments, the contractor shall furnish the following certification, or payment shall not be made:

I hereby certify, to the best of my knowledge and belief, that—

(1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;

(2) Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of chapter 39 of title 31, United States Code; and

(3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance

with the terms and conditions of the subcontract.

_____

(Name)

_____

(Title)

_____

(Date)

(d) If the Contractor, after making a certified request for progress payments, discovers that a portion or all of such request constitutes a payment for performance that fails to conform to the specifications, terms, and conditions of this contract (hereinafter referred to as the "unearned amount"), the Contractor shall—

(1) Notify the Contracting Officer of such performance deficiency; and

(2) Be obligated to pay the Government an amount (computed by the Contracting Officer in the manner provided in 31 U.S.C. 3903(c)(1)) equal to interest on the unearned amount from the date of receipt of the unearned amount until—

(i) The date the Contractor notifies the Contracting Officer that the performance deficiency has been corrected; or

(ii) The date the Contractor reduces the amount of any subsequent certified request for progress payments by an amount equal to the unearned amount.

(g) In making these progress payments, the Government shall, upon request, reimburse the Contractor for the amount of premiums paid for performance and payment bonds (including coinsurance and reinsurance agreements, when applicable) after the Contractor has furnished evidence of full payment to the surety. The retainage provisions in paragraph (e) of this clause shall not apply to that portion of progress payments attributable to bond premiums.

10. Section 52.232–8 is amended by removing in the title of the clause the date "(JUL 1985)" and inserting in its place "(APR 1989)"; and by revising paragraph (b) of the clause to read as follows:

52.232–8 Discounts for Prompt Payment.

* * * * *

(b) In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the date on which an electronic funds transfer was made.

(End of clause)

11. Section 52.232–25 is amended by revising the introductory text; by revising paragraph (a); by removing in the title of the clause the date "(FEB 1988)" and inserting in its place "(APR 1989)"; by revising paragraphs (a)(3) and (a)(3)(i); by redesignating the existing paragraph (a)(3)(iii) as (a)(iv) and adding a new (a)(3)(iii); by revising the fourth sentence in (a)(4); by revising the introductory text of paragraph (a)(5) and the first sentence in paragraph (a)(6) and in (a)(6)(i); by revising paragraph (a)(6)(ii)(A) and paragraph (a)(7); by adding paragraph (a)(8), and paragraph (c); by redesignating existing Alternate I as new section 52.232–26 and revising; by redesignating Alternate II as Alternate I and revising the introductory text; and by removing in paragraph (d)(4) of new Alternate I the reference "paragraph (c)" to read "paragraph (d)" as follows:

52.232–25 Prompt Payment.

As prescribed in 32.908(c), insert the following clause:

(a) As authorized in 32.905(a)(2)(ii), the Contracting Officer may modify the date in subdivision (a)(6)(i) of the clause to specify a period longer than 7 days for constructive acceptance, if considered appropriate due to the nature of the supplies or services to be received, inspected, tested, or accepted by the Government, except in the case of a contract for the procurement of a brand-name commercial item for authorized resale.

* * * * *

(3) The due date on contracts for meat and meat food products, contracts for perishable agricultural commodities, contracts for dairy products, edible fats or oils, and food products prepared from edible fats or oils, and contracts not requiring submission of an invoice shall be as follows:

(i) The due date for meat and meat food products, as defined in Section 2(a)(3) of the Packers and Stockyard Act of 1921 (7 U.S.C. 182(3)) and further defined in Pub. L. 98–181 to include any edible fresh or frozen poultry meat, any perishable poultry meat food product, fresh eggs, and any perishable egg product, will be as close as possible to, but not later than, the 7th day after product delivery.

* * * * *

(iii) The due date for dairy products, as defined in section 111(e) of the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4502(e)), edible fats or oils, and food products prepared from edible fats or oils, will be as close as possible to, but not later than, the 10th day after the date on which a proper invoice has been received.

(4) * * * If the invoice does not comply with these requirements, then the Contractor will be notified of the defect within 7 days after receipt of the invoice at the designated billing office (3 days for meat and meat food products and 5 days for perishable agricultural commodities, edible fats or oils, and food products prepared from edible fats or oils. * * *

(5) An interest penalty shall be paid automatically by the Government, without request from the Contractor, if payment is not made by the due date and the following conditions are met, if applicable:

* * * * *

(6) The interest penalty shall be 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 day after the due date. * * *

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance shall be deemed to have occurred constructively on the ____ day [7th day if blank] after the Contractor delivered the supplies or performed the services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, or contractor compliance with a contract provision. * * *

* * * * *

(ii) * * *

(A) The period taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 7 days (3 days for meat and meat food products and 5 days for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils).

* * * * *

(7) An interest penalty shall also be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated as described in subparagraph (a)(6) of this clause on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(8) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with regulations issued by the Office of Management and Budget, shall be paid in addition to the interest penalty amount if the Contractor—

(i) Is owed an interest penalty;

(ii) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(iii) Makes a written demand, not later than 40 days after the date the invoice amount is paid, that the agency pay such a penalty.

* * * * *

(c) If this contract contains the clause at 52.213–1, Fast Payment Procedure, payments will be made within 15 days after the date of receipt of the invoice.

(End of clause)

Alternate I (APR 1989) If payment may be made by electronic funds transfer, add the following paragraph (d) to the clause:

(d) *Electronic Funds Transfer.* Payments under this contract will be made by the Government either by check or electronic funds transfer (through the Treasury Financial Communications System (TFCS) or the Automated Clearing House (ACH)), at the option of the Government. After award, but no later than 14 days before an invoice or contract financing request is submitted, the Contractor shall designate a financial institution for receipt of electronic funds transfer payments. The Contractor shall submit this designation to the Contracting Officer or other Government official, as directed.

(1) For payment through TFCS, the Contractor shall provide the following information:

(i) Name, address, and telegraphic abbreviation of the financial institution receiving payment.

(ii) The American Bankers Association 9-digit identifying number of the financing institution receiving payment if the institution has access to the Federal Reserve Communications System.

(iii) Payee's account number at the financial institution where funds are to be transferred.

(iv) If the financial institution does not have access to the Federal Reserve Communications System, name, address, and telegraphic abbreviation of the correspondent financial institution through which the financial institution receiving payment obtains electronic funds transfer messages, provide the telegraphic abbreviation and American Bankers Association identifying number for the correspondent institution.

(2) For payment through ACH, the Contractor shall provide the following information:

(i) Routing transit number of the financial institution receiving payment (same as American Bankers Association identifying number used for TFCS).

(ii) Number of account to which funds are to be deposited.

(iii) Type of depositor account ("C" for checking, "S" for savings).

(iv) If the Contractor is a new enrollee to the ACH system, a "Payment Information Form," TFS 3881, must be completed before payment can be processed.

(3) In the event the Contractor, during the performance of this contract, elects to designate a different financial institution for the receipt of any payment made using electronic funds transfer procedures, notification of such change and the required information specified above must be received by the appropriate Government official 30 days prior to the date such change is to become effective.

(4) The documents furnishing the information required in this paragraph (d) must be dated and contain the signature, title, and telephone number of the Contractor official authorized to provide it, as well as the contractor's name and contract number.

(5) Contractor failure to properly designate a financial institution or to provide appropriate payee bank account information may delay payments of amounts otherwise properly due.

12. Section 52.232–26 is added to read as follows:

52.232–26 Prompt Payment for Fixed-Price Architect-Engineer Contracts.

As prescribed in 32.908(a), insert the following clause:

(a) As authorized in 32.905(b)(3), the Contracting Officer may modify the date in subdivision (a)(5)(i) of the clause to specify a period longer than 7 days for constructive acceptance or constructive approval, if required to afford the Government a practicable opportunity to adequately inspect the work and to determine the adequacy of the Contractor's performance under the contract.

(b) If applicable, as authorized in 32.906(a) and only as allowed under agency policies and procedures, the Contracting Officer may insert in paragraph (b) of the clause a period shorter than 30 days (but not less than 7 days) for making contract financing payments.

Prompt Payment For Fixed-Price Architect-Engineer Contracts (Apr. 1989)

Notwithstanding any other payment terms in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made. Definitions of pertinent terms are set forth in 32.902. All days referred to in this clause are calendar days, unless otherwise specified.

(a) *Invoice Payments.* (1) For purposes of this clause, "invoice payment" means a Government disbursement of monies to a Contractor under a contract or other authorization for work or services accepted by the Government, payments for partial deliveries that have been accepted by the Government, and progress payments based on contacting officer approval of the estimated amount and value of work or services performed.

(2) The due date for making invoice payments shall be as described in this subparagraph (a)(2) of this clause.

(i) The due date for work or services completed by the Contractor shall be the later of the following two events:

(A) The 30th day after the designated billing office has received a proper invoice from the Contractor.

(B) The 30th day after Government acceptance of the work or services completed by the Contractor. On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(ii) The due date for progress payments shall be the 30th day after Government approval of Contractor estimates of work or services accomplished.

(3) An invoice is the Contractor's bill or written request for payment under the contract for work or services performed under the contract. An invoice shall be prepared and submitted to the designated billing office. A proper invoice must include the items listed in subdivisions (a)(3)(i) through (a)(3)(vii) of this clause. If the invoice does not comply with these requirements, then the Contractor will be notified of the defect within 7 days after receipt of the invoice at the designated billing office. Untimely notification will be taken into account in the computation of any interest penalty owed the Contractor in the manner described in subparagraph (a)(5) of this clause:

(i) Name and address of the Contractor.

(ii) Invoice date.

(iii) Contract number or other authorization for work or services performed (including order number and contract line item number).

(iv) Description of work or services performed.

(v) Delivery and payment terms (e.g., prompt payment discount terms).

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in event of a defective invoice.

(viii) Any other information or documentation required by the contract.

(4) An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made by the due date and the following conditions are met, if applicable:

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was processed and there was no disagreement over quantity, quality, Contractor compliance with any contract term or condition, or requested progress payment amount.

(iii) In the case of a final invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(5) The interest penalty shall be 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 day after the due date, except where the interest penalty is prescribed by other governmental authority. This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the **Federal Register** semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the invoice payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the Contractor of a defective invoice within the periods prescribed in subparagraph (a)(3) of this clause, then the due date on the corrected invoice will be adjusted by subtracting the number of days taken beyond the prescribed notification of defects period. Any interest penalty owned the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties, if requested by the Contractor.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance or approval shall be deemed to have occurred constructively as shown in subdivisions (a)(5)(i)(A) and (B) of this clause. In the event that actual acceptance or approval occurs within the constructive acceptance or approval period, the determination of an interest penalty shall be based on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, Contractor compliance with a contract provision, or requested progress payment

amounts. These requirements also do not compel Government officials to accept work or services, approve Contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(A) For work or services completed by the Contractor, Government acceptance shall be deemed to have occurred constructively on the ____ day [7th day if blank] after the Contractor has completed the work or services in accordance with the terms and conditions of the contract.

(B) For progress payments, Government approval shall be deemed to have occurred on the 7th day after Contractor estimates have been received by the designated billing office.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The period taken to notify the Contractor of a defect in invoices submitted to the Government, but this may not exceed 7 days.

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233–1, Disputes, or for more than 1 year. Interest penalties of less than $1.00 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable will be resolved in accordance with the clause at 52.233–1, Disputes.

(6) An interest penalty shall also be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(7) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with regulations issued by the Office of Management and Budget, shall be paid in addition to the interest penalty amount if the Contractor—

(i) Is owed an interest penalty;

(ii) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(iii) Makes a written demand, not later than 40 days after the date the invoice amount is paid, that the agency pay such a penalty.

(b) *Contract Financing Payments.* (1) For purposes of this clause, if applicable, "contract financing payment," means a Government disbursement of monies to a Contractor under a contract clause or other authorization prior to acceptance of supplies or services by the Government, other than progress payments based on estimates of amount and value of work performed. Contract financing payments include advance payments, progress payments based on a percentage or stage of completion (32.102(e)(1)) other than those made under the clause at 52.232–5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232–10, Payments Under Fixed-Price Architect-Engineer Contracts, and interim payments on cost type contracts.

(2) If this contract provides for contract financing, requests for payment shall be submitted to the designated billing office as specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the (insert day as prescribed by Agency head; if not prescribed, insert 30th day) day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified. For advance payments, loans, or other arrangements that do not involve recurrent submissions of contract financing requests, payment shall be made in accordance with the corresponding contract terms or as directed by the Contracting Officer. Contract financing payments shall not be assessed an interest penalty for payment delays.

(End of clause)

Alternate I (APR 1989). If payment may be made by electronic funds transfer, add the following paragraph (c) to the clause:

(c) *Electronic Funds Transfer.* Payments under this contract will be made by the Government either by check or electronic funds transfer (through the Treasury Financial Communications System (TFCS) or the Automated Clearing House (ACH)), at the option of the Government. After award, but no later than 14 days before an invoice or contract financing request is submitted, the Contractor shall designate a financial institution for receipt of electronic funds transfer payments. The Contractor shall submit this designation to the Contracting Officer or other Government official, as directed.

(1) For payment through TFCS, the Contractor shall provide the following information:

(i) Name, address, and telegraphic abbreviation of the financial institution receiving payment.

(ii) The American Bankers Association 9-digit identifying number of the financing institution receiving payment if the institution has access to the Federal Reserve Communications System.

(iii) Payee's account number at the financial institution where funds are to be transferred.

(iv) If the financial institution does not have access to the Federal Reserve Communications System, name, address, and telegraphic abbreviation of the correspondent financial institution through which the financial institution receiving payment obtains electronic funds transfer messages, provide the telegraphic abbreviation and American Bankers Association identifying number of the correspondent institution.

(2) For payment through ACH, the Contractor shall provide the following information:

(i) Routing transit number of the financial institution receiving payment (same as American Bankers Association identifying number used for TFCS)

(ii) Number of account to which funds are to be deposited.

(iii) Type of depositor account ("C" for checking, "S" for savings).

(iv) If the Contractor is a new enrollee to the ACH system, a "Payment Information Form," TFS 3881, must be completed before payment can be processed.

(3) In the event the Contractor, during the performance of this contract, elects to designate a different financial institution for the receipt of any payment made using electronic funds transfer procedures, notification of such change and the required information specified above must be received by the appropriate Government official 30 days prior to the date such change is to become effective.

(4) The documents furnishing the information required in this paragraph (c) must be dated and contain the signature, title, and telephone number of the Contractor official authorized to provide it, as well as the Contractor's name and contract number.

(5) Contractor failure to properly designate a financial institution or to provide appropriate payee bank account information may delay payments of amounts otherwise properly due.

13. Section 52.232–27 is added to read as follows:

52.232–27 Prompt Payment for Construction Contracts.

As prescribed in 32.908(b), insert the following clause:

(a) As authorized in 32.905(c)(1), the Contracting Officer may modify the date in subdivision (a)(1)(i)(A) of the clause to specify a period longer than 14 days if required to afford the Government a practicable opportunity to adequately inspect the work and to determine the adequacy of the Contractor's performance under the contract.

(b) As authorized in 32.905(c)(5), the Contracting Officer may modify the date in subdivision (a)(4)(i) of the clause to specify a period longer than 7 days for constructive acceptance or constructive approval if required to afford the Government a practicable opportunity to adequately inspect the work and to determine the adequacy of the Contractor's performance under the contract.

(c) If applicable, as authorized in 32.906(a) and only as allowed under agency policies and procedures, the Contracting Officer may insert in paragraph (b) of the clause a period shorter than 30 days (but not less than 7 days) for making contract financing payments.

Prompt Payment For Construction Contracts (Apr 1989)

Notwithstanding any other payment terms in this contract, the Government will make

invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made. Definitions of pertinent terms are set forth in 32.902. All days referred to in this clause are calendar days, unless otherwise specified.

(a) *Invoice Payments.* (1) For purposes of this clause, there are several types of invoice payments which may occur under this contract, as follows:

(i) Progress payments, if provided for elsewhere in this contract, based on Contracting Officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project:

(A) The due date for making such payments shall be 14 days after receipt of the payment request by the designated billing office.

(B) The due date for payment of any amounts retained by the Contracting Officer in accordance with the clause at 52.232–5, Payments Under Fixed-Price Construction Contracts, shall be 30 days after approval for release to the Contractor by the Contracting Officer.

(ii) Final payments based on completion and acceptance of all work and presentation of release of all claims against the Government arising by virtue of the contract, and payments for partial deliveries that have been accepted by the Government (e.g., each separate building, public work, or other division of the contract for which the price is stated separately in the contract):

(A) The due date for making such payments shall be either the 30th day after receipt by the designated billing office of a proper invoice from the Contractor, or the 30th day after Government acceptance of the work or services completed by the Contractor, whichever is later.

(B) On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance shall be deemed to have occurred on the effective date of the contact settlement.

(2) An invoice is the Contractor's bill or written request for payment under the contract for work or services performed under the contract. An invoice shall be prepared and submitted to the designated billing office. A proper invoice must include the items listed in subdivisions (a)(2)(i) through (a)(2)(ix) of this clause. If the invoice does not comply with these requirements, the Contractor will be notified of the defect within 7 days after receipt of the invoice at the designated billing office. Untimely notification will be taken into account in the computation of any interest penalty owed the Contractor in the manner described in paragraph (a)(4) of this clause:

(i) Name and address of the Contractor.

(ii) Invoice date.

(iii) Contract number or other authorization for work or services performed (including order number and contract line item number).

(iv) Description of work or services performed.

(v) Delivery and payment terms (e.g., prompt payment discount terms).

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in event of a defective invoice.

(viii) For payments described in subdivision (a)(1)(i) of this clause, substantiation of the amounts requested and certification in accordance with the requirements of the clause at 52.232–5, Payments Under Fixed-Price Construction Contracts.

(ix) Any other information or documentation required by the contract.

(3) An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made by the due date and the following conditions are met, if applicable:

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was processed and there was no disagreement over quantity, quality, Contractor compliance with any contract term or condition, or requested progress payment amount.

(iii) In the case of a final invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(4) The interest penalty shall be 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 day after the due date, except where the interest penalty is prescribed by other governmental authority. This part is referred to as the "Renegotiation Board Interest Rate," and it is published in the **Federal Register** semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the invoice payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the Contractor of a defective invoice within the periods prescribed in subparagraph (a)(2) of this clause, then the due date on the corrected invoice will be adjusted by subtracting the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties, if requested by the Contractor.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor for payments described in subdivision (a)(1)(ii) of this clause, Government acceptance or approval shall be deemed to have occurred constructively on the 7th day after the Contractor has completed the work or services in accordance with the terms and conditions of the contract. In the event that actual acceptance or approval occurs within the constructive acceptance or approval period, the determination of an interest penalty shall be based on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, or Contractor compliance with a contract provision. These requirements also do not compel Government officials to accept work or services, approve Contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The periods taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 7 days.

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233–1, Disputes, or for more than 1 year. Interest penalties of less than $1.00 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233–1, Disputes.

(5) An interest penalty shall also be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(6) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with regulations issued by the Office of Management and Budget, shall be paid in addition to the interest penalty amount if the Contractor—

(i) Is owed an interest penalty;

(ii) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(iii) Makes a written demand, not later than 40 days after the date the invoice amount is paid, that the agency pay such a penalty.

(b) *Contract Financing Payments.* (1) For purposes of this clause, if applicable, "contract financing payment" means a Government disbursement of monies to a Contractor under a contract clause or other authorization prior to acceptance of supplies or services by the Government, other than progress payments based on estimates of amount and value of work performed. Contract financing payments include advance payments and interim payments under cost-type contracts.

(2) If this contract provides for contract financing, requests for payment shall be submitted to the designated billing office as specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the (insert day as prescribed by Agency head; if not prescribed, insert 30th day) day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified. For advance payments, loans, or other arrangements that do not involve recurrent submissions of contract financing requests, payment shall be made in accordance with the corresponding contract terms or as directed by the Contracting Officer. Contract financing payments shall not be assessed an interest penalty for payment delays.

(c) The Contractor shall include in each subcontract for property or services (including a material supplier) for the purpose of performing this contract the following:

(1) A payment clause which obligates the Contractor to pay the subcontractor for satisfactory performance under its subcontract not later than 7 days from receipt of payment out of such amounts as are paid to the Contractor under this contract.

(2) An interest penalty clause which obligates the Contractor to pay to the subcontractor an interest penalty for each payment not made in accordance with the payment clause—

(i) For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

(ii) Computed at the rate of interest established by the Secretary of the Treasury, and published in the **Federal Register**, for interest payments under section 12 of the Contracts Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(3) A clause requiring each subcontractor to include a payment clause and an interest penalty clause conforming to the standards set forth in subparagraphs (c)(1) and (c)(2) of this clause in each of its subcontracts, and to require each of its subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

(d) The clauses required by paragraph (c) of this clause shall not be construed to impair the right of Contractor or a subcontractor at any tier to negotiate, and to include in their subcontract, provisions which—

(1) Permit the Contractor or a subcontractor to retain (without cause) a specified percentage of each progress payment otherwise due to a subcontractor for satisfactory performance under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties deem appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(2) Permit the Contractor or subcontractor to make a determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

(3) Permit such withholding without incurring any obligation to pay a late payment penalty if—

(i) A notice conforming to the standards of paragraph (g) of this clause has been previously furnished to the subcontractor, and

(ii) A copy of any notice issued by a Contractor pursuant to subdivision (d)(3)(i) of this clause has been furnished to the Contracting Officer.

(e) If a Contractor, after making a request for payment to the Government but before making a payment to a subcontractor for the subcontractor's performance covered by the payment request, discovers that all or a portion of the payment otherwise due such subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, then the Contractor shall—

(1) Furnish to the subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for subcontractor payment;

(2) Furnish to the Contracting Officer, as soon as practicable, a copy of the notice furnished to the subcontractor pursuant to subparagraph (e)(1) of this clause;

(3) Reduce the subcontractor's progress payment by an amount not to exceed the amount specified in the notice of withholding furnished under subparagraph (e)(1) of this clause;

(4) Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency, and—

(i) Make such payment within—

(A) Seven days after correction of the identified subcontract performance deficiency (unless the funds therefor must be recovered from the Government because of a reduction under subdivision (e)(5)(i)) of this clause; or

(B) Seven days after the Contractor recovers such funds from the Government; or

(ii) Incur an obligation to pay a late payment interest penalty computed at the rate of interest established by the Secretary of the Treasury, and published in the **Federal Register**, for interest payments under section 12 of the Contracts Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty;

(5) Notify the Contracting Officer upon—

(i) Reduction of the amount of any subsequent certified application for payment; or

(ii) Payment to the subcontractor of any withheld amounts of a progress payment, specifying—

(A) The amounts withheld under subparagraph (e)(1) of this clause; and

(B) The dates that such withholding began and ended; and

(6) Be obligated to pay to the Government an amount equal to interest on the withheld payments (computed in the manner provided in 31 U.S.C. 3903(c)(1)), from the 8th day after receipt of the withheld amounts from the Government until—

(i) The day the identified subcontractor performance deficiency is corrected; or

(ii) The date that any subsequent payment is reduced under subdivision (e)(5)(i) of this clause.

(f)(1) if a Contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor (hereafter referred to as a "second-tier subcontractor") a written notice in accordance with section 2 of the Act of August 24, 1935 (40 U.S.C. 270b, Miller Act), asserting a deficiency in such first-tier subcontractor's performance under the contract for which the Contractor may be ultimately liable, and the Contractor determines that all or a portion of future payments otherwise due such first-tier subcontractor is subject to withholding in accordance with the subcontract agreement, then the Contractor may, without incurring an obligation to pay an interest penalty under subparagraph (e)(6) of this clause—

(i) Furnish to the first-tier subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon making such determination; and

(ii) Withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under subdivision (f)(1)(i) of this clause.

(2) As soon as practicable, but not later than 7 days after receipt of satisfactory written notification that the identified subcontract performance deficiency has been corrected, the Contractor shall pay the amount withheld under subdivision (f)(1)(i) of this subparagraph to such first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed at the rate of interest established by the Secretary of the Treasury, and published in the **Federal Register**, for interest payments under section 12 of the Contracts Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(g) A written notice of any withholding shall be issued to a subcontractor (with a copy to the Contracting Officer of any such notice issued by the Contractor), specifying—

(1) The amount to be withheld;

(2) The specific causes for the withholding under the terms of the subcontract; and

(3) The remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

(h) The Contractor may not request payment from the Government of any amount withheld or retained in accordance with paragraph (d) of this clause until such time as the Contractor has determined and certified to the Contracting Officer that the subcontractor is entitled to the payment of such amount.

(i) A dispute between the Contractor and subcontractor relating to the amount or entitlement of a subcontractor to a payment or a late payment interest penalty under a

clause included in the subcontract pursuant to paragraph (c) of this clause does not constitute a dispute to which the United States is a party. The United States may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

(j) Except as provided in paragraph (i) of this clause, this clause shall not limit or impair any contractual, administrative, or judicial remedies otherwise available to the Contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by the Contractor or deficient subcontract performance or nonperformance by a subcontractor.

(k) The Contractor's obligation to pay an interest penalty to a subcontractor pursuant to the clauses included in a subcontract under paragraph (c) of this clause shall not be construed to be an obligation of the United States for such interest penalty. A cost reimbursement claim may not include any amount for reimbursement of such interest penalty.

(End of clause.)

Alternate I (APR 1989) If payment may be made by electronic funds transfer, add the following paragraph (1) to the clause:

(1) *Electronic Funds Transfer.* Payments under this contract will be made by the Government either by check or electronic funds transfer (through the Treasury Financial Communications System (TFCS) or the Automated Clearing House (ACH)), at the option of the Government. After award, but no later than 14 days before an invoice or contract financing request is submitted, the Contractor shall designate a financial institution for receipt of electronic funds transfer payments. The Contractor shall submit this designation to the Contracting Officer or other Government official, as directed.

(1) For payment through TFCS, the Contractor shall provide the following information:

(i) Name, address, and telegraphic abbreviation of the financial institution receiving payment.

(ii) The American Bankers Association 9-digit identifying number of the financing institution receiving payment if the institution has access to the Federal Reserve Communications System.

(iii) Payee's account number at the financial institution where funds are to be transferred.

(iv) If the financial institution does not have access to the Federal Reserve Communications System, name, address, and telegraphic abbreviation of the correspondent financial institution through which the financial institution receiving payment obtains electronic funds transfer messages. Provide the telegraphic abbreviation and American Bankers Association identifying number for the correspondent institution.

(2) For payment through ACH, the Contractor shall provide the following information:

(i) Routing transit number of the financial institution receiving payment (same as American Bankers Association identifying number used for TFCS).

(ii) Number of account to which funds are to be deposited.

(iii) Type of depositor account ("C" for checking, "S" for savings).

(iv) If the Contractor is a new enrollee to the ACH system, a "Payment Information Form," TFS 3881, must be completed before payment can be processed.

(3) In the event the Contractor, during the performance of this contract, elects to designate a different financial institution for the receipt of any payment made using electronic funds transfer procedures, notification of such change and the required information specified above must be received by the appropriate Government official 30 days prior to the date such change is to become effective.

(4) The documents furnishing the information required in this paragraph (1) must be dated and contain the signature, title, and telephone number of the Contractor official authorized to provide it, as well as the Contractor's name and contract number.

(5) Contractor failure to properly designate a financial institution or to provide appropriate payee bank account information may delay payments of amounts otherwise properly due.

[FR Doc. 88-30113 Filed 12-29-88; 8:45 am]

BILLING CODE 6820-61-M

federal register

Friday
December 30, 1988

Part XVI

Department of State

Bureau of Consular Affairs

22 CFR Part 41

Waiver by Secretary of State and Attorney General of Passport and/or Visa Requirements for Certain Categories of Nonimmigrants; Final Rule

DEPARTMENT OF STATE

Bureau of Consular Affairs

22 CFR Part 41

[DS-108.879]

Waiver by Secretary of State and Attorney General of Passport and/or Visa Requirements for Certain Categories of Nonimmigrants

AGENCY: Bureau of Consular Affairs, DOS.

ACTION: Final rule.

SUMMARY: This final rule adopts the proposed rule published in the Federal Register on December 2, 1988 (53 FR 48652). This rule adds paragraph (m) to 22 CFR 41.2 in order to implement Chapter 15, Annex 1502.1, Part B of the Free Trade Agreement (FTA) with Canada and the provisions of section 307(a) of Pub. L. 100-449, the "United States-Canada Free Trade Agreement Implementation Act of 1988". This final rule requires Canadian nationals who seek admission to the United States under the provisions of section 101(a)(15)(E) of the Immigration and Nationality Act (INA) to apply for visas.

EFFECTIVE DATE: These regulations take effect on the date the Free Trade Agreement enters into force. The Office of the United States Trade Representative will confirm the precise date of the FTA's entry into force by publication of a notice in the Federal Register. The Department will publish notice of the effective date of these regulations in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Stephen K. Fischel, Chief, Legislation and Regulations Division, Visa Office, Department of State, Washington, DC 20520, (202) 663-1204.

SUPPLEMENTARY INFORMATION: A proposed rule was published on December 2, 1988 (53 FR 48652) which requires Canadian citizens who seek admission into the U.S. under section 101(a)(15)(E) of the INA to apply for treaty trader and investor visas. Presently Canadians are generally exempt from the visa requirement under the waiver provisions of § 41.2(a) which exempts them from seeking visa issuance to enter the United States. The public was given until December 16, 1988 to submit written comments. Since no comments have been received, the provisions of the proposed rule as published on December 2, 1988 are adopted in this final rule and will become effective upon publication in the Federal Register of a public notice by the Office of U.S. Trade Representative confirming the date of the FTA's entry into force. That date is anticipated to be January 1, 1989.

This rule is not considered to be a major rule for purposes of E.O. 12291 nor is it expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 22 CFR Part 41

Aliens, Nonimmigrants, Passports, Visas, Waivers.

Accordingly, Title 22 of the CFR Part 41 is amended to read as follows:

PART 41—[AMENDED]

1. The authority citation for Part 41 continues to read as follows:

Authority: Sec. 104, 66 Stat. 174, 8 U.S.C. 1104; Sec. 109(b)(1), 91 Stat. 847; Sec. 313, 100 Stat. 3435, 8 U.S.C. 1182; Sec. 307, 102 Stat. 1876.

2. Paragraph (m) is added at the end of § 41.2 to read:

§ 41.2 Waiver by the Secretary of State and Attorney General of passport and/or visa requirements for certain categories of nonimmigrants.

* * * * *

(m) *Treaty Trader and Treaty Investor.* Notwithstanding the provisions of paragraph (a) of this section, a visa is required of a Canadian national who is classified, or who seeks classification, under INA 101(a)(15)(E).

Date: December 28, 1988.

Joan M. Clark,

Assistant Secretary for Consular Affairs.

[FR Doc. 88-30254 Filed 12-29-88; 11:47 am]

BILLING CODE 4710-06-M

Reader Aids

Federal Register

Vol. 53, No. 251

Friday, December 30, 1988

INFORMATION AND ASSISTANCE

Federal Register

Index, finding aids & general information	523-5227
Public inspection desk	523-5215
Corrections to published documents	523-5237
Document drafting information	523-5237
Machine readable documents	523-5237

Code of Federal Regulations

Index, finding aids & general information	523-5227
Printing schedules	523-3419

Laws

Public Laws Update Service (numbers, dates, etc.)	523-6641
Additional information	523-5230

Presidential Documents

Executive orders and proclamations	523-5230
Public Papers of the Presidents	523-5230
Weekly Compilation of Presidential Documents	523-5230

The United States Government Manual

General information	523-5230

Other Services

Data base and machine readable specifications	523-3408
Guide to Record Retention Requirements	523-3187
Legal staff	523-4534
Library	523-5240
Privacy Act Compilation	523-3187
Public Laws Update Service (PLUS)	523-6641
TDD for the deaf	523-5229

FEDERAL REGISTER PAGES AND DATES, DECEMBER

48505-48628.....1
48629-48894.....2
48895-49110.....5
49111-49286.....6
49287-49544.....7
49545-49648.....8
49649-49842.....9
49843-49968.....12
49969-50200.....13
50201-50372.....14
50373-50506.....15
50507-50910.....16
50911-51088.....19
51089-51216.....20
51217-51534.....21
51535-51724.....22
51725-52110.....23
52111-52396.....27
52397-52622.....28
52623-52970.....29
52971-53376.....30

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
5498 (See Proc. 5925).....51737
5918.....49287
5919.....49289
5920.....49291
5921.....49969
5922.....49971
5923.....50638, 51625
5924.....51725
5925.....51737
5926.....52397
5927.....52399

Executive Orders:
12543 (*See* Notice of Dec. 28, 1988).....52971
12659.....50911
12660.....51215

Administrative Orders:
Memorandums:
Dec. 12, 1988.....50373
Dec. 19, 1988.....51217
Presidential Determinations:
No. 89-7 of Nov. 18, 1988.....49111
Notices:
December 28, 1988.....52971

4 CFR

81.....50913

5 CFR

300.....51219
536.....49545
737.....48756
831.....48629, 48895, 49638
841.....48629, 48895, 49638
890.....51741
1201.....48505, 49824
1205.....49649
1633.....51223

7 CFR

1d.....50375
6.....49545, 51089
13.....50201
15.....48505
16.....48896
51.....48630
68.....50914
201.....52973
210.....48631
220.....48631
226.....48631, 52584
250.....52177
301.....49973
319.....50507, 50508
330.....49974
354.....50509, 52974
719.....52623
905.....49293
906.....49843, 50914
907.....49649, 50510, 51744
910.....48632, 49651, 50511, 51744
920.....48511
932.....48513
944.....48513
945.....48633
947.....49113
971.....50202
989.....49294, 50203
1002.....48515, 49966
1004.....50916
1007.....48516
1098.....48516
1106.....48518
1124.....52975
1125.....52975
1135.....50917
1210.....51089
1230.....52626
1260.....52628
1408.....50204
3400.....49640

Proposed Rules:
Ch. III.....50972
26.....49637
301.....49885
919.....50229
932.....53000
971.....49885
979.....49153
985.....53001
1097.....53002
1124.....49154
1125.....49154
1210.....51110
1772.....51119
1785.....48651, 51029
1942.....51563
1951.....50972

8 CFR

217.....50160

Proposed Rules:
103.....50230
214.....48914

9 CFR

78.....52631
91.....51745
94.....48519, 49974, 52576
97.....52991
202.....51235
301.....49844
304.....49844
305.....49844
313.....49844
317.....49848
318.....49844, 49848, 50205
327.....49844

Proposed Rules:
54 51565
92 ..... 49185, 50539, 51950
94 52715
113 49669
309 52177
310 52177
318 52177
320 52177

10 CFR
1 52993
2 52993
9 52993
73 52993
170 52632
171 52632

Proposed Rules:
Ch. 1 49886
50 ..... 49997, 52716
55 52716
71 51281
100 50232
140 51120
420 52390
430 48798
785 49675

11 CFR

Proposed Rules:
113 49193
114 49193
116 49193

12 CFR
7 51535
8 48624
203 52657
204 49115
205 52653
229 51747
303 52111
308 51656
346 51093
522 52653
611 50381
612 50381
614 52401
618 50381
620 50381
701 50918
741 50918

Proposed Rules:
205 48914
225 48915
226 ..... 48925, 51785
561 51800
563 51800

13 CFR
123 52111
302 50206
309 ..... 50207, 51236
314 51237

Proposed Rules:
122 52187
124 48550
129 49675

14 CFR
39 52670–52673
71 ..... 52401–52403, 52576
217 52404
221 52675
241 52404

Proposed Rules
21 ..... 48520, 49297, 49851, 50157
23 ..... 49297, 49851
36 ..... 50157, 51087
39 ..... 48521, 49547, 49548, 49853, 49854, 49978, 50511, 50920, 51094, 51095
43 50190
47 50208
61 49979
63 49979
65 49979
71 ..... 48897, 49549, 49638, 49824, 50494, 51535, 51536, 51748, 51749, 52427, 53272
73 52725
75 50921
91 ..... 50190, 50208, 52428
97 ..... 48522, 50513
121 ..... 49522, 49979
127 49522
135 ..... 49378, 49522, 49979
145 ..... 49378, 49522
298 48524
316 51237
385 51749

Proposed Rules:
Ch. I 50973
39 ..... 48929, 49554–49559, 49677, 49678, 49891, 50544, 50545, 51565, 51620
61 49072
71 ..... 48930, 48931, 49679, 50421, 50974, 51567, 51822, 51823, 51824, 51825
93 51628
141 49072
143 49072
398 50233

15 CFR
303 ..... 52678, 52994
315 52114
615 52114
799 ..... 48529, 51751

Proposed Rules:
771 49202
774 49202
776 ..... 48932, 49327
786 49202
799 51751

16 CFR
13 ..... 48530–48532, 51096, 52405, 52679–52681
305 ..... 52115, 51241, 51242, 52405
1000 52407
1014 52404

Proposed Rules:
13 49329
453 ..... 48550, 52726
1061 52428
1604 52428
1704 52428

17 CFR
15 50922
200 51537

Proposed Rules:
229 49997
230 50038
240 49997
249 49997
270 49997
274 49997

18 CFR
2 50924
37 51752
154 49659
157 49659
284 ..... 49659, 50925
385 50943

19 CFR
Ch. I 51244
10 51762
24 51762
122 51271
146 52411
148 51762
177 49117
207 53248
210 49118
355 52306
356 53232

Proposed Rules:
24 49207
101 49891
122 52432
152 49825
213 51281

20 CFR
404 51097
416 51097
501 49491
639 ..... 48884, 49076

Proposed Rules:
602 52108

21 CFR
14 ..... 49550, 50948, 50949
73 49823
74 ..... 49138, 52129
81 ..... 52129, 52130
172 ..... 49638, 51272
173 49823
175 52132
176 ..... 50210, 50950
178 ..... 49550, 52132
179 53176
184 52681
201 49138
510 ..... 49823, 50514, 52682
520 ..... 48532, 48634, 49823, 51273, 53120
522 49823
524 49823
544 52682
546 49823
555 49823
558 ..... 48533, 50400
882 48618
888 52952
1010 52683

Proposed Rules:
130 51062
182 51065
184 51065

22 CFR
41 ..... 50161, 53375
43 49979
510 50514

Proposed Rules:
41 48652
44 53003
210 51032
211 51044

23 CFR
658 48634

Proposed Rules:
655 51826
658 53006

24 CFR
201 ..... 48636, 49855
203 49855
234 ..... 48636, 49855
511 49138
570 52414
596 48638
885 49139
888 49828
4100 50952

26 CFR
1 ..... 48533, 48639, 49873, 53140
14a 48639
602 ..... 48533, 53140

Proposed Rules:
1 ..... 49208, 49893–49895, 51826, 52190, 53174
53 51826
56 51826
301 50243
602 ..... 49208, 49894, 49895, 53174

27 CFR
9 51538

28 CFR
2 49653
16 51541
44 49638

29 CFR
1910 ..... 49981, 50198
1952 52415
2584 52684
2585 52688
2610 50401
2619 49140
2621 50402
2644 52995
2676 50403

Proposed Rules:
530 53344
1926 50038

30 CFR
772 52942
780 ..... 48614, 50491
784 ..... 48614, 50491
815 52942
816 ..... 48614, 50491
817 ..... 48614, 50491
906 52692
915 49656
935 ..... 51542, 51543
942 ..... 49104, 52942

Proposed Rules:
50 52727
56 48934
57 48934
206 50422
761 ..... 52374, 52433
785 52433
816 52433
817 52433
906 50244
931 ..... 49561, 50245

934.....50246, 51845
936.....50247
938.....50424

31 CFR

0.....51457
515.....50491

Proposed Rules:

103.....48551, 49378, 50039, 51846

32 CFR

40a.....52134
58.....52693
65.....48898
68.....49981
199.....50515, 52695
536.....49298
537.....48899
701.....52139
706.....49318, 49319, 51097
809d.....49320

Proposed Rules:

199.....52433

33 CFR

110.....50403
117.....48904, 48905, 49982, 51098, 52159
135.....52995
165.....48906, 48907

Proposed Rules:

110.....48935
117.....51125, 52159
151.....49016
165.....48653, 49562
334.....50623
402.....53012

34 CFR

74.....49141
75.....49141
76.....49141
80.....49141
100.....49141
200.....49141
222.....49141
241.....49141
251.....49141
253.....49141
254.....49141
255.....49141
256.....49141
257.....49141
258.....49141
263.....49141
298.....49141
300.....49141
302.....49141
307.....49141
309.....49141
315.....49141
324.....49141, 49966
326.....49141
338.....49141
361.....49141
366.....49141
367.....49141
369.....49141
370.....49141
385.....49141
386.....49141
387.....49141
388.....49141
389.....49141
390.....49141
396.....49141
538.....49141, 52618
600.....49141
607.....49141
624.....49141
626.....49141
628.....49141
637.....49141
639.....49141
643.....49141
644.....49141
649.....49141
650.....49141
653.....49141
656.....49141
657.....49141
668.....49141
674.....49141, 52578
675.....49141, 52578
676.....49141, 52578
682.....49141
690.....49141
745.....49141
755.....49141
762.....49141
769.....49141
776.....49141
777.....49141
778.....49141
779.....49141
787.....49141
790.....49141

Proposed Rules:

81.....48866
203.....48856
208.....49280
212.....51530

36 CFR

1270.....50404

Proposed Rules:

4.....51526
1234.....48936, 52202

37 CFR

10.....52438
304.....48534

Proposed Rules:

1.....49637
2.....49637

38 CFR

2.....49879
4.....50955
14.....49879, 52416
21.....48549, 50520, 50955
36.....51550

Proposed Rules:

3.....48551, 50547

39 CFR

20.....52697
111.....49657, 49880, 52160, 52697
265.....49983
3001.....48641

Proposed Rules:

3001.....48654, 49968

40 CFR

50.....52698, 52705
51.....52705
52.....48535, 48537, 48539, 48642, 48643, 49881, 50521, 50958, 52705
53.....52705
58.....52705
60.....49822, 50354, 50524
61.....50524, 52170, 52171
62.....49881
81.....50211, 50213, 52172
180.....52708
185.....52709
228.....51777
271.....50529
280.....51273
281.....51273
300.....51780
467.....52172
704.....51698
716.....49966
796.....49148, 51099
797.....51099
798.....49148, 51099
799.....48542, 48645, 49966

Proposed Rules:

Ch. I.....48939
51.....48552
52.....48552, 48554, 48654, 48939, 48942, 49209, 49494, 49680, 50257, 50425, 50975, 52202, 52439, 52442
61.....50428, 53014
81.....50428, 52727
85.....51956
122.....49416
123.....49416
124.....49416
177.....50157
179.....50157
180.....50258–50262, 52733, 53017–53019
185.....53019
186.....53019
228.....50977
260.....53282
261.....48655, 49680, 50040, 50550, 53282, 53330
262.....53282
264.....53282
265.....53282
270.....53282
271.....53282
300.....48661, 51390, 51394, 51962
302.....53282
372.....49688
435.....48947
504.....49416
721.....52443
795.....49822
798.....51847
799.....49822, 51847

41 CFR

101–40.....50157
201.....52423

Proposed Rules:

101–6.....53022
201–45.....48947

42 CFR

57.....49690, 49824, 50407
59.....49320
74.....48645
405.....48645
441.....48645

Proposed Rules:

57.....49690
405.....53025
1001.....51856, 52448

43 CFR

4.....49658
426.....50530
3160.....49661
3480.....49984
3830.....49664
3850.....49664
3860.....49664

Public Land Orders:

4.....48648
960 (Revoked by PLO 6690).....49151
3830.....48876
3850.....48876
3860.....48876
5550 (Revoked in part by PLO 6692).....49551
5566 (Amended in part by PLO 6692).....49551
6690.....49151
6691.....49664
6692.....49551
6693.....49664
6694.....52424
6697.....52997

Proposed Rules:

2200.....49824
4100.....49564

44 CFR

64.....49883, 50409, 51274
65.....51552
67.....51100, 51554

Proposed Rules:

5.....51863
67.....50491, 51568
72.....53028

45 CFR

4.....49551
205.....52709
1356.....50215

Proposed Rules:

1304.....49565
1306.....49565
1385.....49332
1386.....49332
1387.....49332
1388.....49332
1609.....50982, 53120

46 CFR

Proposed Rules:

Ch. I.....52735
30.....49018
56.....48557
150.....49018
151.....49018
153.....49018
161.....48558
164.....48557
390.....49895
572.....49210, 50264, 52448
585.....49574
587.....49574
588.....49574

47

1.....42425
2.....52174
22.....48909, 52174
32.....49320
43.....49986

73.....48648, 48649, 49322, 49323, 49637, 49987–49989, 50537, 51555, 51556, 51780, 52425
80.....48650
95.....51625, 52713

Proposed Rules:

1.....50045
2.....52449
36.....49575
73.....48663, 48664, 49335, 49336, 49693, 50046, 50556, 51569, 52449–52451, 52740–52742
74.....52742
76.....49336, 51569
90.....52449, 52743

48 CFR

Ch. 2, App. T.....50410
Ch 7, App. B.....50630
Ch 7, App. D.....50630
Ch 7, App. J.....50630
25.....53340
52.....53340
204.....50410, 51557
206.....51557
213.....50410
215.....50410
217.....50410
219.....50410, 51557
222.....51557
225.....50410, 51557
227.....50410, 51557
231.....51557
235.....50410
237.....50410
242.....49822, 51557
245.....50410, 51557
248.....51557
252.....50410, 51557
253.....50410
270.....50410
501.....51107
519.....48910
522.....51107
552.....48910, 51077
553.....51107
701.....50630
702.....50630
728.....50630
731.....50630
733.....50630
736.....50630
742.....50630
752.....50630
753.....50630
852.....48615
927.....51277
1602.....51781
1632.....51781
1652.....51781
1804.....51340
1807.....51340
1808.....51340
1809.....51340
1810.....51340
1812.....51340
1813.....51340
1814.....51340
1815.....51340, 52713
1816.....51340
1817.....51340
1819.....51340
1823.....51340
1825.....51340
1827.....51340
1828.....51340
1833.....51340
1836.....51340
1837.....51340
1842.....51340
1848.....51340
1852.....51340
2801.....49665
2804.....49665
2806.....49665
2845.....49665
2852.....49665

Proposed Rules:

28.....48614, 53279, 53361
32.....53364
52.....53361, 53364
53.....53361
203.....49694, 52744
209.....52744
219.....49577
226.....49577
252.....49212, 49577, 49694, 52744
1837.....50047

49 CFR

89.....51237
92.....51279
209.....52918
213.....52918
214.....52918
215.....52918
216.....52918
217.....52918
218.....52918
219.....52918
220.....52918
221.....52918
222.....52918
223.....52918
224.....52918
225.....48547, 52918
226.....52918
227.....52918
228.....52918
229.....52918
231.....52918
232.....52918
233.....52918
234.....52918
235.....52918
236.....52918
385.....50961
386.....50961
393.....49380
396.....49402, 49968
571.....49989, 50221
604.....53348
840.....49151
1011.....49323
1140.....49989, 51626
1152.....49666

Proposed Rules:

Ch. II.....49336
173.....49895
209.....49695
225.....48560
571.....50047, 50429
1056.....50270
1103.....53029

50 CFR

216.....50420
611.....52714
642.....49325, 51280
652.....50970
658.....49992
672.....52714
675.....49552, 49994
681.....52998

Proposed Rules:

17.....52452, 52745, 52746, 53030
270.....51284
602.....53031
671.....52749

LIST OF PUBLIC LAWS

Note: The list of public laws enacted during the second session of the 100th Congress has been completed.

Last List November 30, 1988

The list will be resumed when bills are enacted into public law during the first session of the 101st Congress, which convenes on January 3, 1989. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 523-6641. The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone 202-275-3030).