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Briefing on How To Use the Federal Register—
For information on briefing in Washington, DC, see announcement on the inside cover of this issue.

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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: June 15; 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

Regulation Identifier Numbers (RINs)

Agencies have begun including a Regulation Identifier Number in the headings of their **Federal Register** documents. RINs also appear in entries listed in the *Unified Agenda of Federal Regulations*, which is published in the **Federal Register** in April and October of each year. Assigning RINs makes it easier for the public and agency managers to track the entries at the various stages of their development.

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Rules and Regulations

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 410

Training

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations under the Government Employees Training Act to (1) eliminate unnecessary reporting on training provided by Federal agencies to State and local government employees, (2) eliminate an obsolete reference to a report on cooperative education, (3) update references to certain training forms and (4) revise the regulations on training source determinations to eliminate unnecessary features dealing with agencies' determinations as to whether to use Government or non-Government sources to meet their training needs.

EFFECTIVE DATE: July 3, 1989.

FOR FURTHER INFORMATION CONTACT: Frank Masterson, (202) 632-9769.

SUPPLEMENTARY INFORMATION: On January 10, 1989, OPM published proposed regulations (54 FR 822) implementing provisions of the Government Employees Training Act (5 U.S.C. 4101 *et seq.*). The comment period, which was 60 days from the date of publication, ended on March 13, 1989. Comments were received from four Federal agencies and one labor organization. Three of the agencies concurred in the proposals without change. One agency suggested that the words "from training" be added to § 410.901(b)(1)(iv) so that it would be understood that the assessments of economies and improved operations to be made under that regulation are assessments reflecting the impact of training programs. We agree and have revised the regulations accordingly.

The labor organization questioned our proposal dealing with training source determinations, involving an amendment of 5 CFR 410.501. That proposal called for the removal of a requirement that an agency determine what it would cost to meet a new training need through in-house performance before using training from a non-Government facility. The rationale for the proposal was that an agency's decisions affecting the availability of in-house training are decisions made within the framework of agency and Office of Management and Budget policies and are separable from determinations on the use of existing training sources—determinations which are governed by the training law (5 U.S.C. 4118(b)(2)). The labor organization commented that estimating the costs of in-house performance of training need not be an undue burden and would be in the interests of economy and efficiency. It further commented that adoption of the proposal would be an abdication of OPM's responsibilities. There is nothing in what we have proposed which would prevent an agency from estimating the costs of in-house performance of training to meet a new need. An agency may feel constrained to do that within the framework of its own administrative policies or within the larger context of Executive branch policies dealing with the performance of commercial activities. All we are saying is that such determinations should be viewed as outside the purview of the training law and were unnecessarily brought within the purview of OPM's regulations issued under that law. Therefore, we are retaining our proposal to amend 5 CFR 410.501.

As a corollary to our revision of that section, a change is being made in 5 CFR 410.506(a) dealing with the waiver of a limitation on training through non-Government facilities. The organization's comments reflect puzzlement over the change proposed for § 410.506(a) and appear to suggest an inconsistency with the proposal for § 410.501. The change provides for a waiver when use of such facilities is less costly than training available from Government facilities or when training through non-Government facilities is the only available training. The underscored condition ensures that the two sections are in harmony.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal employees and agencies.

List of Subjects in 5 CFR Part 410

Education, Government employees, Personnel Management Office, Manpower training programs, Authority delegation.

U.S. Office of Personnel Management.
Constance Horner,
Director.

Accordingly, the Office of Personnel Management amends 5 CFR Part 410 as follows:

PART 410—TRAINING

1. The authority citation for Part 410 continues to read as follows:

Authority: 5 U.S.C. 4101, *et seq.*; E.O. 11348, 3 CFR, 1967 Comp., p. 275. § 410.503 also issued under 5 U.S.C. 5364. § 410.506 and § 410.602 also issued under 5 U.S.C. 1104. § 410.902 also issued under 42 U.S.C. 4746.

2. Section 410.501 is revised to read as follows:

§ 410.501 Determining the source of training.

If adequate training is reasonably available from a Government facility to meet an agency's need, it shall use that facility. If adequate training is not reasonably available from a Government facility, the agency shall use a non-Government facility. The head of an agency will determine that adequate training is not reasonably available within the Government when either of the following conditions is met.

(a) There is no training within the agency, and reasonable inquiry has failed to disclose training elsewhere in the Government (in another agency or an interagency training facility), which would be available and adequately meet its need; or

(b) Adequate training available within the Government would be more expensive, because of the costs of

distance, time, or other factors, than training available from non-Government facilities which would adequately meet the need.

3. Section 410.506(a) is revised to read as follows:

§ 410.506 Waiver of limitations on training of employees through non-Government facilities.

(a) The head of an agency may waive the limitation in section 4106(a)(1) of title 5, United States Code, if it is in the public interest because the training from non-Government facilities is the only available training or is as effective as, and less costly than, training available from Government facilities.

* * * * *

4. Section 410.901 is revised to read as follows:

§ 410.901 Reports.

(a) The reports required by section 4113(b) of title 5, United States Code, and the reports required by this section shall be prepared for each fiscal year. An agency shall submit a consolidated report to OPM by the date specified each year by OPM in its notification to agencies.

(b) The consolidated report shall include:

(1) A narrative summary—

(i) Outlining, in the first report to OPM under this section, the training policies and overall program of the agency and, in each subsequent report, any major changes in policy or shifts in program emphasis;

(ii) Describing the manner in which training has aided in the accomplishment of the mission of the agency by providing skills and knowledges;

(iii) Assessing generally the value of training to the agency;

(iv) Assessing generally the extent to which economies and improved operation have resulted in the agency from training; and

(v) Providing other information which OPM may request concerning specific areas of agency training activity.

(2) A statistical summary, in the format prescribed by OPM, on employee participation and agency expenditures in training conducted through agency, interagency, and non-Government facilities.

(3) A Long-Term Training Report, OPM Form 1306, containing special information required by section 4113(b)(2) of title 5, United States Code, regarding employees receiving training by, in, or through non-Government facilities for more than 120 days.

(4) A Contributions and Awards Report, OPM Form 1307, containing special information regarding employees who, under authority of section 4111(a) of title 5, United States Code, receive from non-Government sources contributions or awards incident to training in non-Government facilities.

(5) A report on personnel engaged in agency training activities, OPM Form 1186.

(6) Information on the number of employees failing to fulfill their obligations under section 4108 of title 5, United States Code, and a description of the action taken with respect to the recovery of the additional expenses incurred by the Government in connection with their training.

(7) Such other information as OPM may request.

(c) OPM may grant exceptions to the requirements stated in paragraphs (a) and (b) of this section.

[FR Doc. 89-13164 Filed 6-1-89; 8:45 am]
BILLING CODE 6325-01-M

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1203

RIN 3124-AA07

Procedures for Review of Rules and Regulations of the Office of Personnel Management

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board is revising its regulations in this Part in plain English. In addition, the heading for this Part is changed to more accurately describe what is covered and Subpart A is eliminated since there are no other subparts. Section 1203.17 is renumbered 1203.21. Section 1203.18 is renumbered 1203.22 and amended at paragraph (c) to provide a current cite to part 1201 of this Title. These changes are the result of a thorough review of existing regulations to identify any portions that could be rewritten to be more readily understood by persons who are not practitioners in personnel administration or the law. The revised language is not intended to change the meaning or requirements of the existing sections.

EFFECTIVE DATE: June 2, 1989.

FOR FURTHER INFORMATION CONTACT: Charles J. Stanislav, (202) 653-8931.

SUPPLEMENTARY INFORMATION:

List of Subjects in 5 CFR Part 1203

Administrative practice and procedure, Civil rights, Government employees.

Accordingly, the Merit Systems Protection Board revises 5 CFR Part 1203 as follows:

PART 1203—PROCEDURES FOR REVIEW OF RULES AND REGULATIONS OF THE OFFICE OF PERSONNEL MANAGEMENT

General

Sec.
1203.1 Scope; application of Part 1201, Subpart B.
1203.2 Definitions.

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1203.11 Request for regulation review.
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Order of the Board

1203.21 Final order of the Board.
1203.22 Enforcement of order.

Authority: 5 U.S.C. 1205 (a)(4), (e), and (g).

General

§ 1203.1 Scope; application of Part 1201, Subpart B.

(a) *General.* This part applies to the Board's review, under 5 U.S.C. 1205(a)(4) and 1205(e), of any rules or regulations ("regulations") issued by the Office of Personnel Management (OPM). It applies to the Board's review of the way in which an agency implements regulations, as well as to its review of the validity of the regulation before it has been implemented.

(b) *Application of 5 CFR Part 1201, Subparts B and C.* (1) Where appropriate, and unless the Board's regulations provide otherwise, the Board may apply the provisions of 5 CFR Part 1201, Subpart B to proceedings conducted under this part. It may do so on its own motion or on the motion of a party to these proceedings.

(2) The following provisions of 5 CFR Part 1201, Subparts B and C do not apply to proceedings conducted under this part:

(i) Sections 1201.21 through 1201.27 which concern petitions for appeal of agency actions, and the pleadings that are filed in connection with those petitions; and

(ii) Sections 1201.111 through 1201.119 which concern final decisions of presiding officials, and petitions for Board review of those decisions.

§ 1203.2 Definitions.

(a) "Invalid regulation" means a regulation that has been issued by OPM, and that, on its face, would require an employee to commit a prohibited personnel practice if any agency implemented the regulation.

(b) "Invalidly implemented regulation" means a regulation, issued by OPM, whose implementation by an agency has required an employee to commit a prohibited personnel practice. A valid regulation may be invalidly implemented.

(c) "Merit system principles" are the principles stated in 5 U.S.C. 2301(b)(1) through 2301(b)(9).

(d) "Pleadings" are written submissions containing claims, allegations, arguments, or evidence. They include briefs, motions, requests for regulation review, responses, replies, and attachments that are submitted in connection with proceedings under this part.

(e) "Prohibited personnel practices" are the impermissible actions described in 5 U.S.C. 2302(b)(1) through 2302(b)(11).

(f) "Regulation review" means the procedure under which the Board, under 5 U.S.C. 1205(e), reviews regulations issued by OPM before they have been implemented, in order to determine whether the regulations would require any employee to commit a prohibited personnel practice, or reviews those regulations after they have been implemented, in order to determine whether the implementation has required any employee to commit a prohibited personnel practice.

(g) "Request for regulation review" means a request that the Board review a regulation issued by OPM.

Procedures for Review

§ 1203.11 Request for regulation review.

(a) An interested person or the Special Counsel may submit a request for regulation review.

(b) Contents of request. (1) Each request for regulation review must include the following information:

(i) The name, address, and signature of the requester's representative or, if the requester has no representative, of the requester;

(ii) A citation identifying the regulation being challenged;

(iii) A statement (along with any relevant documents) describing in detail the reasons why the regulation would require an employee to commit a prohibited personnel practice; or the reasons why the implementation of the regulation requires an employee to commit a prohibited personnel practice;

(iv) Specific identification of the prohibited personnel practice at issue; and

(v) A description of the action the requester would like the Board to take.

(2) If the prohibited personnel practice at issue is one prohibited by 5 U.S.C. 2302(b)(11), the request must include the following additional information:

(i) Identification of the law or regulation that allegedly would be or has been violated, and how it would be or has been violated; and

(ii) Identification of the merit system principles at issue and an explanation of the way in which the law or regulation at issue implements or directly concerns those principles.

§ 1203.12 Granting or denying the request for regulation review.

(a) The Board, in its sole discretion, may grant or deny an interested person's request for regulation review. It will grant a request for regulation review that the Special Counsel submits. It will not, however, review a regulation before its effective date.

(b) After considering the request for regulation review, the Board will issue an order granting or denying the request in whole or in part. Orders in which the Board grants the request, in whole or in part, will identify the agency or agencies involved, if any. They also will include the following:

(1) A citation identifying the regulation being challenged;

(2) A description of the issues to be addressed;

(3) The docket number assigned to the proceedings; and

(4) Instructions covering the review proceedings, including information regarding the time limits for filing submissions related to the request.

(c) All Board orders granting or denying a request for regulation review will be published in the Federal Register.

§ 1203.13 Filing pleadings.

(a) *Place to file and number of copies.* One original and three copies of each pleading must be filed with the Office of the Clerk, U.S. Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. In addition, parties to a proceeding under this part must serve their pleadings on each other in accordance with § 1203.14 of this part. The Office of the Clerk will make all pleadings available for review by the public.

(b) *Time limits.* (1) A request for regulation review may be filed any time after the effective date of the regulation.

(2) A response to a request for regulation review, whether the response supports or opposes the request, must be filed within the time period provided in the Board order granting the request for review.

(3) A reply to a response may be filed within 10 days after the response is filed. The reply may address only those matters raised in the response that were not addressed in the request for regulation review.

(4) Motions may be filed at any time during the regulation review. The filing of a motion will not delay the acting of the Board unless the Board orders a postponement. The Board may rule immediately on a motion for an extension of time or a continuance if circumstances make consideration of others' views regarding the motion impracticable.

(5) Submissions opposing motions must be filed within five days after the opposing party receives the motion.

(c) *Additional pleadings.* The Board will consider pleadings in addition to those mentioned above only if the Board requests them, or if it grants a request that it consider them.

(d) *Method and date of filing.* Documents may be filed with the Board either by mail addressed to the Office of the Clerk, or by personal delivery to that office. If the document was submitted by certified mail, it is considered to have been filed on the mailing date. If it was submitted by regular mail, it is presumed to have been filed five days before the Office of the Clerk receives it, in the absence of evidence contradicting that presumption. If it was delivered personally, it is considered to have been filed on the date the Office of the Clerk receives it.

(e) *Extensions of time.* The Board will grant a request for extension of time only when good cause is shown.

§ 1203.14 Serving documents.

(a) *Parties.* In every case, the person requesting regulation review must serve a copy of the request on the Director of OPM. In addition, when the implementation of a regulation is being challenged, the requester must also serve a copy of the request on the head of the implementing agency. A copy of all other pleadings must be served, by the person submitting the pleading, on each other party to the proceeding.

(b) *Method of serving documents.* Pleadings may be served on parties by mail or by personal delivery. Service by mail is accomplished by mailing the pleading to each party or representative, at the party's or representative's last known address. Service by personal delivery is accomplished by delivering the pleading to the business office or

home of each party or representative and leaving it with the party or representative, or with a responsible person at that address. Whether service is accomplished by mailing or by personal delivery, the party serving the document must submit to the Board, along with the pleading, a certificate of service as proof that the document was served on the other parties or their representatives. The certificate of service must list the names and addresses of the persons to whom the pleading was mailed or delivered, must state the date on which the pleading was mailed or delivered, must state the method (i.e., mail or personal delivery) by which service was accomplished, and must be signed by the person responsible for accomplishing service.

§ 1203.15 Review of regulations on Board's own motion.

The Board may, from time to time, review a regulation on its own motion under 5 U.S.C. 1205(e)(1)(A). When it does so, it will publish notice of the review in the **Federal Register.**

§ 1203.16 Proceedings.

The Board has substantial discretion in conducting a regulation review under this part. It may conduct a review on the basis of the pleadings alone, or on the basis of the pleadings along with any or all of the following:

(a) Additional written comments;

(b) Oral argument;

(c) Evidence presented at a hearing; and/or

(d) Evidence gathered through any other appropriate procedures that are conducted in accordance with law.

Order of the Board

§ 1203.21 Final order of the Board.

(a) *Invalid regulation.* If the Board determines that a regulation is invalid on its face, in whole or in part, it will require any agency affected by the order to stop complying with the regulation, in whole or in part. In addition, it may order other remedial action that it finds necessary.

(b) *Invalidly implemented regulation.* If the Board determines that a regulation has been implemented invalidly, in whole or in part, it will require affected agencies to terminate the invalid implementation.

(c) *Corrective action.* The Board may order corrective action necessary to ensure compliance with its order. The action it may order includes, but is not limited to, the following:

(1) Cancellation of any personnel action related to the prohibited personnel practice;

(2) Rescission of any action related to the cancelled personnel action;

(3) Removal of any reference, record, or document within an employee's official personnel folder that is related to the prohibited personnel practice;

(4) Award of back pay and benefits;

(5) Award of attorney fees;

(6) Other remedial measures to reverse the effects of a prohibited personnel practice; and

(7) The agency's submission of a verified report of its compliance with the Board's order.

§ 1203.22 Enforcement of order.

(a) Any party may ask the Board to enforce a final order it has issued under this part. The request may be made by filing a petition for enforcement with the Office of the Clerk of the Board and by serving a copy of the petition on each party to the regulation review. The petition must include specific reasons why the petitioning party believes that there has been a failure to comply with the Board's order.

(b) The Board will take all action necessary to determine whether there has been compliance with its final order. If it determines that there has been a failure to comply with the order, it will take actions necessary to obtain compliance.

(c) Where appropriate, the Board may initiate the enforcement procedures described in 5 CFR 1201.183(c).

May 30, 1989.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 89-13088 Filed 6-1-89; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 949

[Docket No. FV-AO-88-2; AMS-88-034]

RIN 0581-AA31

Irish Potatoes Grown in the High Plains Area of Texas and New Mexico; Issuance of Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule establishes a Federal marketing order regulating the handling of Irish potatoes grown in the High Plains area of Texas and New Mexico. The order authorizes regulations to establish grade, size, quality, maturity, pack, and container requirements for potatoes grown in 21 designated counties in Texas and 10 designated counties in New Mexico. In addition, the order authorizes production and marketing research and market development projects for High Plains potatoes. The program will be administered by a committee of six producers, four handlers, and a public member, and be financed by assessments levied on potato handlers. The primary objective of the program is to improve the quality of potatoes shipped to fresh markets. This should reduce marketing losses, improve quality for consumers, and result in improved returns to producers.

EFFECTIVE DATE: June 2, 1989.

FOR FURTHER INFORMATION CONTACT: Robert F. Matthews, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456, telephone (202) 447-2431.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing—Issued March 30, 1988, and published in the **Federal Register** on April 4, 1988 (53 FR 10887); Recommended Decision and Opportunity to File Written Exceptions issued January 25, 1989, and published in the **Federal Register** on January 31, 1989 (54 FR 4805); Secretary's Decision and Referendum Order issued April 19, 1989, and published in the **Federal Register** on April 25, 1989 (54 FR 17742).

Preliminary Statement

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and therefore is excluded from the requirements of Executive Order 12291.

This order is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the "Act" and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

The marketing order was formulated on the record of a public hearing held at Hereford, Texas, on April 19, 1988. Notice of the hearing was published in the April 4, 1988, issue of the **Federal Register.** This notice set forth a proposed order submitted by the Texas-New Mexico Potato Steering Committee on behalf of potato producers and handlers in the production area. The order authorizes regulations to establish grade, size, quality, maturity, pack, and container requirements for potatoes produced in the production area. In

addition, production and marketing research and market development projects are authorized.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of the Agricultural Marketing Service (AMS) on January 25, 1989, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision providing opportunity to file written exceptions thereto by March 2, 1989. One exception was received and was discussed and ruled upon in the Secretary's Decision.

The Secretary's Decision and Referendum Order was issued April 19, 1989, and the referendum conducted May 1 through May 12, 1989. In the referendum, the marketing order was favored by more than two-thirds of the producers voting in the referendum who also represented more than two-thirds of the production represented in the referendum.

Small Business Consideration: In accordance with the provisions of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities. Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.2) as those having average annual gross revenues for the last three years of less than $500,000. Small agricultural service firms, which would include handlers under this order, are defined as those with gross annual revenues of less than $3.5 million.

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 and rules issued thereunder are unique in that they are brought about through group action of essentially small entities for their own benefit. Thus, both the RFA and the Act have small entity orientation and compatibility.

There are approximately 30 handlers of potatoes in the High Plains area, who handled 2,848,000 hundredweight of potatoes for fresh market in 1986 with an estimated crop value of about $26.3 million. While there is a variance in size of individual handler operations, most, if not all, of the handlers that would be regulated under this order would qualify as small firms under SBA's definition. In addition, there are about 110 potato growers in the High Plains area, the majority of which could be classified as small businesses.

While the order will likely impose regulations on handlers, the burden of these regulatory requirements should not be significant compared to the benefits which should accrue to such businesses. The expected impact on persons acting in a handling capacity who could be classified as small businesses was discussed in detail in the Recommended Decision. In summary, the order should be operated in as efficient and economical a manner as will tend to effectuate the declared policy of the Act. In this way all entities, small and large, would be subject to minimal regulatory requirements under the order. In addition, the order contains the authority to exempt from regulation special purpose shipments, as well as minimum quantities, and the order will be operated in a way that would incorporate sound business practices and efficiencies which would minimize the burden on all regulated business entities.

Regulations promulgated under the order could be expected to remove from fresh market channels less desirable grades and sizes of potatoes and divert them to other outlets, such as livestock feed. An extensive cattle-feeding industry exists within the production area which could serve as an outlet for culls, or low grade potatoes. Moreover, as the lower grades and smaller sizes are removed from fresh market channels, prices to growers for the resulting higher quality supplies should increase, reflecting consumer preference for this level of quality. This should outweigh any loss to growers for cull potatoes, since such quality even on the fresh market historically returns little or nothing to the producer.

Although a somewhat larger proportion of a producer's potatoes may be marketed in secondary outlets at a lower price, the greater part of production, which includes the higher or fresh market grades, should yield a greater return. Thus, the order could be expected to have a positive impact on grower returns.

The impact of the order upon handlers is also expected to be positive. Most handlers perform their services for an established fee based on the quantity of potatoes handled for a producer. It is anticipated that most potatoes shipped to fresh market will be required to meet certain quality and size requirements. It is also expected that an expansion of existing markets and the development of new ones will result from the increase in quality.

Further, the burden placed on handlers by the order with respect to reporting and recordkeeping requirements should be negligible. Most of the information that would be reported to the committee is already compiled by handlers for other uses and is readily available.

Reporting and recordkeeping requirements issued under comparable potato marketing order programs impose an average annual burden on each regulated handler of about four hours. It is reasonable to expect that a comparable burden may be imposed under this order on the estimated 30 handlers of High Plains potatoes.

In compliance with the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the reporting and recordkeeping requirements that may be imposed under this order would be submitted to the Office of Management and Budget (OMB) and would not become effective prior to OMB approval.

In determining that the order will not have a significant economic impact on a substantial number of small entities, all of the issues discussed above were considered. The order provisions have been carefully reviewed and every effort has been made to eliminate any unnecessary costs or requirements. Although the order may impose some additional costs and requirements on handlers, it is anticipated that the programs under the order will help to increase demand for potatoes grown in the High Plains area. Therefore, any additional costs should be offset by the benefits derived from expanded markets and sales benefiting handlers and producers alike.

Accordingly, it is determined that this action will not have a significant impact on small handlers or producers.

Moreover, potatoes grown in more than one State will be regulated under the order so as to effectuate the declared purposes of the Act. Thus, any marketing orders, or their equivalent, authorized under respective State statutes could not achieve the same results as an alternative to a Federal marketing order. In accordance with the principle and purpose of Executive Order 12612, consideration has been given as to whether the order will have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

It has been determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Findings and Determinations

(a) *Findings upon the basis of the hearing record.* Pursuant to the provisions of the Act 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 a proposed marketing agreement and a proposed order, regulating the handling of potatoes grown in the High Plains area of Texas and New Mexico.

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

(1) The order, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The marketing order regulates the handling of Texas-New Mexico High Plains potatoes grown in the production area in the same manner as, and is applicable only to persons in the respective classes of commercial and industrial activity specified in, the marketing order upon which a hearing has been held;

(3) The marketing order is limited in its application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) There are no differences in the production and marketing of Texas-New Mexico High Plains potatoes grown in the production area which makes necessary different terms and provisions applicable to different parts of such area; and

(5) All handling of Texas-New Mexico High Plains potatoes grown in the production area is in the current of interstate commerce or directly burdens, obstructs, or affects such commerce.

(b) *Additional findings.* It is necessary and in the public interest to make this order effective June 2, 1989. Any delay beyond that date would interfere with accomplishing the objectives of the order and the Act.

The provisions of this order are known to handlers. The decision of the Assistant Secretary contained all provisions of this order and was issued on April 19, 1989 (54 FR 17742). It is necessary for the order to be implemented during the 1989 season, which begins in June. At the hearing, members of the High Plains potato industry testified that the lack of consistent quality was a problem area that must be improved. Record evidence indicates that because of shipments of poor quality potatoes at the beginning of the season, prices for all High Plains potatoes tend to decline as the season progresses. Moreover, handlers who ship ungraded, unsized potatoes of questionable quality probably contribute to the generally unfavorable image of High Plains potatoes that currently exists. Therefore, the record indicates that the need exists to regulate the marketing of High Plains potatoes through grade, size, quality, pack, container, or marking standards, thereby improving quality which promotes more orderly marketing conditions and higher returns to producers. To accomplish this objective, it is necessary to make this order effective as soon as possible to provide adequate time to appoint a committee, approve a budget, and establish an assessment rate.

In view of the foregoing, it is hereby found and determined that good cause exists for making this order effective June 2, 1989, and that it would be contrary to the public interest to delay the effective date of this order for 30 days after its publication in the **Federal Register** (Section 553(d) Administrative Procedure Act, 5 U.S.C. 551–559).

(c) *Determinations.* It is hereby determined that handlers who, during the period January 1, 1988, through December 31, 1988, handled not less than 50 percent of the volume of potatoes grown in the production area, refused or failed to sign the proposed marketing agreement regulating the handling of potatoes grown in the High Plains area of Texas and New Mexico; it is further determined that:

(1) The refusal or failure of such handlers to sign the proposed marketing agreement tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of this order is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers of potatoes grown in the production area;

(3) The issuance of this order is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of its approval and who, during the period January 1, 1988, through December 31, 1988 (which has been deemed to be a representative period), have been engaged within the High Plains area of Texas and New Mexico in the production of potatoes for fresh market, such producers having also produced for market at least two-thirds of the volume of such commodity represented in the referendum.

List of Subjects in 7 CFR Part 949

Marketing orders, Potatoes, Texas, New Mexico.

Order Relative to Handling of Irish Potatoes Produced in the High Plains Area of Texas and New Mexico

It is therefore ordered, That on and after the effective date hereof, all handling of Irish potatoes grown in the production area shall be in conformity to, and in compliance with, the terms and conditions of the said order as follows:

The provisions of the marketing order are set forth in full herein.

Therefore, Title 7, Chapter IX is amended by adding Part 949 to read as follows:

Note: This part will appear in the annual Code of Federal Regulations.

PART 949—IRISH POTATOES GROWN IN THE HIGH PLAINS AREA OF TEXAS AND NEW MEXICO

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Authority: Sec. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

Definitions

§ 949.1 Secretary.

"Secretary" means the Secretary of Agriculture of the United States, or any officer or employee of the Department of Agriculture who has been delegated, or who may hereafter be delegated the authority to act for the Secretary.

§ 949.2 Act.

"Act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (Sec. 1–19, 48 Stat. 31, as amended; 7 U.S.C 601 et seq.)

§ 949.3 Person.

"Person" means an individual, partnership, corporation, association, or any other business unit.

§ 949.4 Production area.

"Production area" means the counties of: Bailey, Briscoe, Castro, Cochran, Dallam, Donley, Deaf Smith, Floyd, Gaines, Hale, Hall, Hartley, Hockley, Lamb, Lubbock, Motley, Oldham, Parmer, Swisher, Terry, and Yoakum located in the State of Texas, and the counties of Chaves, Curry, De Baca, Eddy, Guadalupe, Lea, Roosevelt, Torrance, Union, and Quay located in the State of New Mexico.

§ 949.5 Potatoes

"Potatoes" means and includes all varieties of *Solanum tuberosum*, commonly known as Irish potatoes, grown in the production area.

§ 949.6 Seed potatoes.

"Seed potatoes" or "seed" means any potatoes which have been certified by the official seed certification agency of the States of Texas or New Mexico, or other seed certification agencies recognized by the Secretary, and which bear the official tags, seals, or other appropriate indentification indicating such certification.

§ 949.7 Handler.

"Handler" is synonymous with "shipper" and means any person, except a common or contract carrier of potatoes owned by another person, who handles potatoes or causes potatoes to be handled.

§ 949.8 Handle or ship.

"Handle" or "ship" means to grade, package, sell, transport, or in any other way to place potatoes grown in the production area, of cause such potatoes to be placed, in the current of commerce within the production area or between the production area and any point outside thereof. Such term shall not include the transportation, sale, or delivery within the production area of field-run potatoes to storage or to a person for the purpose of having potatoes prepared for market.

§ 949.9 Producer.

"Producer" is synonymous with "grower" and means any person engaged in a proprietary capacity in the production of potatoes for market.

§ 949.10 Fiscal period.

"Fiscal period" means the 12-month period beginning on June 1 and ending May 31 of the following year, or such other period that may be recommended by the committee and approved by the Secretary.

§ 949.11 Committee.

"Committee" means the administrative committee known as Texas-New Mexico Potato Committee established pursuant to § 949.20.

§ 949.12 Grade, size and maturity.

"Grade" means any of the officially established grades of potatoes, "Size" means any of the officially established sizes of potatoes, and "Maturity" means any of the stages of development or condition of the outer skin (epidermis) of potatoes, as defined in the United States Standards for Potatoes issued by the United States Department of Agriculture (§§ 51.1540 to 51.1556, inclusive of this title), including amendments, modifications, or variations thereof, or, such other grades, sizes, and maturities as may be recommended by the committee and approved by the Secretary.

§ 949.13 Varieties.

"Varieties" means all classifications or subdivisions of Irish potatoes according to those definitive characteristics now or hereafter recognized by the United States Department of Agriculture.

§ 949.14 Pack.

"Pack" means a quantity of potatoes in any type of container, which falls within specific weight limits, numerical limits, grade limits, size limits, or any combination of these recommended by the committee and approved by the Secretary.

§ 949.15 Container.

"Container" means a sack, bag, crate, box, basket, barrel, or bulk load or any other receptacle used in the packaging, transportation, sale or other handling of potatoes.

§ 949.17 District

"District" means each of the geographic divisions of the production area initially established pursuant to § 949.23 or as reestablished pursuant to § 949.24.

§ 949.18 Export.

"Export" means the shipment of potatoes to any destination which is not within the 50 States, or the District of Columbia, of the United States.

Committee

§ 949.20 Establishment and membership.

(a) There is hereby established a committee, consisting of 11 members, to administer the terms and provisions of this part. Six members shall be producers, four members shall be handlers, and one shall be a public member. Each committee member shall have an alternate who shall have the same qualifications as the member.

(b) Each member, other than the public member, shall be an individual who is, prior to selection and during such term of office (1) a resident of the production area, and (2) a producer or handler, or an officer or employee of a producer or handler.

(c) Four members shall be producers from District 1 and two members shall be producerrs from District 2. Three members shall be handlers from District 1 and one member shall be a handler from District 2. Any person who operates in more than one district or is engaged in both producing and handling potatoes shall elect one classification, and one district from which to be represented on the committee.

(d) The public member shall be a resident of the production area and be neither a producer nor a handler and shall have no direct financial interest in the commercial production, financing, buying, packing or marketing of potatoes, except as a consumer, nor

shall such person be a director, officer or employee of any firm so engaged.

§ 949.21 Alternates.

An alternate member of the committee shall act in the place and stead of the member for whom such person is an alternate, during such member's absence or when designated to do so by such member. In the event both a member of the committee and that member's alternate are unable to attend a committee meeting, the member, the alternate, or the committee, in that order, may designate another alternate from the same district and the same classification (handler or producer) to serve in such member's stead. In the event of the death, removal, resignation, or disqualification of a member, that member's respective alternate shall serve until a successor of such member is selected and has qualified. The Committee may request the attendance of alternates at any or all meetings, notwithstanding the expected or actual presence of the respective members.

§ 949.22 Term of office.

(a) Except as otherwise provided in paragraph (b) of this section, the term of office of committee members and their respective alternates shall be for three years and shall begin as of January 1 and end the last day of December or for such other three-year period as the committee may recommend and the Secretary approve. Members and alternates shall serve in such capacity for the portion of the term of office for which they are selected, and until their respective successors are selected. No member or alternate may serve more than two consecutive terms on the committee unless specifically exempted from this requirement by the Secretary.

(b) The term of office of the initial members and alternates shall begin as soon as possible after the effective date of this subpart. As determined by the Secretary, approximately one-third of the initial committee members and alternates shall serve for a one-year term and approximately one-third of the initial committee members and alternates shall serve for a two-year term. The remainder of the initial committee members and alternates shall serve for a three-year term. Those members serving initial terms of one year or less may serve two additional, consecutive three-year terms.

§ 949.23 Districts.

To determine a basis for selecting committee members, the following districts of the production area are hereby initially established:

District 1: All production area counties located within the State of Texas;

District 2: All production area counties located within the State of New Mexico;

§ 949.24 Redistricting and reapportionment.

At least every five years the committee shall review the geographic distribution of potato production in the production area and, if warranted, recommend to the Secretary the reapportionment of members among districts, and the reestablishment of districts within the production area. In recommending any such changes, the Committee shall give consideration to:

(a) Shifts in potato acreage within the districts and within the production area during recent years;

(b) The importance of new production in its relation to existing districts;

(c) The equitable relationship of committee membership and districts; and

(d) Other relevant factors. No change in districting or in apportionment of members within districts may become effective less than 30 days prior to the date on which terms of office begin each year and no recommendations for such redistricting or reapportionment may be made less than six months prior to such date.

§ 949.25 Nominations.

(a) Initial members. The nomination process for the initial committee shall be conducted by the Secretary. The nominations for each of the six initial producer and four initial handler members of the committee, together with the nominations for the initial alternate members for each position, shall be made as soon as practicable after the effective date of this subpart. The nominee for the initial public member shall be submitted to the Secretary not later than 90 days after the first meeting of the committee.

(b) Successor members. (1) The committee shall hold or cause to be held not later than October 1 of each year, or such other date as may be specified by the Secretary, a meeting or meetings of producers and handlers in each district for the purpose of designating at least one nominee for each position as member and for each position as alternate member of the committee. In the alternative, the committee may conduct nominations by mail in a manner recommended by the committee and approved by the Secretary.

(2) The names of nominees shall be submitted to the Secretary at such time and in such manner and form as may be prescribed;

(3) Only producers may participate in designating producer nominees and only handlers may participate in designating handler nominees to the committee;

(4) Only producers and handlers who are present at such nomination meetings, or represented at such meetings by a duly authorized employee, may participate in the nomination and election of nominees for members and their alternates.

(5) Any person who operates in more than one district or is engaged in both producing and handling potatoes shall elect the classification, and the district in which to participate in designating nominees.

(6) Regardless of the number of districts in which a person produces or handles potatoes, such persons are entitled to cast only one vote for each position to be filled in the district and classification in which the person is eligible and elects to vote in designating nominees for committee members and alternates. Such vote would be cast on behalf of the voter, the voter's agents, subsidiaries, affiliates, and representatives.

(c) The public member shall be nominated by the members of the committee. The committee may establish procedures for receiving names of persons to be considered for nomination as the public member. The name of the person nominated as the public member shall be submitted by the incumbent committee to the Secretary by November 1, or such other date recommended by the committee and approved by the Secretary, of the year the term expires together with information deemed pertinent by the committee or as requested by the Secretary.

§ 949.26 Selection.

Committee members and alternates shall be selected by the Secretary on the basis of representation provided for in § 949.20 or as modified pursuant to § 949.24.

§ 949.27 Failure to nominate.

If nominations are not made within the time and manner prescribed in § 949.25, the Secretary may, without regard to nominations, select the members and alternates on the basis of the representation provided for in § 949.20 or as modified pursuant to § 949.24.

§ 949.28 Acceptance.

Any person prior to selection as a member or alternate member of the committee shall qualify by filing with the Secretary a written acceptance

within the time period specified by the Secretary of the person's willingness to serve.

§ 949.29 Vacancies.

To fill any vacancy caused by the death, removal, resignation, or disqualification of a member or alternate, a successor for the unexpired term may be selected by the Secretary from nominations made pursuant to § 949.25, from previously unselected nominees on the current nominee list, or from other eligible persons.

§ 949.30 Expenses.

Members and alternates, when serving as members of the committee, shall serve without compensation but shall be reimbursed for such expenses authorized by the committee and necessarily incurred by them in attending committee meetings and in the performance of their duties under this part: Provided, that the committee at its discretion may request the attendance of one or more alternates at any or all meetings notwithstanding the expected, or actual, presence of the respective members and may pay expenses as aforesaid.

§ 949.31 Procedure.

(a) A majority of all members of the committee shall be necessary to constitute a quorum or to pass any motion or approve any committee action.

(b) The committee may provide for the members thereof, including the alternate members when acting as members, to vote by mail, telegraph, telephone, or other means of communication, provided that any such vote cast orally shall be confirmed promptly in writing. If any assembled meeting is held all votes shall be cast in person.

§ 949.32 Powers.

The committee shall have the following powers:

(a) To administer the provisions of this subpart as specified herein;

(b) To make rules and regulations to effectuate the terms and provisions of this subpart;

(c) To receive, investigate, and report to the Secretary complaints of violation of the provisions of this part; and

(d) To recommend to the Secretary amendments to this part.

§ 949.33 Duties.

The committee shall have, among others, the following duties:

(a) As soon as practicable after the beginning of each term of office, to meet and organize, to select a chairman and such other officers as may be necessary, to select subcommittees, to adopt such rules, regulations, and bylaws for the conduct of its business as it deems necessary, and to recommend nominees for the public member and alternate;

(b) To act as intermediary between the Secretary and any producer or handler;

(c) To furnish to the Secretary such available information as may be requested;

(d) To appoint such employees, agents, and representatives as it may deem necessary, to determine the compensation and define the duties of each such person, and to protect the handling of committee funds.

(e) To investigate from time to time and to assemble data on the growing, harvesting, shipping, and marketing conditions with respect to potatoes;

(f) To recommend research and development projects to the Secretary in accordance with this part;

(g) To notify handlers of each meeting of the committee to consider recommendations for regulations and of all regulatory actions taken, and to provide such notification to producers through appropriate news releases or such other means as may be available to the committee;

(h) To give the Secretary the same notice of meetings of the committee and its subcommittee(s) as is given to its members;

(i) To prepare a marketing policy;

(j) To keep minutes, books, and records which clearly reflect all of the acts and transactions of the committee. Such minutes, books, and records shall be subject to examination at any time by the Secretary or the Secretary's authorized agent or representative. Minutes of each committee meeting shall be reported promptly to the Secretary;

(k) Prior to the beginning of each fiscal period, to submit to the Secretary a budget or projected income and expenses for such fiscal period, together with a report thereon;

(l) To prepare periodic statements of the financial operations of the committee and to make copies of each statement available to producers and handlers for examination at the office of the committee;

(m) To prepare and submit to the Secretary, an annual report, and make a copy available to each producer and grower who requests it. This annual report shall contain at least:

(1) A complete review of the regulatory operations during the fiscal period;

(2) An appraisal of the effect of such regulatory operations upon the potato industry; and

(3) Any recommendations for changes in the program.

(n) To cause the books of the committee to be audited by a certified public accountant at least once each fiscal period and at such other times as the committee may deem necessary or as the Secretary may request. The report of such audit shall show the receipt and expenditure of funds collected pursuant to this part. Two copies of such report shall be furnished to the Secretary. A copy of each such report shall be made available at the principal office of the committee for inspection by producers and handlers; however, confidential information shall be removed from the report; and

(o) To consult, cooperate, and exchange information with other marketing order committees and other individuals or agencies in connection with all proper activities and objectives under this part.

Expenses and Assessments

§ 949.40 Expenses

The committee is authorized to incur such expenses as the Secretary may find are reasonable and likely to be incurred during each fiscal period for its maintenance and functioning, and for purposes determined to be appropriate for administration of this part. Handlers shall share expenses upon the basis of a fiscal period. Each handler's share of such expenses shall be proportionate to the ratio between the total quantity of potatoes handled by such handler as the first handler thereof during a fiscal period and the total quantity of potatoes handled by all handlers as first handlers thereof during such fiscal period.

§ 949.41 Budget.

Sixty days prior to the beginning of each fiscal period, or at such other time as may be specified by the Secretary, the committee shall prepare an estimated budget of income and expenditures necessary for its administration of this part. The committee may recommend a rate of assessment calculated to provide adequate funds to defray its proposed expenditures. The committee shall submit such budget to the Secretary with an accompanying report showing the basis for its calculations. An amended budget may be submitted as provided in § 949.42(c).

§ 949.42 Assessments.

(a) The funds to cover the committee's expenses shall be acquired by the levying of assessments upon handlers as provided in this subpart or from voluntary contributions for projects

pursuant to § 949.48. Each person who first handles potatoes under this part shall pay assessments to the committee which assessments shall be in payment of such handler's pro rata share of the committee's expenses.

(b) Assessments shall be levied upon handlers at rates established by the Secretary. Such rates may be established upon the basis of the committee's budget, recommendations, and other available information. Such rates may be applied to specified containers used in the production area.

(c) At any time during, or subsequent to, a given fiscal period the committee may recommend the approval of an amended budget and an increase in the rate of assessment. Upon the basis of such recommendations, or other available information, the Secretary may approve an amended budget and increase the established rate of assessment.

(d) The payment of assessments for the maintenance and functioning of the committee may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(e) The committee may impose a late payment charge or an interest charge on any handler who fails to pay any assessment in a timely manner. Such time and the rates shall be recommended by the committee and approved by the Secretary.

(f) In order to provide funds for the administration of this part before sufficient operating income is available from assessments, the committee may accept advance assessments and may also borrow money for such purpose. Advance assessments received from a handler shall be credited toward assessments levied against that handler during the fiscal year.

§ 949.43 Accounting.

(a) If, at the end of a fiscal period, the assessments collected are in excess of expenses incurred, such excess shall be accounted for in accordance with one of the following:

(1) If such excess is not retained in a reserve, as provided in subparagraph (2) of this paragraph, it shall be refunded proportionately to the persons from whom it was collected.

(2) The committee, with the approval of the Secretary, may carry over such excess into subsequent fiscal periods as a reserve: *Provided,* That the reserves are less than approximately two fiscal period's expenses. Such reserve funds may be used in (i) to defray expenses, during any fiscal period, prior to the time assessment income is sufficient to cover such expenses; (ii) to cover deficits incurred during any fiscal period when assessment income is less than expenses; (iii) to defray expenses incurred during any period when any provisions of this part are suspended or are inoperative; (iv) to cover necessary expenses of liquidation in the event of termination of this part. Upon such termination, any funds not required to defray the necessary expenses of liquidation shall be disposed of in such manner as the Secretary may determine to be appropriate. To the extent practical, such funds shall be returned pro rata to the persons from whom such funds were collected.

(b) All funds received by the committee pursuant to the provisions of this part shall be used solely for the purposes specified herein. The Secretary may at any time require the committee and its members to account for all receipts and disbursements.

(c) Upon the removal or expiration of the term of office of any member of the committee, such member shall account for all receipts and disbursements and deliver all property and funds in such member's possession to the committee, and shall execute such assignments and other instruments as may be necessary or appropriate to vest in the committee full title to all of the property, funds, and claims vested in such member pursuant to this part.

(d) The committee may make recommendations to the Secretary for one or more of the members thereof, or any other person, to act as a trustee for holding records, funds, or any other committee property during periods of suspension of this subpart, or during any period or periods when regulations are not in effect and, upon determining such action is appropriate, the Secretary may direct that such person or persons shall act as trustee or trustees for such committee.

Research and Development

§ 949.48 Research and development.

The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects, not including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption, or efficient production of potatoes. The expense of such projects shall be paid from funds collected pursuant to § 949.42.

Regulation

§ 949.50 Marketing policy.

Prior to beginning of each fiscal year, the committee shall submit to the Secretary a report setting forth its marketing policy for the ensuing season. Additional reports shall be submitted if it is deemed advisable by the committee to adopt a new marketing policy because of changes in the demand or supply situation with respect to potatoes. The committee shall publicly announce the submission of each such marketing policy report and copies thereof shall be available at the committee's office for inspection by any producer or any handler. In determining each such marketing policy the committee shall give due consideration to the following:

(a) Supply of potatoes by grade, size, quality, and maturity in the production area;

(b) Estimates of supplies of potatoes in the production area and in competing areas;

(c) Estimates of supplies of other competing commodities;

(d) Market prices by grades, sizes, containers, and packs;

(e) Anticipated marketing problems;

(f) Level and trend of consumer income; and

(g) Other relevant factors.

§ 949.51 Recommendations for regulations.

(a) Whenever the committee's marketing policy considerations deem it advisable to regulate the handling of any variety or varieties of potatoes in a manner provided in §§ 949.53, 949.54, or 949.55 it shall recommend to the Secretary grade, size, quality, maturity, or pack regulation, or any combination thereof, or amendment thereto, or modification, suspension, or termination thereof.

(b) In arriving at its recommendations for regulation pursuant to (a) of this section, the committee shall give consideration to current information with respect to the factors affecting the supply and demand for potatoes during the period or periods when it is proposed that such regulations should be effective. With each such recommendation for regulation, the committee shall submit to the Secretary the data and information on which such recommendation is predicated and such other available information as the Secretary may request.

§ 949.53 Issuance of regulations.

(a) The Secretary shall issue regulations on the handling of potatoes whenever the Secretary finds from recommendations and information submitted by the committee, or from other available information, that such regulation would tend to effectuate the

declared policy of the act. Such regulations may:

(1) Limit the handling of particular grades, sizes, qualities, maturities, or packs of any or all varieties of potatoes, or any combination of the foregoing during any period.

(2) Limit the handling of particular grades, sizes, qualities, maturities or packs of potatoes differently, for different varieties, for different containers, for different packs, for different purposes under § 949.55, or for any combination of the foregoing, during any period.

(3) Fix the size, capacity, weight, dimensions, pack or marking of the container or containers which may be used in the packaging or handling of potatoes, or both.

(4) Establish in terms of grades, sizes, or both, minimum standards of quality and maturity during any period when season average prices are expected to exceed the parity level.

(b) The Secretary shall notify the committee of each regulation issued pursuant to this section. The committee shall give reasonable notice thereof to handlers.

(c) Nothing in this subpart shall authorize any regulation eliminating shipment of potatoes in bulk.

§ 949.54 Modification, suspension, or termination of regulations.

(a) In the event the committee at any time finds that, by reason of changed conditions, any regulations issued pursuant to § 949.53 should be modified, suspended, or terminated, it shall so recommend to the Secretary.

(b) Whenever the Secretary finds, from the recommendations and information submitted by the committee or from other available information, that a regulation should be modified, suspended, or terminated with respect to any or all shipments in order to effectuate the declared policy of the act, the Secretary shall modify, suspend, or terminate such regulation. If the Secretary finds that a regulation obstructs or does not tend to effectuate the declared policy of the act, the Secretary shall suspend or terminate such regulation. On the same basis and in like manner the Secretary may terminate any such modification or suspension.

§ 949.55 Handling for special purposes.

(a) Upon the basis of recommendations and information submitted by the committee, or other available information, the Secretary, may modify, suspend, or terminate requirements in effect pursuant to § 949.42 or §§ 949.51 to 949.53 inclusive, or § 949.60 or any combination thereof, to facilitate handling of potatoes for:

(1) Relief or charity;

(2) Livestock feed;

(3) Export;

(4) Seed;

(5) Potatoes, other than certified seed, sold to a producer exclusively for planting within specific geographic limits;

(6) Other purposes recommended by the committee and approved by the Secretary.

(b) The committee, with the approval of the Secretary, shall prescribe rules and regulations to prevent potatoes handled pursuant to this section from entering trade channels other than those authorized by regulations and by such rules as may be necessary and incidental thereto.

Inspection

§ 949.60 Inspection and certification.

(a) During any period in which the handling of potatoes is regulated pursuant to §§ 949.53 through 949.55, inclusive, no handler shall handle potatoes unless such potatoes are inspected by an authorized representative of the Federal or a Federal-State Inspection Service and are covered by a valid inspection certificate, except when relieved of such requirements by §§ 949.54, 949.55, or 949.60(b).

(b) The committee may, with the approval of the Secretary, issue rules requiring inspection on regraded, resorted or repacked lots, or providing for special inspection requirements or relief therefrom. Such rules may provide distinctions, insofar as practical, between handling at shipping point and handling in receiving markets within the production area.

(c) Upon recommendation of the committee and approval by the Secretary, any or all potatoes so inspected and certified shall be identified by appropriate seals, stamps, or tags to be affixed to the container by the handler under the direction and supervision of a Federal or Federal-State Inspector or the committee. Master containers may bear the identification instead of the individual containers within said master container.

(d) Insofar as the requirements of this section are concerned, the length of time for which an inspection certificate is valid may be established by the committee with the approval of the Secretary.

(e) When potatoes are inspected in accordance with the requirements of this section, a copy of each inspection certificate issued shall be made available to the committee by the inspection service.

(f) The committee may recommend and the Secretary may require that no handler shall transport or cause the transportation of potatoes by motor vehicle or by other means unless such shipment is accompanied by a copy of the inspection certificate issued thereon, or other evidence of inspection acceptable to the Secretary such as a Positive Lot Indentification stamp, to indicate that such inspection has been performed. Such certificate or document shall be surrendered to such authority as may be designated.

Reports and Recordkeeping

§ 949.80 Reports and recordkeeping.

Upon request of the committee, made with the approval of the Secretary, each handler shall furnish to the committee, in such manner and form and at such time as it may prescribe, such reports and other information as may be necessary for the committee to perform its duties under this part.

(a) Such reports may include, but are not necessarily limited to, the following:

(1) The quantities of potatoes received by variety by a handler during any or all periods of a season;

(2) The quantities disposed of by the handler, segregated as to quantities subject to regulation, and where necessary, segregated as to types of outlets and special or modified regulations applicable to alternative outlets, and including quantities not subject to regulation;

(3) The date of each such disposition and the identification of the carrier transporting such potatoes;

(4) Information essential to identification of any or all specific quantities, lots, and disposition or potatoes handled under §§ 949.53 to 949.55, inclusive, which may include identification of inspection certificates, exemption certificates, certificates of privilege, or other appropriate identification, including the destination of each special shipment, where necessary.

(b) All such reports shall be held under appropriate protective classification and custody by the committee, or duly appointed employees thereof, so that the information contained therein which may adversely affect the competitive position of any handler in relation to other handlers will not be disclosed. Compilations of general reports from data submitted by handlers is authorized, subject to the prohibition of disclosure of an individual handler indentity or operations.

(c) Each handler shall maintain for at least 2 succeeding years such records and documents on potatoes received by such handler as may be necessary to verify reports submitted to the committee pursuant to this section.

(d) For the purpose of assuring compliance with recordkeeping requirements and verifying reports of handlers, the Secretary and the committee, through their duly authorized employees or agents, shall have access to any premises where applicable records are located, and where potatoes are handled, and at any time during reasonable business hours shall be permitted to inspect such handler's premises and any potatoes held by such handler and examine any and all records of such persons with respect to matters within the purview of this part.

Compliance

§ 949.81 Compliance.

No person shall handle potatoes except in conformity with the provisions of this subpart and the regulations issued thereunder.

Miscellaneous Provisions

§ 949.82 Right of the Secretary.

The members of the committee (including successors and alternates) and any agent or employee appointed or employed by the committee shall be subject to removal or suspension by the Secretary at any time. Each and every order, regulation, decision, determination or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void, except as to acts done in reliance thereon or in compliance therewith prior to such disapproval by the Secretary.

§ 949.84 Termination or suspension.

(a) The Secretary may terminate or suspend the operation of any or all of the provisions of this part whenever the Secretary finds that such provisions do not tend to effectuate the declared policy of the Act.

(b) *Producer referendum.* (1) The Secretary shall terminate in accordance with section 8(c)(16)B of the Act, the provisions of this part at the end of any fiscal period whenever the Secretary finds that such termination is favored by a majority of producers, who during a representative period, as determined by the Secretary have been engaged in the production of potatoes for market: *Provided,* That such majority has, during such representative period, produced for market more than fifty percent of the volume of such potatoes for market: *Provided further,* That termination shall be announced before the beginning of the ensuing fiscal period.

(2) The Secretary shall conduct a referendum every sixth fiscal year with the first such referendum to be conducted within six years from the effective date of this section, to ascertain whether continuance of this subpart is favored by producers. The Secretary may terminate the provisions of this part at the end of any fiscal year in which the Secretary has found that continuance of this subpart is not favored by producers who, during a representative period determined by the Secretary, have been engaged in the production for market of potatoes in the production area. Such termination of the part shall be announced on or before the end of the fiscal year.

(c) The provisions of this part shall in any event terminate whenever the provisions of the Act authorizing them cease to be in effect.

§ 949.85 Proceedings after termination.

(a) Upon the termination of the provisions of this part the then functioning members of the committee shall continue as joint trustees for the purpose of liquidating the affairs of the committee of all funds and property then in the possession of or under control of the committee, including claims for any funds unpaid or property not delivered at the time of such termination. Action by said trusteeship shall require the concurrence of a majority of the said trustees.

(b) The said trustees shall continue in such capacity until discharged by the Secretary; shall from time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of said committee and of the trustees, to such person as the Secretary may direct; and shall upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title and right to all of the funds, property, and claims vested in said committee or the trustees pursuant to this part.

(c) Any person to whom funds, property, or claims have been transferred or delivered by the committee or its members pursuant to this section shall be subject to the same obligations imposed upon the members of the committees and upon the said trustees.

§ 949.86 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued pursuant to this subpart or the issuance of any amendments to either thereof, shall not (a) affect or waive any right, duty, obligation, or liability which shall have arisen or which may thereafter arise in connection with any provision of this subpart or any regulations issued under this subpart; or (b) release or extinguish any violation of this subpart or of any regulations issued under this subpart; or (c) affect or impair any rights or remedies of the Secretary or of any other person with respect to any such violations.

§ 949.87 Duration of immunities.

The benefits, privileges and immunities conferred upon any person by virtue of this part shall cease upon the termination of this part, except with respect to acts done under and during the existence of this part.

§ 949.88 Agents.

The Secretary may, by designation in writing, name any person, including any officer or employee of the United States, or name any agency in the United States Department of Agriculture, to act as the Secretary's agent or representative in connection with any of the provisions of this part.

§ 949.89 Derogation.

Nothing contained in this part is, or shall be construed to be, in derogation or in modification of the rights of the Secretary or of the United States to exercise any powers granted by the Act or otherwise, or in accordance with such powers, to act in the premises whenever such action is deemed advisable.

§ 949.90 Personal liability.

No member or alternate of the committee or any employee or agent thereof, shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any handler or to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member, alternate, agent, or employee, except for acts of dishonesty, willful misconduct or gross negligence.

§ 949.91 Separability.

If any provision of this part is declared invalid or the applicability thereof to any person, circumstances or thing is held invalid, the validity of the remainder of this subpart, or the applicability thereof to any other

person, circumstances or thing shall not be affected thereby.

§ 949.92 Amendments.

Amendments to this subpart may be proposed from time to time by the committee or by the Secretary.

Signed at Washington, DC, on May 31, 1989, to become effective June 2, 1989.

Jo Ann R. Smith,

Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 89-13243 Filed 6-1-89; 8:45 am]

BILLING CODE 3410-02-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88-NM-57-AD; Amdt. 39-6230]

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive, applicable to certain Boeing Model 747 series airplanes, which requires replacement of certain underwing fuel tank access doors with stronger, fire-resistant doors. This amendment is prompted by several incidents of door penetration by tire and engine debris, which resulted in spillage of significant quantities of fuel. This condition, if not corrected, could result in a fire.

DATES: Effective July 8, 1989.

ADDRESSES: The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Michael E. Dostert, Propulsion Branch, ANM-140S, telephone (206) 431-1974. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington, 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an airworthiness directive, applicable to Boeing Model 747 series airplanes, which requires that certain fuel tank access doors be replaced with improved types with more impact resistance, was published in the **Federal Register** on September 19, 1988 (53 FR 36340). The comment period closed on November 10, 1988.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

The only comments received were submitted by the Air Transport Association (ATA) of America on behalf of its member airlines. The ATA requested the proposed AD be withdrawn if the FAA planned to adopt a Federal Aviation Regulations (FAR) Part 121 rule, requiring replacement of the subject fuel tank access doors. The FAA does not concur that issuance of the proposed AD action should be deferred pending Part 121 rulemaking activity. A total of 16 fuel tank access door penetration incidents, including 3 of the inboard access doors, have been reported on Model 747 airplanes. In light of this service history and immediate safety implications, the FAA has determined that the need for timely action specific to the Model 747 airplane is appropriate.

The ATA also requested that the proposed 4-month compliance period be extended to at least one year after the effective date of the AD to allow operators to obtain parts and schedule retrofit of the fuel tank access doors. The FAA concurs in part with this request. The proposed compliance time of 4 months for replacement of the inboard fuel tank access doors and 30 months for the remaining 14 doors was established after careful consideration of the degree of risk, the number of airplanes affected, the predicted availability of parts, and the potential for disruption in operators' scheduled operations. Following issuance of the NPRM, the FAA has been advised that problems in access door production schedules have occurred, and, therefore, 8 months will be required to produce the required number of replacement doors. Accordingly, the FAA has revised paragraph A. to extend the compliance time from 4 months to 8 months for replacement of the four inboard access doors. However, the 30-month compliance time for replacement of the remaining 14 doors per airplane has not been changed.

Paragraph A. has also been revised to specify more accurately the number and location of access doors required to be replaced.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the proposed rule, with the changes noted above. The FAA has determined that these changes will neither increase the economic burden on any operator, nor increase the scope of the AD.

There are approximately 700 Model 747 series airplanes of the affected design in the worldwide fleet. It is estimated that 208 airplanes of U.S. registry will be affected by this AD, that it will take approximately 60 manhours per airplane to accomplish the required actions, and that the average labor cost will be $40 per manhour. Replacement door material costs, based on the manufacturer's kit price, are estimated to be $600 per door (18 doors total per airplane). Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $2,745,600.

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

For the reasons discussed above, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this regulation and is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Applies to Model 747–100, 747–200, 747–300, and 747–SP series airplanes, certificated in any category. Compliance required as indicated, unless previously accomplished.

To minimize the fire hazard as a result of lower wing surface fuel tank access door penetration due to impact from low energy engine and tire debris, accomplish the following:

A. Within the next 8 months after the effective date of this AD, replace the two inboard fuel tank access doors on each lower wing skin (Nos. 544AB and 545AB) on the left wing and (Nos. 644AB and 645AB) on the right wing, with doors having impact resistance equivalent to that of 2024–T3 aluminum 0.140-inch thick, as approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region in accordance with the procedures described in Section 28–11–02 of the Boeing Model 747 Maintenance Manual. The replacement doors must also be fire resistant, as defined in the Federal Aviation Regulations, Part 1.

B. Within the next 30 months after the effective date of this AD, replace the following 14 lower wing surface fuel tank access doors, seven on the left wing (Nos. 546AB, 546BB, 552AB, 552BB, 552CB, 552DB, and 552EB), and seven on the right wing (Nos. 646AB, 646BB, 652AB, 652BB, 652CB, 652DB, and 652EB), with doors having impact resistance equivalent to that of 2024–T3 aluminum 0.140-inch thick, as approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, in accordance with the procedures described in Section 28–11–02 of the Boeing Model 747 Maintenance Manual. The replacement doors must also be fire resistant, as defined in the Federal Aviation Regulations, Part 1.

C. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment and then send it to the Manager, Seattle Aircraft Certification Office.

D. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. 3707, Seattle, Washington 98124. These documents may be examined at FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective July 8, 1989.

Issued in Seattle, Washington, on May 22, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89–13046 Filed 6–1–89; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Airspace Docket No. 88–AWP–21]

Alteration of VOR Federal Airway; Arizona

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the description of Federal Airway V–235 by extending the airway from Mormon Mesa, NV, to Peach Springs, AZ. A special flight rules area has been established around the Grand Canyon, CO, area. The flight-free zone restricts aircraft in the Grand Canyon area from operating below 14,500 feet mean sea level (MSL). This action provides an airway, outside of the zone, with a lower minimum en route altitude (MEA), thereby aiding pilots unable to operate at higher altitudes.

EFFECTIVE DATE: 0901 u.t.c. July 27, 1989.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, 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) 267–9250.

SUPPLEMENTARY INFORMATION:

History

On March 23, 1989, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to alter the description of V–235 by extending the airway from Mormon Mesa, NV, to Peach Springs, AZ (54 FR 11960). Special flight rules have been established for the Grand Canyon area. This flight-free area zone restricts aircraft proceeding northbound from the Grand Canyon from operating below 14,500 feet MSL. This action provides a lower MEA between Morman Mesa and Peach Springs. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, this amendment is the same as that proposed in the notice. Section 71.123 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6E dated January 3, 1989.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations alters the description of Federal Airway V–235 by extending the airway from Mormon Mesa, NV, to Peach Springs, AZ. A special flight rules area has been established around the Grand Canyon, CO, area. The flight-free zone restricts aircraft operations in certain parts of the Grand Canyon area below 14,500 MSL. This action provides an airway outside of the special flight rules area, with a lower MEA, thereby aiding pilots unable to operate at those higher altitudes.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, VOR Federal airways

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended, 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.

§ 71.123 [Amended]

2. Section 71.123 is amended as follows:

V–235 [Amended]

By removing the words "From Morman Mesa, NV, via INT Morman Mesa," and substituting the words "From Peach Springs, AZ, Mormon Mesa, NV, via INT Mormon Mesa"

Issued in Washington, DC, on May 22, 1989.

Original signed by William C. Davis,

Acting Manager, Airspace—Rules and Aeronautical Information Division.

[FR Doc. 89–13049 Filed 6–1–89; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Airspace Docket No. 89–AWP–6]

Alteration of VOR Federal Airway; California

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The San Jose, CA, very high frequency omni-directional radio range (VOR) has been relocated approximately 2 miles west of its current location to coordinates lat. 37°22'29" N., long. 121°56'36" W. Federal Airway V–334 is the only airway affected by the relocation and this action amends the description of that airway concurrent with the relocation of San Jose VOR.

EFFECTIVE DATE: 0901 u.t.c., July 27, 1989.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, 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) 267–9250.

SUPPLEMENTARY INFORMATION:

The Rule

This amendment to Part 71 of the Federal Aviation Regulations amends the description of VOR Federal Airway V–334 due to the relocation of the San Jose, CA, VOR. The airway is being realigned concurrent with the relocation of that navigational aid. This redescription does not involve a significant change in controlled airspace and is a minor technical amendment in which the public would not be particularly interested in commenting. Therefore, I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary. Section 71.123 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6E dated January 3, 1989.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore —(1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, VOR Federal airway.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended, 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.

§ 71.123 [Amended]

2. Section 71.123 is amended as follows:

V–334 [Revised]

From San Jose, CA; INT San Jose 025° and Sacramento, CA, 194° radials; Sacramento.

Issued in Washington, DC, on May 22, 1989.

William C. Davis,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 89–13048 Filed 6–1–89; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Airspace Docket No. 89–ASO–22]

Amendment to Transition Area, Vidalia, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment is editorial in nature and does not alter dimensions of the existing Vidalia, Georgia, transition area. The current description contains reference to the Onion RBN. With installation of an ILS Localizer, the RBN now functions as an outer compass locater/LOM and the name of the RBN is now "ONYUN." This amendment changes the reference from Onion RBN to ONYUN LOM.

DATES: Effective date: 0901 u.t.c., July 27, 1989. Comments must be received on or before June 20, 1989.

ADDRESSES: Send comments on the rule in triplicate to: Federal Aviation Administration, ASO–530, Manager, Airspace and Procedures Branch, Docket No. 89–ASO–22, Air Traffic Division, P.O. Box 20636, Atlanta, Georgia 30320.

The official docket may be examined in the Office of the Assistant Chief Counsel for Southern Region, Room 652, 3400 Norman Berry Drive, East Point, Georgia 30344, telephone: (404) 763–7646.

FOR FURTHER INFORMATION CONTACT: James G. Walters, Airspace Section, Airspace and Procedures Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone: (404) 763–7646.

SUPPLEMENTARY INFORMATION:

Request for Comments on the Rule

Although this action is in the form of a final rule, which involves an editorial change in the Vidalia, Georgia, transition area which involves changing the reference from Onion RBN to ONYUN LOM, and was not preceded by notice and public procedure, comments are invited on the rule. When the comment period ends, the FAA will use the comments submitted, together with other available information, to review the regulation. After the review, if the FAA finds that changes are appropriate, it will initiate rulemaking proceedings to amend the regulation. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in evaluating the effects of the rule and determining whether additional rulemaking is needed. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy aspects of the rule that might suggest the need to modify the rule.

The Rule

The purpose of this amendment to § 71.181 of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is to amend the description of the Vidalia, Georgia, transition area. The reference to the Onion RBN is in error and is being corrected to the ONYUN outer compass locater/LOM. The airspace dimensions of the transition area remain unchanged. Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in

FAA Handbook 7400.6E dated January 3, 1989.

Under the circumstances presented, the FAA concludes that there is an immediate need for a regulation to correct the description of the Vidalia, Georgia, transition area. This change is editorial in nature and does not alter the dimensions of the existing transition area. Therefore, I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary and contrary to the public interest.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended, 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 Public Law 97-449, January 12, 1983); 14 CFR 11.69.

2. Section 71.181 is amended as follows:

Vidalia, Georgia [Amended]

By substituting the words "ONYUN LOM" in lieu of the term "Onion RBN" where it appears in the existing description.

Issued in East Point, Georgia, on May 17, 1989.

William D. Wood,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 89-13047 Filed 6-1-89; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 172

[Docket No. 85F-0346]

Food Additives Permitted for Direct Addition to Food for Human Consumption; Aspartame

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of aspartame in frozen, ready-to-thaw-and-eat cheesecakes, fruit, and fruit toppings. This action is in response to a petition filed by Foodways National, Inc.

DATES: Effective June 2, 1989; written objections and requests for a hearing by July 3, 1989.

ADDRESS: Written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, Room. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Carl L. Giannetta, Center for Food Safety and Applied Nutrition (HFF-334), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, 202-426-5487.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of August 23, 1985 (50 FR 34197), FDA announced that a food additive petition (FAP 5A3874) had been filed by Foodways National, Inc., P.O. Box 44, Boise, ID 83707, proposing that § 172.804 *Aspartame* (21 CFR 172.804) be amended to provide for the safe use of aspartame as a sweetener in frozen cheesecakes, fruit, and fruit toppings.

FDA has evaluated data in the petition and other relevant material. The agency concludes that the proposed food additive use is safe, and that the regulations should be amended in § 172.804(c) as set forth below. The agency emphasizes that the introductory paragraph of § 172.804 provides that aspartame may only be used for those purposes "for which standards of identity established under section 401 of the [Federal Food, Drug, and Cosmetic] Act do not preclude such use."

The filing notice describes the products covered in the petition as frozen cheesecakes, fruit, and fruit toppings. However, the petition further described these products as "ready to thaw and eat." The agency has included this language in the regulation to clarify that the products covered by the regulation are not heat treated (cooked) subsequent to thawing.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in 21 CFR 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. This action was considered under FDA's final rule implementing the National Environmental Policy Act (21 CFR Part 25).

Any person who will be adversely affected by this regulation may at any time on or before July 3, 1989, 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 172

Food additives, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 172 is amended as follows:

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

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

Authority: Secs. 201(s), 409, 72 Stat. 1784–1788 as amended (21 U.S.C. 321(s), 348); 21 CFR 5.10 and 5.61.

2. Section 172.804 is amended by adding new paragraph (c)(19) to read as follows:

§ 172.804 Aspartame.

* * * * *

(c) * * *

(19) Frozen, ready-to-thaw-and-eat cheesecakes, fruit, and fruit toppings.

* * * * *

Dated: May 26, 1989.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 89–13119 Filed 6–1–89; 8:45 am]

BILLING CODE 4160–01–M

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21 CFR Part 172

[Docket No. 87F–0240]

Food Additives Permitted for Direct Addition to Food for Human Consumption; Aspartame

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of aspartame as a sweetener in frozen dairy and nondairy frostings, toppings, and fillings. This action is in response to a petition filed by the Foodways National, Inc., and the NutraSweet Co.

DATES: Effective June 2, 1989; written objections and requests for a hearing by July 3, 1989.

ADDRESS: Written objections may be sent to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Carl L. Giannetta, Center for Food Safety and Applied Nutrition (HFF–334), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–426–5487.

SUPPLEMENTARY INFORMATION: In a notice published in the Federal Register of August 21, 1987 (52 FR 31667), FDA announced that a food additive petition (FAP 7A4014) had been filed by the Foodways National, Inc., P.O. Box 10, Ontario, OR 97914; and the NutraSweet Co., 4711 Golf Rd., Skokie, IL 60076, proposing that § 172.804 *Aspartame* (21 CFR 172.804) be amended to provide for the safe use of aspartame as a sweetener in frozen dairy and nondairy frostings, toppings, and fillings.

FDA has evaluated data in the petition and other relevant material. The agency concludes that the proposed food additive use is safe, and that the regulations should be amended as set forth below. The agency emphasizes that the introductory paragraph of § 172.804 provides that aspartame may only be used for those purposes "for which standards of identity established under section 401 of the [Federal Food, Drug, and Cosmetic] Act do not preclude such use." Thus, for example, aspartame may not be used in sweet cocoa and vegetable fat (other than cacao fat) coating that complies with 21 CFR 163.150.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in 21 CFR 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

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

Any person who will be adversely affected by this regulation may at any time on or before July 3, 1989 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 172

Food additives, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 172 is amended as follows:

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

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

Authority: Secs. 201(s), 409, 72 Stat. 1784–1788 as amended . (21 U.S.C. 321(s), 348); 21 CFR 5.10 and 5.61.

2. Section 172.804 is amended by adding new paragraph (c)(20) to read as follows:

§ 172.804 Aspartame.

* * * * *

(c) * * *

(20) Frozen dairy and nondairy frostings, toppings, and fillings.

* * * * *

Dated: May 26, 1989.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 89–13120 Filed 6–1–89; 8:45 am]

BILLING CODE 4160–01–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[COTP Baltimore, MD Regulation 89-02]

Security Zone Regulations: Severn River and Annapolis Harbor, Annapolis, MD

AGENCY: Coast Guard, DOT.

ACTION: Emergency rule.

SUMMARY: The Coast Guard is establishing a security zone in Severn River and Annapolis Harbor, Annapolis, Maryland. The security zone is needed to protect the participants attending the SEALINK 89 Symposium being sponsored by the Government of the United States from sabotage or other subversive acts, accidents, or other causes of a similar nature. Entry into this zone is prohibited unless authorized by the Captain of the Port or his authorized representative.

EFFECTIVE DATES: These regulations are effective from 8:00 a.m., June 12, 1989 to 11:00 a.m., June 16, 1989, unless sooner terminated by the Captain of the Port, Baltimore, Maryland.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander F.C. Buckley, at U.S.C.G. Marine Safety Office, Custom House, 40 South Gay Street, Baltimore, Maryland 21202-4022, (301) 962-5105.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking (NPRM) was not published for this regulation and good cause exists for making it effective in less than 30 days from the date of Federal Register publication. Publishing an NPRM and delaying the effective date of this security zone would be contrary to the public interest since immediate action is needed to protect the participants attending the SEALINK 89 Symposium from injury due to sabotage or other subversive acts.

Drafting Information

The drafters of this regulation are Lieutenant Commander F.C. Buckley, project officer for the Captain of the Port, Baltimore, Maryland and Lieutenant Commander R.K. Kutz, Project Attorney, Fifth Coast Guard District Legal Staff.

Discussion of Regulation

The Coast Guard is establishing a security zone in the Severn River and Annapolis Harbor, Annapolis, Maryland, to protect the participants attending the SEALINK 89 Symposium being sponsored by the Government of the United States. The symposium will be held at the U.S. Naval Academy between June 12 and June 15, 1989. No vessels will be allowed to navigate within the security zone around the Naval Academy except by specific permission and direction from a designated Coast Guard commissioned, warrant, or petty officer on scene. Coast Guard vessels will be on scene around the clock to notify boaters of restrictions and to enforce the security zone. To assist the public in identifying Coast Guard representatives of the Captain of the Port, these individuals will be wearing a distinctive SEALINK ballcap. Yellow buoys also will be set along the perimeter of this portion of the zone. In addition, all vessels and persons will be prevented from entering the waters below or within fifteen yards of the Annapolis Hilton Hotel, including any projections and associated structures, and the barge moored alongside the Annapolis Hilton Hotel catwalk, without the permission of the Captain of the Port or representative of the Captain of the Port.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Security measures, Vessels, Waterways.

Regulation

In consideration of the foregoing, Subpart D of Part 165 of Title 33, Code of Federal Regulations, is amended as follows:

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

Authority: 33 USC 1231; 50 USC 191; 33 CFR 1.05-1(g), 6.04-1, 6.04-6, and 160.5; 49 CFR 1.46.

2. A new § 165.T0538 is added to read as follows:

§ 165.T0538 Security Zone: Severn River and Annapolis Harbor, Annapolis, Maryland.

(a) *Location.* The following areas are a security zone:

(1) The waters of the Severn River and Annapolis Harbor bounded by the Naval Academy Seawall and a line connecting the following points:

Latitude	*Longitude*
38°59'06.1" N	76°29'15.9" W
38°59'11.0" N	76°29'18.1" W
38°59'12.4" N	76°29'13.9" W
38°59'14.0" N	76°29'04.3" W
38°58'52.8" N	76°28'32.0" W
38°58'37.1" N	76°28'49.8" W
38°58'35.8" N	76°29'02.8" W
38°58'36.9" N	76°29'04.5" W

(2) The waters below or within fifteen yards of the Annapolis Hilton Hotel, including any projections and associated structures, the waters within fifteen yards of the barge moored alongside the hotel catwalk, and the hotel catwalk itself.

(b) *Representative of the Captain of the Port.* A "representative of the Captain of the Port" is any uniformed United States Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port, Baltimore, Maryland to act on his behalf with respect to this zone.

(c) *Regulations.* (1) No person or vessel may enter, remain in, or anchor in the security zone without the permission of the Captain of the Port or a representative of the Captain of the Port.

(2) Each person and vessel in the security zone shall immediately obey any direction or order of the Captain of the Port or any representative of the Captain of the Port.

(3) For further information contact the Coast Guard Marine Safety Office, Baltimore, at (301) 962-5105 or the on scene Coast Guard patrol vessels on VHF FM 16.

(4) The general regulations in section 165.33 of this part do not apply to this security zone.

(d) *Effective Dates.* These regulations are effective from 8:00 a.m., June 12, 1989 to 11:00 a.m., June 16, 1989, unless sooner terminated by the Captain of the Port, Baltimore, Maryland.

Dated: May 22, 1989.

J.H. Parent,

Captain, U.S. Coast Guard, Captain of the Port, Baltimore, Maryland.

[FR Doc. 89-12947 Filed 6-1-89; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

Whiskeytown Unit, Whiskeytown-Shasta-Trinity National Recreation Area, CA; Gold Panning Regulations

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: On February 9, 1988, the National Park Service, Department of the Interior, published in the Federal Register (53 FR 88-3759) a proposed rule to permit the activity of gold panning within the Whiskeytown Unit, Whiskeytown-Shasta-Trinity National Recreation Area. An editorial correction was printed in the Federal Register (53 FR 88-7466) on March 8, 1988. This proposal was made available for public review and comment for a period of thirty (30) days following publication in the Federal Register, and ending on March 10, 1988. One supporting comment was received regarding the

issuance of permits to visitors who wish to participate in this activity. As a result, the final rule, except for a minor editorial change, is published unchanged from the proposed rule. It has been promulgated to permit a level of public use and enjoyment of the area resources consistent with the establishment of the Whiskeytown Unit, Whiskeytown-Shasta-Trinity National Recreation Area to provide for both preservation and recreational use.

EFFECTIVE DATE: July 3, 1989.

FOR FURTHER INFORMATION CONTACT: Ray C. Foust, Superintendent, Whiskeytown Unit, Whiskeytown-Shasta-Trinity NRA, P.O. Box 188, Whiskeytown, California 96095, Telephone: (916) 241-6584).

SUPPLEMENTARY INFORMATION:

Background

The Whiskeytown Unit of the Whiskeytown-Shasta-Trinity National Recreation Area is the only existing unit within the National Park System that contains a property, on the National Register of Historic Places, that commemorates the California Gold Rush. Further, a significant part of the interpreted history of the unit is related to the Gold Rush and its influences on the area during the mid-1800's. The park now allows gold panning as part of an interpretive program. However, to allow panning outside of a structured interpretive program and to allow visitors to retain minimal amounts of gold as an enhancement of this experience, the National Park Service proposes this rulemaking pursuant to the Unit's enabling legislation at section 6.

The existing National Park Service (NPS) general regulations at 36 CFR 2.1(a)(1)(iv) that pertain to the preservation of natural resources restrict the possessing, removing and/or digging for any mineral resource. These provisions apply at the Whiskeytown Unit of the National Recreation Area. However, the enabling act for the Whiskeytown-Shasta-Trinity National Recreation Area, Pub. L. 89-336, section 6, provides the Secretary of the Interior with the authority to permit the removal of nonleasable minerals from lands within the recreation area in accordance with the Reclamation Act of 1939 (43 U.S.C. 387).

The regulation provides the conditions under which the recreational gold panning will be allowed. It stipulates registration requirements, locations where the activity will be allowed, and controls on the equipment, materials and methods by which the gold panning may occur.

A proposed rule was published February 9, 1988, in the **Federal Register** (53 FR 3759) to allow for this activity. An editorial correction was published March 8, 1988, in the **Federal Register** (53 FR 7466) to clarify the methods of taking gold from "any method" to "any other method." No other changes in the final rule from the proposed rule have occurred. During the 30-day comment period that expired March 10, 1988, one supporting comment was received from the Bureau of Land Management (BLM) recommending that the permit system adopted by the NPS be similar in nature to that utilized by BLM on adjacent lands.

Drafting Information

The primary authors of this regulation are Ray C. Foust, Superintendent, and T. Dwayne Collier, Chief of Visitor Services and Law Enforcement Operations, both of Whiskeytown Unit, Whiskeytown-Shasta-Trinity NRA.

Paperwork Reduction Act

This rulemaking does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

Compliance With Other Laws

An environmental assessment of the effects of this proposed regulation was prepared and submitted to the Regional Director, Western Region, National Park Service, in July, 1987. A statement of a "Finding of No Significant Impact," in accordance with the National Environmental Policy Act (42 U.S.C. 4332), was prepared in conjunction with the environmental assessment in July, 1988.

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 (February 19, 1981), 46 FR 13193, and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). While this rulemaking has no economic effect, it does relax one existing NPS regulation, 36 CFR 2.1(a)(1)(iv), that restricts the possessing, removing and/or digging for any mineral resources.

An Assessment of Actions Having An Effect On Cultural Resouces was conducted in accordance with the National Historic Preservation Act, 16 U.S.C. 470, *et seq.*, it was determined that the proposed activity will not have an adverse effect on cultural resources.

List of Subjects in 36 CFR Part 7

National parks, reporting and recordkeeping requirements.

In consideration of the foregoing, 36 CFR Chapter I, Part 7 is amended as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

1. The authority citation for Part 7 is revised to read as follows:

Authority: 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under D.C. Code 8-137 (1981) and D.C. Code 40-721 (1981).

2. Section 7.91 is amended by adding a new paragraph (d) to read as follows:

§ 7.91 Whiskeytown Unit, Whiskeytown-Shasta-Trinity National Recreation Area.

* * * * *

(d) *Gold Panning.* (1) As used in this section, the term "gold panning" means the attempted or actual removal of gold from a stream by using either a metal or plastic gold pan and a trowel, spoon or other digging implement having a blade surface not exceeding 4 inches wide and 8 inches long.

(2)(i) Unless otherwise designated by the superintendent, gold panning is allowed on all streams. Streams, or portions thereof, that are designated closed to gold panning are marked on a map available for public inspection at the office of the superintendent, or by the posting of signs, or both.

(ii) Prior to engaging in gold panning, a person shall register with, and pay a special recreation permit fee to, the superintendent. The superintendent shall establish the special recreation permit fee in accordance with regulations in part 71 of this chapter.

(iii) A person may remove gold from the Unit only in accordance with these regulations.

(3) The following are prohibited:

(i) Removing gold by any method other than gold panning, including, but not limited to, the use of suction, a crevice cleaner, screen separator, view box, sluice box, rocker, dredge or any other mechanical or hydraulic device, or skin diving equipment such as a snorkel, mask or wetsuit.

(ii) Using any toxic substance or chemical, including mercury, in gold panning activities.

(iii) Conducting gold panning outside the confines of existing stream water levels, or digging into a stream bank, or digging that results in the disturbance of the ground surface or the undermining of

any vegetation, historic feature or bridge abutment.

Becky Norton Dunlop,

Assistant Secretary for Fish and Wildlife and Parks.

Date: April 24, 1989.

[FR Doc. 89-13061 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-70-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-3571-2]

Connecticut and Rhode Island Ozone Attainment Plans; Control of Gasoline Volatility

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: EPA is approving State Implementation Plan (SIP) revisions submitted by the State of Connecticut and the State of Rhode Island. These revisions will reduce emissions of volatile organic compounds from gasoline by limiting the Reid Vapor Pressure (RVP) of gasoline sold between June 30 and September 15 in 1989 and between May 1 and September 15 of each year thereafter to 9 pounds per square inch. EPA is also finding that the Connecticut and Rhode Island RVP regulations are "necessary to achieve" the national ambient air quality standard (NAAQS) for ozone and are therefore excepted from preemption under section 211 of the Clean Air Act. The intended effect of this action is to make necessary progress towards attainment of the ozone standard as expeditiously as practicable as required under the Clean Air Act.

EFFECTIVE DATE: June 30, 1989.

ADDRESSES: Copies of the submittal are available for public inspection at U.S. EPA, Room 2311, JFK Federal Building, Boston, MA 02203; the Connecticut Department of Environmental Protection, State Office Building, 165 Capitol Ave., Hartford, CT 06115; and the Rhode Island Department of Environmental Management, 291 Promenade St., Providence, RI 02908-5767.

FOR FURTHER INFORMATION CONTACT: Peter X. Hagerty, (617) 565-3224; (FTS) 835-3224 or Jennifer York, (617) 565-3220; (FTS) 835-3220.

SUPPLEMENTARY INFORMATION:

Introduction

This **Federal Register** notice describes EPA's decision to approve revisions to both the Connecticut and Rhode Island SIPs which limit the volatility of gasoline from June 30 to September 15 in 1989 and from May 1 to September 15 every year thereafter. Since the Connecticut and Rhode Island regulations are very similar and the public comments received in response to EPA's Notices of Proposed Rulemaking were nearly identical, the two revisions will be discussed together in this notice. Any differences between the states in the regulations, public comments or EPA responses will be clearly identified.

The remainder of this preamble is divided into four sections. The first provides the background for this action, with respect to both chronology and the broad issues involved. The second section presents today's action and EPA's rationale. The third section summarizes the comments received on the proposed action and EPA's responses to them. The final section discusses Rhode Island's revision to the test methods section of the regulations to cure a deficiency identified and discussed in EPA's proposed rulemaking notice.

Background

On November 12, 1987, the Commissioners of the Northeast States for Coordinated Air Use Management (NESCAUM) signed a Memorandum of Understanding expressing their intention to reduce the Reid Vapor Pressure (RVP) of gasoline to 10 pounds per square inch (psi) starting in the summer of 1988 and to 9 psi in the summer of 1989 and continuing every ozone season thereafter. Since there were delays in adopting necessary regulations, the 1988 limit of 10 psi was eliminated, and Connecticut and Rhode Island passed regulations limiting the RVP of gasoline to 9 psi from May 1 to September 15 starting in 1989 and continuing each year thereafter. On November 10, 1988, Rhode Island submitted a SIP revision to EPA for approval to implement this provision. Connecticut submitted its SIP revision on January 30, 1989.

On March 16, 1989, EPA published **Federal Register** notices proposing approval of the Connecticut and Rhode Island SIP revisions (54 FR 11016 and 11018). EPA also proposed to find that these revisions were "necessary" to achieve the national ambient air quality standards (NAAQS) for ozone within the meaning of section 211(c)(4)(C) of the Clean Air Act (the Act), in the event that EPA subsequently took final action on federal RVP regulations.

Section 211(c)(4)(A) of the Act states that a state may not, for purposes of motor vehicle emissions control, prescribe or attempt to enforce any control or prohibition respecting use of a fuel or fuel additive in a motor vehicle engine—"(i) if the Administrator has found that no control or prohibition under paragraph (1) is necessary and has published his finding in the **Federal Register**, or (ii) if the Administrator has prescribed under paragraph (1) a control prohibition applicable to such fuel or fuel additive, unless [the] state prohibition or control is identical to the prohibition or control prescribed by the Administrator." At the time of EPA's proposal on the Connecticut and Rhode Island revisions, EPA had proposed, but not taken final action, on federal RVP control regulations.

On March 22, 1989 EPA published a **Federal Register** notice (54 FR 11868) taking final action on national regulation of RVP, to take effect this summer. The maximum allowed summertime RVP in Connecticut and Rhode Island under the federal regulation is 10.5 psi. Under section 211(c)(4)(A) of the Act, EPA's final action preempted inconsistent state control of RVP for the purpose of motor vehicle emission control, except in California. In its final action, EPA noted that states could be exempted from preemption only if EPA finds it is "necessary" to achieve the NAAQS as provided in section 211(c)(4)(C) of the Act. EPA made specific note of the conditions for EPA approval of state RVP regulations.

Description of Today's Action

EPA today approves revisions to the Connecticut and Rhode Island SIPs which limit gasoline volatility to 9 psi between June 30 and September 15 in 1989 and between May 1 and September 15 in each year thereafter. The Connecticut and Rhode Island programs include authority for the state to issue waivers to individual suppliers if necessary to avoid supply dislocations. EPA is approving the programs as a whole, including any waivers the states might issue under this authority. This aspect of EPA's approval is discussed in full under section 9 of the next portion of this notice describing EPA's response to comments.

EPA is also explicitly finding that the Connecticut and Rhode Island revisions are "necessary to achieve" the NAAQS within the meaning of section 211(c)(4)(C) of the Act. This means that the Connecticut and Rhode Island RVP regulations are not preempted by the federal RVP regulations promulgated on March 22, 1989.

EPA's rationale for this action and its effective date are presented below. In this context many issues raised by

commenters on the proposal will be addressed. The remaining comments will be discussed in the next portion of this notice.

In approving the Connecticut and Rhode Island RVP SIP revisions, EPA must consider requirements imposed by two different sections of the Clean Air Act. As with all SIP revisions, section 110 provides the requirements for approval into the SIP. In this case, since EPA has promulgated Federal RVP regulations, section 211(c)(4)(A) preempts inconsistent state control. However, section 211(c)(4)(C) provides that the Administrator may except a state RVP control program from preemption if he finds it is "necessary" to achieve the NAAQS. Thus, the Connecticut and Rhode Island revisions must satisfy both section 110 and section 211 requirements to gain approval.

EPA has concluded the the Connecticut and Rhode Island RVP regulations are "necessary" to achieve the ozone NAAQS. In reaching this conclusion EPA has followed the test first articulated in approving the Maricopa Country Arizona SIP (53 FR 17413 (May 18, 1988) and 53 FR 30228 (August 10, 1988)) and later presented in the proposed approval of the Connecticut and Rhode Island revisions. EPA stated that if, after accounting for the possible reductions from all other reasonable control measures, Connecticut and Rhode Island could demonstrate that RVP controls are still required to achieve the standard, then RVP controls are necessary within the meaning of section 211(c)(4)(C). EPA will not interpret that provision to require a state to impose more drastic measures such as driving prohibitions or source shutdowns before it can adopt its own fuel control program.

As discussed in the notice of proposed rulemaking, the record indicates that Connecticut needs VOC emission reductions on the order of at least 37% from 1987 inventory levels to acheive the standard. Connecticut reviewed approximately 15 measures suggested by EPA as reasonable in addition to RVP control to 9 psi and found that they could together potentially achieve a 24% reduction from 1987 levels. Enhancements to the state's vehicle inspection and maintenance (I/M) program could produce an additional 2% reduction. Similarly, the record indicates that Rhode Island needs VOC reductions on the order of at least 28% from 1986 inventory levels to achieve the standard. Rhode Island reviewed other reasonable measures in addition to RVP control, including an enhanced state vehicle I/M program, and found that they could together potentially achieve a 10% reduction from 1986 levels.

As indicated in both the Connecticut and Rhode Island proposals, while EPA's regulation of gasoline to 10.5 psi reduces the emission reduction attributable to the state regulation, it does not affect the bottom line—a shortfall will still exist. EPA's technical review of the data presented in the states' submissions and by the commenters affirms the conclusion that a shortfall will exist even with the implementation of all other reasonable state and federal measures.

EPA continues to believe that the fact that the state RVP regulation might not by itself fill the shortfall and hence by itself achieve the standard does not mean the rule is not "necessary to achieve" the NAAQS. It is simple logic that "necessary" is not the same as "sufficient." EPA believes that the "necessary to achieve" standard must be interpreted to apply to measures which are needed to reduce ambient levels when no other measures that EPA or the state has found reasonable are available to achieve this reduction. Beyond such identified "reasonable" measures, EPA need look at other measures before RVP control, only if it has clear evidence that RVP control would have greater adverse impacts than those alternatives. EPA has no such evidence here. Therefore, EPA can defer to Connecticut's and Rhode Island's apparent views that RVP control is the next less costly (or is itself a reasonable) measure. Thus, EPA concludes that the Connecticut and Rhode Island RVP regulations are "necessary" to achieve the NAAQS.

Summary of Public Comments and EPA's Responses

The major issues discussed in the comments are: (1) What constitutes a finding of "necessary to achieve" the standard under section 211(c)(4)(C); (2) whether there has been an adequate technical demonstration that controlling RVP to 9 psi is "necessary" (i.e. whether the threshold for exemption from preemption has been crossed); (3) the scope of EPA's discretion assuming a finding that state RVP controls are necessary to achieve the standard; (4) what effect the 9 RVP limit in Connecticut and Rhode Island will have on the cost and supply of gasoline in those states and the Northeast generally; (5) driveability and safety concerns; (6) whether there is an ozone problem in Connecticut and Rhode Island; (7) whether the states have adequate enforcement programs; (8) whether the states provided "reasonable opportunity" for public comment; (9) what exemptions or waivers from the state regulations should be allowed; (10) the appropriate timing for making the state regulation effective; and (11) whether EPA should withdraw or repropose these actions or reopen the public comment period in light of EPA's recent promulgation of federal RVP regulations and other alleged deficiencies in EPA's proposed actions. Each issue is explored in detail below.

1. What Constitutes a Finding of "Necessary To Achieve" the Standard Under Section 211(c)(4)(C) of the Clean Air Act?

a. Making the "Necessary" Finding Without a Demonstration of Attainment

Comments. One group of comments questioned EPA's ability to make a finding that the Connecticut and Rhode Island RVP regulations are necessary to attain the ozone standard without going through the complete planning involved in approving a state's response to EPA's finding that the current SIP is substantially inadequate to achieve the standard (the "SIP call"). Several comments stated that EPA cannot approve these states' RVP regulations as SIP revisions without finding that the SIPs as a whole achieve attainment of the NAAQS for ozone. Related comments questioned EPA's ability to determine whether these states' RVP controls are necessary without a new updated inventory of VOC sources which EPA will require from the states with ozone nonattainment areas as part of their response to the SIP calls. Finally, one comment asked how much time EPA will give states to achieve the ozone standard and how EPA can determine what is necessary to achieve the standard without knowing when the states must achieve attainment.

Response. Through its SIP calls, EPA has imposed on states like Connecticut and Rhode Island an obligation to revise their ozone SIPs and demonstrate attainment of the standard. The thrust of these comments is that EPA cannot make a finding of necessity without the states' first having gone through the new planning process and developing a new demonstration of attainment. EPA does not interpret section 211(c)(4)(C) to require a complete demonstration of attainment in order to approve a measure which will contribute to attainment.

Forcing a state to demonstrate attainment before allowing it to adopt stricter fuel controls would yield perverse results. Areas with the worst ozone nonattainment problems, which

have the most difficulty assembling a demonstration of attainment, would be disabled for perhaps several years from adopting clearly necessary RVP controls stricter than the national controls. One comment noted that Connecticut and Rhode Island so far have not been able to identify any combination of control measures which would bring the states into attainment, because the size of the VOC emission reduction necessary to do so is so large. It is precisely in areas like Connecticut and Rhode Island, with especially difficult nonattainment problems where the expeditious implementation of new controls, and hence the finding of necessity under section 211(c)(4)(C), is most appropriate.

Beyond that, it is reasonable for EPA to use the best information it now has available to determine whether these states' RVP programs will be necessary to achieve the standard without having to wait for Connecticut and Rhode Island to complete their planning response to the SIP call, including their updated inventories. As explained below, the VOC inventory and reduction figures Connecticut and Rhode Island submitted to EPA were based on reasonably reliable models EPA has used in the past. Such figures are always capable of refinement, but in the Agency's judgment the expenditure of time required to do so is not worth the marginally improved accuracy. See *Vermont Yankee Nuclear Power* v. *N.R.D.C.*, 435 U.S. 519, 554–555 (1978).

EPA has not yet set a date certain by which Connecticut and Rhode Island must attain the ozone standard. Congress may address the widespread nonattainment problem in the amendments to the Act now being considered. In the meantime EPA has also proposed its own policy for how to deal with SIP planning for nonattainment areas in the post-1987 period. 52 FR 45104 (November 24, 1987). The air quality analyses Connecticut and Rhode Island submitted made it clear that RVP control beyond the federal requirements will be necessary to any attainment plan, whether the attainment date that Congress or EPA selects is imminent or long-term. Moreover, there is widespread agreement among EPA and the states in the Northeast that major VOC reductions, probably exceeding the 28 to 37% estimated by EPA in this case, will be required to get close to attaining the ozone standard. Nothing in the air quality data from the summer of 1988, which have become available in quality-assured form since publication of the proposal, indicates that the reduction requirement projected by the Connecticut and Rhode Island analyses overstate the reduction necessary to achieve the standard. Beyond that, the history of ozone planning over the last decade makes it clear that reduction targets are seldom overestimated.

Furthermore, EPA's approval of this proposal now is consistent with section 110(a)(2)(A) of the Act, which requires attainment "as expeditiously as practicable." Interpreting section 211(c)(4)(C) to require a complete attainment demonstration before EPA can approve (and a state can implement) a fuel control that the state has determined to be practicable and that would advance the attainment date would effectively put section 211(c)(4)(C) in conflict with section 110(a)(2)(A). It is doubtful that Congress intended EPA to choose an interpretation that would create such a conflict.

b. The Standard EPA Has Applied to Determine Whether Fuel Controls Are Necessary Compared with Other Controls

Comments. Several commenters maintained that EPA had not adequately analyzed whether there are other control strategies reasonably available which Connecticut and Rhode Island should implement before resorting to RVP controls inconsistent with the federal regulation. EPA will address these comments in section 2d below. Other comments concerned the standard that EPA should use to determine whether RVP controls are necessary compared to other controls. Finally, one comment suggested that EPA's approach to comparing alternative control strategies is so vague that it is necessarily arbitrary.

Response. In the proposals for this action, EPA used the approach it first announced when approving the Maricopa County Arizona SIP (53 FR 17413 (May 18, 1988); 53 FR 30228 (August 10, 1988)) to determine whether RVP controls beyond the federal program are necessary to attain the ozone standard in Connecticut and Rhode Island. Under that approach, if after accounting for the possible reductions from all other reasonable control measures, the states could demonstrate that RVP controls are still required to achieve the standard, then RVP controls are necessary within the meaning of section 211(c)(4)(C). For the reasons stated in the Arizona action and the Connecticut and Rhode Island proposals, EPA will not interpret section 211(c)(4)(C) to require a state to impose more drastic measures such as driving prohibitions or source shutdowns before it can adopt its own fuel control program.

One comment suggested that EPA could clarify the method by which it determines whether fuel controls are necessary by ranking all possible control measures according to their cost per ton of VOC reduced each year, and approving additional fuel controls only when the state has first exhausted all controls which cost less per ton than fuel controls. EPA and the states have not developed cost figures for all the alternative controls which the agencies considered before resorting to state fuel controls. Connecticut and Rhode Island have, however, demonstrated to EPA that implementing all the control measures which EPA now believes to be reasonably available to them for VOC control (including measures that the states have already adopted and are now beginning to implement) would not achieve compliance with the ozone standard. The roster of control measures Connecticut and Rhode Island examined generally corresponds to the list of controls EPA has identified for states to implement in response to the ozone SIP calls, and represents EPA's best judgment as to the controls which could now be reasonably implemented. See EPA's proposed post-1987 ozone policy, 52 FR 45104, Appendix C (November 24, 1987). After examining all controls EPA has determined to be reasonable, a state is free to make its own determination as to what control measures should next be employed.

Moreover, nothing in the language or purposes of section 211(c)(4)(C) suggests that EPA must buttress this judgment as to reasonable controls, a judgment which is based on the states' thoughtful analyses and EPA's expertise regarding alternative measures, with a rigorous cost-effectiveness analysis. In any event, the shortfall in available emission reductions from reasonable measures is so substantial that it is highly unlikely that a rigorous cost-effectiveness comparison would show that there are enough measures whose cost-per-ton-reduced is below that of RVP controls to make such controls unnecessary.

One comment maintained that EPA's method for determining what is necessary is too vague because it would allow EPA to approve state fuel controls "simply because alternative measures are more inconvenient, unpopular, or costly." As discussed in section 2d below, EPA examined reasonable alternative controls which Connecticut and Rhode Island could implement and determined that they would not achieve enough reductions to achieve the standard. EPA also has determined that

remaining controls such as gas rationing, driving reductions, and source shutdowns are so drastic that a state may resort to fuel controls first. This judgment concerning what is too drastic is a complicated policy determination requiring the Administrator to weigh precisely those factors which the commentor would exclude from his consideration—whether the remaining alternatives are costly or unpopular. In *Amoco Oil Co.* v. *Environmental Protection Agency*, 501 F.2d 722, 740–741 (D.C. Cir. 1974) the court distinguished between the factual foundation which EPA must provide in its administrative decisions and policy judgments which are an integral part of the findings Congress requires the Administrator to make under the Act:

> Where by contrast, the regulations turn on choices of policy, on an assessment of risks, or on predictions dealing with matters on the frontiers of scientific knowledge, we will demand adequate reasons and explanations, but not "findings" of the sort familiar from the world of adjudication.

Id. at 741. EPA's and the states' analyses of reasonably available controls is based on a factual record supported by the best analytical tools the agencies had available to them at the time. EPA's judgment that state fuel regulation is a less drastic course than gas rationing and other unpopular controls so far not implemented in any SIP is clearly a matter on the frontier of air pollution control planning, and therefore cannot (and need not) be supported by the same technical record as, for example, EPA's determination that Connecticut needs at least 37 percent reduction from its 1987 inventory or Rhode Island needs at least a 28 percent reduction from its 1986 inventory to attain the standard.

2. Have Connecticut, Rhode Island and EPA Made an Adequate Technical Demonstration That Controlling RVP to 9 psi is "Necessary" to Attain the NAAQS?

a. Adequacy of Emission Inventory.

Comments. Three petroleum industry commenters argued that the emission inventories used in the technical demonstration are inadequate. They pointed out that EPA has already requested that Connecticut and Rhode Island prepare a new inventory as part of their response to the SIP call. Therefore it is argued that the states's reliance on the old inventories is inappropriate.

Response. As described in EPA's Technical Support Document (TSD) for each proposal, the emission inventories used by Connecticut and Rhode Island and reviewed by EPA are based on EPA's "Compilation of Air Pollutant Emission Factors," known by its document number "AP–42." This document and its updates are EPA's longstanding guidance for determining emissions for inventory purposes and has served as the basis for ozone SIP inventories since the mid–1970s. Mobile source emissions were estimated using the then current version of EPA's mobile source emissions model, MOBILE3, consistent with standard EPA guidance. While EPA has called for many states, including Connecticut and Rhode Island, to update their inventories for post–1987 SIP planning purposes, the Agency has continued to use existing inventories in evaluating current control proposals. EPA expects the new Connecticut and Rhode Island inventories, not due until late 1989, to show higher emissions than the current inventory since they are expected to include more sources and improved quality assurance. Thus, if the current inventories are lacking, they understate current emissions and err such that the likely percentage reduction needed to attain the standard is also understated.

As stated in the proposals for this action, EPA believes that if there is an error in quantifying the emission reductions resulting from control to 9 psi, those reductions are understated. If the newly released mobile source emission model, MOBILE4, which includes the effects of running losses, were used, one would expect the reduction in tons of VOCs to increase significantly. Furthermore, contrary to the commenters' belief, the estimated emission reductions are based on reductions achieved during only the four and one-half months each year the regulations are effective. This approach may understate the reduction since 9 psi fuel may be in the distribution system up to two additional months on each end of the regulatory season.

Also contrary to the commenters' claim, EPA's TSDs do contain an estimate of the emission reduction achieved by going from EPA's 10.5 psi limit to the states' 9 psi limit. EPA estimated a 4% reduction from the 1987 inventory in Connecticut and a 1.2% reduction from the 1986 inventory in Rhode Island. This estimate does account for nonlinearity in emission reductions with decreasing RVP limits.

b. Appropriateness of the Modeling Demonstration

Comments. While some commenters agreed that modeling was necessary to evaluate the air quality benefit of the RVP reduction, they objected to EPA's reliance on the Regional Oxidant Model (ROM). The commenters also raised concerns about the appropriate hydrocarbon-to-nitrogen-oxides (NO_x) ratios to be used in such modeling. A third modeling issue concerns the states' and EPA's inability to associate a quantified increment of improved air quality with the control of RVP to 9 psi.

Response. The claim that the ROM does not provide the spatial resolution needed for accurate prediction in individual urban areas loses sight of the fact that we are evaluating statewide programs. The Urban Airshed Model suggested by the commenters is appropriate for large urban areas but would have to be stretched to its limit to cover all of Connecticut. Given Rhode Island's small size, Airshed could be used for evaluating the Rhode Island program. However, having decided that the ROM is an appropriate tool to use in evaluating the Massachusetts program, consistency also favored its used in evaluating the programs in the neighboring states. Finally, the ROM is much better equipped to evaluate the longer range transport of ozone which plagues the Northeast. Caught between the two available model scales, it is EPA's technical judgment that the ROM is an appropriate tool to use in evaluating future reductions needed for Connecticut and Rhode Island.

EPA understands the concern that past strategies have focused almost exclusively on controlling VOCs instead of NO_x. As indicated in EPA's post–1987 ozone strategy, future control scenarios are likely to include NO_x. However, it is highly unlikely that NO_x control alone will suffice. The best technical information available to EPA at this time concerning the Northeast ozone problem points to the need for substantial VOC reductions and at least modest NO_x reductions in the future to attain the ozone standard.

The last modeling issue concerned the states' and EPA's inability to associate a quantified increment of improved air quality with the control of RVP to 9 psi. While such a modeling exercise would be ideal, it is unlikely that one would have much confidence in the outcome of such a sensitivity test. The atmosphere's response to emission reductions of ozone precursors is highly nonlinear such that small increments of reduction may show little or no effect on their own. However, when the reductions from the states' many strategies are aggregated, the total impact becomes quantifiable. Thus, even though Connecticut, Rhode Island and EPA cannot pinpoint where the air quality will improve by what amount on what day, we are confident that there will be a net improvement in ozone levels if Connecticut and Rhode Island were to

decrease VOC emissions by 4% and 1.2% respectively.

c. Whether the Connecticut and Rhode Island RVP Programs Will Help Attain the Ozone Standard at All

Comments. API claimed that analyses by both Connecticut and Rhode Island suggest that the states would virtually be in attainment except for the transport of ozone and its precursors from other areas and that, because of the transport problem, VOC reductions from sources in the states will have little or no effect on ozone attainment there. Under these circumstances, API claimed that EPA cannot reasonably conclude that Connecticut or Rhode Island's program is necessary, or even helpful, to attainment of the ozone standard in that state.

Response. API's concern is flawed because it acknowledges transport into the state but ignores transport out. It may be true that measures taken in Connecticut or Rhode Island will have little measurable impact within that state's borders. This is largely because these states are comparatively small. EPA has, however, consistently designed nonattainment area ozone SIPs to account for the impact an upwind area has on ozone levels in downwind areas. See Clean Air Act section 110(a)(2)(E), 42 U.S.C. section 7410(a)(2)(E). Courts have upheld EPA's interpretation on the nonattainment area controls in Part D of the Act to allow the inclusion of upwind areas which contribute to ozone violations downwind. See *State of Ohio* versus *Ruckelshaus*, 776 F.2d 1333 (6th Cir. 1985), cert. den. sub. nom. *Ohio* versus *Thomas*, 106 S.Ct 2889 (1986), and cases cited therein at 1340. In fact, many states in the Northeast designed their 1982 ozone plans based on design values in neighboring states. On most high ozone days in the Northeast, Connecticut's emissions photochemcially react into ozone somewhere over Massachusetts or Rhode Island. Similarly, Rhode Island's emissions are contributing to unhealthy ozone levels in Massachusetts or southern New Hamsphire. This cross-boundary transport is precisely why EPA has turned to regional scale models to evaluate the need for control measures.

d. Consideration of Other Alternatives

Comments. Commenters expressed concern that Connecticut, Rhode Island and EPA have failed to consider other significant alternative control measures that could lead to attainment. They referenced source categories in Appendix C of EPA's proposed post-1987 ozone policy including stationary source controls and transportation control measures.

Response. EPA believes that sufficient alternatives were considered. In the Connecticut submission EPA found consideration of the emission reduction potential of 13 different point and area source categories. Some of these categories correspond to those suggested by EPA in its proposed post-1987 ozone policy. Not surprisingly, some of the source categories are not relevant because there are no major sources in those categories in Connecticut. Connecticut also included measures not on EPA's recommended list. In most of the relevant categories the potential reductions are a very small portion (less than 1%) of the existing inventory.

API noted that some of the categories recommended by EPA were not evaluated by Connecticut but are part of the state's emission inventory. They particularly note the dry cleaning and wood furniture coating categories. EPA notes that these categories account for 0.2% and 0.1% respectively, of the Connecticut inventory. API further nominated degreasing and pharmaceutical manufacturing for consideration. Totally eliminating emissions in both these categories, which is obviously unachievable, would yield a 3.5% emission reduction. However, accommodating all of API's recommendations would produce less than an additional 4%, still far short of the 11% shortfall indenified in the proposal. See Addendum to Technical Support Document dated May 5, 1989.

In the Rhode Island submission EPA found consideration of four major control measures in addition to RVP control. As discussed in the proposal, Rhode Island anticipates that enhanced plus basic I/M, Stage II, architectural coatings and consumer solvent controls could reduce emissions by about 7.5%. EPA has examined Rhode Island's 1982 SIP and believes that further reductions, not documented in its RVP SIP submission, could be achieved. These reductions would come from lowering the source size cutoff in categories currently regulated by Rhode Island (e.g. paper and fabric coating, graphic arts and other surface coating) and regulating other categories not currently covered (e.g. adhesives, miscellaneous metal coating, automobile refinishing and cutback asphalt). If Rhode Island were to achieve 70% control of these sources, EPA estimates that a 6% reduction from 1986 inventory levels could be realized. See Addendum to Technical Support Document dated May 5, 1989.

EPA's review indicates that the measures identified in the post-1987 ozone policy and suggested by some commenters are not likely to produce any more reductions in Rhode Island than we found in neighboring Connecticut or Massachusetts. In the best case this might reach 4% of the current inventory. Thus it is possible that Rhode Island could achieve up to a 10% reduction in emissions beyond that discussed in the NPR. This additional 10%, while helpful in moving toward attainment, falls far short of filling the 18% shortfall described above. See Addendum to Technical Support Document dated May 5, 1989.

With respect to transportation control measures, the commenters failed to take account of the fact that the existing Connecticut SIP already contains some of the measures suggested by EPA in its proposed post-1987 ozone strategy. The existing SIP (40 CFR 52.370 (c)(32)) includes incentives for reduction in single-passenger commuter vehicle use through carpooling, vanpooling brokerage, extensive fringe park-and-ride facilities, express bus programs, and one of the few indirect source review programs in the country (40 CFR 52.370 (c)(6) and (c)(9)).

Rhode Island has not implemented the same kinds of transportation control measures already in place in Massachusetts and Connecticut. Based on EPA's experience with the Massachusetts and Connecticut programs, however, we expect that Rhode Island might be able to achieve an additional 2% reduction by adopting similar strategies. However, this additional reduction would still not eliminate the estimated shortfall.

While EPA recognizes that other transportation measures may be needed in Connecticut and Rhode Island, the remainder are difficult to quantify, yield small reductions individually, and, as evidenced by the public reaction to the EPA-promulgated implementation plans containing such measures in the 1970s (see H.R. Rep. No. 95-294, 95 Cong. 1st Sess., reprinted in 4 Legislative History of the Clean Air Act Amendments of 1977, at 2748-55 (1978)), generally can be expected to have more significant adverse effects on the public as a whole than RVP controls would. To be sure, if there were sufficient evidence for EPA to conclude that the states' RVP controls would result in significantly more severe impacts than other measures that neither EPA nor the states have yet identified as "reasonable" for the state to implement, then it might well be appropriate for the Agency to account for the emission reductions that those

other measures would achieve before determining the shortfall against which to judge the RVP controls. The Agency does not believe, however, that the states' RVP controls, given the lead-time provided by today's approval, would produce significantly more severe effects than such alternatives (e.g., than a trip reduction ordinance of the type that Arizona found reasonable for application in Phoenix and Tucson).

In sum, Connecticut, Rhode Island and EPA have indeed examined a broad range of potential emission reduction strategies and have still identified a significant shortfall in the level of emission reductions likely to be needed to achieve the ozone standard.

3. What is the Scope of EPA's Discretion Assuming a Finding That State RVP Controls Are Necessary To Achieve the Standard?

a. Permissible Bases for EPA's Decision to Approve State RVP Controls

Comments. Several comments asserted that even where EPA has determined that state fuel controls are necessary to achieve the standard, EPA may nevertheless disapprove those controls if EPA determines that the economic or fuel supply impacts of the state's regulation are unreasonable. These commenters suggested that EPA may give significant consideration to costs because section 211(c)(4)(C) provides that the Administrator "may" approve a SIP revision imposing state fuel controls once he makes the finding of necessity. Conversely, other commenters maintained that EPA may not disapprove the Connecticut and Rhode Island SIP revisions based on economic grounds, once EPA has made the finding of necessity.

Response. EPA believes that it must consider cost to some limited extent whenever the Administrator decides whether to make a finding under section 211(c)(4)(C) that a fuel measure is "necessary" for attainment. As discussed above, to determine whether state fuel controls are necessary, EPA must look first at whether other measures that it determines are reasonable (and, perhaps, other measures the state has adopted) will by themselves achieve timely attainment. Arguably, an alternative measure is "reasonable" only if its effects are less drastic than the effects of the fuel controls. Clearly the cost and supply impact of the state fuel controls will be a factor in any such judgment.

EPA does not interpret the use of "may" in section 211(c)(4)(C) to give the Administrator unfettered discretion to disapprove the SIP revision on economic grounds once he has made the finding that state fuel controls are necessary to achieve the standard. Section 211(c)(4)(C) must be read in the context of the preemption created in section 211(c)(4)(A), which prohibits states from adopting inconsistent fuel controls in their SIPs, or anywhere else, for air pollution control purposes. In the face of this prohibition, the sole effect of the "may" in section 211(c)(4)(C) is to authorize the Administrator to overcome a provision (section 211(c)(4)(A)) that would otherwise bar him from approving the SIP revision. The use of "may" in section 211(c)(4)(C) does not eliminate the obligation that section 110(a)(3)(A) places on the Administrator to approve the SIP revision, provided it meets the requirements of section 110(a)(2). See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 98 (1975). Section 110(a)(2) requires the Administrator to approve a SIP revision if, among other things, it may be necessary to insure attainment and maintenance of the standard. Section 110(a)(2)(B). EPA may not consider the economic impact of a necessary SIP revision under section 110(a)(2); under that provision, it is for the state to determine what economic costs are appropriate to achieve the standards. *Union Electric Co.* v. *E.P.A.*, 427 U.S. 246, 256–258 (1976). Beyond that, it would be incongruous for Congress to give EPA more discretion to reject a SIP revision for reasons unrelated to the goal of achieving the standard as quickly as possible precisely where EPA has determined that a SIP revision is necessary to achieve the standard. Therefore, once EPA makes the finding that state fuel controls are necessary to achieve the standard, a finding which includes a determination that such fuel controls are more reasonable than other available measures, EPA may not reject a state's SIP proposal simply for economic reasons.

One commenter cited *Motor Vehicle Manufacturers Association* v. *E.P.A.*, 768 F.2d 385, 389–390 (D.C. Cir. 1985), for the proposition that the use of "may" under section 211 commits the decision to the discretion of the Administrator. In *MVMA* the court was examining EPA's decision to grant a waiver under section 211(f)(4) of the Act for the use of fuel additives not substantially similar to those in the fuel EPA uses to certify the emissions from automobiles. The court was not examining section 211(c)(4)(C), which allows EPA, upon making a particular finding not mentioned in section 211(f)(4), to act on a SIP revision submitted by a state after full hearing at the state level and subject to the requirements of sections 110(a) (2) and (3)(A).

b. Intent of Federal Preemption Under section 211

Comments. Several comments insisted that EPA should disapprove the Connecticut and Rhode Island RVP controls because Congress intended to avoid a patchwork of different state fuel controls in favor of a uniformly regulated national market for fuels. These commenters expressed concern that the exception in section 211(c)(4)(C) to the rule of preemption under section 211(c)(4)(A) would eventually swallow the rule. Several comments urged EPA not to act inconsistently with its decision not to limit gasoline to 9 psi in 1989 in the federal RVP control program.

On the other hand, several comments urged EPA to support the regional approach to RVP control that the NESCAUM states are undertaking. One commenter pointed out that where Congress has not acted to address the ozone nonattainment problem, it is reasonable to let the states do all they can to attain.

Response. It is clear that section 211(c)(4)(A) indicates that Congress desired to maintain a nationally regulated market for fuels. It is equally clear that section 211(c)(4)(C) indicates Congress recognized that there will be states where the air quality problem is so severe that the interest in a nationally regulated market must bow to the need for additional state controls on fuel content. EPA has not been able to find any legislative history which illuminates with any detail beyond the language of the Act how EPA should strike this balance.

It is reasonable to infer that Congress was aware that the air quality needs of particular states might create varying fuel content requirements, and that Congress accepted that risk in favor of protecting the public health. Several commenters cited *Exxon Corp.* v. *City of New York*, 548 F.2d 1088 (2d Cir. 1977), as precedent that a uniformly regulated fuel market is the overriding purpose behind section 211(c)(4). In *Exxon* the court, however, was not faced with a claim for an exception to preemption under section 211(c)(4)(C), and specifically left it to EPA to determine whether such an exception is appropriate:

> The Act sensibly provides for an exception from its comprehensive preemption of local regulation of motor vehicle fuels only when such regulation is a provision in a state implementation plan approved by the Administrator who has the competence to make the needed professional engineering and energy conservation decisions.

Id. at 1096. Once EPA has made a finding of necessity under section 211(c)(4)(C), it is reasonable for EPA to interpret the Act to place paramount importance on protecting public health and achieving the standard.

EPA believes that the oil industry's concern that the exception will swallow the rule is overstated. As described above, EPA will approve inconsistent state fuel controls only where the state can demonstrate that exhausting all other reasonable alternatives will not achieve the standard, taking costs into account in determining reasonableness. This demonstration is not a trivial hurdle, and it is highly unlikely that every state with an ozone nonattainment area could make such a showing. Furthermore, a state is unlikely to burden its citizens with the potentially higher cost of lower RVP fuel unless the air quality needs are compelling. Finally, regional initiatives such as NESCAUM's help avoid a wide variety of state controls. In this case, the Connecticut and Rhode Island programs are virtually identical to the Massachusetts program and thus provide consistent supply requirements over a group of contiguous states.

EPA also believes that its decision not to impose a limit of 9 psi by 1989 in EPA's RVP control program does not preclude EPA from approving the Connecticut and Rhode Island SIP proposals. When developing its federal RVP control program, EPA imposed controls across the nation, and had to determine the level of RVP control which supply sources for the entire continental United States could reasonably meet. Further, although EPA was able to make this determination as to particular regions within the country, EPA did not intend to account for the particular air quality needs of each state.

4. What Effect Will the 9 RVP Limit in Connecticut and Rhode Island Have on the Cost and Supply of Gasoline?

Comments. Several of the oil company commenters, (API, BP, Mobil) stated that if the 9 psi standard took effect in 1989 the distribution system would be strained and that there could be some significant supply dislocation and cost increases. Several other commenters were worried about possible supply problems. Several stated that even if refiners had capacity to produce 9 psi gasoline, there would be logistical problems such as the need for additional tankage for storage associated with its distribution. Also, one commenter stated that it could not ensure that imports at 9 psi would be available. Most of the oil company commenters (API, Mobil, Sun) stated that there will be some need for capital improvements at refineries to meet the 9 psi standard. Several (API, Mobil), stated that there will likely be a cost impact to the Connecticut and Rhode Island standard and other commenters stated that they were worried about the increased cost. API stated that the estimates of increased cost do not reflect the extra cost increase that could accompany a significant supply distribution.

Proponents cited two studies as support for the position that supply is not a problem.

Response. The potential supply problems arise out of two factors. First, decreasing the volatility of gasoline requires increased refinery capacity. It is certain that implementation of 9 psi volatility in the NESCAUM states will create a refining capacity reduction in the amount of gasoline capable of being produced at each refinery. This is true of both domestic and foreign suppliers. Second, the problem may be further exacerbated by the expected increased demand in gasoline in the summer months.

Various studies have been conducted to determine how much refining capacity will be lost from implementation of 9 psi volatility in the NESCAUM states, how much demand for gasoline is likely to increase in the summer of 1989, and what effect these factors will have on gasoline supply capabilities. The two studies done for NESCAUM and the one done for EPA are inconclusive. There appear to be numerous factors which make precise prediction of these effects impossible. However, under the EPA Study (Sobotka study), estimates indicate that the volatility standard may be feasible without serious supply problems.

The Sobotka study cites the Department of Energy (DOE) as predicting that demand for gasoline should increase only in the range of 1 to 1.5 percent this summer. This estimate is also supported by other studies, including one reported at a National Petroleum Refiners Association conference. The study also estimates that approximately a 5 percent refining capacity shortfall will occur at domestic refineries because of the NESCAUM volatility regulations. The study estimates that with a 1.2 percent increase in demand for gasoline in the summer, U.S. refineries would be able to make up for a 5 percent domestic shortfall, and a 10 percent import shortfall, without constuction of new facilities or installation of additional equipment. Although various factors make it impossible to accurately predict the refining shortfall of imported gasoline, there is no strong evidence indicating that it will exceed 10 percent. Thus, the Sobotka study suggests that it is likely that the resulting refinery capacity shortfalls from a 9 psi standard in 1989 should not result in supply shortfalls.

In the unlikely event of unforeseen supply disruptions, Connecticut and Rhode Island have each assured EPA that they have the authority to take immediate steps to provide needed waivers or exceptions to the program. The States have committed to carefully monitor the supply situation this year and take appropriate action, as may be necessary, to ensure that supply problems do not occur as a result of its state RVP control program. See also the response to section 9 later in this notice for more discussion of state waivers or exceptions.

5. What Effect Will 9 RVP Gasoline Have on Driveability in Cold Weather and on Vehicle Safety?

Comments. Commenters representing petroleum interests expressed concern that the 9 RVP fuel could cause hard starting, hesitation, and stalling in the early spring and late fall. Gasoline will have to enter the distribution system in March and will not be out until October in order to comply with the regulation. Temperatures can be at or near freezing during this time of year. One commenter stated that cars that are poorly tuned and have weak batteries are more susceptible to low RVP fuel problems. They also stated that California should not be used for comparison because they have a shorter supply time since its fuel comes from refineries within the state.

Other commenters supported the use of 9 RVP fuel, claiming that driveability is not a problem because the weather in nothern California is similar to the weather in New England. They also referred to the Motor Vehicle Manufacturers Association statement on the New Jersey RVP regulations, dated August 18, 1988, which stated that 9 RVP fuel would cause no driveability problems. Another commenter representing a group of automobile manufacturers indicated there should be no adverse effect from the use of 9 RVP fuel.

Two commenters stated that although fuel used now is safe because the vapors are too rich in hydrocarbons to be ignited, the reduction to 9 RVP fuel will make the vapors potentially explosive below 15 degrees Fahrenheit. Another commenter's report showed that reduction of RVP to 9 reduced fires

and problems of overpressurization, vapor lock, fuel spurting, and fuel foaming.

Response. We believe that the nature of the gasoline distribution system makes it very unlikely that 9 RVP fuel will be available to consumers in March or early April, even if the blending-down process by that time has begun to reduce RVP. Continued availability of low-RVP fuel is even less likely by late October because the blending-up process will occur rapidly at the close of the control period. Nevertheless, the experience of California, which has required 9 RVP fuel for many years, appears to demonstrate that widespread driveability or fuel safety problems will not occur in New England. We know of no evidence of extensive problems in California, despite significant operation at cool temperatures and high elevations.

As further evidence of this conclusion, one can compare the true vapor pressure (TVP) experienced in fuel tanks at different times during the year. For example, when corrected for elevation, gasoline in Billings, Montana at its January 1988 average RVP of 13.6 psi and at the historic low January temperature of −30 degrees Fahrenheit would result in a true vapor pressure of 1.0 psi. For Boston, the analogous RVP and temperature of 10.0 psi and −12 degrees would also result in a TVP of 1.0 psi. In contrast, 8.5 psi fuel at an analogous Boston April temperature of 18 degrees would result in a TVP of 1.8 psi, 80 percent higher than the winter figure. While similar analyses are not available for Hartford and Providence, winter RVP and temperature in these cities are very similar to Boston and it is reasonable to expect to find similar results. We conclude from this that if low volatility fuel were to reach consumers during very low temperature weather, any degradation in driveability or fuel safety would be no greater (and would likely be less) than that experienced currently during the winter.

Conversely, low volatility fuel should improve vehicle driveability in very hot weather by reducing the occurrence of such conditions as vapor lock and fuel foaming.

6. Is There Really a Severe Ozone Problem in Connecticut and Rhode Island or the Northeast?

Comments. A number of industry commenters, in urging EPA to disapprove the SIP revision, claimed that the air is really becoming cleaner and cleaner over time and that the ozone standard is being met more than 99% of the year. Environmental groups countered these claims with data from 1987 and 1988 which show a worsening of the ozone problem since 1986. They noted that 1988 was one of the worst ozone seasons on record across the Northeast.

Response. EPA is firmly convinced that there is a serious ozone problem in the Northeast. EPA's conviction was evidenced by last year's SIP calls to Connecticut, Rhode Island and most other Northeast states. This SIP call was based on 1985–1987 ozone monitoring data which ranked southern New England among the worst ozone nonattainment areas in the country. EPA's concern is further heightened by the 1988 ozone season. The ozone standard was exceeded more frequently, at more sites, and at higher levels in 1988 than in 1987. In fact, as one commenter noted, a 1988 EPA Region I study comparing public health risk from environmental problems in New England ranked ozone in the highest risk category ("Unfinished Business in New England: A Comparative Assessment of Environmental Problems", December 1988).

7. Have Connecticut and Rhode Island Demonstrated That They Have Adequate Enforcement Programs as Required by Section 110 of the Clean Air Act?

Comments. API correctly noted that section 110 of the Act requires that the state provide a program for enforcement of the emission limitations as well as necessary assurances that it has adequate resources to implement the plan. API noted that Connecticut and Rhode Island intend to enforce their problems through sampling at terminals, bulk plants and other primary distribution points but not at retailers. API pointed out that EPA's RVP enforcement program covers these points and also reaches all the way to retailers, and claimed that this establishes a minimum standard for effective enforcement of RVP limits that Connecticut and Rhode Island fail to meet. API further claimed that the states' regulations do not satisfy EPA's guidelines for enforceability and legal sufficiency because they currently contain no RVP recordkeeping requirements for affected gasoline storage facilities.

Response. EPA does not agree with API's enforcement concerns. EPA's decision to extend its RVP enforcement program down to the retail level reflects concern that nationally there may be the opportunity to increase the RVP of gasoline that has already left the refinery or bulk terminal by blending the gasoline with a higher RVP fuel before it reaches the retailer. This is a reasonable concern for the national RVP program, which allows for three different RVP fuels, depending on defined geographic areas. Opportunities to blend the differing RVP gasoline en route to the retailer to yield a noncomplying fuel would exist. EPA concluded in its national rulemaking that testing at all points in the distribution system would provide the "best safeguard" against distribution of noncompliant gasoline and would result in the "greatest likelihood" of achieving environmental results. However, EPA did not conclude that its program represented a minimum standard or that anything short of this enforcement scheme would be inadequate under section 110(a)(2).

EPA does not believe that the Connecticut and Rhode Island enforcement programs must mirror the federal program. First, if the states successfully ensure that all the gasoline in bulk plants and terminals within the state are below 9 psi, the opportunities for RVP enhancement within the state will be small. Retail distributors would have to truck higher RVP gasoline into Connecticut and Rhode Island and splash blend the gasoline to accomplish this, an unlikely scenario: Second, retail outlets in Connecticut and Rhode Island will be subject to EPA's national enforcement program. If gasoline that does not comply with the states' 9 psi limit is found at retailers in the state by EPA, we will surely share such evidence with the states. Thus, while the EPA and Connecticut and Rhode Island RVP enforcement programs do not match, they do have significant overlap, provide for some inspection of retailers, and contain sufficient flexibility to adequately provide enforcement of the regulation.

EPA also disagrees with API's view that an absence of recordkeeping provisions fatally flaws the states' enforcement programs. While EPA's general enforcement guidance for all programs recommends recordkeeping provisions, EPA is not rigidly bound by such guidance. It is particularly true in this case where EPA's own RVP enforcement program does not require recordkeeping. As API noted, EPA discussed this issue in the TSD for the Connecticut proposal and concluded that it was not problematic.

Moreover, EPA notes that in the comparable arena of enforcement through Delayed Compliance Orders (DCOs), courts have held that EPA may not second guess the state's choice of enforcement mechanisms so long as the chosen system is a reasonable one. *Bethlehem Steel Corp.* v. *U.S. E.P.A.*, 638 F.d 994, 1005–1006 (7th Cir. 1980);

appealed, *Bethlehem Steel* v. *Gorsuch*, 726 F.2d 356 (7th Cir. 1984), reh. den., en banc, vacated on reh., 732 F.2d 97 (7th Cir. 1984), withdrawn and appealed, 742 F.2d 1028 (7th Cir. 1984).

Furthermore, even if Connecticut's and Rhode Island's enforcement schemes were inadequate to support a finding, ultimately, that the state's eventually complete ozone SIP update meets all of the requirements in section 110(a)(2), EPA could still approve the rule under section 110(a)(3). That is because, even with an inadequate enforcement program, the rule would still strengthen the pre-existing SIP and hence, under the rationale in *Michigan* v. *Thomas*, 805 F.2d 176, 186 (6th Cir. 1986), be approvable for that limited purpose.

8. Have Connecticut and Rhode Island Satisfied the Act's Public Notice and Hearing Requirements?

Comments. API claimed that EPA failed to address the question of whether the Connecticut and Rhode Island SIP revisions were adopted after "reasonable notice and public hearing." While acknowledging that public hearings were held, they alleged that the decision to limit RVP to 9 psi was actually made by NESCAUM some time before public hearings on the Connecticut and Rhode Island RVP regulations, and that therefore any hearings nominally provided are substantively inadequate. On the other hand, NESCAUM commented that ozone pollution problems, especially in the Northwest, are clearly regional problems and must therefore be dealt with through consistent regulations.

API also questioned whether notice and hearing was provided on the SIP revision or just a state regulation. They believe it was unclear from the public notices and materials available before the hearings that the RVP rule was actually intended to be submitted as a revision to the SIP.

Response. As to the first claim, EPA's **Federal Register** notice actually provides the dates of the hearings and the TSD contains an itemization of the dates the public notices were published, including an identification of the newspaper the notice was published in. Although there is no summary statement that the public participation requirements for hearing and notice were met, the record does speak to that effect.

EPA finds API's concerns that the public hearings were largely meaningless and thus not "reasonable" to be misplaced. API infers that Connecticut, Rhode Island and the other NESCAUM states had predetermined the outcome of the hearings before and without regard to the hearings held in those states. EPA is not at all convinced that the process was predetermined. If API were aggrieved on this matter, we would have expected it to challenge the states' proceedings under state law, as API has in fact done in New York. However, no party challenged Connecticut's or Rhode Island's proceedings, including API, who was a participant.

EPA acknowledges that Connecticut and Rhode Island did initiate rulemaking on RVP control pursuant to an agreement on RVP control with the other northeast states. However, having initiated the rulemaking on that basis, the state then proceeded to promulgate the regulations through its full administrative process, giving adequate notice and opportunity for public hearing on the proposed regulations.

As a policy matter EPA agrees that the ozone problem in the Northeast is a problem of regional magnitude and has held several meetings with top EPA and State environmental officials in EPA Regions I, II, and III to determine what concerted efforts the states could take on their own to deal with issues of regional, but not necessarily national, scope. Therefore EPA believes that it is appropriate for the northeastern states to regulate ozone precursors in a consistent fashion. However, each state must provide for adequate public participation in the promulgation of individual regulations, including assessing and responding to all submitted comments, as Connecticut and Rhode Island have done in connection with their RVP regulations. As discussed more fully below, EPA reviewed the states' public participation procedures and determined that the states provided adequate opportunity for public input in connection with development of the RVP rules.

API argued specifically that the states' hearing procedures were not adequate to comply with section 110 of the Act or EPA's hearing regulations of 40 CFR section 51.102. The operative language in both the statute and the regulation is "reasonable notice and public hearing." API asserts that Connecticut and Rhode Island had predetermined its final decision on RVP regulation and thus the hearing provided was not reasonable.

However, EPA interprets the language of both the statute and the implementing regulations as requiring the state to provide, first, reasonable notice of public hearing, and second, a public hearing. EPA does not believe that the law requires the Agency to review the hearing record and determine whether the hearing provided was itself "reasonable."

EPA's interpretation of the hearing requirement is clearly reflected in the regulations at 40 CFR 51.102. The regulations go into substantial detail on the manner in which states must provide notice of a hearing in order for that notice to be considered reasonable. See 40 CFR 51.102(d); see also 40 CFR 51.102(g)(2). However, the regulations make absolutely no mention of specific requirements for conduct of public hearings. The state need only certify that it in fact held a public hearing, which Connecticut and Rhode Island clearly did, and need not provide any detailed information on the conduct of the hearing.

This is appropriate because the reasonableness of public notice can be assessed objectively by reviewing the amount and variety of notice methods used. Assessing the reasonableness of a hearing on the other hand would be a highly subjective determination done retrospectively that would unnecessarily infringe on the state's discretion in conducting its hearings. Of course, if EPA received concrete evidence that the hearing did not provide adequate opportunity for public participation, it could find that the hearing did not meet the intent of EPA's regulation. EPA has, however, received no such evidence.

API further claimed that a state must specifically identify a proposed regulation as a future SIP revision prior to scheduling a public hearing on the regulation. However, neither the statute nor EPA's regulations contain any such explicit requirement. The purpose of a public hearing is to receive public input on the substance of proposed regulations, not on whether the state may or may not submit the regulations as a SIP revision. For years EPA has approved SIP revisions with no analysis of whether the state had publicly announced its intent to eventually submit a proposed regulation as a SIP revision at the state public hearing stage.

Generally it should be totally irrelevant to public commenters whether a regulation with which they will be required to comply as a matter of state law might also become an aspect of federal law. At the time Connecticut and Rhode Island held their public hearings on the RVP rules, prior to federal preemption, commenters should similarly have had no concern as to whether the proposed state rules would eventually become federal law as well. Only where a state regulation would otherwise be preempted by existing federal law and therefore unenforceable

would the public have a need to know that the state intended to seek federal approval of the regulation for purposes of preemption waiver in preparing comments at the state hearing level. This was not the case at the time of the state hearing on the Connecticut and Rhode Island RVP rules. Moreover, given EPA's then outstanding proposal to regulate RVP and thus preempt state RVP regulation, it should have been apparent to commenters at the time of the public hearing that Connecticut and Rhode Island would submit the rule as a SIP revision to insure enforceability in the event of EPA final RVP regulation and preemption.

9. Should Waivers or Exemptions from the State Regulations be Granted to Suppliers Who Cannot Provide 9 RVP Gasoline?

Comments. Two commenters (BP Oil and Sun) expressed concern with potential inequities resulting from supplier-specific requests for waivers. They indicated that the use of supplier-specific waiver provisions could diminish the calculated benefits of the rule by allowing higher RVP gasoline into the system, and financially disadvantage those companies which are able to comply. They also expressed concern that the use of waivers and exemptions introduces uncertainties about whether the volatility regulations will be applied fairly and equitably to all gasoline suppliers, because the Connecticut and Rhode Island regulations do not include explicit provisions for the states to follow in considering applications for waivers or exemptions from individual suppliers.

The commenters concluded that if waivers or exemptions are to be used, they must apply to all suppliers and significant penalties should be attached. In addition, one commenter noted that EPA has to consider how it will respond to supplier-specific waiver requests; and EPA "is urged to adopt a policy on waivers which is consistent with its own RVP regulatory program."

Response. EPA is aware that Connecticut and Rhode Island intend to grant waivers to individual suppliers if necessary to avoid serious supply dislocations during the initial stages of their RVP programs. Although EPA did not focus on this aspect of the program in its notice of proposed rulemaking, commenters were also aware of the states' intentions and the issue was fully aired in the public comments. EPA is approving the Connecticut and Rhode Island RVP programs as a whole, which includes the ability of the states to issue waivers as appropriate. EPA is in essence pre-approving any waivers that Connecticut or Rhode Island might grant as part of the overall RVP program being approved into the Connecticut and Rhode Island SIPs today. Connecticut and Rhode Island will not be required to submit each waiver to EPA as a SIP revision before it may take effect.

EPA is currently able to pre-approve any waivers that Connecticut or Rhode Island may grant because the RVP program is a discretionary program that the states' have submitted to generate additional emission reductions and move the state closer to attainment of the ozone NAAQS. EPA is not pre-approving waivers from a federally required program or a program to which EPA has already assigned specific emission reduction credits as part of an overall attainment demonstration. EPA could not pre-approve waivers in such situations because they would constitute SIP relaxations. Here, whatever emission reductions Connecticut and Rhode Island obtain from the RVP program, even after any waivers have been granted, will tighten the existing SIP and improve air quality.

EPA notes that its pre-approval of any waivers Connecticut or Rhode Island may grant under the RVP program differs dramatically from approval of a generic permitting program such as a new source review or bubble program. In those cases, EPA authorizes states to approve relaxations of SIP requirements provided that the state follows approved procedures calculated to insure that all such waivers are accounted for in the SIP attainment demonstration and are issued using replicable evaluation techniques. Here, since EPA is not currently relying on the Connecticut and Rhode Island RVP programs for any defined emission reduction credit toward an approved attainment demonstration, EPA need not now analyze the criteria by which Connecticut or Rhode Island will issue any waivers. Connecticut and Rhode Island are free to issue waivers on the basis of their own state criteria, consistent with any requirements of their state administrative procedures acts.

When Connecticut and Rhode Island do submit their completed post-1987 attainment demonstration, EPA will assign specific emission reduction credits to the RVP programs, taking account of any supplier-specific waivers the states may have issued by that time. Once EPA has approved the Connecticut's and Rhode Island post-1987 SIPs, it will take whatever rulemaking action is necessary to ensure that any further waivers under the RVP program, which at that point would be considered SIP relaxations, would be submitted to EPA for approval as individual SIP revisions.

Finally, EPA notes that any suppliers who receive waivers from Connecticut or Rhode Island must still comply with the federal RVP limit of 10.5 psi.

10. How Soon After the Date of Final Approval of the Connecticut and Rhode Island Revisions Should the RVP Regulations Be Made Effective?

Comments. Many commenters were concerned with the timing of EPA's final action. Those favoring EPA approval of the SIP revision generally favored EPA acting quickly to make the regulations effective by their May 1 starting date or as close to that as possible. These commenters note that the Colonial Pipeline, which supplies 20% of the Northeast's gasoline, has been shipping 9 RVP fuel to the Northeast since March 1, 1989. They also pointed out that those suppliers who have made a good faith effort to comply with the May 1st date would be at a competitive disadvantage relative to those with cheaper, higher volatility gasoline if the date is extended.

Those opposing EPA approval of the SIP revision generally asked that if we did approve it we must provide the petroleum industry with realistic and sufficient lead-time to enable 9 psi gasoline to be distributed throughout the distribution system. These commenters cited EPA's allowing 70 and 100 days for the recently promulgated national regulations to become effective at the terminal and retail level respectively as precedent for such a decision. A third path, suggested by API, would be for EPA to make its final approval conditional on the state's deferral of the compliance date for its regulation.

Response. The timing issue is one of the most difficult ones posed by this action. Since EPA has had control of the timing of the final federal RVP action, the decision on the Massachusetts RVP SIP, and the decision on the Connecticut and Rhode Island RVP revisions, it is important that we ensure that both the federal and state programs start with a maximum likelihood of success and a minimum possibility of supply disruption.

EPA must consider several issues in deciding when to make the rule effective. The first issue is when the industry was put on notice that it would have to supply 9 psi gasoline to Connecticut and Rhode Island. As the states' rules were passed in 1988, the industry was on notice since then of the states' intention to control RVP to 9 psi. However, the Connecticut and Rhode Island rules were preempted on March 22, 1989 by the promulgation of the federal volatility requirements.

Another issue to consider is the lead-time that would be necessary to enable 9 psi gasoline to get through the

distribution system. The record indicates that the industry thought that it would take from 60 to 70 days to achieve compliance at the terminals in Connecticut and Rhode Island. The record also indicates that the Colonial Pipeline, which supplies at least 20% of the gasoline in the Northeast, has been shipping 9 psi gasoline since March 1, 1989.

The final issue involves the air quality consequences of delaying the effective date. EPA should not delay action on a SIP revision in such a manner as would thwart the states' intent in requesting the SIP revision. Connecticut's and Rhode Island's submissions of the RVP SIP revision last winter were clearly aimed at getting their regulatory programs in place for the 1989 ozone season. Thus, it is important to have the effective date as early as possible in order to maximize the air quality benefits of the programs in 1989.

In deciding to make this action effective on June 30, 1989, EPA has attempted to balance these competing interests. EPA believes that this effective date will both minimize possible difficulties the industry might encounter with a shorter lead-time and provide citizens in the Northeast as much relief as is practical during most of the 1989 ozone season. Although some suppliers may have a good faith effort to comply with the May 1 effective date specified in the Connecticut and Rhode Island proposals, they were under no obligation to do so once EPA preempted the states' requirement by promulgating Federal RVP controls on March 22, 1989. The Agency cannot, therefore, select an earlier effective date for all suppliers based on the voluntary action of a few, especially considering that the time between the March 22 federal rulemaking and today's publication is critical to the refiner/supplier planning and implementation process regarding fuel delivery for the coming summer. However, because refiners have already begun to prepare for the sale of 9 RVP fuel as a result of EPA's approval of the Massachusetts RVP SIP (published on May 4, 1989; 54 FR 19173), and in light of the fact that the three states share many links in the gasoline distribution network, the Agency does not believe that an additional 60 to 70 days lead-time is warranted. This starting date in Connecticult and Rhode Island mirrors the starting date of the Massachusetts program.

11. Should EPA Reopen the Comment Period or Withdraw and Repropose This SIP Revision in Light of EPA's Final Action on the National RVP Regulation and Other Alleged Defects in the March Proposals?

Comments. EPA received divergent comments on the appropriate process for and timing of a final action on the Connecticut and Rhode Island SIP revisions. Rhode Island argued that EPA should take final action as soon as possible. On the other hand, the American Petroleum Institute (API) felt that because of numerous allegedly unresolved issues raised in their substantive comments EPA should at a minimum repropose action on the revision to deal with these issues before proceeding to final action.

Response. EPA concludes that given its interpretation of the relevant law and the seasonal nature of the Connecticut and Rhode Island revisions, the Agency should proceed expeditiously to final action based on the record currently before it. EPA is unpersuaded by API's claim that circumstances have so changed since the proposed approvals of the Connecticut and Rhode Island revisions that we should reopen the comment period or withdraw and repropose this action. EPA's proposed Federal Register notices for the Connecticut and Rhode Island RVP programs explicitly discussed the possibility that EPA would take final action on the national RVP program prior to final action on the state programs. EPA clearly presented the path EPA proposed to follow and the conclusions we proposed to reach in the event that the Federal RVP regulations were finally promulgated. Furthermore, in the final Federal Register notice on the national RVP program, EPA explicitly discussed consideration of different state RVP control programs.

In this case EPA concludes that it is not necessary to issue a reproposal prior to taking final action. EPA believes that it has adequately responded to all of the substantive comments raised by commenters in the substantive discussions presented above. Obviously, additional analysis on such technical issues could always be conducted. However, administrative agencies generally have the discretion to determine when issues have been aired sufficiently and to close the record and proceed to final action, consistent of course with the need to act in a reasoned, non-arbitrary fashion. *Vermont Yankee Nuclear Power* v. *N.R.D.C.*, 435 U.S. 519, 554–555 (1978).

Further, EPA should not delay action on a SIP revision in such a manner that would thwart the state's intent in requesting the SIP revision. In this case, Connecticut and Rhode Island have submitted a seasonal requirement that since currently preempted must be approved in a timely fashion in order to effectuate the states' intent that the regulations provide emission reduction benefits in the upcoming summer ozone season. Therefore, EPA should make best efforts to act on the information available to it now to the extent that it is adequate or else the agency would thwart the states' intent with regard to the 1989 ozone season. Since EPA has concluded that the existing record is sufficient, EPA can proceed to final action at this time based on that record.

Enforcement

In EPA's proposal on the Rhode Island SIP revision we indicated that there was a problem with the test method section of Regulation Number 11. The regulation allowed alternative test methods "* * * approved by the Director." EPA stated that such methods must also be approved by EPA or else the alternative methods must be eliminated. EPA's proposal was made with the understanding that this defect would be cured prior to final EPA action.

On April 24, 1989 Rhode Island submitted its revision to Regulation Number 11. The revision adds the words "and EPA" to the end of the relevant sentence. It also changes the specific designation (D323–82) of the ASTM test method for the determination of RVP to a more general designation (D323). This gives the state the flexibility to use the 1982 version of the test or the 1958 version. Both versions will result in accurate measurements of the RVP of gasoline. EPA finds that its prior concerns were addressed in exactly the manner EPA had suggested at proposal and that the test methods section is approvable as revised since it is now fully enforceable.

Final Action

EPA is approving this revision to the Connecticut and Rhode Island Ozone State Implementation Plans to control gasoline volatility, including any waivers Connecticut and Rhode Island may grant under the program. EPA has also made the finding that the Connecticut and Rhode Island SIP revisions meet the requirements of section 211(c)(4)(C) of the Act for an exception to federal preemption.

The Administrator has determined that there is good cause, within the meaning of 5 U.S.C. section 553(d)(3), to make this action effective less than 30 days after publication. The industry has been on notice since the Administrator approved the Massachusetts RVP SIP (54 FR 19173; May 3, 1989) that the Administrator was inclined to approve inconsistent state RVP rules to the extent necessary to provide for attainment. Making this action effective on the same date as the Massachusetts RVP rule provides the industry with a uniform effective date for two contiguous states that both have rules limiting RVP to 9.0 psi.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by (60 days from date of publication). This action may not be challenged later in proceedings to enforce its requirements (see 307(b)(2)).

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 52

Air pollution control, Hydrocarbons, Ozone, Incorporation by reference.

Note: Incorporation by reference of the State Implementation Plans for the State of Connecticut and the State of Rhode Island was approved by the Director of the Federal Register on July 1, 1982.

Authority: 42 U.S.C. 7401–7642

EPA is today approving the Connecticut and Rhode Island SIP revisions pertaining to their state gasoline volatility programs.

Date: May 10, 1989.

William K. Reilly,

Administrator.

For the reasons set forth in the preamble. Part 52 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7642

Subpart H—Connecticut

2. Section 52.370 is amended by adding paragraph (c)(50) to read as follows:

§ 52.370 Identification of plan

* * * * *

(c) * * *

(50) Revisions to federally approved section 22a–174–20(a) of the Regulations of Connecticut State Agencies, submitted on January 27, 1989 by the Department of Environmental Protection, limiting the volatility of gasoline from May 1 through September 15, beginning 1989 and continuing every year thereafter, including any waivers to such limitations that Connecticut may grant. In 1989, the control period will begin on June 30.

(i) Incorporation by reference.

(A) Amendments to subsection 22a–174–20(a) of the Regulations of Connecticut State Agencies, entitled "Storage of 'volatile organic compounds' and restrictions for the Reid Vapor Pressure of gasoline," effective in the State of Connecticut on December 30, 1988.

Subpart 00—Rhode Island

3. Section 52.2070 is amended by adding paragraph (c)(33) to read as follows:

§ 52.2070 Identification of plan.

* * * * *

(c) * * *

(33) Revisions to federally approved Air Pollution Control Regulation Number 11 submitted on November 7, 1988 and April 24, 1989 by the Rhode Island Department of Environmental Management, limiting the volatility of gasoline from May 1 through September 15, beginning 1989 and continuing every year thereafter, including any waivers to such limits Rhode Island may grant. In 1989, the control period will begin on June 30.

(i) Incorporation by reference.

(A) Amendments to Rhode Island Air Pollution Control Regulation No. 11, effective July 5, 1979, entitled, "Petroleum Liquids Marketing and Storage," sections 11.7.1 filed with the Secretary of State of Rhode Island on August 11, 1988, and effective in the State of Rhode Island on August 31, 1988.

(B) Amendments to Rhode Island Air Pollution Control Regulation No. 11, effective July 5, 1979, entitled, "Petroleum Liquids Marketing and Storage," amendmends to section 11.7.2 filed with the Secretary of State of Rhode Island on April 27, 1989, and effective in the State of Rhode Island on May 17, 1989.

§ 52.801 [Amended]

4. The table in § 52.2081 is amended by adding a new entry to "No. 11" to read as follows:

TABLE 52.2081.—EPA APPROVED RULES AND REGULATIONS

State Citation	Title/ Subject	Date Submitted by State	Date Approved by EPA	FR Citation	52.2070	Comments/Unapproved sections
No. 11	* * *	11/07/88, 04/24/89	Publication June 2, 1989.	54 FR	(c)(33)	Approves a limitation on volatility of gasoline from June 30 to Sept. 15, 1989, and May 1 to Sept. 15 in subsequent years at Subsections 11.7.1 and 11.7.2.

[FR Doc. 89–12984 Filed 6–1–89; 8:45 am]
BILLING CODE 6560–50–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 22

[General Docket No. 85–388; FCC 89–141]

Amendment of Sections of Part 22 of the Commission's Rules as They Apply to Applications To Serve Rural Service Areas

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration; clarification.

SUMMARY: In this *Fourth Order on Reconsideration, (Reconsideration Order)*, the FCC considered the Petition for Reconsideration filed by the Cellular Telecommunications Industry Association (CTIA) of the *Fourth Report and Order* in Docket 85–388. In the *Fourth Report and Order*, the FCC had amended § 22.917 of its rules by adopting financial requirements for non-wireline cellular applicants for Rural Service Areas (RSAs). CTIA contended that these requirements did not achieve the Commission's goal of limiting applicants to those who sincerely intended to provide cellular service. The effect of the FCC's action in the *Reconsideration Order* is to deny CTIA's petition and reaffirm its findings and rule amendments in the *Fourth Report and Order*. The FCC also made minor non-substantive amendments to § 22.917(a)(3) and § 22.917(e) to clarify references to other parts of § 22.917.

EFFECTIVE DATE: May 22, 1989.

ADDRESS: Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: David H. Siehl, Mobile Services

Division, Common Carrier, Bureau; tele: 202–632–6450.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Fourth Order On Reconsideration*, adopted May 8, 1988, and released May 22, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Summary of Fourth Order on Reconsideration

1. On May 18, 1988, the Commission released in this proceeding a *Fourth Report and Order*, FCC 88–154, (*Fourth Report and Order*), which amended Part 22 of the Commission's Rules governing the filing of Rural Service Area (RSA) applications. The Commission issued the *Fourth Report and Order* after considering the comments it had requested in the *Third Notice of Proposed Rulemaking* (*Third Notice*), 53 FR 5020 (1988), in this proceeding. In the *Fourth Report and Order*, the Commission adopted financial requirements for non-wireline applicants filing for Rural Service Areas (RSAs) by adding a new § 22.917(c). The Commission also provided that the same financial commitment may be used by an applicant to support applications for any of the 428 RSA markets. After the issuance of the *Fourth Report and Order*, Cellular Telecommunications Industry Association (CTIA) filed a Petition for Reconsideration. In its petition, CTIA contended that the revised RSA financial requirements do not achieve the Commission's goal of limiting the number of applicants to those who intend to provide high quality cellular service. Instead, argued CTIA, the revised rules produce an incentive for speculators to file more applications. CTIA urged the Commission to revise its rules to provide that applicants must submit a separate financial commitment to construct and operate each market for which they apply at the time they file the application. The Commission considered CTIA's arguments in a *Fourth Order on Reconsideration* (*Reconsideration Order*).

2. The Commission said that CTIA had not demonstrated that the RSA financial rules encourage the filing of speculative applications. The Commission stated that it adopted the requirement that non-wireline applicants make a showing of a firm financial commitment at the time of filing their applications in order to assure that only bona fide applicants would be included in the cellular lotteries. The Commission also stated in the *Reconsideration Order* that the provision adopted in the *Fourth Report and Order* to allow these applicants to use the same financial commitment in applying for more than one market was based on a valid contention presented by the commenters to the *Third Notice* that requiring separate firm financial commitments for each market would require an applicant to incur an unreasonable expenditure of funds. The Commission noted that in implementing this provision it had adopted specific requirements intended to assure that applicants have thoroughly considered the financial viability of each RSA proposal and are serious about providing cellular service in each market for which they apply. These requirements adopted to deter speculation were that: financing must be based on a close assessment by the financial institution of the markets for which the applicant applies; the lender must examine the financial viability of each proposal for which the applicant intends to use the commitment; and all financial commitments must be based solely on the creditworthiness of the particular applicant and the financial viability of each of their proposed systems. Additionally, the Commission emphasized that the lender's willingness to make the commitment must be based solely on its relationship with the applicant. Accordingly, the Commission rejected CTIA's arguments and reaffirmed its finding that the financial requirements have a deterrent effect on speculation by making it more difficult for applicants to demonstrate their financial qualifications for RSAs than for Metropolitan Statistical Area markets.

3. Lastly, after redesignating in the *Fourth Report and Order*, *supra*, former paragraphs (c) and (d) of § 22.917 of its rules as (d) and (e) respectively and adding a new paragraph (c), the Commission made minor amendments in the *Reconsideration Order* to § 22.917 (a)(3) and § 22.917(e) to reference paragraph (d), not (c). The Commission also amended § 22.917(a)(3)(iii)(A) to reference paragraph (e) instead of (d). Because the Commission found these rule amendments which clarified the rules to be non-substantive, it concluded that the notice and comment provisions as well as the effective date requirements of the Administrative Procedure Act are inapplicable. Accordingly, the Commission ordered that these rule amendments were effective immediately.

List of Subjects in 47 CFR Part 22

Communications common carriers, Radio, Rural areas.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

Rules Section

Part 22 of 47 CFR is amended as follows:

PART 22—PUBLIC MOBILE SERVICE

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

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303).

§ 22.917 [Amended]

2. Section 22.917(a)(3) introductory text is amended by removing the reference to "paragraph (c)" and adding in its place "paragraph (d)" and (a)(3)(iii)(A) is amended by removing the reference to "paragraph (d)" and adding in its place "paragraph (e)."

3. Section 22.917(e) is amended by removing the reference to "paragraph (c)" and adding in its place "paragraph (d)".

[FR Doc. 89–13043 Filed 6–1–89; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 672

[Docket No. 81132–9033]

Groundfish of the Gulf of Alaska

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

ACTION: Notice of closure.

SUMMARY: The Director, Alaska Region, NMFS (Regional Director), has determined that the portion of the total allowable catch (TAC) of sablefish allocated to hook and line gear in the Central Regulatory Area of the Gulf of Alaska will be taken before the end of the year. The Secretary of Commerce (Secretary) is prohibiting further directed fishing for sablefish by longline vessels fishing in this area from 12:00 noon, Alaska Daylight Time (ADT), on May 27, 1989 through December 31, 1989.

DATES: This notice is effective from 12:00 noon, a.d.t., on May 27, until

midnight, Alaska Standard Time, December 31, 1989.

ADDRESSES: Comments should be addressed to Steven Pennoyer, Director, Alaska Region (Regional Director), National Marine Fisheries Service, P.O. Box 21668, Juneau, Alaska 99802–1668.

FOR FURTHER INFORMATION CONTACT: Janet E. Smoker, Fishery Management Biologist, 907–586–7230.

SUPPLEMENTARY INFORMATION: The Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) governs the groundfish fishery in the exclusive economic zone in the Gulf of Alaska under the Magnuson Fishery Conservation and Management Act. Regulations implementing the FMP are at 50 CFR Part 672. Section 672.20(a) of the regulations establishes an optimum yield (OY) range of 116,000–800,000 metric tons (mt) for all groundfish species in the Gulf of Alaska. Total allowable catches (TACs) for target species and species groups are specified annually within the OY range and apportioned among the regulatory areas and districts.

Section 672.24(b)(1) of current regulations restricts the hook-and-line catch of sablefish in the Central Regulatory Area to 80 percent of the TAC. The 1989 TAC specified for sablefish in this area is 11,700 mt (54 FR 6524, February 13, 1989); the portion of the TAC allocated to hook-and-line gear is 9,360 mt. Under § 672.24(b)(3)(i), if the share of the sablefish TAC assigned to any type of gear for any area or district will be taken before the end of the year, further directed fishing for sablefish will be prohibited to provide adequate bycatch amounts to ensure continued fishing activity by that gear group.

During the remainder of the fishing year, hook-and-line fisheries are expected to require 100 mt of sablefish for bycatch. Therefore, the Regional Director plans to close the directed fishery when 9,260 mt have been taken. The directed hook-and-line fishery for sablefish started April 1, 1989. The Regional Director reports that vessels using hook-and-line gear have landed 7,973 mt of sablefish through May 20 in the Central Regulatory Area. The longline fleet in this area has averaged a daily sablefish landing of 194 mt per day. At this rate, the balance of the 9,260, mt will be harvested by 12:00 noon, a.d.t., May 27, 1989.

Therefore, pursuant to § 672.24(b)(3)(i), the Secretary is prohibiting further directed fishing for sablefish caught with hook-and-line gear in the Central Regulatory Area effective 12:00 noon, ADT, May 27, 1989. Retention of sablefish by hook-and-line fishermen in the Central Regulatory area of amounts less than 4 percent of the total amount of fish and fish products retained on board a vessel, as calculated from round weight equivalents, is permitted.

Allocation of the sablefish resource between hook-and-line and trawl gear in the Central Regulatory Area, and the continued health of all components of the sablefish fishery will be jeopardized unless this notice takes effect promptly. NOAA therefore finds for good cause that prior opportunity for public comment on this notice is contrary to the public interest and its effective date should not be delayed.

Public comments on the necessity for this action are invited for a period of 15 days after the effective date of this notice. Public comments on this notice of closure may be submitted to the Regional Director at the address above until June 11, 1989. If written comments are received which oppose or protest this action, the Secretary will reconsider the necessity of this action, and, as soon as practicable after the reconsideration, will publish in the **Federal Register** a notice either of continued effectiveness of the adjustment, responding to comments received, or that modifies or rescinds the adjustment.

Classification

This action is taken under §§ 672.22 and 672.24, and is in compliance with Executive Order 12291.

List of Subjects in 50 CFR Part 672

Fisheries, Reporting and recordkeeping requirements.

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

Dated: May 26, 1989.

Richard H. Schaefer,

Director of Office of Fisheries, Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89–13065 Filed 5–26–89; 5:01 pm]

BILLING CODE 3510–22–M

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50 CFR Parts 204 and 645

[Docket No. 41156–4156]

Spiny Lobster Fishery of Puerto Rico and the U.S. Virgin Islands

ACTION: Final rule; technical amendment; notice of OMB control numbers.

SUMMARY: This rule announces that the Office of Management and Budget (OMB) has approved the information collection requirements (ICRs) of §§ 645.4 and 645.6 of the final rule to implement the Fishery Management Plan for the Spiny Lobster Fishery of Puerto Rico and the U.S. Virgin Islands (FMP) and publishes the OMB control number for those ICRs.

EFFECTIVE DATE: June 2, 1989.

FOR FURTHER INFORMATION CONTACT: Perry Allen, 813–893–3722.

SUPPLEMENTARY INFORMATION: On December 26, 1984 (49 FR 50049), NOAA published a final rule to implement the FMP. The rule contained ICRs for purposes of the Paperwork Reduction Act at (1) § 645.4—Permits and (2) § 645.6—Vessel and gear identification. A request to collect this information was submitted to OMB for approval. This notice informs the public of the approval and publishes the OMB control number 0648–0205.

Classification

This action is authorized by 50 CFR Parts 204 and 640 and complies with E.O. 12291.

The Assistant Administrator finds that because notice of OMB control numbers is strictly a ministerial action required pursuant to the Paperwork Reduction Act, it is unnecessary to provide notice and opportunity for comment upon such notice, or to delay for 30 days its effective date, under provisions of section 553(b)(B) and (d)(3) of the Administrative Procedure Act.

Dated: May 25, 1989.

Andrew J. Kemmerer,

Acting Executive Director, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR Part 204 is amended as follows:

PART 204—OMB CONTROL NUMBERS FOR NOAA INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 204 continues to read as follows:

Authority: Paperwork Reduction Act of 1980, 44 U.S.C. 3501–3520 (1982).

§ 204.1 [Amended]

2. In § 204.1(b) the table is amended by adding in the left hand column, in numerical order, "section 645.4" and "section 645.6" and adding in the right hand column, in corresponding positions, "–0205".

[FR Doc. 89–13067 Filed 6–1–89; 8:45 am]

BILLING CODE 3510–22–M

Proposed Rules

Federal Register
Vol. 54, No. 105
Friday, June 2, 1989

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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 591

RIN 3206-AB34

Cost-of-Living Allowances and Post Differentials (Nonforeign Areas)

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) proposes to amend its regulations on the cost-of-living allowance and post differential paid in nonforeign areas. The proposed regulations describe the general method to be used in setting the allowance rates and address the administrative aspects of the program. This proposed amendment to the regulations is necessary to bring the terminology into conformance with current usage, clarify certain provisions, publish modifications to the methodology, and ensure that the requirements of the Administrative Procedure Act are met or exceeded.

DATES: Comments must be received on or before August 31, 1989.

ADDRESS: Persons wishing to submit written comments may send them to: U.S. Office of Personnel Management; White Collar Pay and Allowances Division; Room 7H38; 1900 E Street, NW., Washington, DC 20415

FOR FURTHER INFORMATION CONTACT: Allan G. Hearne, (202) 632-7184.

SUPPLEMENTARY INFORMATION: On October 21, 1985, OPM published (50 FR 42531), for comment, proposed regulations on the allowance and differential program. Changes have been made to the proposed regulations based on the comments received and consideration of other pertinent factors. These changes are sufficient to warrant a new comment period.

The original deadline (December 20, 1985) for comments on the original proposed regulations was extended twice. That comment period ended on March 31, 1986. We received over 300 comments from employees, three from members of Congress, three from Federal agencies, one from a union, two from Federal executive associations, one from an interagency rent commission, and one from an economist hired by employee organizations.

Many of the comments were critical of the methodology proposed in our October notice. Because of these comments, OPM has designed a new methodology based on the procedures that are typical of private sector practice in establishing cost-of-living allowances. This new methodology is presented here for comment. The comments on the previous proposal that are still relevant are discussed below.

I. Definitions

One commenter requested we include definitions for "date of arrival" and "date of departure" that had been removed. We agree and have replaced these two definitions in § 591.201 (Definitions).

An agency requested we explain when payments begin and end. We agree and this subject is included under § 591.210(g) (Payment of Allowances and Differentials).

An agency requested we specify which Federal pay plans are covered by the program. We agree and this subject is included under § 591.203 (Agencies and Employees Covered).

An employee suggested we define all Hawaii allowance areas by county. We agree and have done so in § 591.204(b) (Establishment of Allowance Areas).

Several employees suggested that 50 miles by road from the three principal cities is too far for defining areas in Alaska. Fifteen miles by road was suggested as an alternative. We believe the 50-mile radius is a reasonable definition of an economic community for the purposes of these regulations and continue to use it in the definition.

In addition to changes adopted to reflect comments received, we have added the Commonwealth of the Northern Marinas Islands to the definitions in § 591.201, to the list of nonforeign areas in § 591.202, and to the list of areas eligible for the post differential in § 591.208, because commonwealth status was conferred upon that area by Presidential proclamation on November 3, 1986.

II. Statute

Several commenters felt that the 25 percent of base pay limit for allowance payments is artificial and inadequate. This limit is mandated by 5 U.S.C. 5941.

Some commenters felt the base area for comparison of living costs should be somewhere other than the alleged high cost Washington, DC, area. The base area is also mandated in the law authorizing the program.

Section 5941 of Title 5, U.S.C., specifies the District of Columbia as the base area. There was much concern about the base area being defined to include portions of Maryland and Virginia near the city of Washington, DC. It is unrealistic to compare living costs of employees in allowance areas to those in the District of Columbia without considering the fact that a significant number of employees working in the District live and shop in Maryland and Virginia. The President, in Executive Order 12510, amended Executive Order 10,000 to clarify the use of the Washington area as the base area.

One commenter felt our regulations should comment on the Federal tax-free status of allowance payments. We cannot do so because tax regulations are the responsibility of the Department of the Treasury.

There were numerous comments that the "manner of living" and "differences in good services" language once contained in Executive Order 10,000 were removed without proper notice and opportunity for comment. We are bound by the Executive Order as it has been amended by the President.

III. Alternative Methods

A few commenters suggested we pay Federal employees the allowances authorized by private firms for their employees. We cannot do so because the law only authorizes payments based on living costs or conditions of environment, not payments based on private sector pay practices that may rest on factors other than those in the law.

Several commenters suggested we base Federal pay on private pay within the allowance area. Again, the law authorizes payments based only on living costs or conditions of environment. Private pay rates may reflect these factors but also reflect size

of the firm, industry mix, degree of labor market competition, and other factors not specified in the law governing the COLA program.

One commenter suggested we use the Urban Family Budgets published by the U.S. Bureau of Labor Statistics instead of conducting our own surveys, however, the Urban Family Budget series was discontinued in 1981.

IV. Housing

A large number of comments were received on the housing portion of the living cost comparison, which represents a significant fraction of total living costs. In the previous proposal this portion was calculated in a way different from the other parts of the proposed index. The earlier proposal would have compared actual housing costs incurred by employees rather than estimated average unit costs. Some employees suggested that the housing cost comparison must be for similar types of houses; same size, type, composition, amenities, location, etc. Under our new proposal housing costs will be calculated for similar housing units in each area.

One employee suggested we use only current market prices for housing and ignore earlier purchases. We disagree because the purchase price and interest rate, two important factors in home ownership costs, are very independent on the time of purchase. We want the new methodology to include the costs of consumers who purchased in past years as well as those making more recent purchases. Because this mix reflects the average of what consumers actually pay, it is a more accurate measure of living costs than current market prices, which affect only those currently purchasing housing. Because the allowance is paid to all employees, not just to those recently transferred to the area, this method is more appropriate than one based only on current purchases.

Some commenters felt the proposed housing cost survey should be replaced with a "rent equivalence" approach. This method estimates the cost for owner occupied housing based on the rental rates for similar housing units that are renter occupied in an area. Commenters said this sort of survey would be easier to administer, more accurate, and permit employees in the allowance areas to achieve economic equality with employees in Washington, DC. We intend to collect data on the cost components that effect homeowners rather than estimate those costs through a survey of rental rates.

Some employees believe that the housing survey starts a vicious cycle. They believe their income is so low that they can only afford to buy low-cost housing. Subsequent surveys record their low housing costs and their allowance is reduced. They suggested we survey non-Federal employees to eliminate this alleged problem. Under the proposed methodology we will collect housing information without regard to the employment of the occupant.

A rental rate committee suggested that rural areas outside a 50-mile radius of each of the three survey cities in Alaska be exempt from the provisions of § 591.207(a)(2) (Federal Quarters), which covers allowance adjustments for Federal housing. We disagree. The Office of Management and Budget (OMB) Circular A–45, "Policy Governing Charges for Rental Quarters and Related Facilities", provides the rules by which rents for Federal quarters are set. This circular provides suitable adjustments for rental rates in rural areas. To the extent that agencies follow OMB Circular A–45, no deductions from allowances will occur, so no exemption is necessary.

Some commenters suggested that reductions in allowance amounts for employees who are provided Federal housing at rates lower than those set using the OMB Circular A–45 policy should be taken from the allowance index amount instead of from the final allowance. It is possible, for example, to have living costs 50-percent higher than in Washington, while the allowance rate is limited by law to only 25 percent. The intent of the suggestion was that for employees who are provided housing below market rates, the deduction should be made from the 50-percent index rather than from the 25-percent allowance rate. In effect, no deductions would be made from the allowance. The intent of this provision in Executive Order 10,000 is to ensure that employees in Federal housing are not given an advantage over those who live in private housing. The advantage would arise because employees in Federal housing would receive the entire allowance and also pay below market rates for their housing. The Government would be compensating employees twice for high living costs: once through the allowance and again through low cost housing. Deductions from allowances for employees in Federal housing provided at rates below those required by OMB Circular A–45 policy will be made from the allowance actually payable to the employees.

There was also some concern about the meaning of § 591.207(a)(2). The intent of that section is to reduce allowance payments to employees in Federal housing *only* if the agency is charging rent below that mandated by OMB CIrcular A–45. The rental rates established under the OMB policy are *net rates* after all appropriate adjustments have been made. If the agency is in compliance with OMB Circular A–45, the employee's allowance will be unaffected. We have revised the wording of that section to correspond more closely with the intent of OMB Circular A–45.

V. Goods and Services

There were numerous comments regarding items covered in the surveys. Most of these comments are discussed below in section.

VI. Special Circumstances

Other items suggested for inclusion in the survey include legal services, appliance repair, auto power train repair, auto painting and body work, medical operations, cable TV, child care, house painting, plumbing, and furnace repairs. There is an almost endless list of goods and services that could be priced. We will publish a list of the goods and services priced to establish allowance rates each time we adjust the rates. In this fashion items can be added or dropped from the survey as needed.

Many commenters stated we must price the exact brand or model of an item in each area. The commenters maintain that this step is necessary to ensure complete equality of purchasing power or living standard between the nonforeign areas and Washington, DC. While we do not agree that the statute guarantees economic parity, we have nevertheless modified our price collection mechanism to incorporate this comment. Under the new proposal the data will be collected using quality specific criteria whenever possible.

Several commenters suggested that sale prices for items should be included in the survey. This issue was raised by the General Accounting Office in a 1982 study of the allowance program. We propose to not adopt this recommendation for the following reasons:

—It is doubtful that reliable data could be obtained; it would require more data collection; and, it would result in increased reporting burdens.

—Because allowance rates reflect relative living costs, sale price patterns would have to differ significantly between an allowance area and the Washington area to affect an item or category index. Because the allowance is paid to the nearest 2.5 percent, a measurable impact is unlikely.

VI. Special Circumstances

The most frequent comments involved special circumstances or needs, or a site-specific life style generated by isolation or climate. Items mentioned included—additional air travel to visit relatives or for vacation or emergencies; long distance phone calls to distant relatives; lack of adequate roads; additional auto maintenance because of salt air, high humidity, or salt on the roads; winter weather needs, such as snow plowing and road grading, higher auto accident rates, engine block heaters, 4-wheel drive vehicles, and snow tires; winter clothing needs, such as boots, mittens, parkas, and rain gear; leisure activity products, such as fishing, hunting, skiing, and camping gear, ice skates, snowmobiles, lift tickets, boats, and trailers; metal garbage cans; extra heating or light bills; quality of educational opportunities; quality of medical care; and similar items. The economist representing employee groups asserted an additional five index points should be added to the cost-of-living allowance index to account for these differences in needs. We do not agree. In some locations it is possible to argue that allowances should be reduced due to warm climate (no heating bills or winter clothing), little traffic congestion or other negative factors associated with urban environments, and the like. In any case, the statute does not require living standard equality. It only permits payment of an allowance based on relative living costs. Further, the statute forbids payments in excess of 25 percent of base pay regardless of living cost differences.

VII. Notice and Comment

Some employees felt it was too difficult to find information on the allowances in the **Federal Register** and suggested we continue to publish rates in FPM letters. Section 553(b) of title 5, U.S.C., specifies the **Federal Register** as the vehicle for notice of rulemaking. Hence, information on allowances must appear in the **Federal Register**. Although 5 U.S.C. 553(a) exempts allowance rate adjustments from the notice and comment provisions, we think it would be useful to publish future rate changes for comment and propose to do so. OPM will publish an FPM bulletin to be posted in Federal agencies transmitting each **Federal Register** notice. The notice will provide a discussion of the survey results specifying any unusual circumstances involved in rate changes and giving more detail on the methods employed. In addition, newspapers in the allowance areas generally report on our rate changes. We believe this will provide sufficient notice of OPM actions.

Several commenters suggested we hold public hearings on these regulations. We received over 300 written comments on various aspects of the original proposed regulations. We therefore believe the comment period gave ample opportunity for interested parties to make known their views and that public hearings would not add new information. We anticipate that this new comment period on the revised regulations will also generate a significant response from interested parties.

VIII. Miscellaneous

Many employees commented on the hardships that result when allowances are reduced. The consensus seemed to be that any allowance reduction should be made gradually. Executive Order 10,000 permits gradual reduction in allowance rates only when the reduction is due to a change in methodology. The Executive Order further states that OPM must review the rates at least annually to "insure that payment of additional compensation shall continue only during the continuance of conditions justifying such payment and shall not in any instance exceed the amount justified." This language precludes the gradual reduction of allowance rates if the change is not caused by a change in methodology.

Many employees feel that the allowance should compensate for environmental hardship. We do not agree. The Executive Order permits two payments based on separate circumstances: an allowance to be based on living costs; and a differential to be based on environmental hardship. Because employees can receive both an allowance and a differential, it would be inappropriate to include environmental factors in the allowance.

One commenter felt that a post differential hardship allowance should be paid in outlying areas of Alaska. At present, we are paying a 25 percent allowance. The law limits payments of allowances or differentials, or a combination of both to 25 percent. Thus, it is not possible to authorize an additional payment in these outlying areas.

Another comment suggested we consider recruitment and retention conditions in setting allowance rates. Although the reason for the allowance was to enable the Government to recruit and retain a competent workforce, Executive Order 10,000 bases the allowance only on living costs and does not include additional payment for recruitment and retention incentives. These conditions, therefore, cannot be factors in setting allowance rates. Recruitment and retention problems for specific occupations, grades and locations are handled through the special rates program authorized by 5 U.S.C. 5303.

Many commenters in Puerto Rico believe consideration should be given to the taxation of the allowance by the Commonwealth government. This issue is currently under litigation in the United States District Court for the District of Puerto Rico in *Parker* v. *Alicea and Horner* (No. 87–0386, March 13, 1987). Hawaii also taxes the allowance. The Federal government taxes the differential but not the allowance. Because current Federal tax regulations exempt allowance payments from Federal income tax, it would be to the general disadvantage of the employees if we considered income taxes when calculating the allowance. Calculations involving income tax must consider Federal taxes as well as state, commonwealth, and local taxes. Because an allowance eligible employee's Federal tax burden is either zero or equal to what would be paid in Washington, including Federal taxes would generally lower the indexes more than including state, commonwealth, and local taxes would raise them.

One commenter stated that commissaries in Alaska are the only ones that must pay for transportation of goods to the site. Any transportation fees included in the prices charged to the consumers in the commissary are included in the prices we collect there. Surcharges added at the cash register are also included in the index calculations.

These regulations provide substantial detail with respect to the substance, subjects, and issues involved in the program and determining and setting allowance rates. The new proposed regulations reflect a balancing of objectivity, precision, and feasibility that takes into account OPM's experience in administering the program, a careful analysis of the comments received on the original proposed regulations, input from private sector experts in the field, and the current state of the applicable law as relected in statute, Executive order, and court decisions.

Commonwealth of the Northern Mariana Islands

An interim rule adding the Commonwealth of the Northern Mariana Islands to the locations covered by the post differential and setting a 25-percent differential rate there was published in

the **Federal Register** on April 15, 1987 (52 FR 12131). We received no comments on that rule and it will be incorporated in these regulations when they are finalized.

Current Allowance and Differential Rates

Allowance rates currently in effect were previously published in FPM Bulletins 591–30 (Anchorage) and 591–32 and 591–33 (all other locations). Post differential rates currently in effect were published in 5 CFR Part 591, Appendix B of Subpart B, except for the rate for the Commonwealth of the Northern Mariana Islands, which appeared in FPM Bulletin 591–34. The rates currently authorized will not change until the new regulations go into effect. These regulations will eliminate some of the allowance categories that existed under the previous regulations. The Local Retail/Federal Housing and Commissary/Exchange/Federal Housing allowance categories will cease to exist when these regulations are finalized. Deductions in allowances paid to employees in Federal housing will be handled under § 591.207(a)(2) (Federal Quarters), instead of as a separate allowance category.

Any necessary deductions for employees in the old Local Retail/Federal Housing Category will be from the new Local Retail Category allowance. Those from the old Commissary/Exchange/Federal Housing Catgory will be from the new Commissary/Exchange Category.

The following allowance rates (reprinted from the FPM material cited above) and categories are authorized until these new regulations go into effect.

Location/category	Allowance rates (percent)
State of Alaska	
Anchorage and 50 miles by road:	
Local retail/private housing	25.0
Local retail/Federal housing	17.5
Commissary/exchange/private housing	17.5
Commissary/exchange/Federal housing	7.5
Fairbanks and 50 miles by road:	
Local retail/private housing	25.0
Local retail/Federal housing	25.0
Commissary/exchange/private housing	20.0
Commissary/exchange/federal housing	15.0
Juneau and 50 miles by road:	
Local retail/private housing	25.0
Local retail/Federal housing	25.0
Commissary/exchange/private housing	25.0
Commissary/exchange/federal housing	25.0
Alaska-all other locations:	
Local retail/private housing	25.0
Local retail/Federal housing	25.0
Commissary/exchange/private housing	25.0
Commissary/exchange/Federal housing	25.0
State of Hawaii	
City and county of Honolulu (Oahu):	
Local retail/private housing	22.5
Local retail/Federal housing	5.0
Commissary/exchange/private housing	12.5
Commissary/exchange/Federal housing	0
County of Maui (Islands of Maui, Molokai, Lanai):	
Local retail/private housing	20.0
Local retail/Federal housing	12.5
Commissary/exchange/private housing	N/A
Commissary/exchange/Federal housing	N/A
County of Kauai:	
Local retail/private housing	17.5
Local retail/Federal housing	7.5
Commissary/exchange/private housing	17.5
Commissary/exchange/Federal housing	7.5
County of Hawaii:	
Local retail/private housing	15.0
Local retail/Federal housing	7.5
Commissary/exchange/private housing	N/A
Commissary/exchange/Federal housing	N/A
Territory of Guam	
Guam:	
Local retail/private housing	12.5
Local retail/Federal housing	12.5
Commissary/exchange/private housing	0
Commissary/exchange/Federal housing	0
Commonwealth of Puerto Rico	
Puerto Rico:	
Local retail/private housing	10.0
Local retail/Federal housing	7.5
Commissary/exchange/private housing	0
Commissary/exchange/Federal housing	0
Virgin Islands	
St. Croix:	
Local retail/private housing	12.5
Local retail/Federal housing	0
Commissary/exchange/private housing	N/A
Commissary/exchange/Federal housing	N/A
St. Thomas & St. John:	
Local retail/private housing	12.5
Local retail/Federal housing	0
Commissary/exchange/private housing	N/A
Commissary/exchange/Federal housing	N/A

N/A means the category does not exist in the location.

The following post differential rates are authorized until these new regulations go into effect.

Location	Differential rate (percent)
American Samoa	25
Canton Island	25
Christmas Island	25
Commonwealth of the Northern Mariana Islands	25
Johnston and Sand Islands	25
Midway Islands	25
Wake Island	25
Guam	20

(Both an allowance and a differential are authorized on Guam. Employees may be eligible to receive an allowance or differential or both but may receive no more than 25 percent of basic pay in combined allowance/differential payments.)

Regulatory Flexibility Act

I certify that these proposed regulations will not have a significant economic impact on a substantial number of small entities because they apply to Federal employees and agencies.

E. O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of Executive Order 12291, Federal Regulation.

List of Subjects in 5 CFR Part 591

Government employees, Travel and Transportation expenses, Wages.

U.S. Office of Personnel Management,

Constance Horner,

Director.

Accordingly, OPM is revising Subpart B of Part 591 of Title 5, Code of Federal Regulations, to read as follows:

PART 591—ALLOWANCES AND DIFFERENTIALS

* * * * *

Subpart B—Cost-of-Living Allowance and Post Differential—Nonforeign Areas

Sec.

591.201 Definitions.
591.202 Areas covered.
591.203 Agencies and employees covered.
591.204 Establishment of allowance areas.
591.205 Comparative cost index.
591.206 Establishment of allowance rates.
591.207 Allowance categories, eligibility, and adjustments.
591.208 Post differential.
591.209 Eligibility for a differential.
591.210 Payment of allowances and differentials.
591.211 Periodic review.

* * * * *

Subpart B—Cost-of-Living Allowance and Post Differential—Nonforeign Areas

Authority: 5 U.S.C. 5941; E.O. 10,000; 3 CFR, 1943–1948 Comp., p. 792.

§ 591.201 Definitions.

In this subpart—

"Allowance area" means a geographic area for which allowance has been authorized. There may be more than one allowance area within a nonforeign area. Allowance areas are listed in § 591.204 of this part.

"Date of arrival" means the beginning of business on the workday of the employee's arrival at the post, or, if the employee's arrival is on a nonworkday, the beginning of business on the first workday following arrival.

"Date of departure" means the close of business on the workday of the employee's departure from the post, or, if the employee's departure is on a nonworkday, the close of business on the last workday preceding departure.

"Day" or "calendar day" means any day of the year. Fractional days are considered whole days.

"Nonforeign allowance" or "allowance" means a cost-of-living allowance established by the Office of Personnel Management and payable under section 5941 of title 5, United States Code, at a location in a nonforeign area where living costs are substantially higher than those in the Washington, DC, area.

"Nonforeign area" means the States of Alaska and Hawaii, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, territories and possessions of the United States, and any additional areas located outside the contiguous United States that the Secretary of State designates as being within the scope of Part II of Executive Order 10,000, as amended. Nonforeign areas are listed in § 591.202 of this part.

"Nonforeign differential" or "differential" means a post differential established by the Office of Personnel Management and payable under section 5941 of title 5, United States Code, at a location in a nonforeign area if conditions of environment differ substantially from conditions of environment in the contiguous United States and warrant its payment as a recruitment incentive.

"Rate of basic pay" means the rate of pay fixed by statute for the position held by an individual before any deductions and exclusive of additional pay of any kind, such as overtime pay, night differential, extra pay for work on holidays, or allowances and differentials.

"Washington, DC, area" or "Washington area" means the District of Columbia and all other areas in Maryland and Virginia included in the Washington DC-MD-VA Metropolitan Statistical Area as defined by the Office of Management and Budget.

§ 591.202 Areas covered.

The following areas are nonforeign areas:

(a) Alaska (including all the Aleutian Islands east of longitude 167 degrees east of Greenwich).

(b) American Samoa (including the island of Tutuila, the Manua Islands, and all other islands of the Samoa group east of longitude 171 degrees west of Greenwich, together with Swains Island).

(c) Canton and Enderbury Islands.

(d) Commonwealth of Puerto Rico.

(e) Virgin Islands of the United States.

(f) Guam.

(g) Commonwealth of the Northern Mariana Islands.

(h) Hawaii (including Ocean or Kure Island).

(i) Howland, Baker, and Jarvis Islands.

(j) Johnston Island and Sand Island.

(k) Kingman Reef.

(l) Midway Islands.

(m) Navassaa Island.

(n) Palmyra Atoll.

(o) Wake Island.

(p) Any small guano islands, rocks, or keys that, in pursuance of action taken under the Act of Congress, August 18, 1856, are considered as appertaining to the United States.

(q) Any other islands to which the U.S. Government reserves claim, such as Christmas Island.

§ 591.203 Agencies and employees covered.

This subpart applies to civilian employees whose rates of basic pay are fixed by statute and who are employed by an executive department, an independent establishment, or a wholly-owned Government corporation. The following pay plans are covered by this subpart:

(a) General Schedule (including PMRS and SES).

(b) Department of Medicine and Surgery (Department of Veterans Affairs).

(c) Foreign Service (where applicable under this subpart).

(d) Postal Service (where applicable under provisions of 39 U.S.C.).

§ 591.204 Establishment of allowance areas.

(a) The Office of Personnel Management (OPM) designates within nonforeign areas allowance areas where employees are eligible to receive a cost-of-living allowance by virtue of living costs that are substantially higher than those in the Washington, DC, area. In establishing the limits of allowance areas, OPM considers (1) the existence of a well defined economic community; (2) the availability of consumer goods and services; (3) the concentration of Federal employees covered by this subpart; and (4) unique circumstances related to a specific location.

(b) The following allowance areas have been established where an allowance is authorized to be paid:

(1) *State of Hawaii.* (i) City and County of Honolulu.

(ii) County of Kauai.

(iii) County of Maui (including Kalawao County).

(iv) County of Hawaii.

(2) *State of Alaska.* (i) City of Anchorage and 50 mile radius by road.

(ii) City of Fairbanks and 50 mile radius by road.

(iii) City of Juneau and 50 mile radius by road.

(iv) The rest of the State.

(3) *Commonwealth of Puerto Rico.* The entire Commonwealth.

(4) *The Virgin Islands.* (i) St. Croix.

(ii) St. Thomas and St. John.

(5) *Territory of Guam.* The entire Territory.

(c) The head of a department or agency will submit requests in writing to OPM for the establishment or revision of allowance areas.

§ 591.205 Comparative cost index.

(a) OPM calculates allowance rates for each area by comparing costs of four categories of expenses in the area to those in the Washington, D.C. area. Two allowance rates are calcualted for each area; Local Retail and Commissary/Exchange (see § 591.207 of this part). The four categorie of expenses are:

(1) Consumption goods and services.

(2) Transportation.

(3) Housing.

(4) Miscellaneous expenses.

(b) Costs are determined for several income levels and home occupancy types (renter or owner), and averaged.

(l) Consumption goods and services budgets (excluding transportation and housing) are estimated from appropriate consumer expenditure data at various income levels for a standard family size. The base budget amounts for goods and services are adjusted by price index multipliers to estimate the budget amounts required in each area.

(i) Goods and serfvices surveyed. The goods and services surveyed for the consumption portion of the system are derived from consumer expenditure

surveys. Whenever possible, exact brands and models are priced in each location. Price data are obtained from appropriate retail outlets in each area. Price data from military facilities are provided by the Department of Defense where needed. Individual items are grouped into categories accounding to common functions or uses.

(ii) The item and category weights are derived from consumer expenditure surveys. The category weights vary by income.

(2) Transportation costs for each income level and area are estimated using data collected by or for OPM on automobile operating expenses and other factors affecting transportation costs.

(3) Housing costs for renters and owners are estimated based on similar housing units. Standard shelter specifications (type, size, age) are selected for each income level. Appropriate living communities to survey based on the income level and housing type specified are selected for each survey location. Housing data on units within the selected communities meeting the specifications are then collected. Mortgage interest rate and payment data are collected from lending institutions in the area, utility companies and other sources provide information about utility rates, and local governments provide information on real estate tax rates. These data are then combined to estimate dollar expenditures within each survey area for the specified shelter in the selected community.

(4) Miscellaneous expenses. Miscelleous expenses for gifts, contributions, savings and investments, retirement, and life insurance are estimated from consumer expenditure surveys and other data appropriate for Federal employees for each income level.

(c) The dollar amounts estimated for consumption,transportation, housing, and miscellaneous expenses are combined into a total amount for each of the multiple income levels and renter/owner status. The renter budgets and owner budgets for each income level are combined using weights representing the proportion of renters and owners at each income level derived from appropriate cunsumer expenditure or census data. The budgets for each location are weighted into one average amount based on the GS grade distribution for the areas. The area budget is divided by the Washington, DC, area budget to generate a comparative cost index. The allowance rate for the area is based upon the index.

(d) OPM will describe in detail the calculation of each allowance rate at the time the rate is published in the **Federal Register** for comment.

§ 591.206 Establishment of allowance rates.

(a) OPM uses the comparative cost indexes for each allowance area to determine the allowance rates for that area. The range of values within which the index value falls determines the appropriate allowance rate, expressed as a percentage of the rate of basic pay for that category of eligible employee.

(b) The following table shows the comparative index range and corresponding allowance rate to be established for an allowance category under § 591.207 of this part:

COMPARATIVE INDEX AND ALLOWANCE RATE TABLE

Index range	Allowance rate (percent)
Less than 105.0	0
105.0 to 106.2	5
106.3 to 108.7	7.5
108.8 to 111.2	10
111.3 to 113.7	12.5
113.8 to 116.2	15
116.3 to 118.7	17.5
118.8 to 121.2	20
121.3 to 123.7	22.5
123.8 and over	25

(c) Allowance area survey summaries, category indexes, and allowance rates are published as notices in the **Federal Register**.

§ 591.207 Allowance categories, eligibility, and adjustments.

(a) Section 205(b) of Executive Order 10,000, as amended, requires adjustments to allowance payments where warranted because of Federal quarters or special purchasing privileges. These adjustments occur only when the quarters or purchasing privileges are made available as a result of Federal civilian employment and result in substantially lower costs when compared to local area costs.

(1) Special purchasing privileges. Adjustments for access to commissaries and exchanges are incorporated into the comparative index calculations and the resulting allowance rates.

(2) Federal quarters. If the rent charged an employee by an agency for quarters is less than the net reasonable value rent, after appropriate adjustments, established as prescribed by the Office of Management and Budget, the difference between the rent charged and the reasonable value rent will be deducted from the allowance paid by the employing agency up to, but not exceeding, the amount of the allowance.

(b) The allowance categories that are established in each area are—

(1) "Local Retail," which applies to those Federal employees who purchase goods and services from private retail establishments.

(2) "Commissary/Exchange," which applies to those Federal employees who shop at private retail establishments, but who, as a result of their Federal civilian employment, also have unlimited access to commissary and exchange facilities. This category is established only in those allowance areas that have these facilities.

(c) Eligibility for access to commissary and exchange facilities is determined by the appropriate military department. Agencies shall obtain the information needed from employees to determine the applicable allowance category.

§ 591.208 Post differential.

(a) The post differential is based on (1) extraordinarily difficult living conditions; (2) excessive physical hardship; or (3) notably unhealthful conditions.

(b) The places at which differentials are paid are—

(1) American Samoa (including the island of Tutuila, the Manua Islands, and all other islands of the Samoa group east of longitude 171 degrees west of Greenwich, together with Swains Island).

(2) Canton and Enderbury Islands.

(3) Guam.

(4) The Commonwealth of the Northern Mariana Islands.

(5) Johnston Island and Sand Island.

(6) Midway Islands and Wake Island.

(7) Christmas Island

(c) New or revised post differential rates are published as notices in the **Federal Register**.

§ 591.209 Eligibility for a differential.

A department or agency will determine employee eligibility to receive a differential as follows:

(a) To be eligible to receive a differential (1) the employee must be a citizen or national of the United States; (2) the employee's residence in the area where the differential applies must be attributable to employment by the United States; and (3) any prior residence in the area must be because of employment by the United States or by U.S. firms, interests, or organizations.

(b) Subject to paragraph (a) of this section, the classes of persons eligible to receive differentials include, but are not limited to—

(1) Those recruited or transferred from outside the area where the differential applies.

(2) Those employed in the area where the differential applies but who—

(i) Were originally recruited from outside the area and have been in substantially continuous employment by other Federal agencies, contractors of Federal agencies, or international organizations in which the U.S. Government participates, and whose conditions of employment provide for their return transportation to places outside the differential area concerned; or

(ii) Were at the time of employment temporarily present in the differential area concerned for travel or formal study and maintained residence outside the area during that period.

(3) Those who are not normally residents of the area where the differential applies and who are discharged from the military service of the United States in the area to accept employment there with an agency of the Federal Government.

§ 591.210 Payment of allowances and differentials.

(a) Allowances and differentials under this subpart are payable to an employee whose permanent duty station is in a nonforeign area for which an allowance or differential is authorized.

(b)(1) Except as provided in paragraph (b)(2) of this section, allowances and differentials are calculated and paid as a percentage of an employee's hourly rate of basic pay for those hours for which the employee receives basic pay, including all periods of paid leave, detail, or travel status outside the area for which the allowance or differential is authorized.

(2) Payment of a differential during periods of paid leave or travel outside the area for which the differential is authorized continues for the first 42 consecutive calendar days of the absence. Payment of allowances and differentials while absent from the post continues only if the employee returns to duty status in the area, unless the agency determines that—

(i) It is in the public interest not to return the employee to the duty station; or

(ii) The employee's failure to return to the duty station was due to compelling personal reasons or to circumstances over which the employee had no control.

(c) An employee assigned to a duty station for which both an allowance and a differential are authorized under this subpart and eligible for both will receive the full amount of the allowance, plus so much of the differential as will not cause the combined total of allowance and differential to exceed 25 percent of the hourly rate of basic pay.

(d) If an employee who is receiving an allowance or differential or both under this subpart is temporarily assigned to a duty station in a foreign area and is eligible to receive a foreign post differential authorized by the Department of State under 5 U.S.C. 5925, the employee will receive the foreign area differential, plus so much of the allowance and/or differential (in that order) authorized under this subpart as will not cause the combined total to exceed 25 percent of the hourly rate of basic pay.

(e)(1) An allowance or a differential is not part of an employee's rate of basic pay for the purpose of computing entitlements to overtime pay, retirement, life insurance, or any other additional pay, allowance, or differential under title 5, United States Code.

(2) An allowance or differential is included in an employee's regular rate of pay for computing overtime pay entitlement under the Fair Labor Standards Act of 1938, as amended.

(f) Payment of an allowance or a differential is not an equivalent increase in pay within the meaning of 5 U.S.C. 5335.

(g) Payment of an allowance or differential will begin as of the date of arrival on regular assignment or transfer, or on the date of entrance on duty in the case of local recruitment. Payment of an allowance or differential will cease on separation, or as of the date of departure on transfer to a new post of regular assignment.

§ 591.211 Periodic review.

In accordance with Executive Order 10,000, OPM reviews from time to time, but at least annually, the places designated, the rates fixed, and the regulations in this subpart that are prescribed for payment of allowances and differentials. This review is to make warranted changes to ensure that payments under this subpart will continue only during the continuance of conditions justifying payment of allowances and differentials and will not in any instance exceed the amount justified. However, if program or methodology revisions would substantially reduce an established differential or allowance rate, then the rate of such additional compensation may be reduced gradually.

[FR Doc. 89-13165 Filed 6-1-89; 8:45 am]

BILLING CODE 6325-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 89-NM-77-AD]

Airworthiness Directives; Airbus Industrie Model A310 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to adopt a new airworthiness directive (AD), applicable to certain airbus Industrie Model A310 series airplanes, which would require modification of the emergency exists' opening mechanism. This proposal is prompted by reports of the accumulation of moisture in the area of the locking mechanism and subsequent ice buildup. This condition, if not corrected, could prevent the exist of passengers in an emergency situation.

DATES: Comments must be received no later than July 24, 1989.

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 89-NM-77-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Airbus Industrie, Airbus Support Division, Avenue Didier Daurat, 31700 Blagnac, France. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Greg Holt, Standardization Branch, ANM-113; telephone (206) 431-1918. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: Interested persons are invitied to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on

the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 89-NM-77-AD." The post card will be date/time stamped and returned to the commenter.

Discussion: The Direction Generale de L'Aviation Civile (DGAC), which is the airworthiness authority of France, in accordance with existing provisions of a bilateral airworthiness agreement, has notified the FAA of an unsafe condition which may exist on Airbus Industrie Model A310 series airplanes. There has been one report where the emergency exit doors could not be opened after landing, due to ice buildup on the opening mechanism. This condition, if not corrected, could prevent exit of passengers in an emergency situation.

Airbus Industrie has issued Service Bulletin A310-52-2017, Revision 2, dated December 22, 1987, applicable to Model A310 series airplanes, which describes procedures for modification of the opening mechanism on the emergency exit doors which will prevent condensation from accumulating. The DGAC has classified this service bulletin as mandatory, and has issued French Airworthiness Directive 86-28-72(B) addressing this subject.

This airplane model is manufactured in France and type certificated in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement.

Since this condition is likely to exist or develop on other airplanes of the same type design registered in the United States, an AD is proposed which would require modification of the opening mechanism on the emergency exit doors, in accordance with the service bulletin previously described.

It is estiamted that 18 airplanes of U.S. registry would be affected by this AD, that it would take approximately 47 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. The estimated cost for the modification kits is $841. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $48,978.

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Airbus Industrie: Applies to Model A310 series airplanes, as listed in Airbus Industrie Service Bulletin A310-52-2017, Revision 2, dated December 22, 1987, certificated in any category. Compliance is required as indicated, unless previously accomplished.

To prevent frozen condensation from blocking the emergency exit doors operating mechanism, accomplish the following:

A. Within 100 hours time-in-service after the effective date of this AD, modify the emergency exit doors' opening mechanism, in accordance with Airbus Industrie Service Bulletin A310-52-2017, Revision 2, December 22, 1987.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment and then send it to the Manager, Standardization Branch, ANM-113.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Airbus Industrie, Airbus Support Division, Avenue Didier Daurat, 31700 Blagnac, France. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or at the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on May 22, 1989.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-13050 Filed 6-1-89; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 89-AEA-6]

Proposed Alteration of VOR Federal Airway V-162; West Virginia

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to alter the description of Federal Airway V-162 located in the vicinity of Clarksburg, WV. This action would revoke that section of the airway between Clarksburg and the Derin, WV, intersection which has not been used by Washington Air Route Traffic Control Center (ARTCC) in over 5 years.

DATES: Comments must be received on or before July 14, 1989.

ADDRESSES: Send comments on the proposal in triplicate to: Manager, Air Traffic Division, AEA-500, Docket No. 89-AEA-6, Federal Aviation Administration, JFK International

Airport, The Fitzgerald Federal Building, Jamaica, NY 11430.

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.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

FOR FURTHER INFORMATION CONTACT: Jesse B. Bogan, Jr., 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) 267–9253.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy 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. 89–AEA–6." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing data 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 data 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.

The Proposal

The FAA is considering an amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to alter the description of VOR Federal Airway V–162 located in the vicinity of Clarksburg, WV. The section of the airway between Clarksburg and the Derin, WV, intersection has not been used in over 5 years by the Washington ARTCC. Therefore, we propose to revoke that section of V–162 between Clarksburg and the Derin intersection. Section 71.123 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6E dated January 3, 1989.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, VOR Federal airways.

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.

§ 71.123 [Amended]

2. Section 71.123 is amended as follows:

V–162 [Amended]

By removing the words "From INT Clarksburg, WV, 135° and Elkins, WV, 098° radials; Clarksburg."

Issued in Washington, DC, on May 18, 1989.

Harold W. Becker,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 89–13051 Filed 6–1–89; 8:45 am]

BILLING CODE 4910–13–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL–3597–9]

Plan for Vulcan Materials Company Geismar Chemicals Plant, Geismar, LA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed approval.

SUMMARY: EPA is proposing approval of the Vulcan Materials Company Geismar Chemicals Plant Alternative Emission Reduction Plan ("Bubble") as a revision to the Louisiana State Implementation Plan (SIP). The Bubble uses credits obtained from extra control of emissions from five volatile organic compound (VOC) storage tanks in lieu of controls on one process vent and one VOC storage tank. The emission reduction credits (ERCs) were determined to be valid consistent with the provisions for bubbles as outlined in EPA's Emissions Trading Policy Statement (ETPS) of December 4, 1986. (51 FR 43840).

DATE: Comments must be received by July 3, 1989.

ADDRESSES: Copies of the State's submittals are available for review during normal business hours at the following locations:

Air Quality Division, Louisiana Department of Environmental Quality, Land and Natural Resources Bldg., 625 N. 4th St., P.O. Box 44066, Baton Rouge, Louisiana 70804.

Environmental Protection Agency, Region 6, Air Programs Branch, 1445 Ross Avenue, Dallas, Texas 75202.

FOR FURTHER INFORMATION CONTACT: Bill Riddle, State Implementation Plan Section; Air Programs Branch; Air, Pesticides & Toxics Division; EPA

Region 6, 1445 Ross Ave., Dallas, Texas 75202, (214) 655–7214.

SUPPLEMENTARY INFORMATION: On October 31, 1983, the Governor of Louisiana submitted a request to revise the Louisiana SIP to include an Alternative Emission Reduction Plan for the Vulcan Materials Company facility located at Geismar, Ascension Parish. The submittal contained certification that adequate notice and a public hearing were provided for the proposed alternative controls. Additional information necessary for complete review of the proposal was submitted on May 4, 1984, by the Air Quality Division (AQD) of the Louisiana Department of Environmental Quality. The AQD revised the bubble in a letter of June 27, 1984, to remove several sources which by then were in compliance and no longer needed to be included in the bubble. A permit was issued by LDEQ on March 24, 1983, (# 1829T); however, a revised permit addressing improvements in enforceability of the permit was submitted to EPA on April 9, 1987. EPA is proposing to approve the revised bubble and invites comments from all interested persons. Comments received within 30 days of the publication of this notice will be considered by EPA.

Background

Vulcan Materials Company's Geismar Chemical Plant contains several chemical storage tanks regulated under Louisiana Air Quality Regulation (LAQR) 22.3 and waste gas vents under LAQR 22.8. The Company proposes to control five VOC storage tanks to a level beyond Reasonable Available Control Technology (RACT), as an alternative to placing controls on one other tank and one process vent. The storage tank remaining uncontrolled would have estimated emissions of 4.58 tons per year (TPY) of methanol. The vent remaining uncontrolled under the trade is the HC1 Emergency Scrubber Vent with emissions of 113.8 TPY of chloromethane and ethylene dichloride (EDC). The HC1 Emergency Scrubber Vent contains a waste process stream that is mainly HC1 with a small fraction of organics. The company estimates the cost of control of this vent to be prohibitive and therefore wishes to find an alternative means of compliance.

The credit the company is claiming results from the installation of a vapor recovery system on a tank farm in 1978. This control system was installed in advance of the regulation for control of storage tanks under LAQR 22.3, which was approved by EPA on February 10, 1982 (47 FR 6105). The entire trade is summarized below:

Credits from control of tanks (−163.26 TPY) + Noncompliance emissions (117.78)(1.1) = Progress toward attainment (−33.7)

[10 percent progress toward attainment]

Sources	Emissions (tons/year					
	Actual			Allowable		
	Before bubble	After bubble	Change	Before bubble	After bubble	Change
CCl_4 storage tank 4C	13.52	13.52	0	67.16	13.52	−53.64
EDC storage tank 3A	4.61	4.61	0	32.22	4.61	−27.61
EDC storage tank 3B	4.64	4.64	0	33.22	4.64	−28.58
EDC storage tank 3C	4.64	4.64	0	33.22	4.64	−28.58
EDC storage tank 3D	10.63	10.63	0	35.48	10.63	−24.85
HCL vent	113.8	113.8	0	0.0	113.8	113.8
CH_3OH storage tank—3–73	4.58	4.58	0	0.6	4.38	3.98
10 percent progress toward attainment			0			11.78
Total	156.42	156.42	0	201.9	188.9	−33.7

In regard to air quality data, no ozone monitor is currently functioning in Ascension Parish. A monitor was functioning for the years 1983 and 1984 and showed no violations.

Ascension Parish, however, is located in the metropolitan statistical area (MSA) of Baton Rouge, Louisiana. The Baton Rouge MSA continues to experience violations of the ozone standard. Based upon 1985 through 1987 data the design value for ozone (fourth highest value over a three year period) was 0.14 ppm.

In the proposed Federal Register for the ozone/carbon monoxide strategy, published November 24, 1987, the Baton Rouge MSA was identified in Appendix A of the Post–87 ozone/carbon monoxide strategy as one of the potential 1988 SIP Call areas. It was identified as exceeding the NAAQS in 1984–1986 and is expected to continue to exceed the NAAQS.

One May 26, 1988, EPA sent a letter to the Governor of Louisiana identifying areas in Louisiana that would receive a post–87 SIP call.

According to EPA's proposed post–87 policy the SIP planning area has been expanded to the entire MSA. Therefore, Ascension Parish will be included in the SIP call for Baton Rouge, Louisiana. For this special situation where an area was considered to have a demonstration of attainment when submitted as a bubble proposal but by virtue of a SIP call is now not, a special approach was developed. This approach is discussed below.

Review

The Bubble was reviewed for compliance with the requirements of section 110 of the Clean Air Act, 40 CFR Part 51, EPA's Proposed Emissions Trading Policy Statement published in the Federal Register on April 7, 1982, [47 FR 15076] and the Final ETPS. EPA has reviewed the State submittal and developed an Evaluation Report.[1] This report is available for inspection by interested parties during normal business hours at the EPA Region 6 office. Briefly, the review is summarized below.

The Final ETPS sets out current EPA policy for approving bubbles. EPA

[1] EPA Review of the Vulcan Materials Bubble October, 1988.

policy differs depending on whether the bubble is in a nonattainment area with an approved attainment demonstration ("NAWAD") or a nonattainment area lacking an approved attainment demonstration ("NALAD").

A bubble in a NAWAD is approvable if the baseline is consistent with the assumptions used in the approved SIP, and the bubble does not interfere with attainment of the ozone NAAQS. 51 FR 43838 col. 3.

A bubble in a NALAD is approvable only if it meets the following three requirements:

(i) The baseline must be calculated using the lower of actual, SIP-allowable, or RACT-allowable [1] values for each baseline factor, determined as of the date the source submitted the bubble application to the State.

(ii) The bubble must produce a reduction of at least 20% in the emissions remaining after application of the baseline specified above.

(iii) The State must provide assurances that the Proposed trade will be consistent with its efforts to attain the ambient standard. The Final ETPS sets out five representations that the State must make.

51 FR 43839–40.

EPA believes that these NALAD policy elements are necessary to ensure that the bubble will not interfere with attainment as expeditiously as practicable, as required under 42 U.S.C. 110(a)(2) and 7502.

However, the Final ETPS Relaxes these NALAD requirements for pending bubbles. A pending bubble is defined as a bubble submitted by the State to EPA before EPA published the Final ETPS. 51 FR 43840 col. 2. The rules for a pending bubble in a NALAD are as follows:

(i) The baseline must be calculated using the lower of actual, SIP-allowable, or RACT-allowable values for each baseline factor, determined as of the date the source submitted the bubble application to the State.

(ii) The bubble must produce some reduction—but need not produce a 20% reduction—in the emissions remaining after application of the baseline specified above.

State assurances are not required for a pending bubble. 51 FR 43840.

Grandfathering Principles

Because the Final ETPS is a policy statement, it does not set out requirements that apply with equal force in all circumstances. Beyond this, the actions proposed in today's notice are consistent with the principles of grandfathering that the Court of Appeals for the District of Columbia Circuit has applied when an agency changes policy requirements, but seeks to apply the former policy to certain actions pending before the agency at the time of the policy change. Under these principles, the agency may apply the former policy when: (i) The new rule represents an abrupt departure from well-established practice; (ii) affected parties have relied on the old rule; (iii) the new rule imposes a large burden on those affected; and (iv) there is no strong statutory interest in applying the new rule generally. *Sierra Club* v. *EPA*, 719 F.2d 436 (D.C. Cir. 1982), *cert. den.* 468 U.S. 1204 (1984).

Proposed Ozone Strategy and SIP Calls

By notice dated November 24, 1987, EPA published a proposed policy ("Proposed Ozone Strategy") to address the fact that many areas in the country were not expected to attain the NAAQS for ozone (and carbon monoxide) by the end of 1987, the latest date for attainment expressly identified in the Clean Air Act, 42 U.S.C. 7502. 52 FR 45044. In general, EPA stated that in the spring of 1988, it would issue SIP calls to areas where, based on recent monitoring data, EPA determined that the SIPs were substantially inadequate to attain the NAAQS. The issuance of SIP calls would trigger a new round of SIP development by the states.

EPA proposed to require that the states that receive SIP calls develop revised inventories within one year of the SIP call, and develop and submit for EPA approval new SIPs within two years of the SIP call. EPA further proposed to require that, in general, the new SIPs must persuasively demonstrate attainment of the NAAQS within five years of the SIP call (in order to avoid construction ban penalties). EPA further proposed to require that, in general, the State demonstrate that the SIP would produce expeditious progress in the interim before attainment. This reasonable rate of progress would be an average annual emissions reduction of at least three percent in the base year inventory for the area. See 52 FR 45045.

On May 26, 1988, EPA issued SIP calls with respect to many areas of the country, including the areas to which this preamble applies. The SIP calls trigger a two-step planning process that ultimately should result in the creation of SIP revisions that will produce near-term attainment of the standards.

Application To Vulcan Materials

The State submitted this bubble to EPA before EPA published the Final ETPS on December 4, 1986. Thus, EPA considers this a "pending bubble" under the Final ETPS. At the time the state submitted this bubble, the area was classified as a NAWAD for purposes of applying the Final ETPS. As noted above, under the Final ETPS, a bubble in a NAWAD is approvable if the baseline is consistent with the assumptions used in the approved SIP, and the bubble does not interfere with attainment of the ozone NAAQS. At the time the State submitted this bubble, it met these requirements.

To be valid as an ERC, the reduction must be surplus, enforceable, permanent, and quantifiable. First, the reduction is surplus because it exceeds the RACT-level reduction already required in the SIP. At minimum, only emission reductions not required by current regulations in the SIP, not already relied on for SIP planning purpose, and not used by the source to meet any other regulatory requirement can be considered surplus and substituted for required reductions as part of an emissions trade. Louisiana Air Quality Regulation 22.3.1.2 defines RACT for a storage of a VOC substance whose vapor pressure is between 1.5 and 4.0 psia as a welded tank with a floating roof and primary seal. The five storage tanks are attached to a vapor recovery system. The difference between RACT emissions and the lower current emissions qualifies as a surplus reduction. Ascension Parish is currently classified by EPA as a rural ozone nonattainment area. Under EPA policy, such areas need only impose RACT-level controls on stationary sources to satisfy a demonstration of attainment.

The emissions limits are enforceable at the State level under Administrative Permit #1829T(M–1) issued April 9, 1987, by the Louisiana Air Quality Division to Vulcan Chemicals Company.

The emission limits were originally included in permit #1829T issued March 24, 1983. In order to improve the enforceability of the permit the State reissued to Vulcan a revised permit #1829T(M–1), issued April 9, 1987. Based upon review of the reissued permit a majority of concerns of EPA on enforceability were addressed; however, several points of enforceability need to be included in an additional revised permit before EPA can finalize this action. Noted below are the issues that the State is requested to address:

1. There should be a test method to determine vapor condenser efficiency and a test method for the HCl scubber vent. These methods must be made federally enforceable before final approval.

2. A method to verify compliance with emissions from tanks must be included in the permit. The method to be used is the EPA publication AP–42, Compilation of Air Pollutant Emission Factors, 3rd edition. This is because the 3rd edition

[1] RACT refers to Reasonably Available Control Technology.

was in effect at the time of bubble submittal from the State. It is necessary that all input variables to the appropriate emission calculations be kept as records (flow rate, temperature, pressure, etc.), both fluctuating parameters and constants, so that it can be checked as to how compliance was determined.

3. The methanol tank (3–73) needs to be included in specific condition 1 for recordkeeping.

4. All attachments included with the April 9, 1987, permit (#1829T(M–1)) need to be referenced in the Specific Conditions of the permit as being enforceable components of the permit. All pages need to be numbered (n of 17).

The five storage tanks are permanently attached to the vapor recovery system. Any lesser means of control would subject Vulcan to possible enforcement action. Under conditions of Permit #1829T(M–1) the new emission limits are permanent. The state submitted detailed calculations quantifying all of the emissions involved in the trade. These calculations were verified by EPA.

The proposed bubble also meets the further criteria given in the Emissions Trading Policy Technical Issues Document published in the April 7, 1982, **Federal Register** [47 FR 15079], and meets the conditions of the final ETPS. The trade is a pound for pound trade of VOCs at the same facility, and is consistent with the RACT baseline called for by EPA policy for rural ozone nonattainment areas [44 FR 20372]. None of the pollutants involved in this trade are listed under Section 112 of the Clean Air Act (NESHAP) as a hazardous material.

However, while EPA was considering this bubble, it received additional information that the SIP for the Baton Rouge MSA does not in fact provide for attainment by the end of 1987. In the November 24, 1987, **Federal Register** notice describing EPA's proposed policy for areas that are not expected to attain by the end of 1987, EPA stated that a SIP call would likely be issued for this area. 52 Fed. Reg. 45100–03. On May 26, 1988, EPA issued the SIP call for this area.

A SIP call, as a finding by EPA under Clean Air Act § 110(a)(2)(H) that the SIP is "substantially inadequate" to achieve the NAAQS, amounts to a provisional finding that the area receiving the call is, for purposes of the general applicability of the Final ETPS, a nonattainment area lacking an approved demonstration ("NALAD").

The pending bubble requirements of the Final ETPS contemplate a bubble submitted by the State before publication of the Final ETPS, at a time when the area is a NALAD, with no EPA action on the bubble by the date of publication of the Final ETPS. These pending bubble requirements do not explicitly contemplate the circumstances here, in which the bubble was submitted by the State before publication of the Final ETPS, at a time when the area was NAWAD, but the areas subsequently received a SIP call that converted it to NALAD before EPA acted on the bubble.

EPA has determined that different policy elements should apply to this pending bubble. EPA does not believe that the bubble should be required to use a trading baseline of the lower of actual, SIP-allowable, or RACT-allowable emissions; rather, the bubble may continue to use the baseline that is consistent with the assumptions in the applicable attainment demonstration. Nor is the bubble required to show any reduction in emissions beyond the baseline.

However, EPA does believe that for these bubbles, the State should provide certain State assurances. Specifically, the State must make the following representations to EPA:

(i) The State will submit to EPA during the comment period assurances that:

—The State will submit work plans with interim milestones for submitting the revised SIP and correcting deficiencies by the time specified by EPA under the Post-87 SIP call.

—The State will submit, by the time specified by EPA, a complete plan that demonstrates attainment in accordance with the Clean Air Act and EPA policy.

—The State has dedicated appropriate resources to develop the new SIP.

(ii) If the activities committed to in the above assurances are not met, EPA may propose to revisit its approval of emissions trade determinations depending on the degree of failure to meet the commitments.

EPA believes that if the State adequately makes these representations, EPA will be able to approve this bubble on grounds that it does not interfere with attainment and maintenance of the ozone NAAQS, in accordance with Clean Air Act 110(a)(2). EPA believes that applying the policy elements described above would be consistent with the fact that the Final ETPS is a policy statement whose tests may not apply with equal force in all circumstances. Moreover, although grandfathering principles under the case law described above do not literally apply inthe case of this bubble because EPA has not issued any new rule, EPA believes that these principles provide a helpful analogy because of the changed circumstances—conversion from NAWAD to a NALAD—these areas found themselves in while EPA was considering the bubble application.

Specifically, EPA believes it appropriate to exempt this bubble from using a lower-of-actual-or-allowable baseline or providing progress beyond baseline emissions, on equitable ground: the State and the source had submitted the bubble several years ago, and had relied on the area's classification as a NAWAD in submitting the bubble. Subjecting the bubble to the stricter baseline requirements and the progress requirements would be a significant burden because the bubble would likely require significant restructuring to be approvable, which would require the State to undergo its rulemaking process again.

EPA further believes, however, that State assurances of the type described above are necessary. These assurances would protect the requirement of non-interference with attainment because the ongoing state planning process can be expected to result in a SIP that will provide for attainment.

For the reasons stated above, EPA is proposing to approve this plan. Interested persons are invited to submit comments on this proposed approval. EPA will consider all comments received within thirty days of the publication of this notice.

Pursuant to the provisions of 5 U.S.C. 605(b), I certify that the attached rule will not have a significant impact on a substantial number of small entities since it proposes no new requirements.

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 52

Air pollution control, Ozone, Sulfur oxides, Nitrogen dioxide, Lead, Particulate matter, Carbon monoxide, Hydrocarbons, Intergovernemental relations.

Authority: 42 U.S.C. 7401–7642.

Dated: May 19, 1989.

Joe D. Winkle,

Acting Deputy Regional Administrator (6D).

[FR Doc. 89–13162 Filed 6–1–89; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 89-77; DA 89-585]

Broadcast Television Service; Transfers of Control of Certain Licensed Non-Stock Entities

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: This action extends the deadline for comments in the *Notice of Inquiry* in MM Docket 89-77 concerning transfers of control of certain licensed non-stock entities (54 FR 15957, April 20, 1989) from June 1, 1989, to July 17, 1989. Also, the period for filing reply comments is extended from June 16, 1989, to July 31, 1989. This action is taken in response to a joint "Motion for Extension of Time to File Comments" filed by National Public Radio, National Federation of Community Broadcasters, National Association of Public Television Stations and the Corporation for Public Broadcasting. The extension is granted in order to allow the petitioning organizations time to survey their members and thus provide the Commission with more complete, essential data that is needed to reach a determination in this proceeding.

DATES: Comments are now due on July 17, 1989, and reply comments are due by July 31, 1989.

ADDRESS: Federal Communication Commission, Washington, DC. 20554.

FOR FURTHER INFORMATION CONTACT: David Horowitz, Mass Media Bureau, Policy and Rules Division, (202) 632-7792.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Order Granting Motion for Extension of Time to File Comments*, adopted May 24, 1989, and released May 25, 1989. The full text of this *Order* is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Services, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73.

Radio broadcasting, Television broadcasting.

Federal Communications Commission.

Roderick K. Porter,

Acting Chief, Mass Media Bureau.

[FR Doc. 89-13044 Filed 6-1-89; 8:45 am]

BILLING CODE 6712-01-M

Notices

Federal Register
Vol. 54, No. 105
Friday, June 2, 1989

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

Form Under Review by Office of Management and Budget

May 26, 1989.

The Department of Agriculture has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extensions, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) An indication of whether section 3504(h) of P.L. 96–511 applies; (9) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Officer, USDA, OIRM, Room 404–W Admin. Bldg., Washington, D.C. 20250, (202) 447–2118.

Revision

• Animal and Plant Health Inspection Service

Animal Welfare
VS 18–1, 18–1A, 18–3, 18–5, 18–6, 18–9, 18–11, 18–19, 18–20, 18–23
Recordkeeping; On Occasion; Weekly; Annually; one-time only State or local governments; Bussinesses or other for-profit; Federal agencies of employes; Non-profit institutions; Small businesses or organizations; 132,639 responses; 168,731 hours; not applicable under 3504(h)
Dr. R.L. Crawford (301) 436–7833

• Food and Nutrition Service

7 CFR Part 225—Reporting/Recordkeeping (Summer Food Service Program)
FNS 19–1, 19–2, 80, 81, 81–1, 189, and 418
Recordkeeping; Monthly
State or local governments; Small businesses or organizations; 31,160 responses; 127,818 hours; not applicable under 3504(h)
Marian Stroud (703) 756–3598

Extension

• Foreign Agriculture Service

Issuing Certificates for the Importation of Specialty Sugars
None
On occasion
Businesses or other for-profit; 50 responses; 100 hours; not applicable under 3504(h)
John L. Nuttall (202) 447–2916

• Agriculture Marketing Service

Lawn and Turf Seed Mixtures, Germination Test Dates, and Certain Labeling Requirements Under the Federal Seed Act.
None
Recordkeeping; On occasion
State or local governments; Farms; Businesses or other for-profit; Small businesses or organizations; 14,625 hours; 37,169 responses; not applicable under 3504(h)
James P. Triplitt (301) 344–4430

• Agriculture Marketing Service

Cotton Research and Promotion Act
None
Recordkeeping; Monthly; Annually
Farms; Businesses or other for-profit; 21,800 responses; 4,602 hours; not applicable under 3504(h)
Garry L. Lewicki (202) 447–2259

Reinstatement

• Farmers Home Administration

7 CFR 1944–D, Farm Labor Housing Loan and Grant Policies, Procedures, and Authorizations
None
On occasion
State or local governments; Farms; Non-profit institutions; 740 responses; 8,442 hours; not applicable under 3504(h)
Jack Holston (202) 382–9736

New Collection

• Agriculture Stabilization and Conservation Service

Rice Loan Deficiency Payment Application and Certification
CCC–700
On occasion
Farms; Small businesses or organizations; 56,000 responses; 14,000 hours; not applicable under 3504(h)
Beverly Pritts (202) 447–8374

Donald E. Hulcher,
Acting Departmental Clearance Officer.

[FR Doc. 89–13060 Filed 6–1–89; 8:45 am]
BILLING CODE 3410–01–M

Forest Service

Project for the Leola-Sullivan Timber Sale in the Colville National Forest, WA

AGENCY: Forest Service, USDA.

ACTION: Revision of a notice of intent to prepare an Environmental Impact Statement published Monday, April 10, 1989 in Volume 54, Number 67 of the Federal Register.

SUMMARY: Forest Service will prepare an environmental statement (EIS) to analyze and disclose the environmental impacts of a site specific proposal to harvest and regenerate timber, construct and reconstruct roads and habitat improvement projects for wildlife in the Leola-Sullivan Timber Sale Are on the Sullivan Lake Ranger District, Pend Oreille County, Washington. This EIS will tier to the Colville Forest Plan (December 1988) which provides the overall guidance (Goals, Objectives, Standards and Guidelines, and Management Area direction) in achieving the desired future condition for the Leola-Sullivan area. The agency invites written comment and suggestions on the management of this area and the scope of this analysis. In addition, the agency gives notice of the full environmental analysis and decision making process that will occcur on this project area so that interested and affected people are aware of how they may participate and contribute to the final decision.

Because this revision does not change the area or time of the original notice of intent, no additional formal comment period is planned prior to the release of the draft EIS and suggestions will be

accepted on the issues, alternative or impacts of alternatives from now until the end of the 45 day comment period on the draft EIS.

DATE: Comments concerning the management of this project area will be accepted until the comment period ends on the draft EIS. The draft EIS is expected to be available to the public in June, 1989.

ADDRESS: Submit written comments and suggestions concerning the management of Leola-Sullivan area to Edward L. Schultz, Forest Supervisor, 695 South Main, Colville, Washington 99114, or Andrew Mason, District Ranger, Route HC2, Metaline Falls, Washington 99153.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed project work and EIS should be directed to Albert Skoglund, Supervisory Forester, Route HC2, Metaline Falls, Washington 99153 (telephone: (509) 446–2681).

SUPPLEMENTARY INFORMATION: The Colville Forest Plan provides the overall guidance for management activities in the potentially affected Leola-Sullivan area through its Goals, Objectives, Standards and Guidelines, Management Area direction, and monitoring requirements.

The majority of the potentially affected area is in Caribou Habitat (Mgt. Area 2) with lesser amounts of area in High Use Recreation (Mgt. Area 3A) and Timber Production (Mgt. Area 7).

The decision to be made is what if any timber harvest timber harvest and other related site specific projects will be undertaken. Related projects could road construction and reconstruction, wildlife and fish habitat improvements, site preparation, tree planting, and thinning. This decision will be made from a range of alternatives presented in an EIS. A no-action alternative will be included. The selected alternative will identify the site specifie projects to be included. The period of this action will extend over a period of about 5–7 years. This proposal will follow the Management Area direction and Standards and Guidelines set forth in the Colville National Forest Land and Resource Management Plan.

Because of the controversial nature of timber harvest and road building activities in this area, other Federal, State, and local agencies, potential timber purchasers and other individuals or organizations who may be interested in or affected by the decision will be invited to participate in the scoping process. This process will include:

1. Determination of potential cooperating agencies and assignment of responsibilities.

2. Identification of the issues to be addressed.

3. Identification of issues to be analyzed in depth.

4. Elimination of insignificant issues, issues covered by previous environmental review, and issues not within the scope of this decision.

The Fish and Wildlife Service, Department of the Interior, will be invited to participate as a cooperating agency to evaluate potential impacts on threatened and endangered species habitat occurring as a result of this action.

Scoping for this project began in March 1989. Notification of scoping included public notices and individual communications. The scoping and analysis is expected to take about three months. The draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by June 1989. At that time EPA will publish a notice of availability to the draft EIS in the **Federal Register.**

The comment period on the draft EIS will be 45 days from the date the EPA's notice of availability appears in the **Federal Register.** It is very important that those interested in the management of the Leola-Sullivan area participate at that time. To be the most helpful, comments on the draft EIS should be as specific as possible and may address the adequacy of the statement or the merits of the alternatives discussed (see The Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act of 40 CFR 1503.3). In addition, Federal court decisions have established that reviewers of draft EIS must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewers' position and contentions, *Vermont Yankee Nuclear Power Corp.* v. *NRDC, 435 U.S. 519, 553 (1978),* and that environmental objections that could have been raised at the draft stage may be waived if not raised until after completion of the final EIS. *Wisconsin Heritages, Inc.* v. *Harris, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980).* The reason for this is to ensure that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final.

After the comment period ends on the draft EIS, comments will be analyzed and considered by the Forest Service in preparing the final EIs. In the final, the Forest Service is required to respond to comments received (40 CFR 1503.4). The Final EIS is scheduled to be completed by October 1989. The responsible official will consider the comments, responses, and consequences discussed in the EIS, applicable laws, regulations, and policies in making a decision regarding the management of the project area. The responsible official will document the decision and reasons for the Record of Decision. That decision will be subject to review under 36 CFR Part 217.

Edward L. Schultz,

Forest Supervisor.

Date: May 23, 1989.

[FR Doc. 89-13111 Filed 6-1-89; 8:45 am]

BILLING CODE 3410-11-M

Vegetative Management Practices for Exotic Plant Species; Flathead National Forest, Hungry Horse, MT; Intent To Prepare an Environmental Impact Statement

The Department of Agriculture, Forest Service will prepare an Environmental Impact Statement (ELS) to analyze and disclose the environmental impacts of vegetation management practices to prevent the spread of exotic plant species on the Hungry Horse, Spotted Bear, and Swan Lake Ranger Districts, Flathead National Forest, Lake, Powell, Missoula, and Flathead Counties, Montana. The area under consideration includes portions of the Great Bear and Bob Marshall Wilderness Areas and Forest Service trail head facilities that provide access to the Bob Marshall Wilderness on the Spotted Bear, Hungry Horse, and Swan Lake Ranger Districts, Flathead National Forest. Plant species under consideration include Leafy Spurge (*Euphorbia esula*), Hound's-tongue (*Cynoglossum officinale*), Butter and Eggs (*Linaria vulgaris*), Spotted Knapweed (*Centaurea maculosa*), Whitetop (*Cardaria draba*), Musk Thistle (*Carduus nutans*), Goatweed (*Hypericum perforatum*), and Canada Thistle (*Cirsium arvense*). The Forest Service proposes multi-year vegetation management practices. Alternatives will be evaluated on a site-specific, species-specific basic and will include a no action alternative. Aerial spraying of herbicides is not being considered. The EIS will tier to the Flathead Forest Plan which provides overall guidance in achieving the desired future condition for the areas under consideration.

The Forest Service is seeking information, comments, and assistance from Federal, State, and local agencies and other individuals or organizations who may be interested in or affected by the proposed action.

Comments concerning the scope of the analysis should be received by July 1,

1989 to receive timely consideration in the preparation of the draft EIS.

Submit written comments and suggestions on the potential management opportunities to Bert Stout, District Ranger, Spotted Bear District, Box 310, Hungry Horse, MT 59919.

FOR FURTHER INFORMATION CONTACT: Rich Lasko, Interdisciplinary Team Leader, Spotted Bear District Box 310, Hungry Horse, MT 59919.

SUPPLEMENTARY INFORMATION: The Bob Marshall complex contains one of the largest expanses of Congressionally designed wilderness in the lower 48 states. The Wilderness Act defines wilderness as those areas "where the earth and the community of life are untrammeled by man." Although wilderness may be popularly perceived as those areas that are "left alone", human impacts have required that the Forest Service actively comply with the Wilderness Act mandate that wilderness be "protected and managed so as to preserve its natural condition." The Flathead Forest Plan provides a similar wilderness management goal that commits the agency to "Maintain plants and animals indigenous to the area by protecting the natural dynamic equilibrium associated with natural, complete ecosystems."

Currently the invasion of exotic species into the Bob Marshall and Great Bear Wilderness threatens the "natural condition" of these areas. Exotic species currently infesting these areas range from widely established species such as Timothy grass (*Phleum* sp.) to plants classified as noxious weeds by Montana state law. Noxious weeds such as leafy spurge (*Euphorbia esula*), spotted knapweed (*Centaurea maculosa*), and Canada thistle (*Cirsium arvense*) were introduced to North America from Eurasia and in the absence of natural control agents have spread rapidly in Montana. At the present time these species infest only very small areas in the Bob Marshall and Great Bear Wilderness. However, if left uncontrolled in the wilderness, the species could spread and significantly displace vegetatation and reduce the forage available to elk, deer, and other species.

The Forest Service will consider a range of control alternatives based on the individual plant species' characteristics, the extent of infestations, the infestation site characteristics, and other factors. Alternatives will include a no action alternative as well as manual and cultural treatment methods, biological control, and herbicide use. Aerial spraying of herbicides is not being considered. Alternatives for preventing new infestations will also be investigated. Preventive techniques could include restrictions on the type of livestock feed that may be transported into these areas. Such restrictions could apply to commercial outfitters as well as members of the general public.

All control and prevention measures implemented by the Flathead National Forest will be coordinated as necessary with the Lewis and Clark, Lolo, and Helan National Forests which administer wilderness lands adjacent to the Flathead portion of the Bob Marshall and Great Bear Wilderness.

Public participation is important at several points of the analysis. Although people may visit with Forest Service officials at any time during the analysis and prior to the decision, two time periods are specifically identified for the receipt of comments on the analysis. The two public comment periods include the scoping process (now through May) and the review period for the draft EIS (September–October, 1989). The Forest Service is seeking information, comments, and assistance from Federal, State, and local agencies and other indivduals or organizations who may be interested in or affected by the proposed action. This input will be used in preparation of the Draft Environmental Impact Statement (DEIS). The scoping process includes:

1. Identifying potential issues.
2. Identifying issues to be analyzed in depth.
3. Eliminating insignificant issues or those which have been covered by relevant previous environmental analysis.
4. Identifying additional alternatives.
5. Identifying potential environmental effects of the proposed action and alternatives (i.e., direct, indirect, and cumulative effects, and connected actions).
6. Determining potential cooperating agencies and task assignments.

The Fish and Wildlife Service, Department of the Interior, will be consulted informally throughout the analysis. To meet the requirements of the Endangered Species Act, the Fish and Wildlife Service will review the EIS and biological evaluation and, if necessary, render a formal Biological Opinion of the effects on Threatened and Endangered Species.

The DEIS is expected to be filed with the Environmental Protection Agency (EPA) and available for public review in September, 1989. At that time the EPA will publish a notice of availability of the DEIS in the **Federal Register**. After a 45-day public comment period, the comments received will be analyzed and considered by the Forest Service in the Final Environmental Impact Statement (FEIS). The FEIS is scheduled to be completed by December, 1989. The Forest Service will respond in the FEIS to the amounts received on the DEIS. The Forest Supervisor who is the responsible official for this EIS will make a decision regarding this proposal considering the comments, responses, and environmental consequences discussed in the FEIS, and the applicable laws, regulations, and policies. The decision and reasons for the decision will be documented in the Record of Decision.

Date: May 2, 1989.

Mary H. Peterson,

Deputy Forest Supervisor.

[FR Doc. 89–13122 Filed 6–1–89; 8:45 am]

BILLING CODE 3410–11–M

Cuddy Mountain Roadless Area; Payette National Forest, ID

AGENCY: Forest Service, USDA.

ACTION: Revised notice of intent to prepare an environmental impact statement.

SUMMARY: On April 7, 1988, a notice of intent to prepare an environmental impact statement appeared in the **Federal Register** for proposed development in portions of the Cuddy Mountain Roadless area which is within the Weiser and Council Ranger Districts, Payette National Forest, Adams County, Idaho. It stated that development was the established direction in the preferred alternative of the Payette Forest Plan. It also stated that the period for public comment on issues and concerns would end May 1, 1988. The original Notice of Intent is revised as follows to further clarify the nature of the proposed action and its schedule.

In the Final Payette Forest Plan, approximately 20,600 acres of the 43,200 acre roadless area were included under a General Forest management prescription, making them available for development. The Forest Plan did not recommend any of the Cuddy Mountain Roadless Area for wilderness consideration. As part of the Forest Plan, a proposed and probable activities schedule was developed to estimate the effects of implementing the Forest Plan. The environmental impact statement (EIS) for Cuddy Mountain evaluates the potential site-specific impacts which would result from implementing management practices as specified in the Forest Plan.

Specifically the EIS will disclose the direct and indirect effects of the first

timber sale scheduled in the area, the Dukes/Grade Creek Timber Sale. Three other sales are scheduled for the area in the next 10–15 years.

A range of alternatives for this area will be considered. One of these will be nondevelopment of the area. Other alternatives will consider development designs for timber production, wildlife and fishery habitat activities, and recreation opportunities.

Philip Jahn, Council District Ranger, and Harold Laird, Weiser District Ranger, are the responsible officials.

The analysis was expected to take about seven months. Analysis has taken additional time and a draft environmental impact statement is now expected to be filed with the Environmental Protection Agency and to be available for public review by June, 1989. At that time EPA will publish a notice of availability of the DEIS in the **Federal Register**. The comment period on the draft environmental impact statement will be 45 days from the date the EPA notice of availability appears in the **Federal Register**. The final environmental impact statement is scheduled to be completed by November, 1989.

DATE: Written comments and suggestions concerning this revised notice of intent should be sent to Veto J. LaSalle, Forest Supervisor, Payette National Forest, P.O. Box 1026, McCall, ID, 83638.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and environmental impact statement should be directed to Phil Gilman, Branch Chief, Planning, Programming, and Information, Payette National Forest, phone 208–634–8151.

Date: May 26, 1989.

Phil Gliman,

Branch Chief, Planning, Program, and Information.

[FR Doc. 89–13108 Filed 6–1–89; 8:45 am]

BILLING CODE 3110–11–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Caribbean Fishery Management Council; Public Hearing on Shallow-Water Reef Fish Fisheries Amendment 1

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

ACTION: Notice of public hearings and request for comments.

SUMMARY: The Caribbean Fishery Management Council will hold a second round of public hearings, in the U.S. Virgin Islands, on Amendment 1 to the Shallow-Water Reef Fishery Management Plan. Amendment 1 proposes to establish (1) a total closure of the Nassau grouper fishery and (2) an area closure to protect the spawning grounds of the red hind (grouper) southeast of St. Thomas. Comments are requested from the public and oral and/or written presentations will be accepted.

DATES: Written comments will be accepted until July 26, 1989. The public hearings are scheduled as follows:

1. June 26, 1989, 7:30 p.m., St. Croix, U.S. Virgin Islands.

2. June 27, 1989, 7:30 p.m., St. Thomas, U.S. Virgin Islands.

ADDRESSES: Written comments should be sent to the Caribbean Fishery Management Council, Suite 1108, Banco de Ponce Building, Hato Rey, Puerto Rico 00918–2577. The hearings will be held at the following locations:

1. St. Croix—Legislature Building, St. Croix, U.S. Virgin Islands.

2. St. Thomas—Blue Room, Virgin Isle Hotel, St. Thomas, U.S. Virgin Islands.

FOR FURTHER INFORMATION CONTACT: Miguel A. Rolon, Executive Director, Caribbean Fishery Management Council, 809–766–5926.

Dated: May 26, 1989.

Richard H. Schaefer,

Director of Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89–13066 Filed 6–1–89; 8:45 am]

BILLING CODE 3510–22–M

North Pacific Fishery Management Council; Public Meetings

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The North Pacific Fishery Management Council, the Council's Scientific and Statistical Committee (SSC), its Advisory Panel, and other Council Committees will meet on June 19–23, 1989, at the Sheraton Hotel in Anchorage, AK. Except as noted below, the meetings are open to the public.

The Council will meet on June 20 at 9 a.m., in the Kuskokwim Room at the Sheraton. The Council is scheduled to approve its revised Statement of Organization, Practices and Procedures, review public proposals for inshore-offshore preference and consider further action, as well as review opinions for addressing full utilization of groundfish and associated waste issues. The Council will also receive recommendations from its Fishery Planning Committee on future management alternatives, and approve them for further analysis. A discussion paper on future problems and solutions for fisheries in the Gulf of Alaska and Bering Sea/Aleutian Islands will be presented, and the Council will identify specific management measures for further analysis. The Council will refine system alternatives for licenses and individual fishing quotas for sablefish and halibut, in anticipation of final analysis over the summer. The Council may also revise its schedule for considering fishery management alternatives to allow for review and alteration of the schedule at predetermined dates. Final approval of Amendment #13 to the Bering Sea/Aleutian Islands Groundfish Fishery Management Plan (FMP), and Amendment #18 to the Gulf of Alaska FMP is on the agenda, as well as review and approval of a pollock roe stripping amendment for public review. The Council will receive results from the Shelikof Strait pollock survey and will consider adjusting the pollock total allowable catch for the remainder of 1989. The Council will receive reports on current legislation, the Exxon oil spill, Habitat Committee recommendations, international fisheries, the North Pacific Council's Domestic Observer Program, the status of 1989–1990 bycatch management in the Bering Sea, and industry efforts to minimize herring bycatch. A domestic fisheries report from the Alaska Department of Fish and Game, a National Oceanic and Atmospheric Administration (NOAA) Fisheries Management Report, and a report on enforcement and surveillance by the U.S. Coast Guard will also be presented. The Council will meet in executive session (not open to the public) at least once during the week to receive updates on litigation and foreign affairs.

The Council's SSC and P are scheduled to meet in the Sheraton also during the week. Both meetings are scheduled to begin at 10 a.m., on June 19 at the hotel. The Fisheries Planning Committee is tentatively scheduled to meet on June 19 at 1:30 p.m., and the Habitat Committee is tentatively scheduled to meet at 7 p.m., on June 19. Other workgroup and committee meetings may be announced on short notice during the week.

For more information contact Steve Davis, Deputy Director, North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510; telephone: (907) 271–2809.

Date: May 26, 1989.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-13068 Filed 6-1-89; 8:45 am]

BILLING CODE 3510-22-M

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Pacific Fishery Management Council's Groundfish Select Group (GSG) will meet on June 13-14, 1989. The meeting will begin at 1 p.m., on June 13 at the Red Lion Inn-Portland Center, Coos Bay Room, 310 S.W. Lincoln, Portland, OR. The GSG will discuss mangement of the Pacific whiting joint venture fishery to extend the season and to reduce the bycatch of yellowtail rockfish. It will develop management options for the Pacific Council to consider at its July 12-13, 1989, meeting in San Diego, CA, and will continue deliberating long-term management options for the sablefish fisheries.

For more information contact Lawrence D. Six, Executive Director, Pacific Fishery Management Council, 2000 SW. First Avenue, Portland, OR 97201; telephone: (503) 326-6352.

Date: May 26, 1989.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-13069 Filed 6-1-89; 8:45 am]

BILLING CODE 3510-22-M

Pacific Fishery Management Council; Public Meetings

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Pacific Fishery Management Council's Anchovy Advisory Subpanel, Anchovy Plan Development Team, and Scientific and Statistical Committee's (SSC) Anchovy Subcommittee will convene public meetings.

The Anchovy Subcommittee of the SSC will meet on June 23, 1989, at 1 p.m., at the National Marine Fisheries Service (NMFS), Southwest Fisheries Center, 8604 La Jolla Shores Drive, La Jolla, CA, to review the NMFS estimate of anchovy spawning biomass for 1989.

The Anchovy Advisory Subpanel and the Anchovy Plan Development Team will meet on June 27 at 10:30 a.m., at the NMFS, Southwest Regional Office, 300 South Ferry Street, Terminal Island, CA, to discuss performance of the 1988-89 anchovy fishery, preliminary 1989 spawning biomass assessment, and preliminary 1989-90 quotas. Recommendations from this meeting will be presented to the Pacific Council at its July 12-13, 1989, meeting in San Diego, CA. For more information contact Lawrence D. Six, Exeuctive Director, Pacific Fishery Management Council, 2000 SW. First Avenue, Portland, OR 97201; telephone: (503) 326-6352.

Date: May 26, 1989.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-13070 Filed 6-1-89; 8:45 am]

BILLING CODE 3510-22-M

South Atlantic Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The South Atlantic Fishery Management Council and its Committees will hold public meetings on June 19-23, 1989, at the Sheraton New Bern Hotel, One BiCentennial Parkway, New Bern, NC. Discussions will include large pelagics, king and Spanish mackerel, red drum, spiny lobster, habitat, and other fishery management business. The Council's Finance, Personnel, Advisory Panel Selection, and Executive Committees also will meet. The Executive Committee may hold a closed session (not open to the public). A detailed agenda will be available to the public on or about June 2, 1989.

For more information contact Carrie R.F. Knight, Public Information Specialist, South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407, telephone: (803) 571-4366.

Date: May 26, 1989.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-13071 Filed 6-1-89; 8:45 am]

BILLING CODE 3510-22-M

COMMISSION OF FINE ARTS

Meeting

The Commission of Fine Arts' next scheduled meeting is Thursday, 22 June 1989 at 10:00 a.m. at the Commission's offices at 708 Jackson Place, NW., Washington, DC 20006 to discuss various projects affecting the appearance of Washington, DC, including buildings, memorials, parks, etc.; also matters of design referred by other agencies of the government. Handicapped persons should call the offices (566-1066) for details concerning access to meetings.

Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Mr. Charles H. Atherton, Secretary, Commission of Fine Arts, at the above address or call the above number.

Dated in Washington, DC 26 May 1989.

Charles H. Atherton,

Secretary.

[FR Doc. 89-13092 Filed 6-1-89; 8:45 am]

BILLING CODE 6330-01-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Amendment of Import Limits for Certain Wool and Man-Made Fiber Textile Products Produced or Manufactured in the People's Republic of China

May 26, 1989.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs amending limits.

EFFECTIVE DATE: June 5, 1989.

FOR FURTHER INFORMATION CONTACT: Jerome Turtola, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, refer to the quota Status Reports posted on the bulletin boards of each Customs port or call (202) 566-6828. For information on embargoes and quota re-openings, call (202) 377-3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The Governments of the United States and the People's Republic of China have agreed to amend the current limits for Categories 447, 448, 647 and 648. These amendments reflect reclassification of trade as a result of implementation of the Harmonized Commodity Code.

A copy of the current bilateral textile agreement is available from the Textiles Division, Bureau of Economic and Business Affairs, U.S. Department of State, (202) 647-1998.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 53 FR 44937, published on November 7, 1988). Also see 53 FR 50276, published on December 14, 1988.

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

May 26, 1989.

Commissioner of Customs,
Department of the Treasury,
Washington, D.C. 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive issued to you on December 6, 1988, as amended, concerning imports into the United States of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in the People's Republic of China and exported during the twelve-month period which began on January 1, 1989 and extends through December 31, 1989.

Effective on June 5, 1989, the directive of December 6, 1988 is amended further to include amended limits for the following categories:

Category	Amended 12 month limit [1]
447	73,544 dozen.
448	20,673 dozen.
647	1,264,919 dozen.
648	921,367 dozen.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1988.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 89-13121 Filed 6-1-89; 8:45 am]

BILLING CODE 3510-DR-M

Announcement of Import Restraint Limits for Certain Wool and Man-Made Fiber Textile Products Produced or Manufactured in the Czechoslovak Socialist Republic

May 26, 1989.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits for the new agreement year.

EFFECTIVE DATE: June 1, 1989.

FOR FURTHER INFORMATION CONTACT: Jerome Turtola, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port. For information on embargoes and quota re-openings, call (202) 377-3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

During negotiations held May 19-21, 1989, the Governments of the United States and the Czechoslovak Socialist Republic agreed to extend the bilateral textile agreement through May 31, 1992. The two governments also agreed to add Categories 410/624, 433 and 434 to the agreement. A formal exchange of diplomatic notes will follow.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 53 FR 44937, published on November 7, 1988).

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the Memorandum of Understanding dated May 21, 1989, but are designed to assist only in the implementation of certain of its provisions.

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

May 26, 1989.

Commissioner of Customs,
Department of the Treasury,
Washington, DC 20229.

Dear Mr. Commissioner: Under the terms of Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as further extended on July 31, 1986; pursuant to the Memorandum of Understanding dated May 21, 1989 between the Governments of the United States and the Czechoslovak Socialist Republic; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on June 1, 1989, entry into the United States for consumption and withdrawal from warehouse for consumption of wool and man-made fiber textile products in the following categories, produced or manufactured in Czechoslovakia and exported during the twelve-month period beginning on June 1, 1989 and extending through May 31, 1990, in excess of the following levels of restraint:

Category	12-month restraint limit
410/624	950,000 square meters.
433	8,000 dozen.
434	11,800 dozen.
435	7,300 dozen.
443	77,860 numbers.

Imports charged to these category limits, except Categories 410/624, 433 and 434, for the period June 1, 1988 through May 31, 1989 shall be charged against those levels of restraint to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by the previous entries, such goods shll be subject to the levels set forth in this directive.

The limits set forth above are subject to adjustment in the future pursuant to the provisions of the current bilateral agreement and the Memorandum of Understanding dated May 21, 1989 between the Governments of the United States and the Czechoslovak Socialist Republic.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 89-13122 Filed 6-1-89; 8:45 am]

BILLING CODE 3510-DR-M

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Indonesia

May 30, 1989.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: June 6, 1989.

FOR FURTHER INFORMATION CONTACT: Jennifer Tallarico, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 535-9480. For information on embargoes and quota re-openings, call (202) 377-3715.

SUPPLEMENTARY INFORMATION:

Authority. Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limits for certain categories are being adjusted, variously, for swing, carryforward and carryover.

A description of the textile and apparel categories in terms of HTS numbers is available in the Correlation: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 53 FR 44937, published on November 7, 1988). Also see 53 FR 24476, published on June 29, 1988.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

May 30, 1989.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive of June 24, 1988, as amended, issued to you by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in Indonesia and exported during the period which began on July 1, 1988 and extends through June 30, 1989.

Effective on June 6, 1989, you are directed to adjust the limits for cotton and man-made fiber textile products in the following categories, as provided under the terms of the current bilateral textile agreement between the Governments of the United States and Indonesia:

Category	Adjusted 12-month limit [1]
Sublevels in group I:	
314	36,443,526 square meters.
336	95,222 dozen.
336/339	726,758 dozen.
351	140,628 dozen.
640	514,356 dozen.
647	597,533 dozen.
648	1,483,571 dozen.
Sublevels in group II:	
342/642	212,137 dozen.
369-D [2]	489,525 kilograms.
636	278,428 dozen.

[1] The limits have not been adjusted to account for any imports exported after June 30, 1988.

[2] In Category 366-D, only HTS numbers 6302.60.0010 and 6302.91.0020.

The Committee for the implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 89-13166 Filed 6-1-89; 8:45 am]

BILLING CODE 3510-DR-M

Denial of Entry of Certain Shipments of Textiles and Textile Products From Romania

May 30, 1989.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs amending an export visa arrangement.

EFFECTIVE DATE: June 6, 1989.

FOR FURTHER INFORMATION CONTACT: Diana Solkoff, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212.

SUPPLEMENTARY INFORMATION:

Authority. Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854)

The Governments of the United States and the Socialist Republic of Romania agreed to amend further their current export visa arrangement to require that visas issued by the Government of Romania be stamped only in blue ink.

Shipments of textiles and textile products, produced or manufactured in Romania and exported from Romania on and after June 6, 1989 which are accompanied by visas stamped in black ink will be denied entry.

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

May 30, 1989.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive issued to you on December 29, 1983, as amended, by the Chairman, Committee for the Implementation of Textile Agreements, which established export visa requirements for certain cotton, wool and man-made fiber textile products, produced or manufactured in Romania.

Effective on June 6, 1989, you are directed to prohibit entry of textiles and textile products, produced or manufactured in Romania and exported from Romania on and after June 6, 1989 which are visaed in black ink. Merchandise shall be visaed by the placing of an original circular stamped marking (the visa) in blue ink on the front of the commercial invoice. If the visa is not acceptable, a new visa or visa waiver must be obtained.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 89-13167 Filed 6-1-89; 8:45 am]

BILLING CODE 3510-DR-M

COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

Procurement List 1989; Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Additions to procurement list.

SUMMARY: This action adds to Procurement List 1989 a commodity to be produced and a service to be provided by workshops for the blind or other severely handicapped.

EFFECTIVE DATE: July 3, 1989.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 557-1145.

SUPPLEMENTARY INFORMATION: On March 24, and April 17, 1989, the Committee for Purchase from the Blind and Other Severely Handicapped published notices (54 FR 12262 and 15245) of proposed additions to Procurement List 1989, which was published on November 15, 1988 (53 FR 46018).

No comments were received concerning the proposed additions to the Procurement List. After consideration of the material presented to it concerning capability of qualified workships to produce the commodity and service at fair market prices and impact of the additions on the current or most recent contractors, the Committee has determined that the commodity and service listed below are suitable for procurement by the Federal Government

under 41 U.S.C. 46–48c and 41 CFR 51–2.6.

I certify that the following actions will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

a. The actions will not result in any additional reporting, recordkeeping or other compliance requirements.

b. The actions will not have a serious economic impact on any contractors for the commodity and service listed.

c. The actions will result in authorizing small entities to produce the commodity and service procured by the Government.

Accordingly, the following commodity and service are hereby added to Procurement List 1989:

Enclosure, Ballistic Protective, 6920–01–089–4401. (Requirements of U.S. Army Missile Command, Redstone Arsenal, Alabama only).

Janitorial/Custodial—Federal Building Complex in the following Oklahoma City, Oklahoma locations:

U.S. Port Office/U.S. Courthouse, 215 Dean A. McGee Avenue
Federal Building/U.S. Courthouse, 200 North West Fourth Street
Alfred P. Murrah Federal Building, 200 North West Fifth Street
Federal Parking Facility, 200 North West Fifth Street

Beverly L. Milkman,

Executive Director.

[FR Doc. 89–13171 Filed 6–1–89; 8:45 am]

BILLING CODE 6820–33–M

Procurement List 1989; Proposed Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee has received proposals to add to Procurement List 1989 commodities to be produced by workshops for the blind or other severely handicapped.

DATE: Comments must be received on or before July 3, 1989.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 557–1145.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.6. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government will be required to procure the commodities listed below from workshops for the blind or other severely handicapped.

It is proposed to add the following commodities to Procurement List 1989, which was published on November 15, 1988 (53 FR 46018):

Pole, Folding Cot, Insect Bar 7210–00–267–5641.

Pad, Writing Paper (Repositionable)
7530–01–116–7865
7530–01–116–7866
7530–01–116–7867

Beverly L. Milkman,

Executive Director.

[FR Doc. 89–13172 Filed 6–1–89; 8:45 am]

BILLING CODE 6820–33–M

DELAWARE RIVER BASIN COMMISSION

Special Commission Meeting

Notice is hereby given that the Delaware River Basin Commission will hold a special meeting on Thursday, June 8, 1989 beginning at 10:00 a.m. in the Goddard Conference Room of its offices at 25 State Police Drive, West Trenton, New Jersey.

As part of its May 24, 1989 regular business meeting, the Commission conducted a hearing on a proposed amendment to its Comprehensive Plan to authorize future diversions of Delaware Basin water from the proposed modified Francis E. Walter Reservoir project. Based upon written comments and testimony provided in response to the Commission's May 9 hearing notice, the Commission has extended the comment period for submission of written statements on the proposal. Statements received by the close of business on June 5, 1989 will be included in the hearing record.

The subject of the June 8, 1989 special Commission meeting will be to consider the hearing record and action on the proposed reservation of a portion of Francis E. Walter Reservoir water supply storage for use in northeast Pennsylvania.

Susan M. Weisman,

Secretary.

May 25, 1989.

[FR Doc. 89–13094 Filed 6–1–89; 8:45 am]

BILLING CODE 6360–01–M

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collections Under Review by the Office of Management and Budget

AGENCY: Energy Information Administration.

ACTION: Notice of requests submitted for review by the Office of Management and Budget.

SUMMARY: The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act (Pub. L. 96–511, 44 U.S.C. 3501 et seq).

The listing does not include information collection requirements contained in new or revised regulations which are to be submitted under section 3504(h) of the Paperwork Reduction Act, or management and procurement assistance requirements collected by the Department of Energy (DOE).

Each entry contains the following information: (1) The sponsor of the collection (the DOE component or Federal Energy Regulatory Commission (FERC)); Collection number(s); (3) Current OMB docket number (if applicable); (4) Collection title; (5) Type of request, e.g., new, revision, or extension; (6) Frequency of collection; (7) Response obligation, i.e., mandatory, voluntary, or required to obtain or retain benefit; (8) Affected public; (9) An estimate of the number of respondents per report period; (10) An estimate of the number of responses annually; (11) An estimate of the average hours per response; (12) The estimated total annual respondent burden, and (13) A brief abstract describing the proposed collection and the respondents.

DATES: Comments must be filed within 30 days of publication of this notice.

ADDRESS: Address comments to the Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503. (Comments should also be addressed to the Office of Statistical Standards, at the address below.)

FOR FURTHER INFORMATION AND COPIES OF RELEVANT MATERIALS CONTACT: Jay Casselberry, Office of Statistical Standards (EI–73), Energy Information Administration, M.S. 1H–023, Forrestal Building, 1000 Indepen dence Avenue,

SW., Washington, DC 20585, (202) 586–2171.

SUPPLEMENTARY INFORMATION: If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the OMB DOE Desk Officer of your intention to do so as soon as possible. The Desk Officer may be telephoned at (202) 395–3084. (Also, please notify the DOE contact listed above.)

The energy information collection submitted to OMB for review was:

1. Federal Energy Regulatory Commission
2. FERC 521
3. 1902–0087
4. Headwater Benefits
5. Extension
6. On occasion
7. Mandatory
8. Businesses or other for profit, State or local governments; Federal agencies or employees
9. 14 respondents
10. 14 responses
11. 33.60 hours per response
12. 470 hours (total)
13. To carry out the legislative requirements of Section 10(f) of the FPA, which directs the Commission to determine the benefits that have been received by downstream parties from the operation of a storage reservoir or other headwater improvements, and to assess the downstream beneficiaries for a part of the annual charges for interest, maintenance and depreciation of the headwater project.

Statutory Authority:

Sec. 5(a), 5(b), 13(b), and 52, Pub. L. 93–275, Federal Energy Administration Act of 1974, 15 U.S.C. 764(a), 764(b), 772(b), and 790a.

Yvonne M. Bishop,

Director, Statistical Standards Energy Information Administration.

[FR Doc. 89–13170 Filed 6–1–89; 8:45 am]

BILLING CODE 6450–01–M

Financial Assistance Award Intent To Renew Grant With Florida Solar Energy Center

AGENCY: U.S. Department of Energy.

ACTION: Notice of non-competitive assistance award.

SUMMARY: The Department of Energy (DOE) announces that pursuant to 10 CFR 600.7(b)(2)(i)(A), it is restricting eligibility for a renewal award under Grant Number DE–FG01–84CE22122 to Florida Solar Energy Center (FSEC) under DOE's Building and Community System's Windows and Daylighting Program for daylight availability research.

Scope: The objectives of this work are to advance the state-of-the-art of daylighting and fenestration design and performance evaluation in the following areas:

(1) Contribute to the development of an international standard practice for daylight availability measurements and planning for the International Commission on Illumination (CIE) International Daylight Measurement Year (IDMY).

(2) Continue Analysis of availability data collected at FSEC and use this to verify and extend existing theoretical models of daylight availability.

(3) Continue to perform analyses, write papers, and develop improved design tools based upon the data collected at FSEC and elsewhere.

(4) Continue supporting Lawrence Berkeley Laboratory (LBL) work in design tool development and evaluation.

(5) Evaluate the relative merits of daylighting and energy efficient electric lighting in now-residential applications, for the benefit of the U.S. population and electric utility operations.

Eligibility: Eligibility for this renewal award is being limited to FSEC an institute of higher education because of their high qualifications in the fields of optical physics and fenestration system design and evaluation.

2. The FSEC has experience in the design, development, testing, and use of an integrating sphere spectrophotometer for the measurement of the solar optical properties of various materials. The Center, also, has experience in developing and using a solar calorimeter for fenestration solar radiant heat gain measurements and a specialized fast-response, multi-channel photometer for performing a variety of illumination measurements. This experience will be valuable in Task 1 and 4, assiting LBL in analyzing fenestration photometry data, and in improving the method of performing these measurements.

The FSEC has an optical laboratory designed for both indoor and outdoor tests of the solar radiant heat gain and light transmittance and distribution of various fenestration materials and components. This laboratory will be valuable for the performance of tests required to accomplish Task 1, 3, and 4.

The term of this renewal shall be from January 1, 1989 through December 31, 1989.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Energy, Office of Procurement Operations, Attn: Rosemarie H. Marshall, MA–453.2, 1000 Independence Avenue, SW., Washington, DC 20585.

Thomas S. Keefe,

Director Contract Operations Division "B" Office of Procurement Operations.

[FR Doc. 89–13169 Filed 6–1–89; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket No. CI89–421–000]

Enron Oil & Gas Co.; Petition for Declaratory Order

May 26, 1989.

Take notice that on May 19, 1989, Enron Oil and Gas Company (Enron) filed a petition requesting the Commission to issue a declaratory order stating that it has no jurisdiction over certain natural gas facilities which petitioner intends to construct and operate in federal waters offshore Texas on the Outer Continental Shelf. Petitioner contends that the facilities are gathering and production facilities under section 1(b) of the Natural Gas Act (NGA) and are, therefore, exempt from jurisdiction and the certificate requirements of the NGA.

Enron states that it proposes to construct and operate approximately 6.5 miles of 16-inch diameter pipeline with a maximum operating pressure of 1350 psig from Platform B in the northwest corner of Matagorda Island (MAT) Block 638 to a subsea connection with the existing 24-inch diameter pipeline of Northern Natural Gas Company (Northern) in MAT Block 622, which is adjacent to Amoco Production Company's (Amoco) C Platform. Enron states that other gathering lines have been constructed in this area which attach natural gas reserves to Northern's line at or near Amoco's platform in MAT 622. Enron also plans to construct a 12-inch diameter pipeline of approximately 2.2 miles from a proposed A Platform in the center of MAT Block 620 to a subsea tap on the aforesaid 16-inch diameter line approximately 500 feet downstream of the MAT Block 638 Platform B. Enron also comtemplates constructing a 10-inch pipeline, 1.9 miles in length connecting its Platform A in MAT Block 620 to a MAT Block 620 B Platform.

Enron states that no compression facilities on the proposed 16-inch line or on the MAT Block 638 and 620 platforms would be installed initially. Enron states that approximately 75,000 MMBtu of natural gas per day is expected to flow from MAT Blocks 638 and 620 initially.

increasing to 200,000 MMBtu per day. Enron also states that if additional reserves are developed in MAT Block's 637, 651 and 652, such reserves could be attached to the proposed 16-inch pipeline.

Petitioner contends that under the primary function test set forth in *Farmland Industries, Inc.*, 23 FERC ¶ 61,063 (1983), the proposed facilities perform a gathering function which qualify the facilities for an exemption under section 1(b) of the NGA.

Any person desiring to be heard or to protest this petition should file a motion to intervene or protest in accordance with Rules 214 or 211 of the Commission's rules of practice and procedure. All motions to intervene or protest should be submitted to the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, within 15 days after publication of this notice in the **Federal Register**. All protests will be considered be the Commission, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene in accordance with Rule 214. Copies of this petition are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-13126 Filed 6-1-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-49-000]

National Fuel Gas Supply Corp.; Informal Settlement Conference

Take notice that on June 27, 1989 at 10:00 a.m., an informal settlement conference will be convened for the purpose of exploring a possible settlement in the above proceeding.

The conference will be held at the offices of the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426.

Participants are defined by 18 CFR § 385.102(b), are invited to attend. For further information, contact Russell Mamone, (202) 357-5744.

Lois D. Cashell,

Secretary.

[FR Doc. 89-13134 Filed 6-1-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP89-1422-000, et al.]

Stingray Pipeline Co. et al.; Natural Gas Certificate Filings

May 26, 1989.

Take notice that the following filings have been made with the Commission:

1. Stingray Pipeline Company

[Docket No. CP89-1422-000]

Take Notice that on May 17, 1989, Stingray Pipeline Company (Stingray), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-1422-000, a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for Midcon Marketing Corporation (Midcon), a marketer of natural gas, under the blanket certificate issued by the Commission's Order No. 509, pursuant to section 7 of the Natural Gas Act, corresponding to the rates, terms and conditions filed in Docket No. RP89-70-000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Stingray states that pursuant to a transportation agreement dated March 23, 1989, under its Rate Schedule ITS, it proposes to transport up to 250,000 dekatherms (dt) per day equivalent of natural gas for Midcon. Stingray states that it would transport the natural gas from various receipt points on its system as shown in Exhibit "A" of the transportation agreement and would deliver the natural gas, less fuel and unaccounted-for line loss, to Holy Beach and OXY-NGL plant, both located in Cameron Parish, Louisiana, and Stingray-HIOS Exchange (EHI-A330) located offshore Texas, Stingray indicates that it would transport 250,000 dt on an average dy and 91,250,000 dt annually.

Stingray advises that service under § 284.223(a) of the Commission's Regulations (18 CFR 284.223(a) commenced on April 1, 1989, as reported in Docket No. ST89-3326.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

2. Panhandle Eastern Pipe Line Company

[Docket No. CP89-1444-000]

Take notice that on May 19, 1989 Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas, 77251-1642, filed in Docket No. CP89-1444-000 a request pursuant to §§157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas for Panhandle Trading Company (PTC), a shipper and marketer of natural gas, pursuant to Panhandle's blanket certificate issued in Docket No. CP86-585-000 and section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open for public inspection.

Specifically, Panhandle requests authority to transport up to 300,000 Dt. per day on an interruptible basis on behalf of PTC pursuant to a Transportation Agreement dated March 28, 1989 between Panhandle and PTC (Transportation Agreement). The Transportation Agreement provides for Panhandle to receive gas from various existing points of receipt on its system. Panhandle will then transport and redeliver subject gas, less fuel used and unaccounted for line loss, to Haven Pool in Reno County, Kansas.

The Shipper states that the estimated daily and estimated annual quantities would be 275,000 Dt. and 100,375,000 Dt., respectively. Service under § 284.223(a) commenced on April 1, 1989, as reported in Docket No. ST89-3178-000.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

3. Colorado Interstate Gas

[Docket No. CP89-1453-000]

Take notice that on May 19, 1989, Colorado Interstate Gas Company (CIG), Post Office Box 1087, Colorado Springs, Colorado 80944, filed in Docket No. CP89-1453-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 284.223) for authorization to transport natural gas for Questar Energy Company (Questar), a marketer, under CIG's blanket certificate issued in Docket No. CP86-589-000, *et al.*, pursuant to Section 7(c) of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

CIG proposes to transport up to 15,000 Mcf of natural gas per day, on an interruptible basis, for Questar pursuant to a transportation service agreement dated December 1, 1988. It is stated that CIG would receive gas from various existing points of receipt on its system in Kansas, Wyoming, and Colorado, and redeliver the subject gas, less fuel gas and lost and unaccounted-for gas, for the account of Questar in Kearny County, Kansas. CIG further states that the estimated average daily and annual quantities would be 13,500 Mcf and 4.9

Bcf, respectively. CIG states that service commenced on April 6, 1989, under the 120-day automatic provisions of § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-3140-000.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

4. Northern Natural Gas Company, Division of Enron Corp.

[Docket No. CP89-1434-000]

Take notice that on May 18, 1989, Northern Natural Gas Company, Division of Enron Corporation (Northern) 1400 Smith Street, P.O. Box 1188, Houston, Texas 77251-1188, filed in Docket No. CP89-1434-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) and the Natural Gas Policy Act (18 CFR 284.223) for authorization to transport gas on behalf of Mesa Operating Limited Partnership (Mesa) a marketer of natural gas, under Northern's blanket certificate issued in Docket No. CP86-435-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Northern proposes to transport on an interruptible basis up to 110,000 MMBtu of natural gas equivalent per day on behalf of Mesa pursuant to a transportation agreement dated April 15, 1989, between Northern and Mesa. Northern would receive the gas at existing delivery points in Oklahoma, Kansas, Texas and New Mexico and redeliver equivalent volumes, less fuel used, at existing delivery points in Kansas, Texas, Oklahoma, Iowa, Illinois, Nebraska, Minnesota, Wisconsin and Mississippi.

Northern further states that the estimated average daily and annual quantities would be 82,500 MMBtu and 40,150,000 MMBtu, respectively. Service under § 284.223(a) commenced on April 15, 1989, as reported in Docket No. ST89-34000-000, it is stated.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

5. Stingray Pipeline Company

[Docket No. CP89-1471-000]

Take notice that on May 22, 1989, Stingray Pipeline Company (Stingray), Post Office Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-1471-000, a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas for Sun Operating Limited Partnership (Sun), a shipper and marketer of natural gas, pursuant to Stingray's blanket certificate issued by the Commission's Order No. 509 and section 7 of the Natural Gas Act, corresponding to the rates, terms and conditions filed in Docket No. RP89-70-000, all as more fully set forth in the request which is on file with the Commission and open for public inspection.

Specifically, Stingray Requests authority to transport up to 38,000 Dt. per day on an interruptible basis on behalf of Sun pursuant to a Transportation Agreement dated March 27, 1989 between Stingray and Sun (Transportation Agreement). The Transportation Agreement provides for Stingray to receive gas from various existing points of receipt on its system. Stingray will then transport and redelivery subject gas, less fuel used and unaccounted for line loss, to Holy Beach and OXY-NGL Plant located in Cameron, Parish, Louisiana and Stingray-HIOS Exchange (EHI-A330) located offshore Texas.

The Shipper states that the estimated daily and estimated annual quantities would be 27,100 Dt. and 9,891,500 Dt., respectively. Service under Section 284.223(a) commenced on April 1, 1989, as reported in Docket No. ST89-3154.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

6. United Gas Pipe Line Company

[Docket No. CP89-1455-000]

Take notice that on May 19, 1989, United Gas Pipe Line Company (United) P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP89-1455-000 a request pursuant to §§ 157.205 and 284.223 (18 CFR 157.205 and 284.223) of the Commission's Regulations under the Natural Gas Act for authority to provide interruptible transportation service for Phoenix Gas Pipeline Company (Phoenix), an intrastate pipeline company, under United's blanket transportation certificate which was issued by Commission order on January 15, 1988, in Docket No. CP88-6-000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

United indicates that it will receive the gas from Phoenix at various existing interconnections in the states of Texas, Louisiana, and Mississippi and deliver the gas for the account of Phoenix at various interconnections in the states of Louisiana, Mississippi, Alabama and Florida. United will transport the gas pursuant to its Rate Schedule ITS.

United proposes to transport up to 103,000 MMBtu of gas per peak and average day and approximately 37,595,000 MMBtu of gas annually. United indicates that the transportation service commenced under the 120-day automatic authorization of § 284.223(a) of the Commission's Regulations on April 19, 1989, pursuant to a transportation agreement dated December 6, 1988, as amended April 10, 1989. United notified the Commission of the commencement of the transportation service in Docket No. ST89-3457-000 on May 10, 1989.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

7. Panhandle Eastern Pipe Line Company

[Docket No. CP89-1468-000]

Take notice that on May 22, 1989, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-1468-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas for PSI, Inc. (PSI), a shipper and marketer of natural gas, under its blanket certificate issued in Docket No. CP86-585-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the requet on file with the Commission and open to public inspection.

Panhandle proposes to transport for PSI on an interruptible basis up to 250,000 dt equivalent of natural gas on a peak day, 125,000 dt equivalent on an average day, and 45,625,000 dt equivalent on an annual basis. It is stated that service under § 284.223(a) commenced April 1, 1989, as reported in Docket No. ST89-3174. Panhandle indicates that the service would be provided pursuant to Panhandle's Rate Schedule PT. It is stated that the service would have a primary term of one month from the initial date of service and would continue on a monthly basis thereafter. No new facilities are proposed herein.

Comment date: July 10, 1989 in accordance with Standard Paragraph G at the end of the notice.

8. ANR Pipeline Company

[Docket No. CP89-1442-000]

Take notice that on May 18, 1989, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48243, filed in Docket No. CP89-1442-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to provide transportation

service on behalf of Odeco Oil & Gas Company (Odeco), a marketer of natural gas, under ANR's blanket certificate issued in Docket No. CP88–532–000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

ANR requests authorization to transport, on an interruptible basis, up to a maximum of 30,000 dekatherms of natural gas per day for Odeco from receipt points located in Orange County, Indiana and St. Landry Parish, Louisiana, to delivery points located in Paulding, Ohio. ANR anticipates trnasporting an annual volume of 10,950,000 dekatherms.

ANR states that the transportation of natural gas for Odeco commenced April 1, 1989, as reported in Docket No. ST89–3364–000, for a 120-day period pursuant to § 284.223(a) of the Commission's Regulations and the blanket certificate issued to ANR in Docket No. CP88–532–000.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

9. Trunkline Gas Company

[Docket No. CP89–1418–000]

Take notice that on May 17, 1989, Trunkline Gas Company (Trunkline), P.O. Box 1642, Houston, Texas, 77251–1642 filed in Docket No. CP89–1418–000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulation under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas for Heartland Gas Marketing, Inc. (Heartland) under the blanket Certificate issued in Docket No. CP86–586–000 pursuant to section 7 of the Natural Gas, all as more fully set forth in the request on file with the Commission and open to public inspection.

Trunkline states that it proposes to transport up to 500 dt per day on an interruptible basis on behalf of Heartland pursuant to a Transportation Agreement dated January 31, 1989, between Trunkline and Heartland (Transportation Agreement). The Transportation Agreement provides for Trunkline to receive gas from various existing points of receipt on its system. Trunkline will then transport and redeliver subject gas, less fuel and unaccounted line loss, to CIPSCO-Effingham and CIPSCO-Newton; CIPSCO-Canal/Illinois, and CIPSCO-Cave in Rock in Effingham, Williamson and Johnson Counties, Illinois.

Trunkline also states that the estimated daily and estimated annual quantities would be 250 dt and 91,250 dt, respectively.

Trunkline further states that it commenced this service April 1, 1989, as reported in Docket No. ST89–3158–000.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

10. Northern Natural Gas Company Division of Enron Corporation

[Docket No. CP89–1446–000]

Take notice that on May 18, 1989, Northern Natural Gas Company, Division of Enron Corporation (Northern), 1400 Smith Street, P.O. Box 1188, Houston, Texas 7725–1188, filed in Docket No. CP89–1446–000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas on behalf of Yates Petroleum Corporation, (Yates), under the blanket certificate issued in Docket No. CP86–435–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Northern states that it proposes to transport up to 100,000 MMBtu of natural gas per day for Yates, on a peak day, 75,000 MMBtu on an average day, and 36,500,000 MMBtu annually, under Rate Schedule IT–1. This service was reported to the Commission in Docket ST89–3401–000. Northern further states that construction of facilities will not be required to provide the proposed service.

Comment date: July 10, 1989 in accordance with Standard Paragraph G at the end of the notice.

11. Panhandle Eastern Pipe Line Company

[Docket No. CP89–1465–000]

Take notice that on May 22, 1989, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251–1642, filed in Docket No. CP89–1465–000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to provide transportation service on behalf of Gas Energy Development (GED), under Panhandle's blanket certificate issued in Docket No. CP86–585–000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Panhandle requests authorization to transport, on an interruptible basis, up to a maximum of 60,000 dt of natural gas per day for GED from receipt points located in Colorado, Kansas, Oklahoma and Texas to a delivery point located in Reno, Kansas. Panhandle anticipates transporting, on an average day 40,000 dt and an annual volume of 14,600,000 dt.

Panhandle states that the transportation of natural gas for GED commenced April 1, 1989, as reported in Docket No. ST89–3163–000, for a 120-day period pursuant to § 284.223(a) of the Commission's Regulations and the blanket certificate issued to Panhandle in Docket No. CP86–585–000.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

12. Stingray Pipeline Company

[Docket No. CP89–1420–000]

Take notice that on May 17, 1989, Stingray Pipeline Company (Stingray), P.O. Box 1642, Houston, Texas 77251–1642, filed in Docket No. CP89–1420–000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to provide transportation for Panhandle Trading Company (Panhandle), a shipper and marketer of natural gas, under Stingray's blanket certificate issued by the Commission's Order No. 509 pursuant to section 7 of the Natural Gas Act, with the corresponding rates, terms and conditions in Docket No. RP89–70–000, all as more fully set forth in the request on file with the Commission and open for public inpection.

Stingray states that it would transport up to 125,000 dt equivalent of natural gas per day on an interrutible basis on behalf of Panhandle pursuant to a transportation agreement dated March 23, 1989, between Stingray and Panhandle. It is stated that the transportation agreements provides for Stingray to receive gas from various existing points of receipt on its system, and Stingray would then transport and redeliver subject gas, less fuel used and unaccounted for line loss, to Holly Beach and OXY–NGL Plant located in Cameron Parish, Louisiana and Stingray-HIOS Exchange located offshore Texas.

It is further stated the estimated daily and estimated annual quantities would be 75,000 dt and 27,375,000 dt equivalent of natural gas, respectively.

Stingray states that it commenced the transportation of natural gas for Panhandle on April 1, 1989, as reported in Docket No. ST89–3203 for a 120-day period, pursuant to § 284.223(a)(1) of the Commission's Regulations. Stingray further states existing facilities would be used in order to provide this transportation service.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

13. Panhandle Eastern Pipe Line Company

[Docket No. CP89-1463-000]

Take notice that on May 22, 1989, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-1463-000 a request pursuant to § 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 284.223) for authorization to perform an interruptible transportation service for Mountain Industrial Gas Company (Mountain Industrial), a marketer, under Panhandle's blanket certificate issued in Docket No. CP86-585-000, pursuant to section 7(c) of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Panhandle states that pursuant to a transportation agreement dated February 10, 1989, it proposes to receive up to 2,000 dt equivalent of natural gas per day from Mountain Industrial at specified receipt points located in Colorado, Kansas, Michigan, Ohio, Oklahoma, and Texas and redeliver the gas at a specified point in Morton County, Missouri. Panhandle estimates that the peak day volumes, average day volumes, and annual volumes would be 2,000 dt equivalent of natural gas, 400 dt equivalent of natural gas, and 146,000 dt equivalent of natural gas, respectively. It is stated that on April 1, 1989, Panhandle commenced a 120-day transportation service for Mountain Industrial under § 284.223(a) as reported in Docket No. ST89-3292-000.

Panhandle further states that no facilities need be constructed to implement the service. Panhandle states that the term of the transportation service would continue on a month to month basis until terminated by either Panhandle or Mountain Industrial upon at least thirty days written notice to the other. Panhandle proposes to charge rates and abide by the terms and conditions of its Rate Schedule PT.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

14. Panhandle Eastern Pipe Line Company

[Docket No. CP89-1466-000]

Take notice that on May 22, 1989, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-1466-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to transport natural gas on behalf of Natural Gas Clearinghouse, Inc. (NGC), a marketer of natural gas, under Panhandle's blanket certificate issued in Docket No. CP86-585-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request is on file with the Commission and open to public inspection.

Panhandle proposes to transport, on an interruptible basis, up to 250,000 dt equivalent of natural gas on a peak day for NGC, 75,000 dt equivalent on an average day and 27,375,000 dt equivalent on an annual basis. It is stated that the transportation service would be effected using existing facilities and would not require any construction of additional facilities. It is explained that Panhandle would receive the gas for NGC's account at designated points on Panhandle's system and would deliver equivalent volumes of gas less fuel used and unaccounted for line loss at a designated point in Reno County, Kansas. It is explained that the service commenced April 1, 1989, under the automatic authorization provisions of § 284.223 of the Commission's Regulations, as reported in Docket No. ST89-3164.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

15. Stingray Pipeline Company

[Docket No. CP89-1359-000]

Take notice that on May 12, 1989, Stingray Pipeline Company (Stingray), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-1359-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to provide transportation for Shell Gas Trading Company (Shell), a shipper and marketer of natural gas, under Stingray's blanket certificate issued by the Commission's Order No. 509 pursuant to Section 7 of the Natural Gas Act, with corresponding rates, terms and conditions in Docket No. RP89-70-000, all as more fully set forth in the request on file with the Commission and open for public inspection.

Stingray states that it would transport up to 250,000 dt equivalent of natural gas per day on an interruptible basis on behalf of Shell pursuant to a transportation agreement dated March 23, 1989, between Stingray and Shell. It is stated that the transportation agreements provides for Stingray to receive gas from various existing points of receipt on its system and Stingray would then transport and redeliver subject gas, less fuel used and unaccounted for line loss, to Holly Beach and OXY-NGL Plant located in Cameron Parish, Louisiana and Stingray-HIOS Exchange located offshore Texas.

It is further stated the estimated daily and estimated annual quantities would be 250,000 dt and 91,250,000 dt equivalent of natural gas, respectively.

Stingray states that it commenced the transportation of natural gas for Shell on April 1, 1989, as reported in Docket No. ST89-3144 for a 120-day period, pursuant to § 284.223(a)(1) of the Commission's Regulations. Stingray further states existing facilities would be used in order to provide this transportation service.

Comment date: July 10, 1989, in accordance with Standard Paragraph G at the end of this notice.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 89-13062 Filed 6-1-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. ER89-117-000 and ER89-183-000]

Niagara Mohawk Power Corp.; Filing

May 26, 1989.

Take notice that on April 26, 1989 Niagara Mohawk Power Corporation tendered for filing with the Commission additional information in response to a letter from the Commission dated February 10, 1989. This information includes support for the pricing of short-term transmission transactions and the calculation of losses. Niagara Mohawk also submitted amendments to its agreements with UNITIL Power and Central Vermont Public Service Corporation.

Copies of this filing were served upon UNITIL Power and Central Vermont Public Service Corporation.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before June 9, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-13127 Filed 6-1-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER88-599-000]

Rochester Gas & Electric Corp.; Filing

May 26, 1989.

Take notice that on April 13, 1989, Rochester Gas and Electric Corporation (Rochester) tendered for filing an amended Agreement between Rochester and Green Mountain Power Corporation. Rochester states that this amended Agreement is intended to supercede the original agreement and modifies such original agreement by incorporating changes agreed to in response to Staff's November 4, 1988 deficiency letter.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before June 8, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-13128 Filed 6-1-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP88-267-008, TM89-3-8-000, RP89-176-000]

South Georgia Natural Gas Co.; Proposed Changes in FERC Gas Tariff

May 26, 1989.

Take notice that on May 22, 1989, South Georgia Natural Gas Company (South Georgia) tendered for filing the following proposed tariff sheets to First Revised Volume No. 1 of its FERC Gas Tariff, with a proposed effective date of June 1, 1989:

Fourth Revised Sheet No. 4c
Second Revised Sheet No. 16T

South Georgia submits that the proposed tariff sheets are being submitted for the purposes of: (1) Revising the allocation methodology utilized by South Georgia to flowthrough fixed take-or-pay costs allocated to it as directed by the Commission's letter order of April 28, 1989, in Docket Nos. RP88-267 and TM89-2-8; (2) reflecting the revised level of fixed take-or-pay charges allocated to South Georgia by Southern Natural Gas Company (Southern); and (3) implementing a volumetric take-or-pay surcharge on volumes of gas transported by South Georgia on behalf of current or former nonjurisdictional sales customers.

Any person desiring to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with the Commission's rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions to protests should be filed on or before June 5, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken but will not make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commisson and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-13129 Filed 6-1-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-148-001]

Southern Natural Gas Co.; Proposed Changes in FERC Gas Tariff

May 26, 1989.

Take notice that On May 19, 1989, Southern Natural Gas Company (Southern) tendered for filing the following sheets to its FERC Gas Tariff, Sixth Revised Volume No. 1, to be effective May 9, 1989:

Substitute Second Revised Sheet No. 30CC
Substitute Original Sheet No. 30UU.1

Southern states that on May 10, 1989, the Commission issued its Order Accepting Tariff Sheets in Docket No. RP89-148-000 (Order) in which the Commission accepted tariff sheets containing various revisions to Southern's Rate Schedules FT and IT and General Terms and Conditions thereto subject to Southern refiling tariff sheets that delete "in its sole discretion" from section 8 of Rate Schedules FT and IT. Accordingly, Southern has submitted the aforementioned revised tariff sheets in compliance with the Commission's Order to be effective May 9, 1989.

Southern states that copies of the filing were mailed to all of Southern's jurisdictional purchasers, shippers, and interested state commissions, as well as the parties listed on the Commission's official service list compiled in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such protests should be filed on or before June 5, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-13130 Filed 6-1-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP89-175-000 and TM89-3-7-000]

Southern Natural Gas Co.; Proposed Changes in FERC Gas Tariff

May 26, 1989.

Take notice that on May 22, 1989, Southern Natural Gas Company (Southern) tendered for filing the following proposed tariff sheets to Sixth Revised Volume No. 1 of its FERC Gas Tariff, with a proposed effective date of June 1, 1989:

Fourth Revised Sheet No. 4B.1
Fourth Revised Sheet No. 4B.2
Fourth Revised Sheet No. 4B.3

Southern states that the proposed tariff sheets reflect the flowthrough of the buy-out and buy-down costs allocated to Southern by United Gas

Pipe Line Company (United) and Sea Robin Pipeline Company (Sea Robin) to Southern's firm sales customers in compliance with the provisions of the Stipulation and Agreement in Docket Nos. RP83–58, *et al.*

Any person desiring to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR §§ 385.211 or 385.214). All such motions or protests should be filed on or before June 5, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken but will not make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89–13131 Filed 6–1–89; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. RP85–177–061, CP88–136–005, RP88–67–012]

Texas Eastern Transmission Corp.; Proposed Changes in FERC Gas Tariff

May 26, 1989.

Take notice that Texas Eastern Transmission Corporation (Texas Eastern) on May 22, 1989 tendered for filing certain tariff sheets as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, and Original Volume No. 2.

Texas Eastern states that these tariff sheets are filed in compliance with the Commission's September 29, 1988 Order, 44 FERC (CCH) ¶ 61,413 (1988), entitled "Order Approving Contested Offer of Settlement and Issuing Certificates" (September 29 Order) approving the Joint Offer of Settlement filed on May 27, 1988 (May 27 Settlement) and the Commission's April 21, 1989 order, 47 FERC (CCH) ¶ 61,100 (1989), entitled "Order Denying Rehearing, Denying Request For Stay, Granting Clarification and Late Interventions," (April 21 Order), both orders issued in Docket Nos. RP85–177 and CP88–136.

Texas Eastern states that certain tariff sheets in Docket Nos. RP85–177 and CP88–136 set forth the terms and conditions under which Texas Eastern will operate pursuant to the certificates of public convenience and necessity granted by the September 29 Order in Docket No. CP88–136–000, and accepted by Texas Eastern on October 11, 1988. Other tariff sheets in Docket No. RP88–67, set forth the rates which Texas Eastern proposes to charge commencing on the effective date of the new services.

1. New Services (Docket Nos. RP85–177 and CP88–136)

The first group of tariff sheets reflect the addition to Texas Eastern's tariff of new Rate Schedules CD–1 and CD–2 and related Forms of Service Agreements and changes to Rate Schedules FT–1 and IT–1 to reflect the transportation certificates issued by the Commission to Texas Eastern, including a blanket transportation certificate pursuant to Subpart G of the Commission's Regulations.

A Gas Supply Inventory Reservation Charge is also included in the service agreements underlying new Rate Schedules CD–1 and CD–2 and in the General Terms and Conditions of Texas Eastern's FERC Gas Tariff applicable to Rate Schedules DCQ and GS.

Texas Eastern states that Rate Schedules CD–1, CD–2, and FT–1 Service Agreements are being prepared and will be sent to all current Rate Schedule DCQ and GS customers for execution who have requested such new agreements. Commencing on the effective date of these tariff sheets, Texas Eastern will render service to those customers who return to Texas Eastern an executed CD–1, CD–2, and FT–1 Service Agreements pursuant to the certificate authorizations granted by the Commission in its September 29 Order in Docket Nos. CP88–136–000 et al., which authorizations were accepted by Texas Eastern on October 11, 1988.

2. Rates (Docket No. RP88–67)

In compliance with the September 29 and April 21 Orders, and the May 27 Settlement, Texas Eastern is submitting other tariff sheets to specify the rates Texas Eastern will charge commencing with the effective date of the new services. These rates are based upon the RP88–67 cost of service motioned into effect on September 1, 1988, and accepted subject to refund by the Commission in Docket No. RP88–67 by order dated September 28, 1988. Workpapers supporting the proposed derivation of the rates are attached to the filing. Sheet Nos. 484 and 489 incorporate Rate Schedules CD–1 and CD–2 in the Annual Overrun Penalties specified in Section 32 of Texas Eastern's General Terms and Conditions. Section 32 is in effect subject to refund pursuant to an order dated August 31, 1988, in Docket No. RP88–221.

3. Proposed Effective Date

All of the tariff sheets are proposed to become effective on July 1, 1989, or the first day of the first month following the acceptance by the Commission of this filing without modification, whichever is later.

Texas Eastern urges that these tariff sheets be accepted at the earliest practical date. These tariff sheets is necessary to permit Texas Eastern to commence service pursuant to the certificates on July 1, 1989. If such acceptance is obtained on or before June 30, 1989, Texas Eastern states it will commence service pursuant to the executed Service Agreements under Rate Schedules CD–1, CD–2, and FT–1 and will offer open-access transportation under Rate Schedules FT–1 and IT–1 to all parties under the blanket transportation certificate as of July 1, 1989.

Copies of this filing are being posted in accordance with § 154.16 of the Commission's Regulations. Lists of All Authorized Purchasers of Natural Gas from Texas Eastern Transmission Corporation and Interested State Commissions to whom copies of this filing have been mailed by overnight mail are attached to the filing. Texas Eastern is also serving by overnight mail all parties to Docket No. RP88–67, all parties on the restricted list in Docket No. RP85–177 and all current Rate Schedule IT–1 Shippers. Accordingly, all affected parties expressing a prior interest in Texas Eastern's rates and/or the new rate schedules should receive de facto notice of this filing by May 23, 1989.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before June 5, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the

Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-13133 Filed 6-1-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-179-000]

Western Gas Interstate Co.; Proposed Changes in Rates and Charges

May 26, 1989.

Take notice that on May 22, 1989, Western Gas Inerstate Company ("Western"), pursuant to Section 4 of the Natural Gas Act and Part 154 of the Commission's Regulations thereunder, tendered for filing proposed changes to its FERC Gas Tariff, to be effective June 21, 1989.

Western states that the rates and charges filed in this proceeding are based on the overall cost of service for the test period consisting of actual experience for the twelve months ending March 31, 1989, adjusted for known and measurable changes through December 31, 1989.

Western states that its cost allocation is essentially the same as it has historically used in previous rate cases. However, it has adopted the modified fixed variable method for cost classification and rate design.

Western further states that the proposed restructured rates are in compliance with ratemaking principles set forth in Order Nos. 500 et seq. and 436 et seq. Firm transportation services and jurisdictional sales services will include demand or reservation charges and commodity charges.

Copies of the filing are on file with the Commission and are available for public inspection.

Any person desiring to be heard or to protest Western's filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE, Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214 and 385.211). All such motions or protests must be filed on or before June 5, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene.

Lois D. Cashell,

Secretary.

[FR Doc. 89-13132 Filed 6-1-89; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-3598-3]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared May 15, 1989 through May 19, 1989 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(o) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 382-5076.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in **Federal Register** dated April 14, 1989 (54 FR 15006).

Draft EISs

ERP No.: D-MMS-A02228-00, Rating EO2, Central and Western Gulf of Mexico Outer Continental Shelf (OCS) Oil and Gas Lease Sales Nos. 123 and 125, Offshore AL, MS, TX, and LA.

Summary: EPA's environmental objections to the proposed action in both sales are the (1) impact of unrestricted leasing on biologically sensitive offshore habitats; (2) impacts on the unique deepwater chemosynthetic communities, or so-called "Bush Hill" communities; and (3) the lack of a well-defined basis for drawing conclusions regarding the effects of offshore air emissions on onshore air quality.

Final EISs

ERP No.: F-COE-G36141-OK, Coal Creek Local Flood Protection, Implementation, City of Henryetta, Okmulgee County, OK.

Summary: EPA has no objections to the proposed action as described.

ERP No.: F-USA-A10057-00, Nationwide Biological Defense Research Program Continuation, Implementation.

Summary: EPA recommended that a number of mitigation measures be implemented in the Record of Decision. These mitigation measures includes compliance with applicable environmental laws, biological safety guidance, and Army environmental requirements.

Dated: May 30, 1989.

Richard E. Sanderson,

Director, Office of Federal Activities.

[FR Doc. 89-13175 Filed 6-1-89; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-3598-2]

Environmental Impact Statements; Availability

Responsible Agency: Office of Federal Activities, General Information (202) 382-5076 or (202) 382-5074. Availability of Environmental Impact Statements Filed May 22, 1989 Through May 26, 1989 Pursuant to 40 CFR 1506.9.

EIS No. 890135, Draft, AFS, NC, Grassy Gap and Wesser Timber Sales Management Plan, Implementation, Nantahala National Forest, Graham and Swain Counties, NC, Due: July 21, 1989, Contact: Steve Rickerson (704) 479-6431.

EIS No. 890136, Draft, BLM, NV, Nellis Air Force Range Planning Area Resource Management Plan, Implementation, Nye, Lincoln and Clark Counties, NV, Due: September 1, 1989, Contact: Roger Alexander (702) 646-8800.

EIS No. 890137, Draft, AFS, CO, Lake Catamount Resort Construction, Special Use Permit, 404 Permit, Routt National Forest, Routt County, CO, Due: July 17, 1989, Contact: Sherry Reed (303) 879-1870.

EIS No. 890138, Draft, FHW, OR, US 30/Columbia River Highway Improvements, Bennett Road to Columbia Road, Funding and 404 Permit, Columbia County, OR, Due: July 27, 1989, Contact: Dale Wilken (503) 399-5749.

EIS No. 890139, Final, FHW, PA, Airport Parkway-Southern Expressway Construction, US 22/30 and PA-60 Interchange to PA-60/Beaver Valley Expressway, Funding and Possible COE Permits, Allegheny County, PA, Due: July 3, 1989, Contact: Manuel A. Marks (717) 782-3411.

EIS No. 890140, Final, AFS, OR, Shady Beach Fire Recovery Project, Beach Mountain to Slapjack Butte, Implementation, Rigdon Ranger District, Willamette National Forest, Lane County, OR, Due: July 3, 1989, Contact: Herb Wick (503) 782-2283.

EIS No. 890141, Final, NAS, PRO, Galileo Mission Project, Galileo Spacecraft Preparation and Operation Plan, Implementation, Solar System Exploration Program (Tier 2), Due: July 3, 1989, Contact: Dudley McConnell (202) 453-1587.

EIS No. 890142, Draft, FHW, VA, VA-17 Bypass Extention, VA-17/29 Business to VA-17 northwest of Warrenton, Construction, Funding and COE General Permit, Town of Warrenton, Fauquier County, VA, Due: July 17, 1989, Contact: James Tumlin (804) 771-2371.

EIS No. 890143, Draft, BOP, MD, Cumberland Minimum Security Federal Prison Camp and Correctional Institution Facility, Construction and Operation, Mexico Farms Industrial Park, Cumberland, Allegany County, MD, Due: July 17, 1989, Contact: William Patrick (202) 272-6871.

EIS No. 890144, Final, AFS, AK, 1989-94 Ketchikan Pulp Long-Term Timber Sale Management Plan, Implementation, Tongass National Forest, Prince of Wales Island, AK, Due: SEE BELOW, Contact: Michael Lunn (907) 225-3101.

EPA has granted a reduction of the 30-day period to five days for the following harvest units:

527-102	597-115
589-118	571-132
532-107	620-117
590-125	571-133
540-109	620-122.

The period for these units will end on June 6, 1989. The remaining 350 units addressed in the EIS will be subject to the 30-day wait period which will end on July 3, 1989.

Dated: May 30, 1989.

Richard E. Sanderson,

Director, Office of Federal Activities.

[FR Doc. 89-13174 Filed 6-1-89; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-59270A; FRL-3597-8]

Certain Chemicals; Approval of Test Marketing Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of three applications for test marketing exemptions (TME) under section 5(h)(1) of the Toxic Substances Control Act (TSCA) and 40 CFR 720.38. EPA has designated these applications as TME-89-9, TME-89-10, and TME-89-11. The test marketing conditions are described below.

EFFECTIVE DATE: May 23, 1989.

FOR FURTHER INFORMATION CONTACT: Mark Howard, Premanufacture Notice Management Branch, Chemical Control Division (TS-794), Office of Toxic Substances, Environmental Protection Agency, Room E-613, 401 M Street, SW., Washington, DC 20460, (202) 245-4143.

SUPPLEMENTARY INFORMATION: Section 5(h)(1) of TSCA authorizes EPA to exempt persons from premanufacture notification (PMN) requirements and permit them to manufacture or import new chemical substances for test marketing purposes if the Agency finds that the manufacture, processing, distribution in commerce, use, and disposal of the substances for test marketing purposes will not present any unreasonable risk of injury to health or the environment. EPA may impose restrictions on test marketing activities and may modify or revoke a test marketing exemption upon receipt of new information which casts significant doubt on its finding that the test marketing activity will not present any unreasonable risk of injury.

EPA hereby approves TME-89-9, TME-89-10, and TME-89-11. EPA has determined that test marketing of the new chemical substances described below, under the conditions set out in the TME applications, for the stated time period, and under the restrictions specified below, will not present any unreasonable risk of injury to health or the environment. Production volume, use, and the number of customers must not exceed that specified in the applications. All other conditions and restrictions described in the applications and in this notice must be met.

The following additional restrictions apply to TME-89-9, TME-89-10, and TME-89-11:

A. The Applicant must establish a program whereby each person under its control who is reasonably likely to be exposed by inhalation to the TME substances is provided with, and is required to wear, at a minimum, a NIOSH-approved respirator. Such respirator must be used in accordance with 29 CFR 1910.134 and 30 CFR Part 11.

B. The Applicant shall distribute the TME substances only to persons who agree to comply with the same respiratory protection requirements imposed upon the Applicant under paragraph A. above.

C. A bill of lading accompanying each shipment must state that the use of the TME substances is restricted to that approved in the TMEs.

D. The Applicant shall maintain the following records until 5 years after the date they are created, and shall make them available for inspection or copying in accordance with section 11 of TSCA:

1. Records of the quantity of the TME substances produced and the dates of manufacture.

2. Records of dates of the shipments to each customer and the quantities supplied in each shipment.

3. Copies of the bill of lading that accompanies each shipment of the TME substances.

4. Copies of letters from distributees agreeing to comply with respirator protection requirements.

TME-89-9

Date of Receipt: April 6, 1989.

Notice of Receipt: May 4, 1989 (54 FR 19236).

Applicant: Confidential.

Chemical: (G) Substituted Heterocycle.

Use: (G) Resin additive.

Production Volume: Confidential.

Number of Customers: Confidential.

Test Marketing Period: 18 months, commencing on the first day of manufacture.

Risk Assessment: EPA identified concerns for liver toxicity, kidney toxicity, and developmental toxicity based on an analogous chemical substance. However, during manufacturing, processing, and use, dermal exposure will be prevented by use of protective gloves, clothing, and goggles, and any inhalation exposure will be prevented by use of NIOSH-approved respirators. Therefore, the test market substance will not present any unreasonable risk of injury to health or the environment.

TME-89-10

Date of Receipt: April 6, 1989.

Notice of Receipt: May 4, 1989 (54 FR 19236).

Applicant: Confidential.

Chemical: (G) Substituted Heterocyclic.

Use: (G) Intermediate.

Production Volume: Confidential.

Number of Customers: Confidential.

Test Marketing Period: 18 months, commencing on the first day of manufacture.

Risk Assessment: EPA identified concerns for liver toxicity, kidney toxicity, and developmental toxicity based on an analogous chemical substance. However, during manufacturing, processing, and use, dermal exposure will be prevented by use of protective gloves, clothing, and goggles. No inhalation exposures are expected during manufacturing, processing, and use of this TME substance due to its form. However, should there be any change from this form which is reasonably likely to result in inhalation exposure, NIOSH-approved respirators will be required. Therefore, the test market substance will not present any unreasonable risk of injury to health or the environment.

TME-88-11

Date of Receipt: April 6, 1989.

Notice of Receipt: May 4, 1989 (54 FR 19236).

Applicant: Confidential.

Chemical: (G) Substituted Heterocyclic.

Use: (G) Intermediate.
Production Volume: Confidential.
Number of Customers: Confidential.
Test Marketing Period: 18 months, commencing on the first day of manufacture.

Risk Assessment: EPA identified concerns for liver toxicity, kidney toxicity, and developmental toxicity based on an analogous chemical substance. However, during manufacturing, processing, and use, dermal exposure will be prevented by use of protective gloves, clothing, and goggles, and inhalation exposure will be prevented by use of NIOSH-approved respirators. Therefore, the test market substance will not present any unreasonable risk of injury to health or the environment.

The Agency reserves the right to rescind approval or modify the conditions and restrictions of an exemption should any new information that comes to its attention which casts significant doubt on its finding that the test marketing activities will not present any unreasonable risk of injury to health or the environment.

Dated: May 23, 1989.

John W. Melone,

Director, Chemical Control Division, Office of Toxic Substances.

[FR Doc. No. 13163 Filed 6-1-89; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

[GEN Docket No. 88-476; DA 89-533]

New York Public Safety Plan

AGENCY: Federal Communications Commission.

ACTION: Notice .

SUMMARY: The FCC is accepting the New York Metropolitan Area's (Region 8's) plan for public safety. By accepting this plan, the FCC enables the licensing of the 821–824/866–869 MHz spectrum for public safety to begin. The New York Metropolitan Region is the first of the 55 regions in the National Plan to be accepted.

EFFECTIVE DATE: May 22, 1989.

FOR FURTHER INFORMATION CONTACT: Maureen Cesaitis, Private Radio Bureau, Policy and Planning Branch, Washington, DC 20554, (202) 632–6497.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, adopted May 12, 1989, released May 22, 1989, accepting the New York Metropolitan Area's Plan for Public Safety. The full text of this Commission action is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of the Order may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Summary of Order

The Chief, Private Radio Bureau, and Chief Engineer have accepted the regional public safety plan for the New York Metropolitan Area, Region 8. The Region 8 plan is the first regional plan submitted to the Commission and is the culmination of the efforts of the many public safety organizations that participated in its development.

The two Bureaus said the Plan is a landmark for the public safety community. They recognized the tremendous effort that went into preparing the Region 8 Plan, which comprises counties from Connecticut, New York and New Jersey.

In 1987, the Commission established policies and rules for a National Plan for public safety services to ensure that the new six megahertz of public safety spectrum (821–824/866–869 MHz) be used effectively and efficiently for important public safety functions. The Commission established 55 regions and instructed each region to develop a plan for use of the newly allocated spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in the area. After each plan is completed and approved by its regional planning committee, it must be submitted to the Chief, Private Radio Bureau, and the Chief Engineer.

The Bureaus found that the Region 8 Plan conforms with the National Public Safety Plan and includes all the necessary elements specified in the 1987 Report and Order. Specifically, the plan provides a summary of its major elements, including usage guidelines, frequency reassignment, common channel implementation, encryption, use of long-range and cellular communications, application evaluation and appeal procedures. In a general description of how the spectrum is to be allotted among the various eligible users within the region, the plan "walks" through the algorithm it has adopted to maximize spectrum efficiency. The plan explains how the requirements of all eligible entities within the region were considered and met to the degree possible, and how future needs will be handled. It explains how the Plan has been coordinated with adjacent regions and offers a detailed description of how the plan puts the spectrum to the best possible use by requiring system design within minimum coverage areas, by assigning frequencies so that maximum frequency reuse and offset channel use may be made, by using trunking, and by requiring small entities with minimal requirements to join together on a single system where possible.

The Bureaus commended the Tri-State Regional Planning Committee for its excellent work in developing the Plan for a region with a huge population concentration spread over three states and encompassing a multitude of public safety and special emergency entities. They said the Region 8 Plan represents a careful balance of public safety and special emergency mobile communications needs throughout the area and will result in efficient use of the newly allocated 800 MHz Public Safety radio spectrum. In particular, the Bureaus noted the frequency reuse plan, the way in which blocks of frequencies were organized for wide area systems, and the careful detail evident throughout, down to specific channel assignments.

Beginning May 22, 1989, individual public safety entities in Region 8 could apply for licensing in the new 800 MHz spectrum.

Ordering Clauses

3. *It is ordered* That the New York Metropolitan Area Regional Plan for Public Safety IS ACCEPTED, subject to amendments contained in the Order.

4. *It is further ordered* That this proceeding is TERMINATED.

List of Subjects in the Public Safety Plan

Public safety, Special emergency, Trunking, Land mobile.

Federal Communications Commission.

Ralph A. Waller,

Chief, Private Radio Bureau.

Thomas P. Stanley,

Chief Engineer.

[FR Doc. 89-13045 Filed 6-1-89; 8:45 am]

BILLING CODE 6712-01-M

Applications for Consolidated Hearing

[Editorial Note: This is a republication of a document which was printed in the issue of April 24, 1989 at page 16405. That issue's, table of contents mistakenly listed the entry for the document under the Federal Energy Regulatory Commission.]

1. The Commission has before it the following mutually exclusive applications for a new TV station:

Applicant, city and state	File No.	MM Docket No.
A. Sainte Limited; Las Vegas, NV	BPCT-881011KG	89-80
B. Blackstar Communications, Inc.; Las Vegas, NV	BPCT-881121KK	
C. Televenture Broadcasting, Inc.; Las Vegas, NV	BPCT-881128KF	
D. Lorraine Walker Arms; Las Vegas, NV	BPCT-881202KK	
E. P.Z. Entertainment Partnership L.P.; Las Vegas, NV	BPCT-881205KG	
F. Channel 15—Daniel R. Ewing, Limited Partnership; Las Vegas, NV	BPCT-881205KH	
G. Media Profiles, Inc.; Las Vegas, NV	BPCT-881205KI	
H. Tierra Alta Broadcasting, Inc.; Las Vegas, NV	BPCT-881205KJ	
I. North Las Vegas Broadcasting Co., Inc.; Las Vegas, NV	BPCT-881205KK	
J. Echonet Corportion; Las Vegas, NV	BPCT-881205KM	

2. Pursuant to section 309(e) of the Communications Act of 1934, as amended, the above applications have been designated for hearing in a consolidated proceeding upon the issues whose headings are set forth below. The text of each of these issues has been standardized and is set forth in its entirety under the corresponding headings at 51 FR 19347, May 29, 1986. The letter shown before each applicant's name, above, is used below to signify whether the issue in question applies to that particular applicant.

Issue Heading and Applicant(s)

Air Hazard, E, H, I and J
Comparative, A, B, C, D, E, F, G, H, I and J
Ultimate, A, B, C, D, E, F, G, H, I and J

3. If there is any non-standardized issue(s) in this proceeding, the full text of the issue and the applicant(s) to which it applies are set forth in an Appendix to this Notice. A copy of the Complete HDO in this proceeding is available for inspection and copying during normal business hours in the FCC Deckets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text may also be purchased from the Commission's duplicating contractor, International Transcription Services, Inc., 2100 M Street NW., Washington, DC 20037 (Telephone No. (202) 857-3800).

Roy J Stewart, *Chief, Video Services Division, Mass Media Bureau.*

[FR Doc. 89-13118 Filed 6-1-89; 8:45 am]

BILLING CODE 1505-02-M

FEDERAL MARITIME COMMISSION

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.: 202-000150-096.

Title: Trans-Pacific Freight Conference of Japan.

Parties:

American President Lines, Ltd.
Barber Blue Sea
Kawasaki Kisen Kaisha, Ltd.
Mitsui O.S.K. Lines, Ltd.
A. P. Moller-Maersk Line
Neptune Orient Lines Limited
Nippon Liner System, Ltd.
Nippon Yusen Kaisha
Orient Overseas Container Line, Inc.
Sea-Land Service, Inc.

Synopsis: The proposed modification would permit the Conference Chairman to transmit certain conference information to the administrator(s) of the Trans-Pacific Discussion Agreement ("TDA"), and the Trans-Pacific Stabilization Agreement ("TSA"). It would also permit the Conference Chairman to receive information from TDA and TSA, and would permit the Conference to rely on such information to reach decisions. It would further permit one or more of the Conference's members to provide information to TDA and TSA in the course of TDA and TSA meetings.

Agreement No.: 202-003103-098.

Title: Japan-Atlantic and Gulf Freight Conference.

Parties:

Barber Blue Sea
Kawasaki Kisen Kaisha, Ltd.
Mitsui O.S.K. Lines, Ltd.
A. P. Moller-Maersk Line
Neptune Orient Lines Limited
Nippon Liner System, Ltd.
Nippon Yusen Kaisha
Orient Overseas Container Line, Inc.

Synopsis: The proposed modification would permit the Conference Chairman to transmit certain conference information to the administrator(s) of the Trans-Pacific Discussion Agreement ("TDA"), and the Trans-Pacific Stabilization Agreement ("TSA"). It would also permit the Conference Chairman to receive information from TDA and TSA, and would permit the Conference to rely on such information to reach decisions. It would further permit one or more of the Conference's members to provide information to TDA and TSA in the course of TDA and TSA meetings.

Agreement No.: 206-011239.

Title: United States/Middle East and Indian Subcontinent Discussion Agreement.

Parties:

The "8900" Lines
A. P. Moller-Maersk Line
Sea-Land Service, Inc.
The West Coast/Middle East and West Asia Rate Agreement
American President Lines, Ltd.
National Shipping Company of Saudi Arabia
United Arab Shipping Company (S.A.G.)
Thames Shipping Ltd.
Waterman Steamship Corporation

Synopsis: The proposed Agreement would authorize the parties to discuss and agree upon rates, terms and conditions of service, and to exchange information in the trade from U.S. ports (excluding ports in Alaska and Hawaii) and from inland and coastal points in the U.S. and Canada via such ports to all ports and points in Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, the United Arab Emirates, Pakistan, Bangladesh, Burma, Sri Lanka and India.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

Dated: May 30, 1989.

[FR Doc. 89-13156 Filed 6-1-89; 8:45 am]

BILLING CODE 6730-01-M

GENERAL SERVICES ADMINISTRATION

Agency Information Collection Activities Under OMB Review

The GSA hereby gives notice under the Paperwork Reduction Act of 1980 that it is requesting the Office of Management and Budget (OMB) to renew expiring information collection 3090–0072, U.S. Government Lease for Real Property, Standard Form 2. This form is a legal instrument conveying leasehold interest in real property to the Government. The form is completed by the Government to reflect negotiated terms and successful offerors must read and sign the form.

Agency: Acquisition Policy Division, GSA.

Addresses: Send comments to Bruce McConnell, GSA Desk Officer, Room 3235, NEOB, Washington, DC, 20503, and to Mary L. Cunningham, GSA Clearance Officer, General Services Administration (CAIR), F Street at 18th, NW, Washington, DC 20405.

Annual Reporting Burden: Firms responding, 800; responses, 1 per year; average hours per response, 5; burden hours, 400.

For Further Information Contact: Hilary Peoples 202–566–1508.

Copy of Proposal: A copy of the proposal may be obtained from the Information Collection Management Branch (CAIR), Room 3014, GS Bldg., Washington, DC 20405, or by telephoning 202–535–7074.

Dated: May 17, 1989.

Emily C. Karam,

Director, Information Management Division (CAI).

[FR Doc. 89–13098 Filed 6–1–89; 8:45 am]

BILLING CODE 6820–61–M

Agency Information Collection Activities Under OMB Review

The GSA hereby gives notice under the Paperwork Reduction Act of 1980 that it is requesting the Office of Management and Budget (OMB) to renew expiring information collection 3090–0086, Description of Property for Possible Leasing, Lessor's Annual Cost Statement, and Proposal to Lease Space, GSA Forms 54, 1217, and 1364. GSA's responsibility is to accommodate Federal agencies in leased space. GSA Form 54 is used by persons to describe property for possible leasing. GSA Form 1217 and 1364 are used by GSA to obtain offers in a standardized format for equitable evaluation of all offers by the Government.

Agency: Acquisition Policy Division, GSA.

Addresses: Send comments to Bruce McConnell, GSA Desk Officer, Room 3235, NEOB, Washington, DC 20503, and to Mary L. Cunningham, GSA Clearance Officer, General Services Administration (CAIR), F Street at 18th, NW, Washington, DC 20405.

Annual Reporting Burden: Firms responding, 3,200; responses, 1 per year; average hours per response, 7; burden hours, 22,400.

For Further Information Contact: Hilary Peoples 202–566–1508.

Copy of Proposal: A copy of the proposal may be obtained from the Information Collection Management Branch (CAIR), Room 3014, GS Bldg., Washington, DC 20405, or by telephoning 202–535–7074.

Dated: May 17, 1989.

Emily C. Karam,

Director, Information Management Division (CAI).

[FR Doc. 89–13099 Filed 6–1–89; 8:45 am]

BILLING CODE 6820–61–M

Material Safety Data Sheets

AGENCY: Federal Supply Service, GSA.

ACTION: Postponement of Requirement for Including Material Safety Data Sheets (MSDS) in each shipment.

SUMMARY: The April 27, 1989, **Federal Register** contained a notice concerning the revision of Clause I–FSS–22, Material Safety Data Sheets (MSDS), which is used in Federal Supply Service contracts for items classified as hazardous. The revision would require the contractor to (1) include one copy of the MSDS for each unit of issue in the shipment in or on the shipping container and, (2) provide a contact point for Material Safety Data Sheets. This change, which was scheduled to become effective on June 7, 1989, is postponed indefinitely, pending further agency reviews.

ADDRESS: General Supply Service, Federal Supply Service, Office of Commodity Management (FC), Operations Management Division (FCO), 1941 Jefferson Davis Highway, Crystal Mall Building No. #4, Room 718 Arlington, Virginia 22202.

FOR FURTHER INFORMATION CONTACT: D. Michael Smith, Chief, Procurement Policy Branch on (703) 557–7950.

Nicholas M. Economou, CPPO,

Director, Operations Management Division.

May 26, 1989.

[FR Doc. 89–13093 Filed 6–1–89; 8:45 am]

BILLING CODE 6820–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Alcohol, Drug Abuse and Mental Health Administration

Alcohol, Drug Abuse, and Mental Health Services Block Grant State Waiver Guidelines: Maintenance of Effort Requirement

AGENCY: Alcohol, Drug Abuse, and Mental Health Administration.

ACTION: Notice.

I. Statutory Authority

The Comprehensive Alcohol Abuse, Drug Abuse, and Mental Health Amendments Act of 1988 (Pub. L. 100–690, section 2031) amends section 1916(c) of the Public Health Service Act by requiring a State to assure it will meet certain maintenance of effort requirements as a condition for receipt of the ADMS Block Grant. The amendment also authorizes the Secretary to waive this requirement based upon extraordinary economic conditions in the State.

II. Discretionary Authority

The authority provided in section 1916(c)(11)(B) is a discretionary authority. Therefore, requested waivers will not necessarily be granted in every case.

III. Pertinent Statuory Provisions

Subparagraph 1916(c)(11)(A) of the PHS Act, as amended by section 2031 of Pub. L. 100–690 provides:

> The State agrees that the State will maintain State expenditures for services provided pursuant to this subpart at a level equal to not less than the average level of such expenditures maintained by the State for the 2-year period preceding the fiscal year for which the State is applying to receive payment under Section 1914.

Subparagraph 1916(c)(11)(B) provides—

> The Secretary may, upon the request of a State, waive the requirement established in subparagraph (A) if the Secretary determines that extraordinary economic conditions in the State justify the waiver.

IV. Basis for Waiver

Waivers may only be granted based upon extraordinary economic conditions within the State.

V. Factors Considered in Determining Whether the Economic Conditions in the State are so Extraordinary as to Justify a Waiver

Generally, extraordinary economic conditions will be considered to be

those beyond the control of the State that so decrease the State's revenues or place such heavy unanticipated demands upon those revenues (e.g., responding to natural disasters such as major hurricane damage) as to make compliance with the maintenance of effort requirement unreasonable.

Examples of extraordinary economic conditions include—

(1) A precipitous decline in the financial resources of the State for reasons beyond the control of the State such as:

(a) A significant decrease in the value of the State's taxable resources;

(b) The removal of significant amounts of property from the State's tax roll due to commercial and/or industrial out-migration or as a result of Federal Government action;

(2) An uncontrollable diversion of available revenue to other purposes to accommodate emergency circumstances such as those resulting from a natural disaster; and

(3) Any other extraordinary economic conditions within the State affecting the State's ability to comply with the maintenance of effort requirement.

Shortfalls in State tax revenues due to tax initiatives or referenda, or the failure of the State to raise tax rates, etc., will generally not be considered extraordinary economic conditions.

VI. Form and Content of a Waiver Request

A request for a waiver may be included as a separate part of the application for the ADMS Block Grant or may be submitted separately in the form of a letter to the Administrator. In either case, the request must be specifically signed by the Governor of the State since the conditions necessary to justify the waiver will be statewide economic conditions beyond the jurisdiction of the State Agency administering the block grant and will involve issues of intrastate rebudgeting.

The request should state:

1. The nature of the extraordinary economic circumstances in the State necessitating the waiver. If the extraordinary economic conditions are conditions which existed for the two years immediately prior to the fiscal year for which the State is seeking a waiver, the State should demonstrate why such continuing conditions may be considered extraordinary in view of their continuing nature. The State should also address why these conditions have not already been reflected in State expenditures for those years thus already reducing the required maintenance of effort level for the year for which the waiver is being sought.

2. How those circumstances prevent the State from complying with the requirement.

3. The precise extent of the decrease in State ADMS expenditures that will be necessary and the subsequent level the State is able to commit to for the period of the waiver.

4. The effect of the proposed decrease in State expenditures on the individuals in the State who need alcohol, drug abuse, and mental health services.

5. The extent and manner of the State's commitment to returning to pre-waiver expenditure levels for subsequent fiscal years.

6. Any other factor the State wishes to be considered.

VII. Duration of Waiver

A waiver will only be granted for a specific Federal fiscal year. If necessary, an additional waiver must be sought for an additional fiscal year. Each subsequent year's request for a waiver will be reviewed as a "stand alone" request. No presumption concerning validity will be accorded a request due to the granting, or failure to grant, a previous request.

VIII. Effect of Waiver on the Amount of the ADMS Block Grant Award

The granting of a waiver will have no effect on the amount of the ADMS Block Grant award. The award will be for the full amount for which the State is otherwise entitled.

IX. State Notification of Disposition of Waiver Request

(1) If the States requests a waiver as part of its application and the waiver is granted, the waiver will be specified in the terms and conditions of award. If the waiver is not granted, the State will be notified by a letter from the Administrator addressed to the Governor, with a copy to the State Agency administering the ADMS Block Grant.

(2) If the States requests a waiver in the form of a letter from the Governor to the Administrator, ADAMHA, the State will receive a letter from the Administrator to the Governor, copy to the State Administering Agency, notifying the State of the disposition of the request. If the request is granted, the waiver will also be reflected in the next regularly scheduled quarterly revision to the award (if any).

The notification of a waiver being granted will contain information concerning the conditions of the waiver.

X. Submission of Application

The Secretary has delegated the authority to grant State requests for waiver to the Administrator, Alcohol, Drug Abuse and Mental Health Administration (ADAMHA). The Administrator will review a State's request for a waiver and will provide a written decision to the State not later than 120 days after the request was received.

Consistent with Section V above, the request for waiver must be signed by the State's Chief Executive Officer (CEO), and submitted as part of the application or separately in the form of a letter. When submitted as a letter, the request should be addressed to: Frederick K. Goodwin, M.D., Administrator, Alcohol, Drug Abuse, and Mental Health Administration, 5600 Fishers Lane, Room 12–105, Rockville, Maryland 20857.

If you have any further questions on the waiver issue or the guidelines, please contact Mr. Thomas Reynolds, Grants Management Officer, ADAMHA Block Grant Programs, 5600 Fishers Lane, Room 13C–20, Rockville, Maryland 20857 (301/443–3334).

Note: The information collection requirements contained in this Notice have bene submitted for review to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1980. Any comments on the information collection requirements of this Notice should be directed to: U.S. Public Health Service, Attn: PRA, Hubert H. Humphrey Building, Room 721H, 200 Independence Avenue, SW., Washington, DC 20201 and to the Office of Information an Regulatory Affairs, OMB, New Executive Office Building, Room 3208, Washington, D.C. 20503 (Attn: Desk Officer for DHHS).

Dated: May 24, 1989.

Frederick K. Goodwin,

Administrator, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 89–13125 Filed 6–1–89; 8:45 am]

BILLING CODE 4160–17–M

Alcohol, Drug Abuse, and Mental Health Services Block Grant State Waiver Guidelines; 50 Percent Set-Aside for Intravenous Drug Abuse—FY 1989

AGENCY: Alcohol, Drug Abuse, and Mental Health Administration.

ACTION: Notice.

I. Statutory Authority

The Comprehensive Alcohol Abuse, Drug Abuse, and Mental Health Amendments Act of 1988 (Pub. L. 100–

690, section 2023), amends section 1912A of the Public Health Service Act, by authorizing the Secretary, Department of Health and Human Services, upon the request of a State, to waive all or part of the Alcohol, Drug Abuse, and Mental Health Services (ADMS) Block Grant requirement that the State expend not less than 50 percent of the State's share of the amounts appropriated in the Anti-Drug Abuse Act of 1988 ($125 million) to carry out programs for the treatment of intravenous drug abuse, described in section 1915(c) of the PHS Act.

II. Discretionary Waiver

The granting of this waiver is a discretionary matter subject to the decision of the Secretary, based on the merits presented by the State in their request. The Secretary will assess the State request for reasonableness and consistency with the following criteria in considering each request for waiver.

III. Statutory Provisions

Section 1912A of the Public Health Service Act indicates the following:

(i)(1) For fiscal year 1989, the Secretary may not make payments to a State from amounts appropriated in the Anti-Drug Abuse Act of 1988 for allotments under this subpart unless the State agrees that—

(A) such payments will be expended only for the purpose of carrying out programs for substance abuse; and

(B) in carrying out such programs, the State will expend not less than 50 percent of such payments to carry out the programs of treatment for intravenous drug abuse described in section 1915(c).

Section 1915(c) indicates, in part, that States may use these monies to develop, implement, and operate programs of treatment for intravenous drug abuse, with priority given to programs to treat individuals infected with the etiologic agent for acquired immune deficiency syndrome; to train drug abuse counselors and other health care providers to provide such treatment; and to carry out outreach activities for the purpose of encouraging individuals in need to undergo such treatment.

(2) The Secretary may, upon request of the State, waive all or part of the requirement established in paragraph (1)(B) for the State if the Secretary determines that the incidence of intravenous drug abuse in the State does not require the level of funding required in such paragraph. The Secretary shall act upon a request for such a waiver not later than 120 days after the date on which the request is made. The Secretary may approve such a request only after providing interested persons in the State an opportunity to comment upon the request.

IV. Guidelines for State Request for Waiver

The Secretary shall consider the extent to which the waiver request addresses or includes the following information:

A. A narrative description of the nature and extent of the incidence and prevalence of intravenous (VI) drug abuse in the State, especially as it relates to all other substance abuse (discussion should include the relative costs of treatment, if this information is available),

B. Other Federal, State, and local funding available in the State to provide services to IV drug abusers and other substance abusers in the State, in relation to the amount required to be expended by the State in accordance with this section of the Anti-Drug Abuse Act of 1988, and

C. Documented evidence of the procedure(s) used by the State to provide the opportunity for interested persons in the State to comment upon a request for this waiver.

The State must, in the request for waiver, specify the exact dollar amount to be waived by the Secretary.

The State should consider using the following data sources to support and document the request for waiver. Comparatively low numbers of IV drug abusers in the following sources would tend to support the State's request that the requirement for a 50 percent IV set-aside should be waived.

A. Narrative Description

The following information sources may be valuable for State use in documenting the extent of the IV drug problem in the State:

1. The number of clients in treatment with IV drug abuse problems, based on information from State management information systems;

2. Client information reported to the State Alcohol and Drug Abuse Profile (SADAP), as compiled by the National Association of State Alcohol and Drug Abuse Directors (NASADAD);

3. Estimates of IV drug abusers contained in the latest National Drug and Alcohol Treatment Unit Survey, jointly conducted by the National Institute on Alcohol Abuse and Alcoholism and the National Institute on Drug Abuse;

4. The number of persons known to be infected with the AIDS virus, based on an IV drug problem, as may have been reported by the State to the Federal Centers for Disease Control;

5. Information from the U.S. Department of Justice Drug Use Forecasting (DUF) system on arrestees who may have IV drug problems;

6. Arrest rates in the State related to heroin and/or cocaine possession, sale, or other criminal offenses;

7. State household or general population surveys reflecting estimates of annual and current use of drugs which have an IV route of administration; and,

8. Waiting lists in publicly-funded methadone or related types of treatment units.

The above is only a recommended list and should not be considered exhaustive.

States may also consider and discuss the number of treatment slots in the State; the utilization rate of those slots; the quality and effectiveness of treatment services for IV drug abusers in the State; and the extent and effectiveness of existing or planned outreach and/or prevention activities directed to those individuals at high risk for IV drug abuse.

B. Availability of Resources

The State request for waiver should include a brief assessment of the resources available to the State in the current fiscal year for drug abuse treatment and prevention services, with emphasis on services to individuals with an IV route of administration.

Information may be in such form and content as may be determined by the State to accurately describe the source and use of such monies based on State financial, audit, or other reporting mechanisms.

Such a description should be consistent with information the State may include in their annual reports to the Federal Government under the Alcohol, Drug Abuse, and Mental Health Services (ADMS) Block Grant. This section should also be consistent with other reporting, such as to the NASADAD survey.

C. Public Comment on the Request for Waiver

For FY 1989, the State request for a waiver must certify that there is evidence that interested persons in the State had an opportunity to comment on the State's request.

Accordingly, it is suggested that the State establish a mechanism for public input (in a manner and form to be determined by the State) which solicits comments from appropriate State and local officials, health planning organizations, community and ethnic focus groups, local elected and other

public officials, public and private sector treatment service providers, the general public, and any others who may wish to provide testimony.

D. Miscellaneous Information

The State request for waiver may contain any other evidence or documentation which the State wishes to include supporting the requested waiver.

V. Submission of Application

The Secretary has delegated the authority to grant State requests for waiver to the Administrator, Alcohol, Drug Abuse and Mental Health Administration (ADAMHA). The Administrator will review a State's request for a waiver and will provide a written decision to the State not later than 120 days after the request was received.

The request for waiver must be signed by the State's Chief Executive Officer (CEO), or an official designated by the CEO, and should be limited to not more than five single-spaced pages (plus appropriate attachments). The request should be forwarded to: Frederick K. Goodwin, Administrator, Alcohol, Drug Abuse, and Mental Health Administration, 5600 Fishers Lane, Room 12–105, Rockville, Maryland 20857.

If you have any further questions on the waiver issue or the guidelines, please contact Mr. George Kanuck, Division of Intergovernmental Affairs and Data Policy, Office of Communications and External Affairs, ADAMHA, at (301) 443–3820.

Note: The information collection requirements contained in this Notice have been submitted for review to the Office of Management and Budget in accordance with the paperwork Reduction Act of 1980. Any comments on the information collection requirements of this Notice should be directed to: U.S. Public Health Service, Attn: PRA, Hubert H. Humphrey Building, Room 721H, 200 Independence Avenue, SW, Washington, DC 20201 and to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, Room 3208, Washington, DC 20503, (Attn: Desk Officer for DHHS).

Dated: May 24, 1989.

Frederick K. Goodwin,

Administrator, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 89–13124 Filed: 6–1–89; 8:45 am]

BILLING CODE 4160–17–M

Alcohol, Drug Abuse, and Mental Health Services Block Grant State Waiver Guidelines; Construction or Rehabilitation of Substance Abuse Facilities

AGENCY: Alcohol, Drug Abuse, and Mental Health Administration.

ACTION: Notice.

I. Statutory Authority

The Comprehensive Alcohol Abuse, Drug Abuse, and Mental Health Amendments Act of 1988 (Pub. L. 100–690, section 2024), amends section 1915 (b) of the Public Health Service Act, by authorizing the Secretary (Department of Health and Human Services) to grant a waiver for the use of funds from the Alcohol, Drug Abuse, and Mental Health Services (ADMS) Block Grant for the construction or rehabilitation of substance abuse facilities.

II. Discretionary Waiver

The granting of this waiver is a discretionary matter subject to the decision of the Secretary, based on the individual merits of each request. The Secretary will not automatically grant each waiver.

III. Statutory Provisions

Section 1915 (b) of the Public Health Service Act authorizes the Secretary to grant a waiver to use ADMS Block Grant funds for construction of a new facility or rehabilitation of an existing facility under the following circumstances:

1. Funds must be used for the construction of a new facility or rehabilitation of an existing facility, but not for land acquisition.
2. The State must demonstrate that adequate treatment cannot be provided through the use of existing facilities and that alternative facilities in existing suitable buildings are not available.
3. The State must identify a specified amount of ADMS Block Grant funds for which a waiver is sought and describe how these funds will be used to construct or rehabilitate a specified number of beds for residential treatment and/or specified number of slots for outpatient treatment. These calculations must be supported by reasonable estimates of their costs of construction or rehabilitation.
4. The State must carefully design a program that will minimize the costs of additional beds.
5. The State must agree to make available non-Federal contributions in cash for construction and rehabilitation in an amount equal to not less than $1 for each $1 of ADMS Block Grant funds requested for this purpose.

IV. Guidelines for State Request for Waiver

In determining whether to grant a waiver, the Secretary shall consider the extent to which the waiver application demonstrates or includes the following in a narrative justification:

A. Assessment of Need

Documentation that the State has assessed the availability and adequacy of treatment services in existing facilities in reasonable geographic proximity to the site considered for construction/rehabilitation and the clients to be served, and demonstration that suitable alternative facilities in existing buildings (schools, military facilities, etc.) are not available for these purposes. States may use any available information to support this justification, including local needs assessments, waiting lists, survey data, or other related sources.

The State must include in its request for waiver the following information:

- A brief description of the project to be funded (including the type(s) of services to be provided and the projected number of residential and/or outpatient clients to be served);
- The specific amount of ADMS Block Grant funds to be used for this project;
- If for residential treatment, the number of beds planned;
- If for outpatient treatment, the number of slots planned.

B. Estimate of Cost

The State's estimate of the total cost of the construction/rehabilitation (and a description of how these estimates were determined), based on an independent estimate of said cost, using standardized, compatible measures as determined by an appropriate State construction certifying authority. An assurance by the State that all applicable National (e.g. National Fire Protection Association, Building Officials and Codes Administrators International), Federal (National Environmetnal Policy Act), State, and local standards for construction/rehabilitation of health care facilities, will be complied with.

C. Obligation of Funds

Documentation of the State's commitment to obligate these funds by the end of the first year in which the funds are available, and that such funds must be expended by the end of the second year (PHS Act, section 1914(a)(2)).

D. Public Support

Certification that there is public support for a waiver (in a manner and form to be determined by the State) which allows opportunity for input from appropriate State and local health planning organizations, local governmental entities, and public and private-sector service providers that may be impacted by the waiver request. The procedure used and the results of that process should be described in the waiver request. For FY 1990 and beyond, to assure adequate public comment on these matters, the State may include a request for a waiver within the annual State legislative public hearing process, required under the Block Grant legislation (PHS Act, section 1916 (b)).

E. Use for Substance Abuse Facilities

Evidence of a State commitment to use the proposed new or rehabilitated substance abuse facility for the purposes stated in the request for waiver for its useful life—at least 20 years for new construction and at least 10 years for rehabilitated facilities. An assurance that, if the facility ceases to be used for such services, or if the facility is sold or transferred for a purpose inconsistent with the State's waiver request, monies will be returned to the Federal Government in an amount proportionate to the Federal assistance provided, as it relates to the value of the facility at the time services cease or the facility sold or transferred.

F. Minimizing the Costs

A description of the methods used to minimize the costs for additional beds, if the facility being constructed or rehabilitated is to be used for residential care. The description should document the costs of the residential facilities in the local area or other appropriate, equivalent sites in the State. The determination of how costs are to be minimized is within the discretion of the State, however, the details of how this determination was arrived at will be included in this description. If the waiver will enhance outpatient treatment slots, the State should describe what steps were taken to "minimize" these costs.

G. State Match

The Secretary will accept the following statement as evidence that the State has agreed to comply with the matching requirement: "The State of ——— agrees to match the ADMS Block Grant funds used for the described project, on a dollar for dollar cash basis, from non-Federal contributions, totalling $———."

H. Miscellaneous Information

The State request for waiver may contain any other evidence or documentation which the State wishes to include supporting the requested waiver.

V. Submission of Application

The Secretary has delegated the authority to grant State requests for this waiver to the Administrator, Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA). The Administrator will review a State's request for waiver for completeness and consistency with the above guidelines, and will provide a written decision to the State not later than 120 days after the date on which the request was received.

The request for waiver must be signed by the State's Chief Executive Officer (CEO), or an official designated by the CEO, and should be limited to not more than 5 single-spaced pages (plus appropriate attachments). The request should be forwarded to: Frederick K. Goodwin, M.D., Administrator, Alcohol, Drug Abuse, and Mental Health Administration, 5600 Fishers Lane, Room 12–105, Rockville, Maryland 20857.

If you have any further questions on the waiver issue or the guidelines, please contact Mr. George Kanuck, Division of Intergovernmental Affairs and Data Policy, Office of Communications and External Affairs, ADAMHA, at (301) 443–3820.

Note: The information collection requirements contained in this Notice have been submitted for review to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1980. Any comments on the information collection requirements of this Notice should be directed to: U.S. Public Health Service, Attn: PRA, Hubert H. Humphrey Building, Room 721H, 200 Independence Avenue, SW Washington, DC. 20201 and the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, Room 3208, Washington, D.C. 20503 (Attn: Desk Officer for DHHS).

Dated: May 24, 1989.

Frederick K. Goodwin,

Administrator, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 89–13123 Filed 6–1–89; 8:45 am]

BILLING CODE 4160–17–M

Centers for Disease Control

[Announcement No. 934]

Community-based Demonstration Projects for Human Immunodeficiency Virus (HIV) Prevention and Risk Reduction

Introduction

The Centers for Disease Control (CDC) announces the availability of Fiscal Year 1989 funds for Cooperative Agreements for Community-Based Demonstration Projects for Human Immunodeficiency Virus (HIV) Research Prevention and Risk Reduction activities.

Authority

This program is authorized under the Public Health Services Act: Section 317(k)(3) [42 U.S.C. 247b].

Eligible Applicants

Eligible applicants are the official State and local public health agencies, including the District of Columbia, American Samoa, the Commonwealth of Puerto Rico, the Virgin Islands, the Federated States of Micronesia, Guam, the Northern Mariana Islands, the Republic of the Marshall Islands, and the Republic of Palau. The purpose of this program is to develop health department-based programs which can serve as models for HIV Prevention Programs. Health departments are responsible for protecting the public health within their jurisdication, and therefore have the authority to coordinate the activities necessary to carry out this program.

Availability of Funds

Approximately $3,500,000 is available in Fiscal Year 1989 to fund approximately 5 awards. It is expected that the average award will be $700,000, ranging from $350,000 to $1,000,000. It is expected that awards will begin on or about September 1, 1989, and will be for a 12 month budget period within a 1 to 5 year project period. Funding estimates may vary and are subject to change. Continuation awards within the project period will be made on the basis of satisfactory progress and the availability of funds.

The funds available under this program are for research on the prevention of HIV infection at the community level. Funds may be used to develop, implement and evaluate new interventions, including those targeting people who are infected with HIV. Applicants are encouraged to have research groups participate in the program.

Purpose

The purpose of these awards is to promote the design, implementation, and evaluation of health department-based intensive programs in well-defined geographic/sociodemographic subdivisions which can then serve as national models of HIV Prevention Programs. These demonstration areas will design and evaluate prevention methods, determine their effectiveness and their potential applicability, document all activities and findings, and facilitate nationwide implementation of workable approaches.

Program Requirements

A. Recipient Activities

1. Using available epidemiologic data, design and conduct assessments of strategies to identify and recruit members of at least three of the following hard-to-reach populations which may be at elevated risk for HIV infection or may be infected with HIV:

a. Intravenous drug users not in treatment programs;

b. Men who have sex with men but do not identify themselves as homosexual or bisexual;

c. Individuals who exchange sex for drugs, money, or other services;

d. Runaways, dropouts, and other youth who may engage in high risk sexual and drug using behavior; and

e. Persons who are or have been sex or needle sharing partners of those listed above, especially female partners.

The applicant must provide appropriate epidemiologic information to justify including a target group not on this list. Applicants with existing cohorts of high risk individuals, whether or not they are listed above, are encouraged to continue assessment activities with them;

2. Develop, implement, and evaluate multifaceted intervention programs to change specific behaviors of individuals at risk of HIV infection in the community. These interventions should use, among other modalities, printed and audiovisual materials, fact-to-face counseling, and other language specific and culturally sensitive approaches. Such programs should focus particularly on those hard-to-reach groups identified by the applicant under activity 1, and should teach the social and technical skills needed to allow behavior change, and reinforce continued and sustained risk avoidance after behavior change has occurred;

3. Promote changes in community norms regarding HIV/AIDS risk reduction behavior by various methods including using mass and targeted media, and encouraging and enabling at risk individuals to disseminate information to their peers about risk reduction and changes in norms for behavior. Such efforts should fucus particularly on those hard-to-reach groups identified by the applicant under activity 1;

4. Undertake studies to improve the understanding of the determinants of high risk behavior among individuals at elevated risk of HIV infection, particularly, but not limited to, the hard-to-reach risk groups identified by the applicant under activity 1;

5. Undertake studies to evaluate changes in the prevalence of risk behaviors in the aforementioned and other relevant high risk groups, and to monitor changes in seroprevalence of HIV in these high risk groups;

6. Evaluate and redirect programmatic efforts in reaction to changes in behaviors and HIV infection in the identified risk groups, and use existing data from surveillance systems to monitor changes in other illnesses which may correlate with behavior change in identified risk groups or other relevant risk groups, (e.g., reportable sexually transmitted infections, hepatitis B, non-A, non-B hepatitis); and

7. Maintain the programmatic and budgetary flexibility to test the feasibility of alternative control strategies, or to conduct short-term studies which seek to replicate or examine the relevance of potentially important findings from other HIV research programs or other Community-Based Demonstration sites.

Projects funded through a cooperative agreement that involve collection of information from 10 or more individuals will be subject to review under the Paperwork Reduction Act.

B. Centers for Disease Control Activities

1. Collaborate in the design of studies of incidence and prevalence of HIV infection and associated risk behaviors in the groups under investigation;

2. Collaborate in the design of all phases of the evaluation, provide consultation on data-collection instruments and procedures, and provide coordination of research and evaluation activities among sites;

3. Participate in the analysis of information gathered from these and other related studies;

4. Provide up-to-date scientific information regarding risk/protective factors for HIV transmission, and coordinate with the national program for preventing the transmission of HIV;

5. Provide technical and theoretical input in planning, operating, and evaluating prevention strategies from other HIV prevention research projects and from the literature on behavior change and identify control strategies requiring further testing and refinement; and

6. Develop course curricula, training materials, job aids, and other learning opportunities to train personnel from other programs.

Other Requirements

Recipients must comply with the document entitled: Content of Aid-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions (October 1988) (54 FR 10049, March 9, 1989).

All recipients must have procedures in place to ensure the confidentiality of patient records.

Review and Evaluation Criteria

Applications will be reviewed and evaluated on the following criteria.

A. Competing Applications

1. The extent to which proposed objectives are specific, measurable, time-phased, and consistent with the stated purpose of this program (10 points);

2. The extent to which the applicant's proposed plan will identify and reach appropriate hard-to-reach individuals at risk for HIV, and the quality and scope of the applicant's past and current activities to provide education about HIV prevention and AIDS to high risk individuals (20 points);

3. The quality of the applicant's proposed interventions and strategies to motivate and reinforce risk reduction behavior change among hard-to-reach individuals identified by the applicant under recipient activity 1. and other relevant risk groups (15 points);

4. The quality of the applicant's proposed plan to promote changes in community norms regarding HIV prevention and risk reduction behavior, and to generate support, cooperation, and collaboration with community based organizations serving individuals at high risk for HIV (15 points);

5. The extent to which the applicant's proposed plan will determine, monitor, and measure changes in the prevalence of specific knowledge, attitudes, beliefs, and self-reported behaviors (KABB) among hard-to-reach individuals identified by the applicant under recipient activity 1. and other relevant risk groups, and will determine, monitor, and measure changes in community norms (10 points);

6. The quality of the applicant's plan, including proposed methods and

instruments of measurement, to evalute the effectiveness of the strategies used to access hard-to-reach individuals identified by the applicant, the effectiveness of the strategies used to motivate and reinforce behavior change among those groups targeted by the interventions, and the impact of the programmatic efforts on community norms (20 points);

7. The extent to which the applicant's proposed plan will enable it to respond to and redirect programmatic efforts based on new information, changes in behavior, and changes in HIV seroprevalence (5 points); and,

8. The extent to which the proposed staff, equipment, and facilities for the project are adequate and the extent to which the applicant proposes to involve appropriate research groups (5 points);

In addition, consideration will be given to the extent to which the budget is reasonable and consistent with the intended use of funds.

B. Continuation Applications

Continuation awards within an approved project period will be made on the basis of availability of funds and documented progress toward the achievement of established short- and long-range objectives; the extent to which the objectives for the new budget period are consistent with the purposes for which the cooperative agreement was originally approved and are realistic, specific, measurble, and time-phased; and the extent to which proposed changes in the need for support, long-term objectives, methods of operation, evaluation plans or personnel are likely to enhance the success of the project. In addition, consideration will be given to the extent to which the budget request and proposed use of project funds are appropriate and reasonable.

Funding Priorities

Priority will be given to applicants applying for competing continuation funding. Current recipients have baseline and follow up data on knowledge, attitudes, beliefs and behaviors of cohorts of individuals, and have existing staff familiar with the program who have established relationships with other service providers, research institutions and community-based organizations in connection with the program.

E.O. 12372 Review

Applications are not subject to review as governed by Executive Order 12372, Intergovernmental Review of Federal Programs.

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance Number is 13.118, Acquired Immunodeficiency Syndrome (AIDS) activity.

Application Submission and Deadline

The original and two copies of the application must be submitted to Lin Dixon, Grants Management Officer, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control, 255 East Paces Ferry Road, NE., Room 300, Atlanta, Georgia 30305, on or before July 28, 1989.

A. *Deadline*: Applications shall be considered as meeting the deadline if they are either:

1. Received on or before the deadline date, or

2. Sent on or before the deadline date and received in time for submission to the independent review group. (Applicants must request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

B. *Late Applications*: Applications which do not meet the criteria in A. 1. or 2. above are considered late applications. Late applications will not be considered in the current competition and will be returned to the applicant.

Where To Obtain Additional Information

Information on application procedures and application package may be obtained from Anne Fogelsong, Grants Management Specialist, Grants Management Branch, Procurement and Grants Offices, Centers for Disease Control, 255 East Paces Ferry Road, NE., Room 300, Atlanta, GA 30305, (404) 842-6640 or FTS 236-6640.

Please refer to Announcement Number 934 when requesting information and submitting any application on the Request for Assistance.

Technical assistance may be obtained from Kevin O'Reilly, Ph.D., Center for Prevention Services, Centers for Disease Control, Atlanta, GA 30333, (404) 639-2570 or FTS 236-2570.

Dated: May 26, 1989.

Robert L. Foster,

Acting Director, Office of Program Support, Centers for Disease Control.

[FR Doc. 89-13084 Filed 6-1-89; 8:45 am]

BILLING CODE 4160-18-M

Food and Drug Administration

[Docket No. 89D-0162]

Uncooked Meat for Animal Food; Compliance Policy Guide; Availability

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of revised Compliance Policy Guide (CPG) 7126.23 "Uncooked Meat for Animal Food." The CPG provides advice and guidance on policy and case development to FDA district offices regarding interstate shipment of raw meat from dead, dying, disabled, or diseased animals for animal food use.

ADDRESSES: Submit written requests for single copies of CPG 7126.23 to the Industry Information Staff (HFV-12), Center for Veterinary Medicine, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Requests should be identified with the docket number found in brackets in the heading of this document. Send two self-addressed adhesive labels to assist that office in processing your requests. CPG 7126.23 is available for public examination in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, between 9 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT:

Marie A. Urban
or
Charles M. Breen,
Center for Veterinary Medicine (HFV-236),
Food and Drug Administration,
5600 Fishers Lane,
Rockville, MD 20857,
301-443-2830.

SUPPLEMENTARY INFORMATION: FDA has prepared CPG 7126.23 "Uncooked Meat for Animal Food" to update a policy guide issued under the same title and number on October 1, 1980. The original policy guide included background information and addressed the regulatory status of such products under the Federal Food, Drug, and Cosmetic Act (the act).

FDA is aware that dead, dying, disabled, or diseased animals may be sold to salvagers for animal food use. Uncooked meat derived from such animals is adulterated under section 402(a)(5) of the act (21 U.S.C. 342(a)(5)), and its shipment in interstate commerce for animal food use is subject to

appropriate regulatory action. Meat from such animals that has not been adequately heat-processed may present a potential health hazard.

The revised guide advises the district offices to conduct preliminary investigations only as a follow-up to complaints and reports of injuries, and to contact the Center for Veterinary Medicine for advice and assistance before they expend substantial resources or recommend regulatory action.

This notice is issued under 21 CFR 10.85.

Dated: May 23, 1989.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 89-13039 Filed 6-1-89; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 87P-0274]

Canned Green Beans Deviating From the Standard of Identity; Extension of Temporary Permit for Market Testing

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that the expiration date of a temporary permit to market test in interstate commerce canned green beans containing added glucono delta-lactone is being extended. This extension will allow the permit holder to continue experimental market testing of the product while the agency takes action on the petition to amend the standard of identity for canned green beans and canned wax beans that was submitted by the permit holder.

DATES: The new expiration date of the permit will be either the effective date of a final rule for any proposal to amend the standard of identity for canned green beans and canned wax beans that may result from the petition or 30 days after termination of such proposal.

FOR FURTHER INFORMATION CONTACT: Arthur R. Johnson, Center for Food Safety and Applied Nutrition (HFF-414), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, 202-485-0112.

SUPPLEMENTARY INFORMATION: A temporary permit was issued under the provisions of 21 CFR 130.17 to the Seymour Canning Co., 530 East Wisconsin St., Seymour, WI 54165, to market test experimental packs of canned green beans containing added glucono delta-lactone. The permit was issued in order to facilitate market testing of a food that deviates from the requirements of the standard of identity promulgated under section 401 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 341). Notice of issuance of the temporary permit to the Seymour Canning Co. was published in the Federal Register of October, 22, 1987 (52 FR 39563).

Seymour Canning Co. has requested that the temporary permit be extended so that the market test period can continue while the agency considers action on a petition submitted on behalf of the Seymour Canning Co., the American National Can Co., and Finnsugar Biochemicals, Inc., to amend the standard of identity for canned green beans and canned wax beans (21 CFR 155.120). FDA has concluded that it is in the interest of consumers to issue the extension.

As provided in 21 CFR 130.17(i), FDA is inviting interested persons to participate in the market test under conditions that apply to the Seymour Canning Co., including the labeling requirements and the amounts of test product to be distributed, except that the designated areas of distribution shall not apply.

Any interested person who wishes to participate in the market test must notify, in writing, the Acting Director, Division of Food Chemistry and Technology (HFF-410), Food and Drug Administration, 200 C Street SW., Washington, DC 20204. The notification must include the amount of test product to be distributed, the areas of distribution, and labeling that will be used for the test product.

FDA is extending the expiration date so that the permit expires either on the effective date of a final rule for any proposal to amend the standard of identity for canned green beans and canned wax beans that may result from the petition or 30 days after termination of such a proposal. All other conditions and terms remain the same.

Dated: May 19, 1989.

Fred R. Shank,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 89-13040 Filed 6-1-89; 8:45 am]

BILLING CODE 4160-01-M

Public Health Service

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The Public Health Service (PHS) is publishing this notice of petitions received under the National Vaccine Injury Compensation Program ("the Program"), as required by section 2112(b)(2) of the PHS Act, as amended. While the Secretary of Health and Human Services is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Claims Court is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program generally, contact the Clerk, United States Claims Court, 717 Madison Place NW., Washington, DC 20005, (202) 633-7257. For information on the Public Health Service's role in the Program, contact the Director, Vaccine Injury Compensation Program, Parklawn Building, 5600 Fishers Lane, Room 4-101, Rockville, MD 20857, (301) 443-6593.

SUPPLEMENTARY INFORMATION: The Program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of Title XXI of the PHS Act, 42 U.S.C. 300aa-10 *et seq.*, provides that those seeking compensation are to file a petition with the U.S. Claims Court and to serve a copy of the petition on the Secretary of Health and Human Services, who is named as the respondent in each proceeding. The Secretary has delegated his responsibility under the Program to PHS. The Claims Court is directed by statute to appoint special masters to take evidence, conduct hearings as appropriate, and to submit to the Court proposed findings of fact and conclusions of law.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table set forth at section 2114 of the PHS Act. This Table lists for each covered childhood vaccine the conditions which will lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the Table and for conditions that are manifested after the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa-12(b)(2), requires that the

Secretary publish in the **Federal Register** a notice of each petition filed. Set forth below is a list of petitions received by PHS from April 27 through May 22, 1989. Section 2112(b)(2) also provides that the special master "shall afford all interested persons an opportunity to submit relevant, written information" relating to the following:

1. The existence of evidence "that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition," and

2. Any allegation in petition that the petitioner either:

(a) "sustained, or had significantly aggravated, an illness, disability, injury, or condition not set forth in the Vaccine Injury Table (see section 2114 of the PHS Act) but which was caused by" one of the vaccines referred to in the table, or

(b) "sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine" referred to in the Table.

This notice will also serve as the special master's invitation to all interested persons to submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the U.S. Claims Court at the address listed above (under the heading "**FOR FURTHER INFORMATION CONTACT**"), with a copy to PHS addressed to Director, Bureau of Health Professions, 5600 Fishers Lane, Suite 8–05, Rockville, MD 20857. The Court's caption (Petitioner's Name v. Secretary of Health and Human Services) and the docket number assigned to the petition should be used as the caption for the written submission.

Chapter 35 of Title 44, United States Code, related to paperwork reduction, does not apply to information required for purposes of carrying out the Program.

List of Petitions

1. Helen Chronister on Behalf of Dennis Wayne Childress, Madisonville, Kentucky, Claims Court Docket No. 89–41 V
2. Edna O'Dell on Behalf of Michael Lee Richmond, Cedar Rapids, Iowa, Claims Court Docket No. 89–42 V
3. Barbara Brading Tison, Lebanon, Ohio, Claims Court Docket No. 89–43 V
4. James Tucker on Behalf of Calvin Tucker, Monticello, Kentucky, Claims Court Docket No. 89–44 V
5. Thomas Rousseau and Carolyn Rousseau on Behalf of Trevor Rousseau, Asuncion, Paraguay, Claims Court Docket No. 89–45 V
6. Clinton Eugene Eads and Toni Lynne Eads on Behalf of Justin Happy Eads, Shawnee, Oklahoma, Claims Court Docket No. 89–46 V
7. Ann Tom on Behalf of Manchester Tom, Honolulu, Hawaii, Claims Court Docket No. 89–47 V and 89–48 V
8. Kelli Delozier and Brown Delozier on Behalf of Mallori Delozier, Dallas, Texas, Claims Court Docket No. 89–49 V
9. Scott R. Young and Crystal Young on Behalf of Scott W. Young, Morristown, Pennsylvania, Claims Court Docket No. 89–50 V
10. Sandra Massing and Jeffery Massing on Behalf of Christopher Massing, Overland, Kansas, Claims Court Docket No. 89–51 V
11. Kyle Stinson on Behalf of Tyler McKinley Stinson, New Holland, Ohio, Claims Court Docket No. 89–52 V
12. Mina Sue McClain on Behalf of Rita Kay McClain, Milan, Tennessee, Claims Court Docket No. 89–53 V
13. Renae Flynn and Michael Flynn on Behalf of Christopher Michael Flynn, Torrance, California, Claims Court Docket No. 89–54 V
14. John Vinyard and Patsy Vinyard on Behalf of Jason Warren Vinyard, Cobb County, Georgia, Claims Court Docket No. 89–55 V.

Dated: May 26, 1989.

John H. Kelso,
Acting Administrator.

[FR Doc. 89–13041 Filed 6–1–89; 8:45 am]
BILLING CODE 4160–15–M

Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Public Health Service (PHS) 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 May 26, 1989.

(Call Reports Clearance Officer on 202–245–2100 for copies of package)

1. Application for Correction of Public Health Service Commissioned Corps Records—0937–0095—An application is submitted by present and former PHS Commissioned Corps officers to request correction of an error or alleged injustice in their personnel records. The information submitted is used by the Board for Correction to determine if an error or injustice has occurred and to rectify such error or injustice. *Respondents:* Individuals or households, Federal agencies or employees; *Number of Respondents:* 25; *Number of Responses per Respondent:* 1; *Average Burden per Response:* 4 hours; *Estimated Annual Burden:* 100 hours.

2. HIV Prevention Programs in Minority and Other Community-Based Organizations Project Reports—NEW—CDC will award cooperative agreements to approximately 75 minority and other community-based organizations serving populations with and at risk of HIV infection and AIDS. This clearance request is to have funded HIV prevention programs submit a quarterly narrative report to CDC. These reports will be used as monitoring and evaluation mechanisms. *Respondents:* Non-profit institutions; *Number of Respondents:* 75; *Number of Responses per Respondent:* 4; *Average Burden per Response:* 4 hours; *Estimated Annual Burden:* 1,200 hours. ,

3. National Ambulatory Medical Care Survey—0920–0134—Data collected from office-based physicians concerning patient visits are aggregated to national statistics. The data are used by the public and private sectors for public health planning, medical education, health manpower assessment, epidemiologic studies, and other medical care utilization research. *Respondents:* Businesses or other for-profit; *Number of Respondents:* 2,600; *Number of Responses per Respondent:* 31; *Average Burden per Response:* .0457 hours; *Estimated Annual Burden:* 3,683 hours.

4. The Framingham Study (Cohort and Offspring)—0925–0216—This research project involves physical examination and testing of surviving members of the Framingham study cohort and their offspring. The study will be used to further describe the risk factors, occurrence rates and consequences of cardiovascular disease in middle-aged and older men and women. *Respondents:* Individuals or households, businesses or other for-profit, small businesses or organizations.

	No. of respondents	No. of hours per response	No. of responses per respondent
Examination and testing	1,600	2	1
Provider record requests	650	.5	1

Estimated Annual Burden..... 3,525 hours

OMB Desk Officer: Shannah Koss-McCallum.

Written comments and recommendations for the proposed information should be sent directly to the OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503.

Date: May 26, 1989.

James M. Friedman,

Acting Deputy Assistant Secretary for Health (Planning and Evaluation).

[FR Doc. 89-13158 Filed 6-1-89; 8:45 am]

BILLING CODE 4160-17-M

Office of the Assistant Secretary for Health; Privacy Act of 1974; Addition of Routine Use to an Existing System of Records

AGENCY: Public Health Service (PHS), HHS.

ACTION: Notification of a new routine use.

SUMMARY: In accordance with the requirements of the Privacy Act, PHS is publishing notice of the addition of a new routine use to system of records 09-37-0002, PHS Commissioned Corps General Personnel Records, Systems of Records, HHS/OASH/OSG.

DATES: PHS invites interested parties to submit comments to the proposed routine use on or before July 3, 1989.

ADDRESS: Please submit comments to: David W. Callagy, Director, Division of Commissioned Personnel, Office of the Surgeon General, OASH, Room 4A-15, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443-3067.

Comments received will be available for inspection at the same address from 8:30 a.m. to 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Paul Lichtenstein, Senior Personnel Policy Specialist, Office of the Director, Division of Commissioned Personnel, Office of the Surgeon General, OASH, Room 4A-15, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443-3067.

The numbers listed above are not toll free.

SUPPLEMENTARY INFORMATION: PHS is proposing to add a new routine use (#26) to permit disclosures to Federal Agencies of automated administrative and personnel data on those commissioned officers assigned to their respective agencies. The information to be disclosed includes data elements in the Officer Information Summary (OIS). The purpose of the disclosure is to facilitate use of this data for normal personnel functions such as determining qualifications for promotion, assignments or transfers.

Another change to the system notice is to note that officials in the Office of the Surgeon General (OSG), the parent organization of the Division of Commissioned Personnel (DCP), are authorized users of the system of records.

The final changes in this notice concern storage of the records. The records of inactive reserve officers, who are not in the ready reserve, will now be maintained at the PHS Health Data Center in Carville, LA. If an inactive reserve officer changes status, that officer's record is returned to DCP. Records for persons who no longer have an active relationship with the PHS Commissioned Corps are sent to the National Personnel Record Center (NPRC) in St. Louis, Missouri after one year. Records of retired officials will also be sent to NPRC after four years.

Dated: May 24, 1989.

Wilford J. Forbush,

Deputy Assistant Secretary for Health Operations and Director, Office of Management

09-37-0002

SYSTEM NAME:

PHS Commissioned Corps General Personnel Records, HHS/OASH/OSG.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Division of Commissioned Personnel, Office of the Surgeon General/OASH, Room 4-35, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857.

Records in this system are kept at the address shown above when the person to whom the record pertains has an active relationship with the PHS Commissioned Corps personnel system. Records for inactive reserve officers, who are not ready reserve, who have a potential active relationship with the PHS Commissioned Corps personnel system, are maintained at the address above.

PHS Health Data Center, GW Long Hansen's Disease Center, Building 12, Carville, Louisiana 70721.

If an inactive officer changes status, his or her records are returned to the Division of Commissioned Personnel for disposition.

Records for individuals who no longer have an active relationship with the PHS Commissioned Corps personnel system are sent to the following locations after one year.

National Personnel Record Center, Civilian Personnel Records, 111 Winnebago Street, St. Louis, Missouri 63118.

Records for retired officers are also sent to St. Louis after four years. When retired officers become deceased, the records are returned to DCP for one year and then returned to St. Louis. Records in this system that are kept at the St. Louis location are considered closed. A record is closed two years from the date on which one of the following occurs: a final decision has been made that an applicant is no longer under consideration for an appointment to the commissioned corps; the person to whom the record pertains has permanently severed all ties with PHS; or the person to whom the record pertains is deceased.

Critical data that can be used to construct key actions concerning an individual's appointment, creditable service, compensation, retirement, or benefits may be micro-fiched and stored at a location apart from the system locations shown above to serve as an emergency data base in the event the original records are destroyed. Because this data is intended to be used only in the event that the original records are destroyed, it includes only duplicates of existing records maintained at the system locations shown above. For this reason, disclosure from and access to this data will generally be unnecessary, since requests for disclosure or access will be granted from the original records.

Names and addresses of contractors given information under routine use 9 can be obtained from the system manager at the Rockville, Maryland location identified above.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who are part of or who have some relationship with the Public Health Service (PHS) Commissioned Corps, including: active duty commissioned officers, former

commissioned officers, inactive reserve officers, retired commissioned officers, deceased commissioned officers, dependents and survivors of the above, former spouses of retired officers, and applicants to the PHS Commissioned Corps.

CATEGORIES OF RECORDS IN THE SYSTEM:

These records contain:

1. Applications for appointment, references and other documents relating to qualifications or suitability for appointment and assignment, including medical intern and residency evaluations;

2. Official Personnel Folders (OPFs), for all officers who are, or were at one time, on active duty, which include: All documents related to the application and appointment process; effectiveness reports; career development and training records; documents relating to assignment, promotion, retention, separation, and all other personnel actions; records of personnel actions relating to pay, travel, and allowances (including overseas educational allowances for dependents); documentation of dependant status used to determine entitlement or eligibility for benefits and identification and privilege cards; applications and records of Service action relating to the Commissioned Officer Residency Deferment Program and Commissioned Officer Student Training and Extern Programs; survivor benefit elections; information supporting officer awards, honors and commendations; documentation supporting non-board terminations and reprimands issued after final administrative action; pay records and medical data after separation or death of the subject individual; and leave records;

3. Worksheets, internal forms, internal memoranda, and other documents which result in, or contribute to an action resulting in a record identified in 2. above;

4. Service Record Cards (summarizing personnel actions); and

5. Correspondence relating to the above.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Public Health Service Act (42 United States Code (U.S.C.) 202–217, 218a, 224, 228, 233, and other pertinent sections); The Social Security Act (42 U.S.C. 410(m) et seq.); portions of Title 10, U.S.C., related to the uniformed services; portions of Title 37, U.S.C., related to pay and allowances for members of the uniformed services; portions of Title 38, U.S.C., related to benefits administered by the Veterans Administration; sections of 50 U.S.C. App., related to the selective service obligation and the Soldiers' and Sailors' Civil Relief Act; Executive Order (E.O.) 9397, "Numbering System for Federal Accounts Relating to Individual Persons;" E.O. 10450, "Security Requirements for Government Employment;" and E.O. 11140, which delegates the authority to administer the PHS Commissioned Corps from the President to the Secretary, DHHS.

PURPOSES:

The information is used by the Office of the Surgeon General (OSG), the Division of Commissioned Personnel (DCP) and Agency Heads and personnel officials of Agencies where Commissioned Officers are assigned, to:

1. Determine qualifications and suitability for appointment, selection, career development, training, promotions, assignments, mobilization, temporary duty, and other types of officer utilization;

2. Determine eligibility for pay, allowances, entitlements, privileges, and benefits;

3. Prepare the Commissioned Officer Roster and Promotion Seniority of the Public Health Service;

4. Determine the eligibility or entitlements of dependents and beneficiaries for benefits based on the service of a PHS commissioned officer;

5. Give legal force and effect to personnel transactions and establish officer rights and obligations under the pertinent laws and regulations governing the commissioned corps personnel system;

6. Provide material for research by the Office of the Secretary, HHS, and the Office of the Assistant Secretary for Health, PHS, concerning the activities of health professionals.

7. Provide information to DHHS components seeking to collect an overdue debt to the Federal government, but only to the extent necessary to collect that overdue debt; and

8. Provide information about professional qualifications, past performance, and career interests of PHS officers to Department and Agency officials involved in the selection or assignment of an officer to a particular program.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records or information from these records may be used:

1. To locate individuals for personnel research or survey response, and in the production of summary descriptive statistics and analytical studies in support of the function for which the records are collected and maintained, or for related work force studies. While published statistics and studies do not contain individual identifiers, in some instances the selection of elements of data included in the study may be structured in such as way as to make the data individually identifiable by inference.

2. To disclose information to a congressional office from the record of an individual in response to a verified inquiry from the congressional office made at the written request of that individual.

3. To the Department of Justice, to a court or other tribunal, when:

(a) HHS, or any component thereof; or

(b) Any HHS employee in his or her official capacity; or

(c) Any HHS employee in his or her individual capacity where the Department of Justice (or HHS, where it is authorized to do so) has agreed to represent the employee; or

(d) The United States or any agency thereof where HHS determines that the litigation is likely to affect HHS or any of its components.

is a party to litigation or has an interest in such litigation, and HHS determines that the use of such records by the Department of Justice, the court, or other tribunal is relevant and necessary to the litigation and would help in the effective representation of the governmental party, provided, however, that in each case, HHS determines that such disclosure is compatible with the purpose for which the records are collected.

4. To disclose information, such as, but not limited to, name, home address, social security number, earned income, withholding status, and amount of taxes withheld, to the Department of Treasury for the following purposes: Preparation and issuance of salary, retired pay, and annuity checks; issuance of U.S. Savings bonds; recording income information; and collecting income taxes.

5. To disclose to State and local government agencies having taxing authority pertinent records relating to employees, retirees, and annuitants, including name, home address, social security number, earned income, and amount of taxes withheld, when these agencies have entered into tax withholding agreements with the Secretary of Treasury, but only to those State and local taxing authorities for which a member, retiree, or annuitant is or was subject to tax, regardless of whether tax is or was withheld.

6. To disclose pertinent information to appropriate Federal, State, or local

agencies; international agencies; or foreign governments responsible for investigating, prosecuting, enforcing, or implementing statutes, rules, regulations, or orders, when PHS becomes aware of evidence of a potential violation of civil or criminal law.

7. To disclose information to an individual who has been asked to provide a reference, to the extent necessary to clearly identify the individual to whom the reference will pertain, inform the source of the purpose(s) of the reference, and to identify the type of information requested from the source, where necessary to obtain information relevant to an agency decision concerning the hiring or retention of any employee, the issuance of a security clearance, the conducting of a security or suitability investigation of an individual, the classifying of jobs, the letting of a contract, or the issuance of a license, grant, or other benefit.

8. To disclose to any agency in the executive, legislative, or judicial branch; the District of Columbia Government; a State or local government agency; a professional credentialing agency; or a nonprofit institution; in response to its request, or at the initiation of the Public Health Service, information in connection with the hiring of an employee; the issuance of a security clearance; the conducting of a security or suitability investigation of an individual; the classifying of jobs; the letting of a contract; the issuance of a license, grant or other benefit by the requesting agency; or the lawful statutory, administrative, or investigative purpose of the agency to the extent that the information is relevant and necessary to the requesting agency's decision on the matter. Information disclosed to professional credentialing or licensing organizations may be made through the computer matching program described in the Federal Register, January 19, 1986 (52 FR 1302).

9. When the Department contemplates contracting with a private firm for the purpose of collating, analyzing, aggregating, or otherwise refining records in this system, relevant records will be disclosed to such a contractor. The contractor shall be required to maintain Privacy Act safeguards with respect to such records. These safeguards are explained in the section entitled "Safeguards."

10. To disclose information to the Department of State and officials of foreign governments for the issuance of passports, visas, and other clearance before an active, retired, or inactive reserve officer is assigned to that country.

11. To disclose information to the Department of Labor, Veterans Administration, Social Security Administration, or other Federal agencies having special employee benefit programs; to a national, State, county, or municipal agency; or to a publicly recognized charitable organization when necessary to adjudicate a claim under a benefit program, or to conduct analytical studies of benefits being paid under such programs, provided such disclosure is consistent with the purposes for which the information was originally collected.

12. To disclose information to the Office of Management and Budget (OMB) at any stage in the legislative coordination and clearance process in connection with private relief legislation as set forth in OMB Circular No. A–19, or for budgetary or management oversight purposes.

13. When an individual to whom a record pertains is mentally incompetent or under other legal disability, information in the individual's record may be disclosed to any person who is legally responsible for the care of the individual, to the extent necessary to assure payment of benefits to which the individual is entitled.

14. To respond to interrogatories in the prosecution of a divorce action or settlement for purposes stated in 10 U.S.C. 1408 ("The Former Spouses' Protection Act").

15. To disclose information about the entitlements and benefits of a beneficiary of a deceased active duty officer, retiree, or annuitant for purposes of making disposition of the estate.

16. To disclose information to the Department of Defense, United States Coast Guard, or Federal Emergency Management Agency, to the extent necessary to facilitate participation of PHS members in planning, training, and emergency operations in support of civil defense activities, and to provide support in the event of a national emergency.

17. To disclose information to Government training facilities (Federal, State, and local) and to non-Government training facilities (e.g., private vendors of training courses or programs, private schools) for training purposes, such as crediting of work experience in the Commissioned Office Student Training and Extern Program, or verification of status or income.

18. To disclose information to the Defense Enrollment/Eligibility Reporting System (DEERS), uniformed services medical treatment facilities and to the Department of Defense Office of the Civilian Health and Medical Program of the Uniformed Services, when the information is needed to verify the eligibility of an officer, his/her dependents, or a former spouse for medical benefits.

19. To disclose information to agencies or organizations established in medically underserved areas who apply to the National Health Service Corps for the assignment of commissioned officers to such agencies or organizations.

20. To disclose information on officers assigned to Federal health care facilities to private sector (i.e., other than Federal, State, or local government) agencies, boards, or commissions (e.g. the Joint Commission on Accreditation of Hospitals), to obtain accreditation or other approval rating but only to the extent that the information disclosed is relevant and necessary for that purpose.

21. When Federal agencies having the power to subpoena other Federal agencies' records, such as the Internal Revenue Service or the Civil Rights Commission, issue a subpoena to the Department for records in this system of records, the Department may make such records available.

22. To disclose to a private employer who is considering hiring a former officer information such as the officer's dates of employment, salary, job title and description, duty station, and character and nature of separation.

23. To disclose information to the Equal Employment Opportunity Commission when requested in connection with investigations into alleged or possible discrimination practices in the Federal sector, examination of Federal affirmative employment programs, or other functions vested in the Commission by the President's Reorganization Plan No. 1 of 1978.

24. To disclose to Federal and non-Federal agencies information allowing the consideration and selection of officers for honor awards made as a result of the individuals work as a commissioned officer, and to publicize those awards granted. This may include disclosure to other public and private organizations, including news media, which grant or publicize officer awards and honors.

25. To disclose information to officials of the Selective Service Administration to allow crediting of active service performed by an individual with PHS so that the individual may be properly classified if draft laws once again become operative.

26. To disclose administrative and personnel information, including data

elements reflected in the Officer Information Summary (OIS), to authorized officials in Federal agencies where commissioned officers are assigned, such as the State Department; the Department of Defense; the Department of Justice, Bureau of Prisons and the Immigration and Naturalization Service; the Transportation Department, United States Coast Guard; the Environmental Protection Agency; the Interior Department, United States Park Service; and the Commerce Department, National Oceanic and Atmospheric Administration.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Automated files are stored on disks, micro-fiche, and magnetic tapes. Nonautomated (hard-copy) files are kept in offices, and may be stored in Lektrievers, Conserv-a-files, safes, cabinets, bookcases, or desks.

RETRIEVABILITY:

Alphabetically by name, by PHS serial number, and by Social Security Number in accordance with Section 7(a)(2)(B) of the Privacy Act and Executive Order 9397, "Numbering System for Federal Accounts Relating to Individual Persons".

Safeguards

1. Authorized Users

a. *Automated Records.* Access to and use of automated records is limited to (1) personnel employed in the Office of the Surgeon General, (2) personnel employed in the Division of Commissioned Personnel, Office of the Surgeon General/PHS, (3) authorized officials in HHS components and organizations where commissioned officers are assigned whose official duties require such access and (4) authorized officials in other Federal agencies, such as those in routine use 26 above, where commissioned officers are assigned whose official duties require such access. Automated data is provided to Department personnel officials to update information contained in their personnel records and pay, leave and attendance systems. The Commissioned Officers and Field Systems Division (COFSD), Office of the Assistant Secretary for Personnel, provides computer design, programming and support to DCP, and has access to the data to the extent necessary to facilitate the provision of these services to DCP. However, COFSD personnel are not authorized to grant access to or make disclosures from automated data in this system to *anyone* (ital.) or any *organization* (ital.) without the express written approval of the Director of DCP or to an official to whom this authority has been delegated.

b. *Nonautomated records.* Access to and use of nonautomated records is limited to departmental employees whose official duties require such access or to individuals needing access to the information for purposes stated under routine uses. These individuals are permitted access to records only after they have satisfactorily identified themselves as having an official need to review the information and have provided satisfactory proof of their identities. Access is also granted to individuals who have written permission to review the record when that permission has been obtained from the individual to whom the record pertains. All individuals from outside the Department, to whom disclosure is made pursuant to a routine use, must complete Privacy Act nondisclosure oaths and must submit written requests for access to these records showing the name and employing office of the requester, the date on which the record is requested, and the purpose for reviewing the information in the record. This written request is then placed into the record.

2. Physical safeguards

a. *Automated records.* Terminals by which automated records are accessed are kept in offices secured with combination locks. Automated records on magnetic tape, disks, and other computer equipment are kept in rooms designed to protect the physical integrity of the record media and equipment. These rooms are within inner offices to which access is permitted only with special clearance. Outer offices are secured with combination locks. During nonwork hours all cabinets, storage facilities, rooms and offices are locked and the premises are patrolled regularly by building security forces.

b. *Nonautomated records.* Nonautomated records are kept in such a way as to prevent observation by unauthorized individuals while the records are actively in use by an authorized employee. When records are not in use, they are closed and secured in desk drawers with locks, metal filing cabinets with locks, or other security equipment, all of which are kept inside authorized office space which is locked whenever it is not in use. Keys to furniture and equipment are kept only by the individual who is assigned to that furniture or equipment and by the DCP security officer or by the Director of the PHS Data Records Center.

3. Procedural safeguards

a. *Automated records.* Automated records are secured by assigning individual access codes to authorized personnel, and by use of passwords for specific records created by authorized personnel. Access codes and passwords are changed for each authorized user approximately every 90 days, on a random schedule. In addition, programming for automated records allows authorized personnel to access only those records that are essential to their duties. Remote access to automated data from remote terminals is restricted to the OSG and Agency personnel officials where Commissioned Officers are employed. No access is permitted to Agencies that do not have automated personnel recordkeeping systems that comply with Privacy Act requirements.

b. *Nonautomated records.* All files are secured when employees are absent from the premises and are further protected by combination locks on entryways and by the building security force. Official records may not be removed from the physical boundaries of DCP. When records are needed at a remote location, copies of the records will be provided. When copying records for authorized purposes, care is taken to ensure that any imperfect or extra copies are not left in the reproduction room where they can be read, but are destroyed or obliterated.

4. *Implementing Guidelines.* Safeguards for automated records are provided in accordance with Part 6 of the Department's Information Resources Management Manual. Safeguards for nonautomated records are provided in accordance with chapters 45–13 and PHS.hf:45–13 of the Department's General Administration Manual.

5. *Contractor Guidelines.* A contractor who is given records under routine use 9 must maintain the records in a secured area, allow only those individuals immediately involved in the processing of the records to have access to them, prevent any unauthorized persons from gaining access to the records, caution employees about the confidentiality of the records, and return the records to the System Manager immediately upon completion of the work specified in the contract. Contractor compliance is assured through inclusion of Privacy Act requirements in contract clauses, and through monitoring by contract and project officers. Contractors who maintain records are instructed to make no disclosure of the records except as authorized by the System Manager.

Retention and disposal: These records are maintained for varying periods of time. Applicant files of individuals selected for appointment as commissioned officers become the Official Personnel Folder. Applicant files of individuals not selected for appointment are maintained for two years after the application process has been completed and are then destroyed, unless an applicant requests that the file be held open for an additional year. The OPF is maintained for one year after an officer separates from active duty, at which time such officer's OPF is transferred to a Federal Records Center for permanent storage. The OPF for inactive reserve officers is maintained at the PHS Health Date Center. When inactive reserve officers change status, the OPF is returned to DCP.

The records of a deceased officer are maintained until one year after an individual's death and are then transferred to a Federal Records Center for permanent storage, unless a dependent of a deceased officer continues to receive benefits from PHS based upon the deceased's PHS service. When a dependent or beneficiary dies or becomes ineligible for futher benefits based on a deceased officer's service, all records are maintained for one year, in the event information is needed from the records to help settle an estate, and are then transferred to the Federal Records Center for permanent storage.

Service Record Cards, which list critical data with regard to the dates of all officers' appointments, reassignments, separations, retirements and deaths are maintained permanently by the System Manager.

SYSTEM MANAGER AND ADDRESS:

Director, DCP (See System Location above).

NOTIFICATION PROCEDURE:

Same as Access Procedures. Requesters should also reasonably specify the record contents being sought.

RECORD ACCESS PROCEDURES:

1. *General procedures.* An individual seeking access to his/her records may initially contact any DCP office or employee for information about obtaining access to the records. DCP employees will inform each individual of the appropriate procedures to follow. Each individual seeking access will be required to verify his/her identity to the satisfaction of the DCP employee providing access. Refusal to provide sufficient proof of identity will result in denial of the request for access until such time as proof of identity can be obtained. The system manager, the Director, DCP, has delegated authority to release automated records to the Assistant Director for Operations, DCP and the authority to release nonautomated records to the DCP Privacy Act Coordinator and Branch Chiefs.

2. *Requests in person.* An individual who is the subject of a record and who appears in person seeking access shall provide his/her name and at least one piece of tangible identification (e.g., PHS Commissioned Corps Identification Card, driver's license, passport, or voter registration card). Identification cards with current photographs are preferred but not required. The record will be reviewed in the presence of an appropriate DCP employee, who will answer questions and ensure that the individual neither removes nor inserts any material into the record without the knowledge of the DCP employee. If the individual requests a copy of any records reviewed, the DCP employee will provide them to the individual. The DCP employee will record the name of the individual granted access, the dates and times of access, and information about the verification of identity on a separate log sheet maintained in the office of the DCP employee who reviewed the record.

3. *Requests by mail.* Written requests must be addressed to the System Manager or the DCP Privacy Act Coordinator, at the address shown as the system location above. All written requests must be signed by the individual seeking access. A comparison will be made of that signature and the signature maintained on file prior to release of the material requested. Copies of the records to which access has been requested will be mailed to the individual. The original version of a record will not be released except in very unusual situations when only the original will satisfy the purpose of the request.

4. *Requests by phone.* Because positive identification of the caller cannot be established with sufficient certainty, telephone requests for access to records generally will not be honored.

5. *Accounting of Disclosures.* An individual who is the subject of records maintained in this record system may also request an accounting of all disclosures that have been made from that individual's records, provided that disclosures have in fact been made.

CONTESTING RECORD PROCEDURES:

Contact the System Manager at the address specified under System Location above and reasonably identify the record. Specify the information being contested. State the corrective action sought, with supporting justification, along with information to show how the record is inaccurate, incomplete, untimely, or irrelevant.

RECORD SOURCE CATEGORIES:

From individual officers, applicants, persons providing references, dependents, former spouses of retired officers, governmental and private training facilities, health professional licensing and credentialing organizations, government officials and employees and from the records contained in the following systems: 09–37–0003, "PHS Commissioned Corps Medical Records," HHS/OASH/OSG/ 09–37–0005, "PHS Commissioned Corps Board Proceedings," HHS/OASH/OSG; 09–37–0006, "PHS Commissioned Corps Grievance, Investigatory, and Disciplinary Files," HHS/OASH/OSG/ 09–37–0008, "PHS Commissioned Corps Unofficial Personnel Files and Other Station Files," HHS/OASH/OSG; and 09–90–0017; "Pay, Leave and Attendance Records," HHS/OS/ASPER.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 89–13042 Filed 6–1–89; 8:45 am]

BILLING CODE 4160–17–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

[Docket No. N–89–1917; FR–2606]

Unutilized and Underutilized Federal Buildings and Real Property Determined To Be Suitable for Use for Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized and underutilized Federal property determined by HUD to be suitable for possible use for facilities to assist the homeless.

DATE: June 2, 1989.

ADDRESS: For further information, contact Morris Bourne, Department of Housing and Urban Development, Room 9140, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 755–9075; TDD number for the hearing- and speech-impaired (202) 426–0015.

(These telephone numbers are not toll-free.).

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, D.C.D.C. No. 88-2503-OG, HUD publishes a Notice, on a weekly basis, identifying unutilized and underutilized Federal building and real property determined by HUD to be suitable for use for facilities to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable this week.

Date: May 25, 1989.

James E. Schoenberger,

General Deputy Assistant Secretary for Housing—Federal Housing Commissioner

[FR Doc. 89-13038 Filed 6-1-89; 8:45 am]

BILLING CODE 4210-27-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR-094-08-6334-12: GP9-217]

Temporary Closure of Public Lands

AGENCY: Bureau of Land Management, Interior.

Note: The above number is a correction to an earlier **Federal Register** notice (54 FR 18160).

ACTION: Temporary closure of public lands in Lane County, OR.

SUMMARY: Notice is hereby given that certain public lands in Lane County, Oregon are temporarily closed to all public use, including recreation, camping, shooting, hiking and sightseeing, from May 15, 1989 through October 31, 1989. The closure is made under the authority of 43 CFR 8364.1.

The public lands affected by this emergency closure are specifically identified as follows:

Willamette Meridian, Oregon

T. 16 S., R. 7 W.,

Sec. 19: SE¼SE¼, excluding the right-of-way of Oregon State Highway 36.

Containing approximately 36 acres.

The following persons, operating within the scope of their official duties, are exempt from the provisions of this closure order: Bureau employees; state, local and federal law enforcement and fire protection personnel; the holders of BLM road use permits that include roads within the closure area; the contractor authorized to construct the Lake Creek Falls Fish Ladder project and their subcontractors. Access by additional parties may be allowed, but most be approved in advance in writing by the Authorized Officer.

Any person who fails to comply with the provisions of this closure order may be subject to the penalties provided in 43 CFR 8360.0-7, which include a fine not to exceed $1,000 and/or imprisonment not to exceed 12 months.

The public lands temporarily closed to public use under this order will be posted with signs at points of public access.

The purpose of this temporary closure is to provide for public safety and the protection of property and equipment during the mobilization, construction and de-moblilization phase of the Lake Creek Falls Fish Ladder project.

EFFECTIVE DATES: May 15, 1989 through October 31, 1989.

ADDRESSES: Copies of the closure order and maps showing the location of the closed lands are available from the Eugene District Office, P.O. Box 10226 (1255 Pearl Street), Eugene, Oregon 97440, or the Coast Range Resource Area Office, 1144 Gateway Loop, Springfield, Oregon 97477.

FOR FURTHER INFORMATION CONTACT: Wayne E. Elliott, Coast Range Area Manage, Eugene District Office, at (503) 683-6989.

Date: May 24, 1989.

Wayne E. Eliott,

Area Manager.

[FR Doc. 89-13110 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-33-M

Rules of Conduct and Supplemental Rules; California Desert District, California Coachella Valley Preserve

AGENCY: Bureau of Land Management, Interior.

ACTION: Supplementary Rules to Protect Resources and Federally Threatened Species Habitat Within the Boundaries of the Coachella Valley Preserve.

SUMMARY: The following described areas are closed to the discharge of taking game. These same areas are also closed to camping, campfires, and the collection of vegetative and wildlife resources without authorization. These rules are necessary to protect lands set aside for the preservation of the Federally Threatened Coachella Valley Fringe-toed Lizard. These rules will ensure that public use of the Preserve lands is compatible with the preservation objectives for the species.

Area	Location
	San Bernardino P.M.
1. Coachella Valley Preserve.	T. 04S., R. 06E., Sec. 1, 2, 10, 11, 13, 14, T. 03S., R. 06E., Sec. 34, 35, 36, T. 04S., R. 07E, Sec. 6, 7, 8, 9, 15, 16, 17.
2. Coachella Valley Preserve Lands jointly administered by the BLM and USFWS.	T. 04S., R. 06E., Sec. 22, 23, 24, 25, 26, 27, 35, 36.
3. Coachella Valley Preserve Indian Avenue Site.	T 03S. R. 04E., Sec. 25, 26.
4. Coachella Valley Preserve Willow Hole/ Edom Hill Site.	T 03S., R. 05E, Sec. 28, 34.

EFFECTIVE DATE: June 1, 1989.

FOR FURTHER INFORMATION CONTACT: Russell L. Kaldenberg, Area Manager, Palm Springs-South Coast Resource Area, 1900 E. Tahquitz-McCallum Way Ste B-1, Palm Springs, CA 92262-7061, (619) 323-4421.

SUPPLEMENTARY INFORMATION: The authority for establishing supplemental rules is contained in 43 CFR 8365.1-6. These rules have been recommended and adopted through the development of the Coachella Valley Preserve Management Plan. These rules will be available in the Palm Springs-South Coast Area Office and Coachella Valley Preserve Visitor Center.

Dated: May 24, 1989.

Russell L. Kaldenberg,

Area Manager.

[FR Doc. 89-13091 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-40-M

[OR-090-09-6310-10: GP-193]

Eugene District Advisory Council; Meeting

Notice is hereby given in accordance with section 309 of the Federal Land Policy and Management Act of 1976 that a meeting of the Eugene District Advisory Council will be held on Friday, June 16, beginning at 9 a.m. in Rooms B and C of Harris Hall, 125 E. 8th Ave., Eugene, Oregon.

The agenda of the meeting will include (1) discussion of the proposed listing of the northern spotted owl as a threatened species; (2) a review of BLM's proposed 1990 timber sales program; (3) and other topics that may be determined later.

The meeting is open to the public. Interested persons may make oral statements to the Council at the end of the meeting or file written statements for the Council's consideration. Anyone desiring to make an oral statement must

notify the District Manager, Bureau of Land Management, 1255 Pearl St., Eugene, Oregon 97401 by the end of the business day on Wednesday, June 14, 1989. A time limit per person may be established by the District Manager.

Ronald L Kaufman,

District Manager.

Date: May 26, 1989.

[FR Doc. 89-13085 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-33-M

[MT-060-09-4320-02]

Lewistown District Grazing Advisory Board Meeting; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of grazing advisory board meeting.

SUMMARY: The Lewistown District Grazing Advisory Board will meet June 29, 1989. The agenda will be:

09:00 a.m.—Introduction and Welcome
09:15 a.m.—Election of Officers
09:30 a.m.—Range Improvement Update
10:00 a.m.—AMP Implementation
11:00 a.m.—Cattle Guard Maintenance
11:30 a.m.—Delinquent Billings
12:00 Noon—Lunch
1:00 p.m.—Consultation on Range Matters
1:30 p.m.—Weed Control
2:00 p.m.—Land Exchange with Fort Belknap
2:15 p.m.—Judith, Valley and Phillips RMP and Related Issues
—National Guard Training Facility
—Prairie Dog Control
4:00 p.m.—Adjourn.

Public comment will be sought at the end of each agenda item.

Location: Bureau of Land Management, 80 Airport Road, Lewistown, Montana.

FOR FURTHER INFORMATION CONTACT: Wayne Zinne, District Manager, Bureau of Land Manager, 80 Airport Road, Lewistown, Montana 59457.

SUPPLEMENTAL INFORMATION: The Lewistown District Grazing Advisory Board is authorized under the Federal Advisory Committee Act, 5 U.S.C., Appendix 1. The board advises the Lewistown District Manager concerning the development of allotment management plans and the utilization of range betterment funds.

Dated: May 24, 1989.

Wayne Zinne,

District Manager.

[FR Doc. 89-13072 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-DN-M

[NV-930-09-4212-11; N-50912]

Realty Action; Lease/Purchase for Recreation and Public Purposes Clark County, NV

The following described public land in Laughlin, Clark County, Nevada has been identified and examined and will be classified as suitable for lease/purchase under the Recreation and Public Purposes Act, as amended (43 U.S.C. 869 et seq.). The lands will not be offered for lease/purchase until at least 60 days after the date of publication of this notice in the Federal Register.

Mount Diablo Meridian, Nevada

T. 32 S., R. 66 E.,
Sec. 15, N½NW¼.
Aggregating 80 acres (gross).

Clark County intends to use the land for community college facilities. The lease and/or patent, when issued, will be subject to the provisions of the Recreation and Public Purposes Act and applicable regulations of the Secretary of the Interior, and will contain the following reservations to the United States:

1. A right-of-way thereon for ditches and canals constructed by the authority of the United States, Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. 945.

2. All minerals shall be reserved to the United States, together with the right to prospect for, mine and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe.

and will be subject to:

An easement for streets, roads and public utilities in accordance with the transportation plan for Clark County/the City of Las Vegas.

The land is not required for any federal purpose. The lease/purchase is consistent with the Bureau's planning for this area.

Detailed information concerning this action is available for review at the office of the Bureau of Land Management, Las Vegas District, 4765 W. Vegas Drive, Las Vegas, Nevada.

Upon publication of this notice in the Federal Register, the above described land will be segregated from all forms of appropriation under the public land laws, including the general mining laws, except for recreation and public purposes and leasing under the mineral leasing laws.

For a period of 45 days from the date of publication of this notice in the Federal Register, interested parties may submit comments to the District Manager, Las Vegas District, P.O. Box 26569, Las Vegas, Nevada 89126. Any adverse comments will be reviewed by the State Director.

In the absence of any adverse comments, the classification of the lands described in this Notice will become effective 60 days from the date of publication in the Federal Register.

Date: May 25, 1989.

Ben F. Collins,

(District Manager, Las Vegas, NV)

[FR Doc. 89-13105 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-HC-M

[NV-930-09-4212-11; N-50460]

Notice of Realty Action Lease/Purchase for Recreation and Public Purposes Clark County, NV

The following described public land in Laughlin, Clark County, Nevada has been identifed and examined and will be classified as suitable for lease/purchase under the Recreation and Public Purposes Act, as amended (43 U.S.C. 869 et seq.). The lands will not be offered for lease/purchase until at least 60 days after the date of publication of this notice in the Federal Register.

Mount Diablo Meridian, Nevada

T. 32 S., R. 66 E.,
Sec. 15, SE¼.
Aggregating 160 acres (gross).

The Clark County Sanitation District intends to use the land for public purposes. The lease and/or patent, when issued, will be subject to the provisions of the Recreation and Public Purposes Act and applicable regulations of the Secretary of the Interior, and will contain the following reservations to the United States:

1. A right-of-way thereon for ditches and canals constructed by the authority of the United States, Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. 945.

2. All minerals shall be reserved to the United States, together with the right to prospect for, mine and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe.

and will be subject to:

1. An easement for streets, roads and public utilities in accordance with the transportation plan for Clark County/the City of Las Vegas.

2. Those rights for power transmission line and access road purposes which have been granted to the U.S. Bureau of Indian Affairs by Permit No. CC-021319 under the Act of March 3, 1901 (31 Stat. 1084).

The land is not required for any federal purpose. The lease/purchase is consistent with the Bureau's planning for this area.

Detailed information concerning this action is available for review at the Office of the Bureau of Land Management, Las Vegas District, 4765 W. Vegas Drive, Las Vegas, Nevada.

Upon publication of this notice in the **Federal Register**, the above described land will be segregated from all forms of appropriation under the public land laws, including the general mining laws, except for recreation and public purposes and leasing under the mineral leasing laws.

For a period of 45 days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments to the District Manager, Las Vegas District, P.O. Box 26569, Las Vegas, Nevada 89126. Any adverse comments will be reviewed by the State Director.

In the absence of any adverse comments, the classification of the lands described in this Notice will become effective 60 days from the date of publication in the **Federal Register**.

Date: May 25, 1989.

Ben F. Collins,

(District Manager, Las Vegas, NV).

[FR Doc. 89-13106 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-HC-M

[CO-942-09-4520-12]

Colorado; Filing of Plats of Survey

May 23, 1989.

The plat of survey of the following described land, will be officially filed in the Colorado State Office, Bureau of Land Management, Lakewood, Colorado, effective 10:00 a.m., May 23, 1989.

The plat representing the dependent resurvey of portions of the north boundary of the Southern Ute Indian Reservation (south boundary of the Ute ceded lands) and subdivisional lines and the subdivision of certain sections, T. 34 N., R. 3 W. (south of the Ute Line), New Mexico Principal Meridian, Colorado, Group No. 764, was accepted May 5, 1989.

This survey was executed to meet certain administrative needs of the Bureau of Indian Affairs.

All inquiries about this land should be sent to the Colorado State Office, Bureau of Land Management, 2850 Youngfield Street, Lakewood, Colorado, 80215.

Jack A. Eaves,

Chief, Cadastral Surveyor for Colorado

[FR Doc. 89-13109 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-JB-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., May 26, 1989.

The plat representing the dependent resurvey of a portion of the First Standard Parallel South (south boundary T. 6 S., R. 16 E.), portions of the west boundary and subdivisional lines, and the subdivision of sections 6 and 7, T. 7 S., R. 17 E., Boise Meridian, Group No. 686, was accepted May 22, 1898.

This survey was executed 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.

Duane E. Olsen,

Chief Cadastral Surveyor for Idaho.

May 26, 1989.

[FR Doc. 89-13107 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-GG-M

[ID-050-4830-16-2410]

Shoshone District Advisory Council; Meeting

AGENCY: Bureau of Land Management (BLM); Interior.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda for a meeting of the Shoshone District Advisory Council.

DATE: Tuesday, July 18, 1989.

ADDRESS: BLM District Office, 400 West F Street, Shoshone, Idaho 83352.

FOR FURTHER INFORMATION CONTACT: K Lynn Bennett, District Manager, Shoshone District Office, P.O. Box 2 B, Shoshone, Idaho 83352. Telephone (208) 886-2206 or FTS 554-6110.

SUPPLEMENTARY INFORMATION: The proposed agenda for the meeting includes the following items:

Election of Officers
Field tour of Riparian Management Projects

The Shoshone District Advisory Council is established under section 309 of the Federal Land Policy and Management Act of 1976 (Pub. L. 94-579; 43 U.S.C. 1701 et seq.) as amended. Operation and administration of the Council will be in accord with the Federal Advisory Committee Act of 1972 (Pub. L. 92-463; 5 U.S.C. Appendix 1) and Department of Interior regulations, including 43 CFR Part 1784.

The meeting will be open to the public. Anyone may present an oral statement before the Council at 9:10 a.m. or may file a written statement with the Council regarding matters on the agenda. Oral statements will be limited to ten minutes. Anyone wishing to make an oral statement should notify the District Manager by July 17, 1989. Records of the meeting will be available in the Shoshone District Office for public inspection or copying within 30 days after the meeting.

K Lynn Bennett,

District Manager

[FR Doc. 89-13097 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-GG-M

[NV-930-09-4212-11; N-50031]

Realty Action; Lease/Purchase for Recreation and Public Purposes Clark County, NV

The following described public land in Laughlin, Clark County, Nevada has been identified and examined and will be classified as suitable for lease/purchase under the Recreation and Public Purposes Act, as amended (43 U.S.C. 869 et seq.). The lands will not be offered for lease/purchase until at least 60 days after the date of publication of this notice in the **Federal Register**.

Mount Diablo Meridian, Nevada

T. 32 S., R. 66 E.,
Sec. 15, N½SW¼SW¼, SE¼SW¼SW¼, SE¼SW¼.

Aggregating 150 acres (gross).

The Clark County Sanitation District intends to use the land for public purposes. The lease and/or patent, when issued, will be subject to the provisions of the Recreation and Public Purposes Act and applicable regulations of the Secretary of the Interior, and will contain the following reservations to the United States:

1. A right-of-way thereon for ditches and canals constructed by the authority of the United States, Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. 945.

2. All minerals shall be reserved to the United States, together with the right to prospect for, mine and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe.

and will be subject to:

1. An easement for streets, roads and public utilities in accordance with the

transportation plan for Clark County/the City of Las Vegas.

2. Those rights for power transmission line and access road purposes which have been granted to the U.S. Bureau of Indian Affairs by Permit No. CC–021319 under the Act of March 3, 1901 (31 Stat. 1084).

The land is not required for any federal purpose. The lease/purchase is consistent with the Bureau's planning for this area.

Detailed information concerning this action is available for review at the office of the Bureau of Land Management, Las Vegas District, 4765 W. Vegas Drive, Las Vegas, Nevada.

Upon publication of this notice in the **Federal Register**, the above described land will be segregated from all forms of appropriation under the public land laws, including the general mining laws, except for the recreation and public purposes and leasing under the mineral leasing laws.

For a period of 45 days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments to the District Manager, Las Vegas District, P.O. Box 26569, Las Vegas, Nevada 89126. Any adverse comments will be reviewed by the State Director.

In the absence of any adverse comments, the classification of the lands described in this Notice will become effective 60 days from the date of publication in the **Federal Register**.

Date: May 25, 1989.

Ben F. Collins,

(District Manager, Las Vegas, NV).

[FR Doc. 89–13102 Filed 6–1–89; 8:45 am]

BILLING CODE 4310–HC–M

[CA–940–09–4214–10; CACA 18891]

Exchange of Public and Private Lands in Riverside County and Order Providing for Opening of Public Lands

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of issuance of land exchange conveyance document and order providing for opening of public lands.

SUMMARY: The purpose of this exchange was to acquire the remaining portion of the non-Federal land within the 13,030-acre preserve for the Coachella Valley fringe-toed lizard. The lizard is Federally listed as threatened and State listed as endangered. The Bureau of Land Management's goal is to acquire approximately 6,700 acres within the preserve. Other Federal and State agencies will acquire the remaining portion of the preserve. The land being acquired does not constitute a habitat for the lizard, but provides a sand source required for the continuing production of active sand dune areas that are critical habitat for the lizard. The public interest was well served through completion of this exchange. The land acquired in this exchange will be opened to the operation of the public land laws and to the full operation of the United States mining laws and the mineral leasing laws.

FOR FURTHER INFORMATION CONTACT: Viola Andrade, BLM California State Office, 916–978–4820.

The United States issued an exchange conveyance document to The Nature Conservancy on May 17, 1989, under Sec. 206 of the Act of October 21, 1976 (43 U.S.C. 1716), for the following described land:

San Bernardino Meridian, California

T. 6 S., R. 8 E.,
Sec. 2, lots 3 to 5, inclusive, S½NE¼, and W½NW¼SE¼.

The area described contains 221.95 acres of public land in Riverside County.

In exchange for this land, the United States acquired the following described parcels of land from The Nature Conservancy:

San Bernardino Meridian, California

Parcel A

T. 4 S., R. 7 E.,
Sec. 9, SW¼.

Parcel B

T. 4 S., R. 6 E.,
Sec. 14, NW¼NW¼.

The areas described aggregate 200 acres of non-Federal land in Riverside County.

The appraised value of the non-Federal land is $156,000, and the appraised value of the public land is $62,000. The difference in values between the non-Federal lands and the public land will be equalized in accordance with the procedures set forth in the Memorandum of Agreement dated December 10, 1987.

At 10 a.m. on July 5, 1989, the non-Federal lands described above shall be open to the operation of the public lands laws generally, subject to valid rights and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on July 5, 1989 shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

At 10 a.m. on July 5, 1989, the non-Federal land described under Parcel A above shall be open to applications under the United States mining laws and mineral leasing laws.

The record shows that effective May 20, 1989, under serial No. CACA 22587, the non-Federal land described under Parcel B was opened to location and entry under the United States mining laws and to applications and offers under the mineral leasing laws.

Date: May 23, 1989

Nancy J. Alex,

Chief, Lands Section Branch of Adjudication and Records.

[FR Doc. 89–13096 Filed 6–1–89; 8:45 am]

BILLING CODE 4310–40–M

[CA–940–09–4212–13; CACA 23666]

Exchange of Public and Private Lands in Calaveras and Mariposa Counties, California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of issuance of land exchange conveyance document.

SUMMARY: The purpose of this exchange was to improve the Bureau's management capabilities along the Merced River. The United States acquired riverfront property adjacent to a large block of public land several thousand acreas in size. The Bureau disposed of several isolated parcels and fragements of public land that were inaccessible to the public and difficult to manage. The public interest was well served through completion of this exchange.

FOR FURTHER INFORMATION CONTACT: Viols Andrade, BLM California State Office, 916–978–4820.

The United States issued an exchange conveyance document to Meridian Minerals Company on May 11, 1989, under Sec. 206 of the Federal Land Policy and Management Act of October 21, 1976 (43 U.S.C. 1716), for the following described land:

Mount Diablo Meridian, California.

T. 2 N., R. 11 E.,
Sec. 24, lot 1.
T. 2 N., R. 12 E.,
Sec. 19, lots 3, 5, 9, 11, 19, and lots 22 to 25, inclusive;
Sec. 30, lots 1, 2, 13, 14, 15, 19, 20, lots 22–24, inclusive, and lots 26 and 27.

The areas described aggregate 133.77 acres of public land in Calaveras County.

In exchange for these lands, the United States acquired the following described land from the Meridian Minerals Company:

A parcel of land known as the "Agatha Placer Mining Claim" designated as Survey No. 5897, embracing a portion of Sec. 10 in

Township 4 South, Range 18 East, Mount Diablo Meridian, and described in patent to Elsie R. Dovidio, dated September 14, 1928, recorded in Volume "I" of Patents, Page 322, Mariposa Country Records.

Excepting therefrom those portions of said land conveyed to the State of California by Elsie R. Dovidio, in a Grant Deed recorded October 24, 1950, in Book 33, page 597 of Official Records.

Also excepting therefrom That portion of said land conveyed to the Pacific Gas & Electric Company by Elsie R. Dovidio, in a Grant Deed recorded Spetember 30, 1953, in Book 44, page 481, of Official Records.

The area described above contains 16.32 acres of non-Federal land in Mariposa County.

A cash payment in the amount of $16,700 has been paid to the United States by the Meridian Minerals Company to equalize values between the non-Federal and and the public lands.

The non-Federal lands are located within the Merced Wild and Scenic River Study Area; therefore, no action will be taken to open the non-Federal lands to the opertaion of the public land laws, including the mining and mineral leasing laws, until it has been determined whether the Merced River will be designated a wild and scenic river.

Date: May 23, 1989.

Nancy J. Alek,

Chief, Lands Section, Branch of Adjudication and Records.

[FR Doc. 89-13095 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-40-M

Realty Action; Exchange of Surface and Mineral Interests in Public and Private Lands, Washington County, Utah, U-49298

AGENCY: Bureau of Land Management, Interior (UT-040-09-4212-13)

ACTION: The surface and mineral estates of the following described public lands have been determined suitable for disposal by exchange under section 206 of the Federal Land Policy and Management Act of 1976, (43 USC 1716): Salt Lake Base & Meridian, Utah, T. 40 S., R. 16 W. sec. 19, SE¼NE¼, E½NE¼ SE¼; sec. 20, SW¼NW¼, NW¼SW¼; sec. 17, Lot 1 containing 142.2 acres. In exchange for these lands, the United States will acquire the surface and mineral estates of the following described lands from Brooks Pace: T. 40 S., R. 16 W., SLM, sec. 2, S½, containing 320 acres.

All of the above described public lands are segregated from appropriation under the public land laws, including the federal mining laws pending disposition of this action.

SUMMARY: The purpose of this action is to acquire by exchange, private lands valuable as deer winter habitat and to improve Federal land ownership patterns. The public interest will be served by making the exchange. Equalization of values will be achieved by cash payment not to exceed 25 percent of the value of the public lands.

DATE: Interested parties may submit comments for 45 days from the date of publication in the **Federal Register.**

ADDRESS: Detailed information concerning this exchange and copies of the environmental assessment report are available at the Dixie Resource Area Office, 225 North Bluff Street, St. George, Utah 84770. Comments on the proposal should be sent to this address.

SUPPLEMENTARY INFORMATION: The terms and conditions applicable to the exchange are:

Title transfer will be subject to all valid existing rights, including a right-of-way to Mountain Bell for telephone lines (U-028763), a road right-of-way to Washington County (U-58181), and a right-of-way to UDOT for Utah State Highway 18.

Any objections received during the comment period will be reviewed and the State Director may sustain, vacate, or modify this realty action. In the absence of any objections, this Realty Action Notice will become the final determination of the Department of the Interior.

Date: May 23, 1989.

G. Von Swain,

Acting District Manager.

[FR Doc. 89-13104 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-DQ-M

[WY-040-09-4200-90; WYW-89429]

Realty Action; Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action, exchange of public land in Sublette County for private lands in Sublette County.

SUMMARY: The following described public land, surface estate only, has been determined to be suitable 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

T. 34 N., R. 108 W.,
Sec. 26, SE¼SE¼.
The land described contains 40 acres.

In exchange, the United States proposes to acquire the following private land, surface estate only, from Joseph R. Hicks:

Sixth Principal Meridian

T. 36 N., R. 110 W.,
Sec. 5, E½NE¼NE¼SW¼SE¼, E½SW¼NE¼SW¼SE¼, SE¼, NE¼SW¼SE¼, E½NE¼SW¼SW¼ SE¼, E½SW¼SW¼SW¼, SE¼SE¼ SW¼SW¼SE¼, and SE¼SW¼SE¼.
The land described contains 20 acres.

DATES: On or before July 17, 1989, interested parties may submit comments to the Area Manager, Pinedale Resource Area, Bureau of Land Management, at the address indicated below. Any adverse comments will be evaluated by the District Manager, 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.

FOR FURTHER INFORMATION CONTACT: Arlan Hiner, Area Manager, Pinedale Resource Area, 431 W. Pine Street (P.O. Box 768), Pinedale, Wyoming 82941, 307-367-4358.

SUPPLEMENTARY INFORMATION: The purpose of the exchange is to eliminate an existing access problem within the Upper Cora Stock Driveway. The exchange is also an important first step in securing legal public access throughout the entire Upper Cora Stock Driveway and legal public access to a large contiguous block of Bureau of Land Management administered land adjacent to the Bridger-Teton National Forest. The values of the public and private land involved in the exchange are equal.

Publication of this notice in the **Federal Register** segregates the public land described above (including prior reserved Federal interests in the private land) from appropriation under 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. The segregation will continue for a period of two (2) years, or until issuance of patent or other document of conveyance, or as of the date specified in an opening order published in the **Federal Register,** whichever occurs first.

Conveyance of the above public land will be subject to:

1. Reservation of a right-of-way for ditches or canals constructed under the authority of the Act of August 30, 1890 (43 U.S.C. 945);

2. Reservation of all minerals to the United States;

3. The requirements of 43 CFR 4110.4–2 regarding authorized grazing use.

This exchange is consistent with Bureau of Land Management policies and planning. The public interest will be served by this exchange.

David E. Haper.

Acting Area Manager.

Dated: May 24, 1989.

[FR Doc. 89–13103 Filed 6–1–89; 8:45 am]

BILLING CODE 4310-22-M

[WY-030-09-4212-13;WYW-113713]

Realty Action; Wyoming

AGENCY: Bureau of Land Management (BLM), Interior.

ACTION: Notice of Realty Action; Proposed Exchange of Public and Private Lands in Fremont and Crook Counties, Wyoming.

SUMMARY: The following described lands have been determined to be suitable for disposal by exchange under section 206 of the *Federal Land Policy and Management Act of 1976* (90 Stat. 2756; 43 U.S.C. 1716):

Sixth Principal Meridian, Wyoming

T. 53 N., R. 65 W.
Sec. 4: Lots 9, 12;
T. 54 N., R. 65 W.
Sec. 8: Lots 6, 7, 10, 11;
Sec. 9: Lots 6, 7, 8;
T. 53 N., R. 66 W.
Sec. 9: SE¼NE¼, E½–SE¼.

Comprising 474.48 acres of public land.

In exchange for these lands, the United States will acquire a parcel or parcels of land, to be specifically identified at a later date, from within the following described block of land owned by the Nature Conservancy:

Sixth Principal Meridian, Wyoming

T. 40 N., R. 105 W.
Sec. 17: All;
Sec. 18: E½, E½NW¼, SW¼NW¼, SW¼;
Sec. 19: N½N½;
Sec. 20: E½, N½NW¼;
Sec. 21: Lots 1, 2, 3, 4, W½;
Sec. 28: Lots 1, 2, 3, 4, NW¼, N½SW¼, SE¼SW¼;
Sec. 29: NE¼, N½SE¼.

Comprising 2,862.1 acres of private land.

The intent of both BLM and the Nature Conservancy is ultimately to exchange public lands for the entire 2,862.1 acres of offered private land described above. This will be accomplished over an, as yet, unspecified period of time, as suitable public lands can be identified for exchange.

The purpose of this exchange is to acquire non-federal lands which have high public values for wildlife habitat, specifically bighorn sheep. The exchange would provide additional winter range for the Whiskey Mountain Bidhorn Sheep herd, which is the largest Rocky Mountain bighorn sheep herd in the United States. The public interest will be served by completing the exchange.

When the specific parcel or parcels to be acquired from the Nature Conservancy have been identified from within the block of offered lands, the values of the lands to be exchanged, if not equal, will be fully equalized through adjustment in acreage.

Lands to be transferred from the United States will be subject to the following:

1. Reservation of a right-of-way for ditches and canals pursuant to the Act of August 30, 1890, 43 U.S.C. 945.

2. Reservation of all minerals along with the right of ingress and egress for exploration and development.

3. Oil and Gas leases, BLM serial numbers W–84848, W–90251, W–88239.

4. Any other valid existing rights including rights-of-way that are identified during the evaluation process.

Publication of the notice segregates the selected public land from the operation of all other public land laws, including the general mining laws, for a period of 2 years from the date of first publication.

FOR FURTHER INFORMATION CONTACT: Jack Kelly, Lander Resource Area Manager (307) 332–7822. Information relating to the exchange is available for review at the Lander Resource Area Office, 125 Sunflower, Lander, Wyoming 82520.

SUPPLEMENTARY INFORMATION: For a period of 45 days from the date of the first publication, interested parties may submit comments to the Lander Resource Area Office, P.O. Box 589, Lander, Wyoming 82502. Any adverse comments will be evaluated by the State 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.

Jack Kelly,

Area Manager.

Date: May 19, 1989.

[FR Doc. 89–13101 Filed 6–1–89; 8:45 am]

BILLING CODE 4310-22-M

Fish and Wildlife Service

Preparation of an Environmental Impact Statement on a Permit Application to Incidentally Take Stephens' Kangaroo Rats, an Endangered Species, in Riverside County, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent and meeting.

SUMMARY: The U.S. Fish and Wildlife Service (Service) has under consideration a proposal to issue a permit under section 10(a) of the Endangered Species Act (Act) for a period not to exceed two years, that would authorize incidental taking of the endangered Stephens' kangaroo rat (*Dipodomys stephensi*). The applicant for this incidental take permit is the County of Riverside, California (County). The application is accompanied by a proposed Conservation Plan (Plan) for the Stephens' kangaroo rat. In response to the permit application and the accompanying proposal, the Service intends to prepare a joint Federal Environmental Impact Statement (EIS) and State Environmental Impact Report (EIR). This notice describes the proposed action and possible alternatives, outlines the scoping process that will be employed in preparing the joint document, and identifies the Service's official to whom questions and comments concerning the proposed action and the EIS/EIR may be directed.

DATES: A public scoping meeting will be held at the Riverside County Office of Education, 4th floor Board Room, 3939 13th Street, Riverside, California, on Monday, June 12, 1989, at 7:30 p.m. Written comments related to the scope and content of the document will be accepted at the address below until June 19, 1989.

ADDRESSES: Information, comments, or questions related to the document and the National Environmental Policy Act process should be submitted to the Regional Director (FWE/SE), U.S. Fish and Wildlife Service, 1002 NE. Holladay Street, Portland, Oregon 97232–4181.

FOR FURTHER INFORMATION CONTACT: Jackie Campbell at the above address, telephone 503/231–6150 or FTS 8–429–6150. Interested persons are encouraged to attend the meeting to identify and discuss major issues and alternatives that should be discussed in the EIS/EIR. The proposed agenda for the facilitated public scoping meeting includes presentations on the status of and

threats to the species, a summary of the proposed action including mitigation measures, and tentative issues, concerns, opportunities, and alternatives. There will be an opportunity for the public to present formal statements, and a question and answer session. Written comments may also be submitted to the above address.

Interested persons are reminded that the primary purpose of the scoping process is to identify, rather than to debate or argue, the significant issues related to the proposed action. Additional public meetings, if requested, will be held on later dates in order to provide opportunities to comment on the draft document.

SUPPLEMENTARY INFORMATION:

Background

On September 30, 1988, the Service issued a final rule which determined that the Stephens' kangaroo rat to be an endangered species (53 FR 38465). This regulation became effective on October 31, 1988. Because of its listening as an endangered species, the Stephens' kangaroo rat is protected by the Act's prohibition against "taking" (16 USC 1538). The Act defines "take" to mean: To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct. "Harm" is further defined by regulation as any act that kills or injures wildlife including significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3).

The Service, however, may issue permits to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities.

The County has submitted an application to the Service for a permit to incidentally take Stephens' kangaroo rats in association with various proposed public and private projects in the western portion of the County. The area covered by the proposed permit would include much of the historical range of the Stephens' kangaroo rat within the County and would allow taking, for a period of two years, resulting from the development of up to 4,500 acres (20 percent) of the 22,000 acres of remaining occupied habitat known for the species.

Under the proposed conservation plan for the incidental take permit, up to 4,500 acres (private lands) of occupied habitat adjacent to lands currently in public ownership would be acquired and managed for the long-term benefit of the species. Comparable acreages of land would be acquired prior to issuance of County permits to destroy similar acreages of habitat. The acquisition of the private lands would be funded, in part, from mitigation fees ($1,950 per acre) collected by the County.

The County would approve the issuance of land development permits, subsequent to California Environmental Quality Act-mandated review of potential impacts to other environmental resources, for otherwise lawful public and private project proponents in specified portions of the County during the two-year period in which the proposed Federal permit is in effect.

The Service's underlying purpose or goal is to develop a program designed to ensure the continued existence of the species, while resolving potential conflicts that may arise from otherwise lawful private and public improvement projects.

The underlying need as to why the Service must make a decision is that it has received an application from the County for an incidental take permit. Congress has directed that such permits be issued if issuance would be in accordance with the requirements of section 10(a) of the Act.

A tentative list of alternatives that would meet the underlying need includes: issuance of an incidental take permit with components presented in the Plan (County lands only); issuance of an incidental take permit where take would be allowed on both County and participating city lands; or the issuance of an incidental take permit with other modifications of the Plan. A "No Action" alternative (denial of the permit) will also be discussed.

A tentative list of issues, concerns, and opportunities has been developed. There will be a discussion of the potential effect, by alternative, in relation to the following issues:

1. Stephens' kangaroo rat;
2. Stephens' kangaroo rat habitat;
3. other biological resources;
4. land use;
5. agriculture;
6. public facilities;
7. recreational facilities; and
8. housing developments.

Dated: May 25, 1989.

Marvin L. Plenert,

Regional Director.

[FR Doc. 89-13083 Filed 6-1-89; 8:45 am]

BILLING CODE 4310-55-M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 701-TA-295 (Final)]

Industrial Belts From South Korea; Import Investigation

AGENCY: United States International Trade Commission.

ACTION: Termination of investigation.

SUMMARY: On April 18, 1989, the U.S. Department of Commerce published notice in the Federal Register of a negative final determination of subsidies in connection with the subject investigation. Accordingly, pursuant to § 207.20(b) of the Commission's Rules of Practice and Procedure (19 CFR 207.20(b)), the countervailing duty investigation concerning industrial belts from South Korea (investigation No. 701-TA-295 (Final)) is terminated.

EFFECTIVE DATE: May 23, 1989.

FOR FURTHER INFORMATION CONTACT: Tedford Briggs (202-252-1181), Office of Investigations, 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 the Commission's TDD terminal on 202-252-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-252-1000.

Authority: This investigation is being terminated under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 201.10 of the Commission's rules (19 CFR 201.10).

By order of the Commission.

Issued: May 26, 1989.

Kenneth R. Mason,

Secretary.

[FR Doc. 89-13114 Filed 6-1-89; 8:45 am]

BILLING CODE 7020-02-M

INTERSTATE COMMERCE COMMISSION

[Docket No. AB-290 (Sub-No. 65X)]

Norfolk and Western Railway Co.; Abandonment Exemption Between Leptic and Lynchburg, VA

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon its 3.52-mile line of railroad between milepost N-201.18 at Leptic, VA, and milepost 204.7 at Lynchburg, VA.

Applicant has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; and (3) no formal complanit filed by a user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on July 2, 1989 (unless stayed pending reconsideration). Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking statements under 49 CFR 1152.29 must be filed by June 12, 1989 [3] Petitions for reconsideration and requests for public use conditions under 49 CFR 1152.28 must be filed by June 22, 1989, with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative: Virginia K. Young, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510.

[1] A stay will be routinely issued by the Commission in those proceedings where an informed decisions on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. *See Exemption of Out-of-Service Rail Lines*, 4 I.C.C. 2d 400 (1988). Any entity seeking a stay involving environmental concerns is encouraged to file its request as soon as possible in order to permit this commission to review and act on the request before the effective date of this exemption.

[2] *See Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C. 2d 164 (1987), and final rules published in the FEDERAL REGISTER on December 22, 1987 (52 FR 48440–48446).

[3] The Commission will accept a late-filed trail use statement so long as it retains jurisdiction to do so.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio*.

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will issue the EA by June 7, 1989. Interested persons may obtain a copy of the EA from SEE by writing to it (Room 3219, Interstate Commerce Commission, Washington, DC 20423) or by calling Elaine Kaiser, Acting Chief, SEE at (202) 275–7684. Comments on environmental and energy concerns must be filed within 15 days after the EA becomes available to the public.

Environmental, public use, or train use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: May 22, 1989.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 89–12742 Filed 6–1–89; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF JUSTICE

Lodging of a Consent Decree Pursuant to the Clean Water Act

In accordance with Departmental policy, 28 CFR 50.7, 38 FR 19029, notice is hereby given that on May 23, 1989, a proposed consent decree in *United States* v. *Borough of North Arlington, New Jersey, et al.*, Civil Action No. 88–2939, was lodged with the United States District Court for the District of New Jersey. The decree resolves claims of the United States against the Borough of North Arlington, New Jersey, the Township of Lyndhurst, New Jersey, and the North Arlington-Lyndhurst Joint Meeting (the "defendants") for violations of the Clean Water Act, 33 U.S.C. 1251 et seq. The violations arose out of the defendants' operation of a sewage treatment plant in Bergen County, New Jersey.

In the proposed consent decree, the defendants agree to pay the United States a civil penalty in the amount of $35,000. In addition, the defendants have ceased discharging pollutants and have shut down their sewage treatment plant.

The proposed decree may be examined at the office of the United States Attorney for the District of New Jersey, 970 Broad Street, Newark, New Jersey 07102; at the Regional II Office of Regional Counsel, Environmental Protection Agency, 26 Federal Plaza, New York, New York 10278, contact: George Shanahan, Esq.; and at the Environmental Enforcement Section, Land and Natural Resources Division of the United States Department of Justice, Room 1515, 10th and Pennsylvania Avenue, NW., Washington, DC 20530. In requesting copies, please enclose a check in the amount of $0.90 (10 cents per page reproduction charge) payable to the Treasurer of the United States. The Department of Justice will receive written comments relating to the proposed consent decree for a period fo thirty (30) days from the date of this notice. Comments should be addressed to Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Borough of North Arlington, New Jersey, et al.*, Civil Action No. 88–2939 (D.N.J.), D.J. Reference No. 90–5–1–1–3099.

Donald A. Carr,

Acting Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 89–13113 Filed 6–1–89; 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. 533 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 contray 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 and 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

Connecticut, CT89-1 (Jan. 6, 1989). pp. 62-65.
New Jersey, NJ89-2 (Jan. 6, 1989). p. 617.
Pennsylvania
PA89-1 (Jan. 6, 1989) ..... pp. 838-841.
PA89-3 (Jan. 6, 1989) ..... pp. 864-865.
PA89-4 (Jan. 6, 1989) ..... pp. 870-871.
West Virginia, VA89-2 (Jan. 6, 1989). p. 1213.

Volume II

Illinois, IL89-9 (Jan. 6, 1989). p. 152.
Michigan
MI89-1 (Jan. 6, 1989)..... pp. 436, 440-446.
MI89-2 (Jan. 6, 1989)..... pp. 452, 456.
MI89-3 (Jan. 6, 1989)..... pp. 469, 472.
MI89-4 (Jan. 6, 1989)..... pp. 477-482.
MI89-5 (Jan. 6, 1989)..... pp. 489, 491.
Missouri, MO89-1 (Jan. 6, 1989). pp. 628-634.
Ohio, OH89-29 (Jan. 6, 1989). pp. 870-906b.

Volume III

Arizona, AZ89-2 (Jan. 6, 1989). p. 19.
California, CA89-2 (Jan. 6, 1989). pp. 44-46, pp. 51-53, p. 55.
Colorado, CO89-1 (Jan. 6, 1989). pp. 106-107.
Idaho, ID89-5 (Jan. 6, 1989).. p. 170.
North Dakota, ND89-3 (Jan. 6, 1989). p. 236.

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 or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 1) 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 26th day of May 1989.

Robert V. Setera,

Acting Director, Division of Wage Determinations.

[FR Doc. 89-13063 Filed 6-1-89; 8:45 am]

BILLING CODE 4510-27-M

Mine Safety and Health Administration

[Docket No. M-89-85-C]

A.K.A. Coal Co., Inc.; Petition for Modification of Application of Mandatory Safety Standard

A.K.A. Coal Company, Inc., Box 148, R.D. No. 1, Hegins, Pennsylvania 17938 has filed a petition to modify the application of 30 CFR 75.1400 (hoisting equipment; general) to its Diamond Slope (I.D. No. 36-07760) located in Schuylkill County, Pennsylvania. 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 cages, platforms or other devices which are used to transport persons in shafts and slopes be equipped with safety catches or other approved devices that act quickly and effectively in an emergency.

2. Effective safety catches or other devices are not available for the conveyances used on the steeply pitching and undulating slopes with numerous curves and knuckles in the main haulage slopes of this anthracite mine.

3. If "makeshift" safety devices are installed they would activate on knuckles and curves when no emergency exists and cause a tumbling effect on the conveyance.

4. As an alternate method, petitioner proposes to operate the man cage or steel gunboat with secondary safety connections securely fastened around the gunboat, and to the hoisting rope above the main connecting device. The hoisting ropes would have a factor of safety in excess of the design factor as determined by the formula specified in

the American National Standard for Wire Rope for Mines.

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 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 July 3, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 25, 1989.

[FR Doc. 89-13149 Filed 6-1-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-89-68-C]

Birchfield Mining, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Birchfield Mining, Inc., 41 Eagles Road, Beckley, West Virginia 25801 has filed a petition to modify the application of 30 CFR 75.1105 (housing of underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps) to its Birchfield No. 1 Mine (I.D. No. 46-07273) located in Boone County, West Virginia. 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 air currents used to ventilate structures or areas enclosing electrical installations be coursed directly into the return.

2. Two 750 KVA transformers, located on Dog Leg Mains, and one spray pump, two submersible pumps, and four 750 KVA transformers located on Henderson Mains cannot be adequately ventilated to the return.

3. The return airways to which the transformers and pumps are now ventilated would be converted to intake airways when the proposed shaft on Estep Mains is completed. Converting the return airways to intake airways would greatly improve the ventilation system.

4. As an alternate method, petitioner proposes that—

(a) The installations would be totally enclosed in fireproof structures;

(b) An automatic fire suppression device activated by heat sensors would be installed in each installation;

(c) Transformers and spray pump would have openings for ventilation. such openings for ventilation would be provided which would close automatically if a fire should occur and the fire suppression device is activated;

(d) A warning light, integrated with the fire suppression device, would be installed in a location adjacent to the haulage track or a location readily observed by persons working nearby;

(e) Persons regularly working in this area would be instructed as to the purpose of the light and course of action to follow if activated.

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 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 July 3, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 26, 1989.

[FR Doc. 89-13150 Filed 6-1-89; 8:45 a.m.]

BILLING CODE 4510-43-M

[Docket No. M-89-65-C]

Blue Diamond Mining, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Blue Diamond Mining, Inc., P.O. Box 87, Leatherwood, Kentucky 41756 has filed a petition to modify the application of 30 CFR 75.1103-4(a) (automatic fire sensor and warning device systems; installation ; minimum requirements) to its Turkey No. 4 Mine (I.D. No. 15-16478) located in Perry 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 statements follows:

1. The petition concerns the requirement that automatic fire sensor and warning device systems provide identification of fire within each belt flight.

2. In a separate petition (M-89-64-C), petitioner proposes to use the air in the belt entry to ventilate active working places.

3. As an alternate method, petitioner proposes to install an early warning fire detection system utilizing a low-level carbon monoxide (CO) detection system in all belt entries used as intake aircourses with specific conditions.

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 July 3, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 25, 1989.

[FR Doc. 89-13151 Filed 6-1-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-89-64-C]

Blue Diamond Mining, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Blue Diamond Mining, Inc., P.O. Box 87, Leatherwood, Kentucky 41756 has filed a petition to modify the application of 30 CFR 75.326 (aircourses and belt haulage entries) to its Turkey No. 4 Mine (I.D. No. 15-16478) located in Perry 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 intake and return aircourses be separated from belt haulage entires, and that belt haulage entries not be used to ventilate active working places.

2. As an alternate method, petitioner proposes to use air in the belt entry to ventilate active working places.

3. In support of this request, petitioner proposes to install an early warning fire detection system utilizing a low-level carbon monoxide (CO) detection system in all belt entries used as intake aircourses and at each belt drive and tailpiece located in intake aircourses.

The monitoring devices would be capable of giving warning of a fire for a minimum of four hours after the source of power to the belt is removed; a visual alert signal would be activated when the CO level is 10 parts per million (ppm) above ambient air and an audible signal would sound at 15 ppm above ambient air. All persons would be withdrawn to a safe area at 10 ppm and evacuated at 15 ppm. The fire alarm signal would be activated at an attended surface location where there is two-way communication. The CO system would be capable of identifying any activated sensor, monitoring electrical continuity and detecting electrical malfunctions.

4. The CO system would be visually examined at least once during each coal producting shift and tested weekly to ensure the monitoring system is functioning properly. The monitoring system would be calibrated with known concentrations of CO and air mixtures at least monthly.

5. If the CO system is deenergized for routine maintenance or for failure of a sensor unit, the belt conveyor would continue to operate and qualified persons would patrol and monitor the belt conveyor using hand-held CO detecting devices.

6. The details for the fire detection system, and the permanent stoppings separating the conveyor belt entries from the intake escapeway would be included as part of the ventilation system and methane and dust control plan.

7. 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 July 3, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 25, 1989.

[FR Doc. 89-13152 Filed 6-1-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-89-63-C]

Consolidation Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Consolidation Coal Company, Consol Plaza, Pittsburgh, Pennsylvania 15241 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its Ireland Mine (I.D. No. 46-01438) located in Marshall County, West Virginia. 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 an examination be made on a weekly basis of seals and of return entries in their entirety.

2. Due to deterioration of roof and rib, certain areas of the mine cannot be safely traveled. Restoration of these areas would expose certified persons to hazardous conditions.

3. As an alternate method, petitioner proposes to establish checkpoints where a certified person would make daily or weekly examinations for hazardous conditions as outlined in the petition.

4. In support of this request, petitioner states that—

(a) The approaches to the checkpoints would, at all times, be maintained in a safe condition. The examination would include tests for methane and the quantity of air;

(b) The person making such examinations and tests would place his/her initials and the date and time at each station. A record of these examinations, tests and actions taken would be recorded in a book kept on the surface and made available for inspection by interested persons;

(c) Methane gas or other harmful, noxious, or poisonous gases would not be permitted to accumulate in the airways. An increase of 0.5 percent methane, or a change of 10 percent in quantity when compared to the last readings at either checkpoint would be cause for an immediate investigation of the affected area;

(d) Persons assigned to make the examinations would be familiar with the normal direction of airflow at each checkpoint. Any changes in airflow would be reported to the mine foreman immediately;

(e) The checkpoints would be included as part of the ventilation and methane and dust control plan.

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 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 July 3, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 24, 1989.

[FR Doc. 89-13153 Filed 6-1-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-89-84-C]

Iron Head Mining, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Iron Head Mining, Inc., P.O. Drawer 1160, Grundy, Virginia 24614 has filed a petition to modify the application of 30 CFR 75.209(a) (automated temporary roof support (ATRS) systems) to its Mine No. 1, section 002-0 (I.D. No. 44-03860) located in Buchanan County, Virginia. 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 an ATRS system be used with roof bolting machines.

2. Due to the size of the roof bolters, petitioner cannot bolt on a cycle that facilitates installation of permanent support (roof bolts) within a reasonable time span. This is due to the way the Fairchild Mark 21 Continuous Miner (Auger Type) is trammed from one working face to another. Also, the tramming of the miner is dislodging the top outby the face, due to the setting and re-setting of the hydraulic jacks required by the present mining practice.

3. As an alternate method, petitioner proposes to use a continuous mining machine and two roof bolters not equipped with ATRS Systems to install permanent supports at the working face with specific procedures as outlined in the petition.

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 postmarked or received in that office on or before July 3, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 25, 1989.

[FR Doc. 89-13154 Filed 6-1-89; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-89-6-M]

Mississippi Chemical Corp.; Petition for Modification of Application of Mandatory Safety Standard

Mississippi Chemical Corporation, Box 101, Carlsbad, New Mexico 88220 has filed a petition to modify the application of 30 CFR 57.14100(b) (safety defects; examination, correction and records), to its Mississippi Chemical Corporation Mine (I.D. No. 29-00175) located in Eddy County, New Mexico. 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 defects on any equipment, machinery, and tools that affect safety be corrected in a timely manner to prevent the creation of a hazard to persons.

2. The lights were removed from shuttle cars to prevent operators from blinding each other when meeting in the time entries, and to avoid head on collisions or hitting other persons or equipment in the area.

3. As an alternate method, petitioner has installed a panel light line through the roadways traveled by shuttle cars and other face equipment.

4. In support of this request, petitioner states that the panel light line system would light the whole face area, and individual lights on the equipment would not be necessary as the roadway and working areas would be well lit.

5. A procedure would be instituted that if the lights go out, or are turned off, ore hauling would stop until the lights are again operational.

6. The petitioner states that the proposed alternate method provides a greater 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 July 3, 1989. Copies of the petition are available for inspection at that address.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

Date: May 25, 1989.

[FR Doc. 89-13155 Filed 6-1-89; 8:45 am]

BILLING CODE 4510-43-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 89-43]

Intent To Grant a Partially Exclusive Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Intent to Grant a Patent License.

SUMMARY: NASA hereby gives notice of intent to grant Diablo Research Corporation of Sunnyvale, California, a limited partically exclusive, royalty-bearing, revocable license to practice the inventions as described in: U.S. Patent No. 4,757,315, entitled "Method and Apparatus for Measuring Distance."

The proposed partially exclusive license will be limited to the fields of the toy, automotive, medical and physical security markets and its will be for a limited number of years and will contain appropriate terms, limitations and conditions to be negotiated in accordance with NASA Patent Licensing Regulations, 14 CFR Part 1245, Subpart 2. NASA will negotiate the final terms and conditions and grant the partically exclusive license, unless within 60 days of the Date of this Notice, the Director of Patent Licensing receives the written objections to the grant, together with supporting documentations. The Director of Patent Licensing will review all written responses to the Notice and then recommend to the Associate General Counsel (Intellectual Property) whether to grant the partially exclusive license.

DATE: Comments to this notice must be received August 1, 1989.

ADDRESS: National Aeronautics and Space Administration, Code GP, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Mr. Harry Lupuloff, (202) 453-2430.

Dated: May 25, 1989.

Edward A. Frankle,

General Counsel.

[FR Doc. 89-13117 Filed 6-1-89; 8:45 am]

BILLING CODE 7510-01-M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92463), as amended, notice is hereby given that a meeting of the Media Arts Advisory Panel (Children's Television Series Section) to the National Council on the Arts will be held on June 21, 1989, from 9:00 a.m.–5:00 p.m. in Room 730 of the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

This meeting is for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman published in the Federal Register of February 13, 1980, these sessions will be closed to the public pursuant to subsections (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

Further information with reference to this meeting can be obtained form Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682-5433.

Dated: May 25, 1989.

Yvonne M. Sabine,

Director, Council and Panel Operations National Endowment for the Arts.

[FR Doc. 89-13090 Filed 6-1-89; 8:45 am]

BILLING CODE 7537-01-M

Meeting

Thursday, June 22, 1989, at 9:30 a.m. has been designated by the President's Committee on the Arts and the Humanities for Plenary Meeting XIX. This meeting has been scheduled in the Kaufman Conference Room, Institute of International Education, 809 United Nations Plaza, New York, New York. This is a regularly scheduled meeting at which Mr. William Kling, President of Minnesota Public Radio and Vice Chairman of American Public Radio, will lead a discussion on *Creative*

Financing for the Arts and the Humanities.

The Committee, charged with exploring ways to increase private support for the arts and the humanities, has generated private funds to support collaborative projects and programs, and it serves as a forum on issues affecting nonprofit cultural organizations.

Please call 202–682–5409 or 212–512–5957 if you expect to attend because space is limited.

Dated: May 25, 1989.

Yvonne M. Sabine,

Director, Council & Panel Office, National Endowment for the Arts.

[FR Doc. 89–13069 Filed 6–1–89; 8:45 am]

BILLING CODE 7537–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–112]

Environmental Assessment and Finding of No Significant Impact Regarding Proposed Order Authorizing Dismantling of the Reactor and Disposition of Component Parts; University of Oklahoma

The Nuclear Regulatory Commission is considering issuance of an Order authorizing the University of Oklahoma (licensee) to dismantle the AGN 211P Nuclear Reactor in Norman, Oklahoma and to dispose of the reactor components in accordance with the application dated October 25, 1988, as supplemented.

Environmental Assessment

Identification of Proposed Action: By application dated October 25, 1988, as supplemented, the licensee requested authorization to dismantle the 100 watt (thermal) University of Oklahoma Research Reactor (UORR), to dispose of its components parts and radioactive material, and decontaminate the facility in accordance with the proposed dismantling plan, and to terminate Facility License No. R–53. The UORR was shut down in April 1986, and has not been operated since then. The reactor fuel has been removed from the facility and shipped to Department of Energy facilities in accordance with DOE, NRC, and DOT requirements.

Need for Proposed Action: In order to prepare the facility for unrestricted access and use, the dismantling and decontamination activities proposed by UORR must be accomplished.

Environmental Impact of the Proposed Action: All decontamination will be performed by trained personnel in accordance with previously reviewed procedures and will be overseen by experienced health physics staff. Solid and liquid waste will be removed from the facility and managed in accordance with NRC requirements. The operations are calculated to result in a total radiation exposure of less than 1 person-rem to facility staff and the public.

These conclusions were based on the fact that all proposed operations are carefully planned and controlled, all contaminated components are removed, packaged, and shipped offsite, and that the radiological control procedures ensure that releases of radioactive wastes from the facility are within the limits of 10 CFR Part 20 and are as low as reasonably achievable (ALARA).

Based on the review of the specific proposed activities associated with the dismantling and decontamination of the UORR facility, the staff has determined that there will be no significant increase in the amounts of effluents that may be released offsite, and no significant increase in individual or cumulative occupational or population radiation exposure.

Alternative Use of Resources: The only alternative to the proposed dismantling and decontamination activities is to maintain the facility as a restricted area. This approach would include monitoring and reporting for the duration of the safe storage period. However, the facility management intends the use the area for other purposes.

Agencies and Persons Consulted: The NRC staff reviewed the licensee's request and did not consult other agencies or persons.

Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed action based upon the foregoing environmental assessment. We conclude that the proposed action will not have a significant effect on the quality of the human environment.

For detailed information with respect to this proposed action, see the application for dismantling, decontamination and license termination dated October 25, 1988, as supplemented and the Safety Evaluation prepared by the staff. These documents area available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC 20555.

Dated at Rockville, Maryland this 26th day of May 1989.

For the Nuclear Regulatory Commission.

Dino C. Scaletti,

Acting Director, Standardization and Non-Power Reactor Project Directorate, Division of Reactor Projects—III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 89–13140 Filed 6–1–89; 8:45 am]

BILLING CODE 7590–01–M

[Docket Nos. 50–325 and 50–324]

Carolina Power & Light Co.; Withdrawal of Application for Amendments to Facility Operating Licenses, Brunswick Steam Electric Plant, Units 1 and 2

The United States Nuclear Regulatory Commission (the Commission) has granted the request of Carolina Power & Light Company (the licensee) to withdraw their application dated February 29, 1988, for the Brunswick Steam Electric Plant, Units 1 and 2 (Brunswick) located in Brunswick County, North Carolina.

The proposed amendments were to delete Surveillance Requirement 4.8.1.1.b, which requires the onsite Class 1E distribution system be demonstrated operable at least once per 18 months. The Commission issued a Notice of Consideration of Issuance of Amendments in the **Federal Register** on March 8, 1989 (54 FR 9914). By letter dated May 1, 1989, the licensee withdrew their application for the proposed amendment. The basis for withdrawal of the application was the licensee's determination that a technical specification change is not necessary. The intent of the surveillance requirement is to verify that power can be shifted from the unit auxiliary transformer to the start up auxiliary transformer during shutdown. The licensee interpreted shutdown to mean cold shutdown. The staff does not share this interpretation. The staff uses the words "during shutdown" so that the test will not be conducted at full operating power due to the potential for causing a reactor trip and possibly challenging safety systems. In order to eliminate the confusion, the Bases pages associated with the surveillance requirement were changed.

For further details with respect to this action, see the application for amendments dated February 29, 1988, and the licensee's letter dated May 1, 1989, withdrawing the application for amendment. The above documents are available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC, and at the University of North Carolina at

Wilmington, William Madison Randall Library, 601 S. College Road, Wilmington, North Carolina.

Dated at Rockville, Maryland this 25th day of May 1989.

For the Nuclear Regulatory Commission.

Elinor G. Adensam,

Director, Project Directorate II-1, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 89-13138 Filed 6-1-89; 8:45 am]

BILLING CODE 7590-01-M

Duke Power Co.; Denial of Amendments to Facility Operating Licenses and Opportunity for Hearing

[Docket Nos. 50-369 and 50-370]

The U.S. Nuclear Regulatory Commission (the Commission) has denied a portion of a request by Duke Power Company, (licensee) for amendments to Facility Operating License Nos. NPF-9 and NPF-17, issued to the licensee for operation of the McGuire Nuclear Station, Units 1 and 2, located in Mecklenburg County, North Carolina. Notice of Consideration of Issuance of the amendments was published in the **Federal Register** on March 8, 1989 (54 FR 9916).

The remainder of the amendment request related to functional testing of fuses, was approved by Amendments 96 and 78 to Facility Operating Licenses NPF-9 and NPF-17, respectively.

The purpose of the denied portion of the licensee's amendment request was to relocate the listing of containment penetration conductor overcurrent protective devices from the Technical Specifications to a separate document, and to relocate the specified method of testing circuit breakers from the surveillance requirement to the Bases.

The NRC staff has concluded that that portion of the licensee's request should not be granted as the amendments would reflect the standard Technical Specifications for Westinghouse plants which have not yet been approved. The licensee was notified of the Commission's denial of the proposed change by letter dated May 25, 1989.

By July 3, 1989, the licensee may demand a hearing with respect to the denial described above. Any person whose interest may be affected by this proceeding may file a written petition for leave to intervene.

A request for hearing or 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.

A copy of any petitions should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, and to Mr. Albert Carr, Duke Power Company, 422 South Church Street, Charlotte, North Carolina 28242, attorney for the licensee.

For further details with respect to this action, see (1) the application for amendments dated March 16, 1987, as supplemented April 24, 1987, (2) the Commission's letter to the licensee dated May 25, 1989, and (3) the Commission's Safety Evaluation related to this amendment request, dated May 25, 1989.

These documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC, and at the Atkins Library, University of North Carolina, Charlotte (UNCC Station), North Carolina 28223. A copy of Items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attention: Document Control Desk.

Dated at Rockville, Maryland, this 25th day of May 1989.

For the Nuclear Regulatory Commission.

David B. Matthews,

Director, Project Directorate II-3, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 89-13139 Filed 6-1-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-382A]

Louisiana Power & Light Co.; Waterford Steam Electric Station, Unit 3, Request for Amendment To Authorize Sale and Leaseback Time for Filing Comments on Antitrust Matters

On May 1, 1989, the Louisiana Power and Light Company (LP&L) submitted an application to amend its operating license for the Waterford Steam Electric Station, Unit 3 (Waterford 3) located in St. Charles Parish, Louisiana. LP&L is presently the sole owner of this facility. The amendment request seeks approval of one or more sale and leaseback transactions by LP&L with respect to any portion of its 100% ownership interest in Waterford 3 to one or more equity investors (to be named later) and at the same time to lease back from said equity investors such interests sold in Waterford 3 and receive from said equity investors the right to use and enjoy the benefits of the undivided ownership interests sold in Waterford 3. The proposed terms of the leases will be for 27½ years subject to rights of renewal. Following the proposed sale and leaseback, LP&L will continue in its present capacity with authority for management, operations,[1] service, maintenance, decommissioning, fuel procurement and disposal, repair and modification of Waterford 3.

Any anticipated sale and leaseback will be subject to the condition that the equity investors and anyone else who may acquire an interest by way of the proposed sale and leaseback are prohibited from exercising directly or indirectly any control over, (1) Waterford 3, (2) power or energy produced by Waterford 3 or (3) the licensee of Waterford 3. Moreover, LP&L will be required to notify the NRC of any action by a lessor or other successor in interest to LP&L that may have an effect on the operation of the facility.

Any person who wishes to express views pursuant to the antitrust issues raised in this amendment request should submit said views within 30 days of the initial publication of this notice in the **Federal Register** to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Chief, Policy Development and Technical Support Branch, Office of Nuclear Reactor Regulation.

Dated at Rockville, Maryland this 26th day of May 1989.

For the Nuclear Regulatory Commission.

Cecil O. Thomas,

Chief, Policy Development and Technical Support Branch, Program Management, Policy Development and Analysis Staff, Office of Nuclear Reactor Regulation.

[FR Doc. 89-13143 Filed 6-1-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-443]

Public Service Co. of New Hampshire, Seabrook Station, Unit No. 1; Issuance of Facility Operating License

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission or NRC),[1] has issued

[1] There is an application pending before the NRC that would transfer the operation of Waterford 3 from LP&L to its sister company, System Energy Resources, Inc. (SERI)—both LP&L and SERI are subsidiaries of Middle South Utilities, Inc.

[1] Public Service Company of New Hampshire is authorized to act as agent for the: Canal Electric Company, Connecticut Light and Power Company, EUA Power Corporation, Hudson Light & Power Company, Massachusetts Municipal Wholesale

Continued

Facility Operating License No. NPF–67 to Public Service Company of New Hampshire (PSNH) and the owners listed below (the utilities listed below including PSNH collectively referred to as the licensees) which authorizes operation of the Seabrook Station, Unit No. 1 (the facility) at reactor core power levels not in excess of 170 megawatts thermal (5% of rated power) in accordance with the provisions of the license, the Technical Specifications and the Environmental Protection Plan with a condition currently limiting operation to no more than 0.75 effective full power hours. Authorization to operate beyond five percent of full power will require specific Commission approval.

The Seabrook Station, Unit No. 1 (Seabrook Unit 1) is a pressurized water reactor located on the southeast coast of New Hampshire in Seabrook Township, Rockingham County, New Hampshire. The license is effective as of the date of issuance.

The application for the license complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations. The Commission has made appropriate findings as required by the Act and the Commission's regulations in 10 CFR Chapter I which are set forth in the license. Prior public notice of the overall action involving the proposed issuance of an operating license was published in the **Federal Register** on October 19, 1981 (46 FR 51330).

The Commission has determined that the issuance of this license will not result in any environmental impacts other than those evaluated in the Final Environmental Statement since the activity authorized by the license is encompassed by the overall action evaluated in the Final Envrionmental Statement.

For further details with respect to this action, see (1) Facility Operating License No. NPF–67, with Technical Specifications (NUREG–1331) and the Environmental Protection Plan; (2) the report of the Advisory Committee on Reactor Safeguards, dated April 19, 1983; (3) the Commission's Safety Evaluation Report, dated March 1983 (NUREG–0896), and Supplements 1 through 8; (4) the Final Safety Analysis Report and Amendments thereto; (5) the Environmental Report and supplements thereto; and (6) the Final Environmental Statement dated December 1982 (NUREG–0895); (7) Assessment of the Effect of License Duration and Matters Discussed in the Final Environmental Statement for the Seabrook Station, Unit No. 1; and (8) the applicant's Decommissioning Funding Assurance Plan, dated March 31, 1989, as supplemented on April 27, 1989.

These items are available for inspection at the Commission's Public Document Room located in the Gelman Building, Lower Level, 2120 L Street NW., Washington, DC, and in the Exeter Public Library, 47 Front Street, Exeter, New Hampshire 03833. A copy of Facility Operating License NPF–67 may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Project Directorate No. I–3. Copies of the Safety Evaluation Report and Supplements 1 through 8 (NUREG–0896) may be purchased at current rates from the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013–7982 or by calling (202) 275–2060 or (202) 275–2171.

Dated at Rockville, Maryland this 26th day of May 1989.

For the Nuclear Regulatory Commission.

Richard H. Wessman,

Director, Project Directorate, I–3, Division of Reactor Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 89–13142 Filed 6–1–89; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–312]

Sacramento Municipal Utility District; Withdrawal of Application for Amendment to Facility Operating License

The United States Nuclear Regulatory Commission (the Commission) has granted the request of Sacramento Municipal Utility District (the licensee) to withdraw its June 13, 1986 application for proposed amendment to Facility Operating License No. DPR–54 for the Rancho Seco Nuclear Generating Station, located in Sacramento County, California.

The proposed amendment would have revised the Technical Specifications pertaining to Licensee Event Report clarifications in accordance with Generic Letter 83–43.

The Commission has previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on May 6, 1987 (52 FR 16955). However, by letter dated May 10, 1989, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated June 13, 1986, and the licensee's letter dated May 10, 1989, which withdrew the application for license amendment. The above documents are available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC, and the Martin Luther King Regional Library, 7340 24th Street Bypass, Sacramento, California 95822.

Dated at Rockville, Maryland this 25th day of May, 1989.

For the Nuclear Regulatory Commission.

Steven A. Reynolds,

Project Manager, Division of Reactor Projects III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 89–13141 Filed 6–1–89; 8:45 am]

BILLING CODE 7590–01–M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. 301–72]

Initiation of Section 302 Investigation; Thailand's Restrictions on Access to Its Cigarette Market

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of initiation of an investigation under section 302(a) of the Trade Act of 1974, as amended; request for written comments.

SUMMARY: Pursuant to 19 U.S.C. 2412(a), the U.S. Trade Representative USTR) has determined to initiate an investigation of the Royal Thai Government's policies and practices with respect to the importation, distribution and sale of cigarettes. USTR invites written comments on these policies and practices.

EFFECTIVE DATE: May 25, 1989.

ADDRESS: Comments should be addressed to the Chairman, Section 301 Committee, Office of the United States Trade Representative, Room 222, 600 17th St., NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Peter Collins, Director for Southeast Asian Affairs, (202) 395–6813, or Catherine Field, Associate General Counsel, (202) 395–3432, Office of the U.S. Trade Representative 600 17th Street, NW., Washington, DC.

SUPPLEMENTARY INFORMATION: On April 10, 1989, the United States Cigarette Export Association (CEA) filed a petition under section 302(a) of the Trade Act of 1974, as amended, 19

Electric Company, Montaup Electric Company, New England Power Company, New Hampshire Electric Corporative, Inc., Taunton Municipal Lighting Plant, The United Illuminating Company, and Vermont Electric Generation and Transmission Cooperative, Inc., and has exclusive responsibility and control over the physical construction, operation and maintenance of the facility.

U.S.C. 2412(a), alleging that the Royal Thai Government and its instrumentality, the Thailand Tobacco Monopoly (TTM) engaged in acts, policies and practices that are unreasonable or discriminate against imports and burden and restrict U.S. commerce. The Thai government maintains an effective ban on the importation of foreign cigarettes and prohibits foreign investment in cigarette manufacture. The petitioner contends that these bans on importation and investment, combined with high tariffs, discriminatory domestic taxes and TTM distribution practices, deny U.S. firms fair and equitable market opportunities. Finally, the CEA alleges that Thai government restrictions on cigarette advertising are intended to put foreign cigarette brands at a competitive disadvantage.

On May 25, 1989, the U.S. Trade Representative initiated an investigation of the Thai government's policies and practices affecting fair and equitable access to the Thai cigarette market. USTR also requested consulations with the Royal Thai Governemnt, as required by section 303(a) of the Trade Act of 1974, as amended.

In preparing the U.S. presentations for such consultations, USTR will seek information and advice from the petitioner and the appropriate committees established pursuant to section 135 of the Trade Act, as provided in section 303(a)(3).

Any interested person is invited to submit written comments on the issues raised in the petition. Comments should be filed in accordance with the regulations at 15 CFR 2006.8 and are due by noon on June 30, 1989. Comments must be in English and provided in twenty copies to: Chairman, Section 301 Committee, Room 222, USTR, 600 17th Street, NW., Washington DC 20506.

A. Jane Bradley,

Chairwoman, Section 301 Committee.

[FR Doc. 89-13115 Filed 6-1-89; 8:45 am]

BILLING CODE 3190-01-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:* Employer Service and Compensation Reports.

(2) *Form(s) submitted:* UI-41, UI-41a.

(3) *OMB Number:* 3220-0070.

(4) *Expiration date of current OMB clearance:* Three years from date of OMB approval.

(5) *Type of request:* Extension of the expiration date of a currently approved collection without any change in the substance or in the method of collection.

(6) *Frequency of response:* On occasion.

(7) *Respondents:* Businesses or other for-profit.

(8) *Estimated annual number of respondents:* 400.

(9) *Total annual responses:* 11,000.

(10) *Average time per response:* 0818 hours.

(11) *Total annual reporting hours:* 900.

(12) *Collection description:* The reports obtain the employee's service and compensation for a period subsequent to those already on file and the employee's base year compensation. The information is used to determine the entitlement to and the amount of benefits payable.

Additional Information or Comments

Copies of the proposed forms and supporting documents can be obtained from Ronald Ritter, the agency clearance officer (312-751-4692). Comments regarding the information collection should be addressed to Ronald Ritter, 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.

Ronald Ritter,

Acting Director of Information Resources Management.

[FR Doc. 89-13100 Filed 6-1-89; 8:45 am]

BILLING CODE 7905-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-26846; File No. SR-Phlx-88-31]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Change Relating to Voting Rights Listing Standards

On October 3, 1988, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) under the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b-4 thereunder,[2] a proposed rule change to add to the Exchange's rules a new Rule 806, the Voting Rights Listing Standards—Disenfranchisement Rule.

The proposed rule change was noticed in Securities Exchange Act Release No. 26676, 54 FR 13800 (April 5, 1989). No comments were received on the proposed rule change.

The Exchange states that the purpose of the proposed rule change is to bring the Exchange into compliance with Rule 19c-4, which was recently adopted by the Commission under the Act.[3]

Rule 19c-4 establishes a minimum voting rights listing standard among the self-regulatory organizations. The Rule prohibits the common stock or other equity securities of a company from being or remaining listed on an exchange if such company issues securities or takes other corporate action that would have the effect of nullifying, restricting or disparately reducing the per share voting rights of existing common stock shareholders of the company.[4]

The text of Phlx's proposed new rule 806 is almost identical to the text of Rule 19c-4 as adopted by the Commission. For example, proposed Rule 806 prohibits the listing by the Phlx of the equity securities of a domestic issuer if that issuer issues securities or takes any corporate action which has the effect of nullifying, restricting or disparately reducing the voting rights of existing shareholders. The text of proposed new rule 806, however, differs from the text of Rule 19c-4 in two respects.

First, proposed Rule 806 incorporates into its text the July 7, 1988 grandfather date provided in the Commission's Adopting Release but not in the actual text of Rule 19c-4. Second, the Exchange proposes to include in paragraph (c)(5) of Rule 806 a provision that would automatically incorporate into the Phlx's rules any exclusion from the voting rights listing standards of Rule 19c-4 adopted by another self-regulatory organization ("SRO"). In its filing, the Exchange stated that the purpose of this provision is to assure that Phlx's rules remain consistent with those of the other markets, and to assure that Phlx will not be prevented from listing or seeking unlisted trading privileges in securities eligible for listing on the other

[1] 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b-4 (1986).

[3] *See* Securities Exchange Act Release No. 25891 (July 7, 1988), 53 FR 26376 (July 12, 1988) ("Adopting Release").

[4] *See* Adopting Release for text of the Rule, including a non-exclusive list of presumptively permitted and prohibited corporate actions.

markets as a result of amendments to their voting rights listing standards. The Phlx has clarified that Rule 806(c)(5) is intended to extend only to written exclusions, adopted by rule, by the other SROs and approved by the Commission. Proposed Rule 806 would not extend to interpretations or other determinations made by other self-regulatory organizations regarding Rule 19c–4 if such interpretations or determinations were not adopted as a rule change. In addition, the Exchange has indicated that it would file proposed rule changes, as soon as possible, to specifically incorporate into the text of its rule any rule changes adopted by the other SROs to their voting rights listing standards.[5]

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular the requirements of section 6(b)(5) of the Act. The Commission believes that the voting rights listing standards set forth in Exchange Rule 806, as required by Rule 19c–4, will promote just and equitable principles of trade and protect investors and the public interest. Specifically, as discussed in the Adopting Release, the terms of Rule 19c–4, as expressly adopted in Phlx Rule 806, will protect shareholders from being disenfranchised while permitting companies flexibility to use disparate voting rights plans for capital raising purposes. Finally, Rule 19c–4, when adopted by the Commission, automatically becomes a rule of the Securities Self-Regulatory Organizations. Proposed Phlx Rule 806 will codify this by officially placing Rule 19c–4 in the Phlx rule book.

It Is Therefore Ordered, pursuant to section 19(b)(2) of the Act,[6] that the proposed rule change is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Dated: May 24, 1989.

Jonathan G. Katz,

Secretary.

[FR Doc. 89–13064 Filed 6–1–89; 8:45 am]

BILLING CODE 8010–01–M

[5] *See* letter to Sharon L. Itkin, Staff Attorney, SEC, from Richard T. Chase, Executive Vice President, Phlx, dated May 5, 1989.

[6] 15 U.S.C. 78s(b)(2) (1982).

[7] 17 CFR 200.30–3(a)(2) (1986).

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster Loan Area No. 2352]

South Carolina (and a Contiguous County in the State of North Carolina); Declaration of Disaster Loan Area

Spartanburg County, and the contiguous counties of Cherokee, Laurens, Greenville, and Union, in the State of South Carolina, and Polk County, in the State of North Carolina, constitute a disaster loan as a result of damages from tornadoes which occurred on May 5, 1989. Applications for loans for physical damage may be filed until the close of business on July 24, 1989, and for economic injury until the close of business on February 23, 1990, at the address listed below:

Disaster Area 2 Office, Small Business Administration, 120 Ralph McGill Blvd., 14th Fl., Atlanta, Georgia 30308.

or other locally announced locations.

	Percent
The interest rates are:	
Homeowners with credit available elsewhere	8.000
Homeowners without credit available elsewhere	4.000
Businesses with credit available elsewhere	8.000
Businesses and non-profit organizations without credit available elsewhere	4.000
Businesses and non-profit organizations (EIDL) without credit available elsewhere	4.000
Others (including non-profit organizations) with credit available elsewhere	9.125

Any county contiguous to Spartanburg County and not listed above has already been named as a contiguous county in a previous declaration for the same tornadoes.

The number assigned to this disaster for physical damage is 235212 and for economic injury the number is 676500.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: May 23, 1989.

Susan S. Engeleiter,

Administrator.

[FR Doc. 89–13073 Filed 6–1–89; 8:45 am]

BILLING CODE 8025–01–M

Region IX Advisory Council; Public Meeting

The U.S. Small Business Administration Region IX Advisory Council, located in the geographical area of Santa Ana, will hold a public meeting at 9:30 a.m. on Tuesday, June 20, 1989, at the Pacific Inland Bank Board Room, 5th floor, 888 S. West St., Anaheim, California, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Steve Waddell, District Director, U.S. Small Business Administration, 901 W. Civic Center Drive, Suite 160, Santa Ana, California 92703, phone (714) 836–2494.

Jean M. Nowak,

Director, Office of Advisory Councils.

May 23, 1989.

[FR Doc. 89–13074 Filed 6–1–89; 8:45 am]

BILLING CODE 8025–01–M

Region I Advisory Council; Public Meeting

The U.S. Small Business Administration Region I Advisory Council, located in the geographical area of Concord, will hold a public meeting at 10:00 a.m. Tuesday, June 6, 1989, in the James Cleveland Federal Building, Room B–16, 55 Pleasant Street, Concord New Hampshire, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call William K. Phillips, District Director, U.S. Small Business Administration, P.O. Box 1257, 55 Pleasant Street, Concord, New Hampshire 03302–1257, phone (603) 225–1400.

Jean M. Nowak,

Director, Office of Advisory Councils.

May 23, 1989.

[FR Doc. 89–13075 Filed 6–1–89; 8:45 am]

BILLING CODE 8025–01–M

Region II Advisory Council; Public Meeting

The U.S. Small Business Administration Region II Advisory Council, located in the geographical area of Newark, will hold a public meeting at 8:30 a.m. on Tuesday, June 13, 1989, at the Headquarters of Bellcore, Bell Communications Research, 290 West Mount Pleasant Avenue, Livingston, New Jersey to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Stanley H. Salt, District Director, U.S. Small Business Administration, 60 Park

Place, Newark, New Jersey 07102, phone (201) 645–3580.

Jean M. Nowak,

Director, Office of Advisory Councils.

May 23, 1989.

[FR Doc. 89–13076 Filed 6–1–89; 8:45 am]

BILLING CODE 8025–01–M

Region II Advisory Council; Public Meeting

The U.S. Small Business Administration Region II Advisory Council, located in the geographical area of New York City, will hold a public meeting at 9:30 a.m., Tuesday, June 20, 1989, in the 4th floor conference room of the American Institute of Certified Public Accountants, 1211 Avenue of the Americas (between 47th and 48th Streets), New York, New York to discuss such matters as may be presented to members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Bert X. Haggerty, District Director, U.S. Small Business Administration, 26, Federal Plaza, Room 3100, New York, New York 10278, phone (212) 264–1318.

Jean M. Nowak,

Director of Advisory Councils.

May 23, 1989.

[FR Doc. 89–13077 Filed 6–1–89; 8:45 am]

BILLING CODE 8025–01–M

Region VI Advisory Council; Public Meeting

The U.S. Small Business Administration Region VI Advisory Council, located in the geographical area of Lower Rio Grande Valley, will hold a public meeting at 12:00 noon on Wednesday, June 14, 1989, at Wyndham Hotel, 900 North Shoreline, Corpus Christi, Texas to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Miquel A. Cavazos, Jr., District Director, U.S. Small Business Administration, 222 E. Van Buren, Suite 500, Harlingen, Texas 78550, phone (512) 427–8625.

Jean M. Nowak,

Director of Advisory Councils.

May 23, 1989.

[FR Doc. 89–13078 Filed 6–1–89; 8:45 am]

BILLING CODE 8025–01–M

Region III Advisory Council; Public Meeting

The U.S. Small Business Administration Region III Advisory Council, located in the geographical area of Richmond, will hold a public metting at 1:00 p.m. to 5:00 p.m. Thursday, June 15 and from 8:30 a.m. to 12 noon Friday, June 16, 1989 at the Holiday Inn Conference Center, 1021 Koger Center Blvd., Richmond, Virginia, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration or others present.

For further information, write or call Catherine S. Marschall, District Director, U.S. Small Business Administration, P.O. Box 10126, Federal Building, Richmond, Virginia 23240, phone (804) 771–1741.

Jean M. Nowak,

Director of Advisory Councils.

May 23, 1989.

[FR Doc. 89–13079 Filed 6–1–89; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Radio Technical Commission for Aeronautics (RTCA); Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. I), notice is hereby given for the third meeting of RTCA Special Committee 166 on User Requirements for Future Airport and Terminal Area Communication, Navigation, and Surveillance Systems to be held June 19–20, 1989, in the RTCA Conference Room, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC 20005, commencing at 9:30 a.m.

The agenda for this meeting is as follows: (1) Chairman's introductory remarks; (2) approval of the minutes of the second meeting, RTCA Paper No. 168–89/SC166–16; (3) working group activities report on operations working group and technology working group; (4) FAA briefing on Terminal Area R,E&D Programs; (5) FAA briefing on Terminal Area NAS Plan Programs; (6) consideration of proposed revision to committee terms of reference, Paper No. 125–89/SC166–14; (7) review of committee report outline; (8) other business; and (9) date and place of next meeting.

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC 20005; (202) 682–0266. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on May 24, 1989.

Geoffrey R. McIntyre,

Designated Officer.

[FR Doc. 89–13052 Filed 6–1–89; 8:45 am]

BILLING CODE 4910–13–M

Maritime Administration

Removal From Roster of Approved Trustee

Notice is hereby given that RepublicBank Houston, N.A., InterFirst Bank Houston, N.A. and First RepublicBank Houston, N.A. are removed from the Roster of Approved Trustees, pursuant to Pub. L. 89–346 and 46 CFR 221.21–221.30.

Dated: May 26, 1989.

By Order of the Maritime Administrator.

James E. Saari,

Secretary.

[FR Doc. 89–13053 Filed 6–1–89; 8:45 am]

BILLING CODE 4910–81–M

National Highway Traffic Safety Administration

Petition for Exemption From the Vehicle Theft Prevention Standard; Porsche Cars North American, Inc.

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Grant of petition for exemption.

SUMMARY: This notice grants the petition by Porsche Cars North America, Inc. (Porsche) for an exemption from the parts marking requirements of the vehicle theft prevention standard for the Porsche 928 and 911 carlines for Model Year 1990. The agency takes this action under section 605 of the Motor Vehicle Information and Cost Savings Act. The agency has determined that the antitheft device which the petitioner intends to install on these lines as standard equipment is likely to be as effective in reducing and determing motor vehicle theft as would compliance with the parts marking requirements.

DATE: The exemption granted by this petition will become effective beginning with the 1990 Model Year.

SUPPLEMENTARY INFORMATION: On January 27, 1989, this agency received from Porsche a petition for exemption

from the theft prevention standard for the Model Year (MY) 1990 Porsche 928 and 911 carlines pursuant to 49 CFR 543, *Exemption from Vehicle Theft Prevention Standard*. The agency reviewed the January 27, 1989 submission and concluded that it constituted a complete petition. Accordingly, January 27, 1989 is the date on which the statutory 120 day period for processing Porsche's petition began. On February 21, 1989, this agency decided to grant the company's request under 49 CFR Part 512 to treat certain information in the petition regarding location of antitheft devices in the 928 and 911 carlines as confidential business information. On March 25, 1989, Porsche provided supplemental information, requested by NHTSA, addressing concerns about reliability and durability.

In its petition, Porsche included a detailed description and diagrams of the identity, design, and location of the components of the antitheft device for the Porsche 928 and 911 carlines. The antitheft system for the 928 and 911 carlines is the same.

The antitheft device is a comprehensive security alarm system that is activated by removing the key from the ignition and locking either the driver or passenger door with the key. The central locking system then locks the remaining door and arms the alarm. The alarm monitors the doors, front hood, rear trunk (911) or hatch (928), radio, and ignition switch. If a door, front hood or trunk/hatch is opened, the radio removed, or the ignition switch moved from the off position without the alarm first being disarmed with the key, the alarm will go off. When this happens, the horn sounds intermittently and the fog lights and brake lights flash. After 90 seconds, the system resets and turns off the horn and lights. The car will not start so long as the alarm remains armed. If the system agains senses another door, hood, or hatch being opened, the radio removed, or the engine trying to be started, the alarm will again activate for 90 seconds. This cycle continues for as long as the vehicle has electical power.

Porsche also stated that the system is designed to make attempts to defeat the system difficult and time consuming. The battery in the Porsche is located in the rear of the vehicle and can only be accessed from inside the car. The Porsche 911 is a rear engine vehicle and the front hood compartment is the storage area. The battery is located in the front hood compartment of the vehicle and can only be accessed by opening the front hood. The releases for the hood of both carlines, the hatchback for the 928, and the rear engine lid for the 911 are all located within the passenger compartment. If the front hood, hatchback or rear engine lid is opened, with the alarm first being disarmed with the key, the alarm will sound.

For both the Porsche 928 and 911, the power lines from the battery to the alarm system are inside the vehicle and cannot be accessed from outside the car. For both models, the alarm control units are solid state and located inside the passenger compartment. If a thief should enter the care through a broken window, Porsche asserts it would take a minimum of 15 minutes to gain access to the alarm control unit and would require specific knowledge of the system in order to successfully bypass it. The thief would then need to bypass the ignition lock to start the car.

Porsche also stated that a thief cannot gain access to the lock switches from outside the car, even if the lock cylinders are removed, without physically breaching the outer metal panels surrounding the locks. All system components are of high quality and tested to insure reliability and durability to Porsche's standards. The reliability and durability testing for the antitheft system is the same for the 911 and the 928.

Porsche believes that the alarm system for both the 928 and 911 carlines will be as effective in reducing and deterring theft as compliance with the parts-marking requirements of the theft prevention standard (49 CFR Part 541), due to the features and functions described in their petition.

Based on substantial evidence, the agency believes that the antitheft device for Porsche 911 and 928 in Model Year 1990 is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the theft prevention standard (49 CFR Part 541).

This determination is based on the information that Porsche submitted with its petition, and on other available information. The agency believes that the device will provide the types of performance listed in 49 CFR Part 543.6(a)(3): Promoting activation; attracting attention to unauthorized entries; preventing defeat or circumventing of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

As required by section 605(b) of the statute and 49 CFR 543.6(a)(4), the agency also finds that Porsche has provided adequate reasons for its belief that the antitheft device will reduce and deter theft. This conclusion is based on the information Porsche provided on its device. This information included a description of reliability and functional tests conducted by Porsche for the antitheft system and its components. The function and design of the Porsche antitheft device is similar to those of other devices, such as that on the Nissan 300ZX, General Motors Allante, and Audi 5000S that the agency previously has considered likely to be at least as effective as complying with Part 541 would be.

If Porsche decides not to use the exemption for the 928 and 911 carlines, it should formally notify the agency. If this is the case, these carlines must be marked according to the requirements under 49 CFR Parts 541.6 and 541.5 (marking of major component parts and those replacement parts).

The agency notes that the limited and apparently conflicting data on the effectiveness of the pre-standard parts marking programs make it difficult at this early stage of the theft standard's implementation to compare the effectiveness of an antitheft device with the effectiveness of compliance with the theft prevention standard. The statute clearly invites such a comparison, which the agency has made on the basis of the limited data available.

NHTSA notes that if Porsche wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Section 543.7(d) states that a Part 543 exemption applies only to vehicles that belong to a line exempted under this Part and equipped with the antitheft device on which the line's exemption was based. Further, § 543.9(c)(2) provides for the submission of petitions "(t)o modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in that exemption."

The agency wishes to minimize the administrative burden which § 543.9(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend in drafting Part 543 to require the submission of a modification petition for every change in the components or design of an antitheft device. The significance of many such changes could be *de minimus*. Therefore, NHTSA suggests that if Porsche contemplates making any changes the effects of which might be characterized as *de minimus*, then the company should consult the agency

before preparing and submitting a petition to modify.

(15 U.S.C. 2025, delegation of authority at 49 CFR 1.50)

Issued on: May 25, 1989.

Jeffrey R. Miller,

Acting Administrator.

[FR Doc. 89-13087 Filed 6-1-89; 8:45 am]

BILLING CODE 4910-59-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Dated: May 26, 1989.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545-0351
Form Number: 3975, 3975A, 3975B, 3975C, 3975D, 3975E, 3975F and 3975G
Type of Review: Revision
Title: Tax Practitioner Mailing File (TPMF)
Description: Form 3975 Series allows practitioners a systematic way to remain on the mailing file (TPMF) and to order information copies of tax forms materials.
Respondents: Business or other for-profit
Estimated Number of Respondents: 895,000
Estimated Burden Hours Per Response:

Form	Estimated Time
3975	3 minutes
3975A	3 minutes
3975B	3 minutes
3975C	3 minutes
3975D	3 minutes
3975E	6 minutes
3975F	4 minutes
3975G	2 minutes

Frequency of Response: Annually
Estimated Total Reporting Burden: 33,052 hours
OMB Number: 1545-1079
Form Number: 9041
Type of Review: Revision
Title: Application for Electronic/Magnetic Tape Filing of Forms 1041, 1065, 5500-C
Description: Form 9041 will be filed by fiduciaries, partnerships, and sponsors/administrators as an application to file their returns electronically or on magnetic tape; and by software firms, service bureaus, and electronic transmitters, to develop auxiliary services.
Respondents: Businesses or other for-profit
Estimated Number of Respondents: 3,000
Estimated Burden Hours Per Response: 18 minutes
Frequency of Response: Annually
Estimated Total Reporting Burden: 900 hours
Clearance Officer: Garrick Shear (202) 535-4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.
OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 89-13056 Filed 6-1-89; 8:45 am]

BILLING CODE 4810-25-M

Public Information Collection Requirements Submitted to OMB for Review

Date: May 26, 1989.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Office listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Internal Revenue Service

OMB number: 1545-0043
Form Number: 972
Type of Review: Revision
Title: Consent of Shareholder to Include Specific Amount in Gross Income
Description: Form 972 is used by shareholders of certain companies to consent to the inclusion in gross income of dividends that are not received. By making their consent, the shareholder may relieve the corporation of paying certain taxes. IRS uses the form to determine if the shareholders have actually included the amounts in gross income.
Respondents: Individuals or households, Businesses or other for-profit institutions,
Estimated Number of Respondents/Recordkeepers: 400
Estimated Burden Hours Per Response/Recordkeeper: 1 hour
Frequency of Response: Annually
Estimated Total Reporting Burden: 408 hours
Clearance Officer: Garrick Shear (202) 535-4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.
OMB Reviewer: Milo Sunderhauf (202)— 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 89-13057 Filed 6-1-89; 8:45 am]

BILLING CODE 4810-25-M

Internal Revenue Service

[Delegation Order No. 156 (Rev. 10); Chief Counsel Directives Manual (30)330]

Delegation of Authority To Permit Disclosure of Tax Information and To Permit Testimony of the Production of Documents

AGENCY: Internal Revenue Service, Treasury.

ACTION: Delegation of authority.

SUMMARY: This revised delegation order authorizes certain Internal Revenue Service officials to disclose returns filed in accordance with Section 60501 of the Internal Revenue Code (IRC) as prescribed in IRC 6103(i)(8). The text of the delegation order appears below.

EFFECTIVE DATE: June 2, 1989.

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Pursuant to the authority vested in the Commissioner of Internal Revenue by Treasury Order 150-10 and in the Chief Counsel by General Counsel Order No. 4 and by Treasury Order 101-05, authority to act in matters officially before their respective functions is hereby delegated.

The authority to disclose returns and/or return information under certain provisions of the IR Code, such as IRC 6103 (h)(1) and (k)(6) is not delegated herein as the language of these provisions themselves permits officers and employees of the internal Revenue Service and the Office of the Chief Counsel to disclose such information.

The authority to disclose returns and return information under IRC 6103(k)(4) is also delegated herein as Delegation Order 114 (as revised) governs these disclosures.

(1) Deputh Assistant Commissioners; Division Directors (or equivalent level position); Chief Counsel Divison Directors; Regional Commissioners; Regional Inspectors; District Counsels; District and Service Center Directors; Director, Martinsburg Computing Center; and Director, Detroit Computing Center are authorized:

(a) To disclose or, in specific instances, authorize the disclosure of returns or return information to such persons as the taxpayer may designate in a written request, subject to the conditions prescribed in IR 6103(c) and the Treasury Regulations thereunder. The authority to withhold return information upon a determination that such disclosure would seriously impair Federal tax administration is also delegated. The authority delegated in this paragraph to disclose returns or return information may be redelegated to Internal Revenue Service employees and employees of the Office of Chief Counsel to the extent necessary within the exercise of their official duties. The authority delegated in this paragraph to withhold return information may be redelegated not lower than Chiefs, Special Procedures function; Group Managers (or their equivalent); Chiefs, Appeals Offices; Chiefs, Criminal Investigation Branch; and Disclosure Officers.

(b) To disclose or, in specific instances, authorize the disclosure of returns, upon the written request of an individual taxpayer, partner, corporate officer, shareholder, administrator, executor, trustee, or other person having a material interest subject to the conditions prescribed in IRC 6103(e). The authority to disclose or, in specific instances, authorize the disclosure of return information to such persons, upon a determination that disclosure would not seriously impair Federal tax administration, as prescribed in IRC 6103(e)(7), is also delegated. The authority to withhold return information upon a determination that disclosure would seriously impair Federal tax administration is also delegated. The authority delegated in this paragraph to disclose or authorize the disclosure of returns or return information may be redelegated to Internal Revenue Service employees and employees of the Office of Chief Counsel to the extent necessary within the exercise of their official duties. In the event a disclosure of return information would seriously impair Federal tax administration, the decision to withhold such return information will be referred to officials not lower than Chiefs, Special Procedures function; Group Managers (or their equivalent); Chiefs, Appeals Offices, Chiefs, Criminal Investigation Branch; and Disclosure Officers.

(c) To disclose or, in specific instances, authorize the disclosure of returns or return information to officers and employees of the Department of Justice including United States attorneys, in a matter involving tax administration, subject to the conditions prescribed in IRC 6103(h)(2), the Treasury Regulations thereunder, and (h)(3)(A). The authority delegated in this paragraph may be redelegated not lower than Chiefs, Special Procedures function; and Group Managers (or their equivalent including Disclosure Officers). The authority delegated in this paragraph to Chief Counsel employees may be redelegated not lower than Chiefs, Appeals Officers; and to attorneys of the Office of Chief Counsel directly involved in such matters. (See paragraph (17) below.)

(d) To disclose or, in specific instances, authorize the disclosure of returns or return information to officers and employees of the Department of Treasury, as specified in IRC 6103(l)(4)(B) or, upon written request, to employees and other persons specified in IRC 6103(l)(4)(A) for use in personnel or claimant representative matters, and to make relevancy and materiality determinations as provided in section 6103(l)(4)(A), subject to the conditions prescribed in IRC 6103(1)(4). The authority delegated in this paragraph may be redelegated only to Assistant Division DIrectors (or equivalent level position); Assistant Regional Commissioners; Regional Director of Appeals; Assistant Regional Inspectors; Regional Chief, Personnel Branch; Assistant District and Service Center Directors; Division Chiefs; National Officer Branch Chiefs, Internal Security Division; Staff Assistants to Regional Counsels; and to attorneys of the Office of Chief Counsel and Inspectors directly involved in such matters. (See paragraph 13(e).)

(e) To disclose or, in specific instances, authorize the disclosure of returns or return information to the extent necessary in connection with contractual procurement by the Service or Office of the Chief Counsel of equipment or other property of services, subject to the conditions prescribed in IRC 6103(n) and the Treasury Regulations thereunder. The authority delegated in this paragraph may be redelegated only to Assistant Division Directors (or equivalent level position); Assistant Regional Commissioners; Regional Director of Appeals; Assistant Regional Inspectors; Assistant District and Service Center Directors; Division Chiefs; Chief Counsel Assistant Division Directors; Assistant Regional Counsel; and Disclosure Officers.

(f) To disclose, or in specific instances; authorize the disclosure of return information (other than taxpayer return information) which may constitute evidence of a violation of any Federal criminal law (not involving tax administration) or to disclose return information under circumstances involving a threat or other imminent danger of death or other physical injury, which is directed against the President or other government official, to the U.S. Secret Service, subject to the conditions prescribed in IRC 6103(i)(3). The authority delegated in this paragraph is also delegated to Assistant District and Service Center Directors. This does not limit the authority granted in paragraph 6(d) of this order.

(g) To determine whether a disclosure of standards used or to be used for selection of return for examination, or data used or to be used for determining such standards will seriously impair assessment, collection or enforcement under the internal revenue laws pursuant to IRC 6103(b)(2). The authority delegated in this paragraph may be redelegated to Disclosure Officers.

(2) Deputy Assistant Commissioners; Division Directors (or equivalent level position); Regional Commisssioners; Regional Inspectors; District and Service Center Directors; Director, Martinsburg Computing Center; and Director, Detroit Computing Center are authorized to determine whether a disclosure of returns or return information in a Federal or State judicial or administrative proceeding pertaining to tax administration would identify a confidential informant or seriously impair a civil or criminal tax investigation, subject to the conditions prescribed in IRC 6103(h)(4). The authority delegated in this paragraph may not be redelegated.

(3) Deputy Assistant Commissioner (Examination); Regional Commissioners; Assistant Commissioner (International); and District and Service Center Directors are authorized:

(a) To furnish an affirmative or negative response to a written inquiry from an attorney of the Department of Justice (including a United States Attorney) involved in a judicial proceeding pertaining to tax administration, or any person (or his/

her legal representative) who is a party to such proceeding, as to whether a prospective juror has or has not been the subject of any audit or other tax investigation by the Internal Revenue Service, subject to the conditions prescribed in IRC 6103(h)(5). The authority delegated in this paragraph may be redelegated only to Assistant District and Service Center Directors; Division Chiefs, Director, Office of Disclosure and Disclosure Officers.

(b) To disclose or, in specific instances, authorize the disclosure of:

(i) Accepted offers-in-compromise to members of the general public, subject to the conditions prescribed in IRC 6103(k)(1).

(ii) The amount of an outstanding obligation secured by a lien, notice of which has been filed pursuant to section 6323(f), to any person who furnishes satisfactory written evidence establishing a right in or intent to obtain a right in property subject to such lien, subject to the conditions prescribed in IRC 6103(k)(2). The authority to disclose or, in specific instances, authorize the disclosure of the amount of such outstanding obligation is also delegated to the Deputy Assistant Commissioner (Collection).

(iii) Taxpayer identity information with respect to any income tax return preparer and information as to whether any penalty has been assessed against such preparer to officers and employees of any agency charged under State or local law with the regulation of such preparers, upon written request and subject to the conditions prescribed in IRC 6103(k)(5);

(iv) Returns or return information with respect to taxes imposed by IRC chapters 2.21, and 24 to the Social Security Administration, upon written request and subject to the conditions prescribed in IRC 6103(l)(1)(A);

(v) Returns or return information with respect to taxes imposed by IRC chapter 22 to the Railroad Retirement Board, upon written request and subject to the conditions prescribed in IRC 6103(l)(1)(C).

(vi) Returns or return information with respect to taxes imposed by IRC subtitle E (relating to taxes on alcohol, tobacco and firearms) to officers and employees of the Bureau of Alcohol, Tobacco and Firearms, upon written request and pursuant to IRC 6103(o)(1).

The authority delegated in subparagraphs (iv) and (v) is also delegated to the Associate Chief Counsel (Technical). The authority delegated in this paragraph may be redelegated only to Assistant District and Service Center Directors; Director, Office of Disclosure; Division Chiefs; and Disclosure Officers. In addition, the authority delegated in subparagraph (i) may also be redelegated only to Chiefs, Special Procedures function; Special Procedures function Advisor Reviewers; and Group Managers (or their equivalent). The authority delegated in subparagraph (ii) may also be redelegated only to Chiefs, Special Procedures function; Special Procedures function Advisor Reviewers; Group Managers (or their equivalent); and Revenue Officers. The authority delegated in subparagraph (iv) may be redelegated not lower than Branch Chief.

(4) Regional Commissioners; Assistant Commissioner (International); District and Service Center Directors are authorized to disclose or, in specific instances, authorize the disclosure of returns or return information to designated State tax officials, upon written request by the head of a State tax agency, for the purpose of and to the extent necessary in the administration of State tax laws, pursuant to the provisions of IRC 6103(d) and subject to the conditions prescribed in IRC 6103(h)(4) and (p)(8). The authority to withhold return information pursuant to IRC 6103 (d) and (h)(4) upon determination that such disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation is also delegated. The authority delegated in this paragraph does not extend to the entry into Federal/State Agreements on the Coordination of Tax Administration. The authority delegated in this paragraph may be redelegated to any supervisory level deemed appropriate, but such redelegation shall not extend to the authority to withhold return information.

(5) The Regional Commissioners; Assistant Commissioner (International); District and Service Center Directors; and Director, Martinsburg Computing Center are authorized to disclose or, in specific instances, authorize the disclosure of returns or return information pursuant to Federal/State Agreements on the Coordination of Tax Administration entered into between the head of any State tax agency and the Commissioner of Internal Revenue, pursuant to the provisions of IRC 6103(d) and subject to the conditions prescribed in IRC 6103(h)(4) and (p)(8). The authority to withhold return information pursuant to IRC 6103 (d) and (h)(4) upon a determination that such disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation is also delegated. The authority delegated in this paragraph may be redelegated to any supervisory level deemed appropriate, but such redelegation shall not extend to the authority to withhold return information.

(6) The Deputy Assistant Commissioner (Examination) is authorized:

(a) To disclose or, in specific instances, authorize the disclosure of returns and return information to Congressional committees and other persons, upon written request and subject to the conditions prescribed in IRC 6103(f). The authority delegated in this paragraph is also delegated to the Assistant to the Commissioner (Legislative Liaison) and Assistant Commissioner (International). The authority delegated in this paragraph may not be redelegated.

(b) To disclose or, in specific instances, authorize the disclosure of returns or return information to officers and employees of a Federal agency pursuant to an ex parte order by a Federal District Court judge or magistrate when needed for use in the enforcement of a Federal criminal statute (not involving tax administration), or to locate a fugitive from justice subject to the conditions prescribed in IRC 6103(i)(1) or (i)(5) and the Treasury Regulations thereunder. The authority to withhold any return or return information, pursuant to IRC 6103(i)(6), upon a determination that such disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation is also delegated. The authority delegated in this paragraph is also delegated to Assistant Commissioner (International); Regional Commissioners; and Assistant District and Service Center Directors. This authority may not be redelegated.

(c) To disclose or, in specific instances, authorize the disclosure of return information (other than taxpayer return information) to officers and employees of a Federal agency upon written request by the head of such agency or the Inspector General thereof, or in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, any United States attorney, any special prosecutor appointed under section 593 of title 28, United States Code, or any attorney in charge of a criminal division organized crime strike force established pursuant to section 510 of title 28, United States Code, when needed for use in the enforcement of a Federal criminal statute (not involving tax

administration), subject to the conditions prescribed in IRC 6103(i)(2). The authority to withhold return information (other than taxpayer return information), pursuant to IRC 6103(i)(6), upon a determination that such disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation is also delegated. The authority delegated in this paragraph is also delegated to Regional Commissioners; and Assistant District and Service Center Directors and Assistant Commissioner (International). This authority may not be redelegated.

(d) To disclose or, in specific instances, authorize the disclosure of:

(i) return information (other than taxpayer return information) which may constitute evidence of a violation of Federal criminal law (not involving tax administration) to the extent necessary to apprise the head of the appropriate Federal agency pursuant to IRC 6103(i)(3)(A);

(ii) return information to the extent necessary to apprise appropriate officers or employees of a Federal or State law enforcement agency of circumstances involving an imminent danger of death or physical injury to any individual pursuant to IRC 6103(i)(3)(B)(i);

(iii) return information to the extent necessary to apprise appropriate officers or employees of a Federal law enforcement agency of circumstances involving the imminent flight of an individual from Federal prosecution pursuant to IRC 6103(i)(3)(B)(ii);

With respect to subparagraph (i), the authority to withhold any return information pursuant to IRC 6103(i)(6) upon a determination that such disclosure would identify a confidential informant or seriously impair a civil or ciminal tax investigation is also delegated.

With respect to subparagraph (ii), the authority is also delegated to Special Agents and Internal Security Inspectors. The authority delegated in this paragraph is also delegated to Assistant Commissioner (International); Regional Commissioners; and Assistant District and Service Center Directors. This authority is in addition to the authority previously delegated in paragraph (1)(f).

(e) To notify the Attorney General or his delegate or the head of a Federal agency that certain returns or return information obtained pursuant to IRC 6103(i) (1), (2) or (3)(A) shall not be admitted into evidence under IRC 6103(i)(4) (A)(i) or (B), upon a determination, in accordance with IRC 6103(i)(4)(C), that such admission would identify a confidential informant or seriously impair a civil or criminal tax investigation. The authority delegated in this paragraph is also delegated to Regional Commissioners; Assistant Commissioner (International); and Assistant District and Service Center Directors. This authority may not be redelegated.

(f) To disclose or, in specific instances, authorize the disclosure of returns or return information to officers and employees of the General Accounting Office, upon written request by the Comptroller General of the United States and subject to the conditions prescribed in IRC 6103(i)(7). The authority to withhold any return or return information, pursuant to IRC 6103(i)(6), upon a determination that such disclosure would impair any civil or criminal tax investigation or reveal the identify of a confidential informant is also delegated. The authority delegated in this paragraph may not be redelegated.

(g) To disclose or, in specific instances, authorize the disclosure of:

(i) the mailing address of taxpayer to officers and employees of an agency when needed in connection with a Federal claim against such taxpayer, upon written request and subject to the conditions prescribed in IRC 6103(m)(2). The authority delegated in this paragraph is also delegated to Regional Commissioners; Assistant Commissioner (International); and Assistant District and Service Center Directors. Upon approval of a contractual agreement for such disclosures, the authority delegated in this paragraph is also delegated to the Deputy Assistant Commissioner Taxpayer Service and Returns Processing; Director, Returns Processing and Accounting Division; Deputy Assistant Commissioner (Computer Services) and Director, Martinsburg Computing Center. The authority delegated in this paragraph may be redelegated only as set forth below. The authority delegated to the Regional Commissioners; Director Martinsburg Computing Center; and Assistant District and Service Center Directors may be redelegated only to the Disclosure Officer, Martinsburg Computing Center and Regional, District and Service Center Disclosure Officers. The authority delegated in this order does not include authority to enter into a contractual agreement, which is contained in Delegation Order No. 100, as revised.

(ii) whether or not an applicant for a loan under an included Federal loan program has a tax delinquent account to the head of the Federal agency administering such program, upon written request and subject to the conditions prescribed in IRC 6103(1)(3). The authority delegated in this paragraph is also delegated to Regional Commissioners; Assistant Commissioner (International); and Assistant District and Service Center Directors. Upon approval of a contractual agreement for such disclosures, the authority delegated in this paragraph is also delegated to the Deputy Assistant Commissioner (Taxpayer Service and Returns Processing); Director, Returns Processing and Accounting Division; Deputy Assistant Commissiner (Computer Services) and Director, Martinsburg Computing Center. The authority delegated in this paragraph may be redelegated only as set forth below. The authority delegated to the Regional Commissioners; Director, Martinsburg Computing Center; and Assistant District and Service Center Directors may be redelegated only to the Disclosure Officer, Martinsburg Computing Center, and Regional, District and Service Center Disclosure Officers. The authority delegated in this order does not include authority to enter into a contractual agreement, which is contained in Delegation Order No. 100, as revised.

(h) To disclose or, in specific instances, authorize the disclosure of the mailing address of taxpayers to officers and employees of the National Institute for Occupational Safety and Health, upon written request and subject to the conditions prescribed in IRC 6103(m)(3). Upon approval by the Assistant Commissioner (Examination) or his/her delegate of a contractual agreement for such disclosures, the authority delegated in this paragraph is also delegated to the Deputy Assistant Commissioner (Computer Services); Director, Tax Systems Division; Director, Martinsburg Computing Center; and Service Center Directors may not be redelegated. The authority delegated in this paragraph does not include authority to enter into a contractual agreement, which is contained in Delegated Order No. 100, as revised.

(i) To disclose, or in specific instances, authorize the disclosure of the mailing address of any taxpayer who has defaulted on a loan:

(i) made from the student loan fund established under part B or E of title IV of the Higher Education Act of 1965 or a loan made to a student at an institute of higher education pursuant to section 3(a)(1) of the Migration and Refugee Assistance Act of 1962, to the Secretary of Education upon written request and

subject to the conditions prescribed in IRC 6103(m)(4).

(ii) made under part C of title VII of the Public Health Service Act or under subpart II of part B of title VIII of such Act to the Secretary of Health and Human Services upon written request and subject to the conditions prescribed in IRC 6103(m)(5).

Upon approval by the Assistant Commissioner (Examination) or his/her delegate of a contractual agreement for such disclosures, the authority delegated in subparagraphs (i) and (ii) is also delegated to the following officials: Deputy Assistant Commissioner (Computer Services); Director, Tax Systems Division; Director, Martinsburg Computing Center; and Service Center Directors. This authority may not be redelegated. The authority delegated in this paragraph does not include authority to enter into a contractual agreement, which is contained in Delegation Order No. 100, as revised.

(j) To disclose or, in specific instances, authorize the disclosure, upon written request, or returns filed in accordance with IRC 6050I, to officers and employees of any Federal agency whose official duties require such disclosure to administer Federal criminal statutes not related to tax administration, pursuant to the provisions of IRC 6103(i)(8). The authority delegated in this paragraph also is delegated to the Assistant Commissioner (Criminal Investigation); Director, Office of Disclosure; District Directors and Assistants; Special Assistant for Financial Enforcement, Detroit Computing Center; and Chiefs, Criminal Investigation Division. This authority may not be redelegated, and shall expire November 17, 1990, the expiration of the disclosure authority under IRC 6103(i)(8).

(7) The Assistant Commissioner (Taxpayer Service and Returns Processing) is authorized:

(a) To disclose or, in specific instances, authorize the disclosure of returns or return information for statistical use to officers and employees of the Department of Commerce, Bureau of Census, upon the written request of the Secretary of Commerce or to officers and employees of the Department of the Treasury, subject to the conditions prescribed in IRC 6103(j)(1)(A) and the Treasury regulations thereunder and (j)(3). The authority delegated in this paragraph may be redelegated only to the Director, Statistics of Income Division.

(b) To disclose or, in specific instances, authorize the disclosure of return information for statistical use to officers and employees of the Department of Commerce, Bureau of Economic Analysis, upon the written request of the Secretary of Commerce, or to officers and employees of the Federal Trade Commission, upon written request of the Chairman, subject to the conditions prescribed in IRC 6103(j)(1)(B) and (j)(2) and the Treasury regulations thereunder. The authority delegated in this paragraph may be redelegated only to the Director, Statistics of Income Division.

(8) The Assistant Director, Public Affairs Division; Regional Commissioners; Assistant Commissioner (International); and District Directors are authorized to disclose or, in specific instances, authorize the disclosure of taxpayers' names and the city, state and zip code of their mailing addresses to the press and other media for purposes of notifying persons entitled to undelivered tax refunds, subject to the conditions prescribed in IRC 6103(m)(1). The authority delegated in this paragraph may be redelegated to Assistant District Directors and Public Affairs Officers.

(9) The Assistant Commissioner (Examination) is authorized:

(a) Upon written request of the President, to disclose, or in specific instances, authorize the disclosure of return information (other than return information that is adverse to the taxpayer) of an individual who is under consideration for appointment to a position in the executive or judicial branch of the Federal Government to the authorized representative of the Executive Office of the President or to the Federal Bureau of Investigation on behalf of the President, subject to the conditions prescribed in IRC 6103(g)(2) and (g)(4). Authority is also delegated to disclose or, in specific instances, authorize the disclosure of return information with respect to the categories of individuals discussed above to the heads of Federal agencies upon written request, or the Federal Bureau of Investigation on behalf of and upon the written request of such agency heads, subject to the conditions described in IRC 6103(g)(2) and (g)(4). Upon receipt of any request for return information under IRC 6103(g)(2), authority to notify the individuals with respect to whom the request has been made is also delegated. The authority delegated in this paragraph may be redelegated but not lower than:

(i) Deputy Assistant Commissioner (Examination), in the case of requests by or on behalf of the President where the return information to be disclosed is not adverse to the taxpayer;

(ii) Director, Office of Disclosure, in the case of requests by or on behalf of the heads of Federal agencies where the return information to be disclosed is adverse to the taxpayer;

(iii) Director, Office of Disclosure, in the case of requests by or on behalf of the heads of Federal agencies where the return information to be disclosed is not adverse to the taxpayer; and

(iv) Director, Office of Disclosure, concerning the notification of individuals with respect to whom a request has been made.

(b) To make the determination that an agency, body or commission or the General Accounting Office has failed to or does not meet the requirements of IRC 6103(p)(4). Subject to the administrative review applicable to State tax agencies described in IRC 6103(p)(7), authority to withhold returns and return information from any agency, body or commission or the General Accounting Office until a determination is made that the requirements of IRC 6103(p)(4) have been or will be met is also delegated. The authority in this paragraph may not be redelegated.

(10) The Deputy Assistant Commissioner (Employee Plans and Exempt Organizations); Regional Commissioners; District Directors of Key Districts for Employee Plans and Exempt Organizations matters; Service Center Directors; Martinsburg Computing Center; and Director, Detroit Computing Center are authorized to disclose, or in specific instances, authorize the disclosure of:

(a) Statements, notifications, reports, or other return information described in IRC 6057(d) to officers and employees of the Social Security Administration for the administration of section 1131 of the Social Security Act, upon written request and subject to the conditions prescribed in IRC 6103(1)(B). The authority delegated in this paragraph to the Deputy Assistant Commissioner (Employee Plans and Exempt Organizations) may be redelegated, but not lower than Branch Chiefs, Employee Plans Technical and Actuarial Division. The authority delegated in this paragraph to Regional Commissioners may be redelegated not lower than Assistant Regional Commissioner. The authority delegated in this paragraph to the District Directors of Key Districts may be redelegated, but not below Chiefs, Technical Review Staffs, Employee Plans and Exempt Organizations Division. The authority delegated in this paragraph to Service Center Directors may be redelegated, but not lower than Section Chiefs (or their equivalent). The authority delegated in this paragraph to the Director, Martinsburg Computing Center

and Director, Detroit Computing Center may be redelegated, but not lower than Branch Chiefs (or their equivalent).

(b) Returns or return information, including compensation information, to officers and employees of the Department of Labor and Pension Benefit Guaranty Corporation for the administration of Titles I and IV of the Employee Retirement Income Security Act of 1974, upon written request and subject to the conditions prescribed in IRC 6103(1)(2) and the Treasury regulations thereunder. The returns or return information which may be disclosed under this paragraph include:

(i) Upon specific written request, the information specified in 26 CFR 301.6103(1)(2)–1(a), 2(a) 3(b)(1), and 3(b)(2);

(ii) Upon receipt by the Commissioner of Internal Revenue of an annual written request, the information specified in 26 CFR 301.6103(1)(2)–3(a);

(iii) Upon receipt by the Commissioner of Internal Revenue of a general written request, information specified in 26 CFR 301.6103(1)(2)–3(d).

(c) The authority delegated in this paragraph to the Deputy Assistant Commissioner (Employee Plans and Exempt Organizations) may be redelegated, but not lower than Branch Chiefs, Employee Plans Technical and Actuarial Division. The authority delegated in this paragraph to Regional Commissioners may be redelegated not lower than Assistant Regional Commissioner. The authority delegated in this paragraph to District Directors of the Key Districts may be redelegated, but not lower than Employee Plans Specialist. The authority delegated in this paragraph to Service Center Directors may be redelegated, but not lower than Section Chiefs (or their equivalent). The authority delegated in this paragraph to the Director, Martinsburg Computing Center and Director, Detroit Computing Center may be redelegated, but not lower than Branch Chiefs (or their equivalent). The authority delegated in this paragraph is also delegated to the National Director of Appeals, Regional Director of Appeals; Chief, Appeals Office; and Associate Chief, Appeals Office and may not be redelegated.

(11) The Deputy Assistant Commissioner (Employee Plans and Exempt Organizations) is authorized to disclose or, in specific instances, authorize the disclosure of drafts of proposed exemptions or of proposed denials of exemption requests, denial letters, and copies of information submitted by taxpayers requesting exemptions to the proper officers of the Department of Labor for consultation and coordination as required by IRC 4975(c)(2). The authority delegated in this paragraph may be redelegated not lower than Branch Chiefs, Employee Plans Technical and Actuarial Division.

(12) Disclosure of information to appropriate Federal, State or local law enforcement officials may be made by Internal Revenue Service employees, and employees of the Office of Chief Counsel, concerning nontax crimes which do not involve return information or the income or other financial information of an individual or entity, in accordance with the provisions of Chapter (35)00 of the Disclosure of Official Information Handbook, IRM 1272. In situations, where there is a question as to whether the information to be disclosed is or is not return information, such as those described in IRM 1272, the Deputy Assistant Commissioner (Examination); Regional Commissioners; Assistant Commissioner (International); and Assistant District and Service Center Directors are authorized to approve or deny such requests for disclosure. The Deputy Assistant Commissioner (Examination) should act in all such matters only after coordination with the Disclosure Litigation Division, Office of Chief Counsel, Regional Commissioners; Assistant Commissioner (International); and Assistant District and Service Center Directors should act in all such matters only after coordination with the Associate Chief Counsel (International), Office of Regional or District Counsel, as appropriate. The authority delegated in this paragraph may not be redelegated.

(13) The authority vested in the Commissioner of Internal Revenue by 26 CFR 301.9000–1 is delegated by this Order to the Senior Deputy Commissioner. It is also delegated to the following officials to the extent described below. (No authorization is needed in cases referred to the Department of Justice which are discussed in paragraph (1)(c) where the testimony or disclosure is made on behalf of the government.]

(a) Regional Commissioners are authorized to determine whether officers and employees of the Internal Revenue Service assigned to their regions, including employees of the Office of the Regional Counsel, but not including employees of the Regional Inspector, will be permitted to testify or produce Service records because of a request or demand for the disclosure of such records or information. The Regional Commissioners should act in all such matters only after coordination with the Office of Regional Counsel. However, the personal testimony of a Regional Commissioner shall require authorization in accordance with (b) below. The authority delegated in this paragraph may not be redelegated. (See (d) and (e) below.) The authority delegated in this paragraph shall not extend to the disclosure of Internal Revenue Service records and information in response to a subpoena or request or other order of the Tax Court. (See General Counsel Order No. 4, 44 Federal Register 58017 (1979), which provides the authority for disclosure of Internal Revenue Service records and information in tax court proceedings.)

(b) The Deputy Assistant Commissioner (Examination) is authorized to determine whether Regional Commissioners, officers and employees of the Internal Revenue Service assigned to the National Office, including employees of the Office of Chief Counsel, and employees assigned to Regional Inspectors will be permitted to testify or produce Service records because of a request or demand for the disclosure of such records or information. The Deputy Assistant Commissioner (Examination) should act in all such matters only after coordination with the Disclosure Litigation Division, Office of Chief Counsel. The authority delegated in this paragraph may not be redelgated. (See (d) and (e) below.) The authority delegated in this paragraph shall not extend to the disclosure of Internal Revenue Service records and information in response to a subpoena or request or other order of the Tax Court. (See General Counsel Order No. 4, 44 Federal Register 58017 (1979).)

(c) The Assistant Commissioner (International), District Directors and Service Center Directors are authorized to determine whether officers and employees of the Internal Revenue Service assigned to their office, district or service center (including regional appellate employees located in the district) will be permitted to testify or produce Service records because of a request or demand for disclosure of such records or information. For purposes of this paragraph, employees of the Office of the District Counsel come under the authority of the District Director. Employees of the Regional Inspector are covered under paragraph (b), above. The District and Service Center Directors should act in all such matters only after coordination with the Office of the District Counsel. The Assistant Commissioner (International) should act in all such matters only after coordination with the Associate Chief

Counsel International). However, the personal testimony of a District Director or Service Center Director shall require authorization in accordance with (a) above. The authority in this paragraph may not be redelgated. (See (d) and (e) below.) The authority delegated in this paragraph shall not extend to the disclosure of Internal Revenue Service records and information in response to a subpoena or request or other order of the Tax Court. (See General Counsel Order No. 4, 44 Federal Register 58017 (1979).)

(d) The authority delegated in paragraphs (a), (b) and (c) shall not extend to testimony or the production of Service records because of a request or demand for the disclosure of such records or information:

(i) By a Congressional Committee;

(ii) Involving a disclosure to the President or certain other persons pursuant to IRC 6103(g);

(iii) Involving a disclosure to the Comptroller General pursuant to IRC 6103(i)(7); or

(iv) Involving a disclosure to correct a misstatement of fact pursuant to IRC 6103(k)(3).

(e) The Director, General Legal Services Division, and Assistant Regional Counsel (GLS), with the concurrence of the Director, General Legal Services Division, are authorized to determine whether officers and employees of the Internal Revenue Service, including employees of the Office of Chief Counsel, will be permitted to testify or produce Internal Revenue records or information because of a request or demand for the disclosure of such records or information, if the request or demand is made in connection with personnel or claimant representative matters under the jurisdiction of the General Legal Services Division for which they have been delegated authority to disclose returns or return information as described in paragraph 1(d). The authority delegated above in this paragraph to the Director, General Legal Services Division, may be redelegated only to the Assistant Director, General Legal Services Division, and to Branch Chiefs and attorneys of the Office of Chief Counsel directly involved in such matters. This paragraph does not limit the authority granted in (a), (b), or (c) above.

(f) The authority delegated to Regional Commissioners and District and Service Center Directors in paragraphs (a) and (c) shall not extend to testimony or the production of Service records because of a request or demand for the disclosure of such records or information which may require a disclosure to a competent authority under a tax convention, whether or not such records or information were previously disclosed pursuant to such convention. The Deputy Assistant Commissioner (Examination) should act in all such matters only after authorization by the appropriate United States competent authority. (See Delegation Order 114, as revised).

(g) In addition to paragraphs (a), (b), (c) and (e) above, authority is further delegated to Assistant Regional Commissioners (Resources Management); Regional Inspectors; Regional and District Counsel; District and Service Center Directors; and Director, Detroit Computing Center, to release or, in specific instances, authorize the release of information from the leave and payroll records of employees under their jurisdiction, and to the Director, Finance Division, to release or, in specific instances, authorize the release of information from the leave and payroll records of all employees of the National Office, when such information is requested or subpoenaed in connection with private litigation, upon determination that release of the information would not be detrimental to the Internal Revenue Service. This delegation does not include authority to release or authorize the release of information contained in official personnel folders, which is covered by IRM 0293. When any uncertainty exists as to the availability of furnishing leave and pay information in a particular case, the matter should be referred to the National Office, Attention: PFR:F, with a complete report of the circumstances. The authority delegated in this paragraph may not be redelegated.

The provisions of this paragraph (13(a)–(g)) are limited to the authorization of testimony or the production of documents pursuant to a request or demand as referred to in paragraphs (d)(1) (i) and (ii) of 26 CFR 301.9000–1 and do not extend to or affect other disclosure authority previously delegated in paragraphs (6) and (9) of this order. Furthermore, in instances where it is anticipated that the testimony or production of Service records by a Chief Counsel attorney will involve matters which may fall within the attorney-client privilege, the determination of whether to waive the privilege, as well as the authority to authorize the testimony or production shall lie with the Deputy Assistant Commissioner (Examination) who will act in these matters only after coordination with the Disclosure Litigation Division. In instances involving Regional or District Counsel attorneys and the attorney-client privilege, authority shall lie with the Regional Commissioner, who will act in these matters only after coordination with the Regional Counsel.

(14) The Deputy Assistant Commissioner (Computer Services); Regional Commissioners; Assistant Commissioner (International); Director, Tax Systems Division; Director, Martinsburg Computing Center; and Service Center Directors are authorized to disclose or, in specific instances, authorize the disclosure of individual master file information to the head of a Federal, State or local child support enforcement agency or an authorized supervisory official under a contractual agreement entered into pursuant to Delegation Order 100, as revised, Revenue Procedure 78–10, and subject to the conditions preescribed in IRC 6103(1)(6)(A)(i). Such contractual agreement should be entered into only after coordination with the Director, Office of Disclosure. The authority delegated in this paragraph may be redelegated to any supervisory level deemed appropriate.

(15) The Deputy Assistant Commissioner (Examination); Regional Commissioners; Assistant Commissioner (International); and Service Center Directors are authorized to disclose or, in specific instances, authorize the disclosure of return information to the head of a Federal, State or local child support enforcement agency or an authorized supervisory official under a contractual agreement entered into pursuant to Delegation Order 100, as revised, Revenue Procedure 78–10, and subject to the conditions prescribed in IRC 6103(1)(6)(A)(ii). Such contractual agreement should be entered into only after coordination with the Director, Office of Disclosure. The authority delegated in this paragraph may be redelegated to any supervisory level deemed appropriate.

(16) The Deputy Assistant Commissioner (Examination); Regional Commissioners; Service Center Directors; Director, Martinsburg Computing Center; and Director, Detroit Computing Center are authorized to disclose or, in specific instances, authorize the disclosure of information returns filed pursuant to part III of subchapter A of IRC chapter 61 to designate personnel of the Social Security Administration for the purpose of carrying out an effective return processing program in accordance with section 232 of the Social Security Act and pursuant to IRC 6103(1)(5). The

authority delegated in this paragraph may not be redelegated.

(17) The Senior Deputy Commissioner, Associate Chief Counsel (International), and Associate Chief Counsel (Litigation) are authorized to disclose or, in specific instances, authorize the disclosure of returns and return information to the designated officers and employees of the Department of Justice pursuant to a written request from the Attorney General, the Deputy Attorney General, or an Assistant Attorney General in a matter involving tax administration, subject to the conditions prescribed in IRC 6103(h)(3)(B). The authority delegated in this paragraph may not be redelegated.

(18) The Assistant Commissioner (Computer Services); Assistant Commissioner (Taxpayer Service and Returns Processing); Director, Office of Disclosure; Service Center Directors and Director, Martinsburg Computing Center are authorized upon written request to disclose, or in specific instances, authorize the disclosure of return information pursuant to IRC 6103(h)(6) with respect to the address and status of an individual as a nonresident alien, citizen or resident of the United States to the Social Security Administration or the Railroad Retirement Board for purposes of carrying out responsibilities for withholding tax from social security benefits under IRC 1441.

(19) At the request of the Commissioner of Internal Revenue and with the approval of the Joint Committee on Taxation, the following officials may disclose information with respect to a specific taxpayer pursuant to IRC 6103(k)(3): Regional Commissioners; Assistant Commissioner (International); District and Service Center Directors; Assistant Commissioner (Examination); Assistant Commissioner (Collection); Assistant Commissioner (Criminal Investigation); Assistant Commissioner (Employee Plans and Exempt Organizations); any individual who is specifically designated by the Commissioner of Internal Revenue. The authority delegated in this paragraph may not be redelegated.

(20) Director, Martinsburg Computing Center; and Director, Office of Disclosure, are authorized to disclose or, in specific instances, to authorize the disclosure of return information from the Information Returns Processing Master File under a contractual agreement entered into pursuant to Delegation Order No. 100, as revised, and Revenue Procedure 85–21, as revised, to Federal, State, and local agencies administering certain welfare programs, subject to the conditions of IRC 6103(1)(7). Such contractual agreements may be entered into only after coordination with the Office of Disclosure. The authority in this paragraph may be redelegated to any supervisory level deemed appropriate, but only by the officials named above.

(21) Delegation Order No. 156 (Rev. 9) and Chief Counsel Directives Manual (30)330, effective October 31, 1987 are superseded.

Charles H. Brennan,

Deputy Commissioner (Operations).

Date: May 22, 1989.

[FR Doc. 89–13037 Filed 6–1–89; 8:45 am]

BILLING CODE 4830-01-M

Commissioner's Advisory Group; Open Meeting

There will be a meeting of the Commissioner's Advisory Group on June 14 & 15, 1989. The meeting will be held in Room 3313 of the Internal Revenue Service Building. The building is located at 1111 Constitution Avenue NW., Washington, DC. The meeting will begin at 8:30 a.m. on Wednesday, June 14 and 8:30 a.m. on Thursday, June 15, 1989. The agenda will include the following topics:

Wednesday, June 14, 1989

Regulations Process

The Ruling Process

What Ways Can We Use the Media to Inform Taxpayers of Their Obligaitons?

The Liaison Function

IRS Recruitment

Thursday, June 15, 1989

Ad hoc topics, Q & A

A Review of Taxpayer Delinquency Investigations (TDI) Procedures.

CAG/IRS Planning Session for September's Meeting.

Note: Last minute changes to the day or order of topic discussion are possible and could prevent effective advance notice.

The meeting, which will be open to the public, will be in a room that accommodates approximately 50 people, including members of the Commissioner's Advisory Group and IRS officials. Due to the limited conference space, notification of intent to attend the meeting must be made with Robert F. Hilgen, Assistant to the Senior Deputy Commissioner no later than June 7, 1989. Mr. Hilgen may be reached on (202) 566–4143 [not toll-free].

If you would like to have the committee consider a written statement, please call or write Robert F. Hilgen, Assistant to the Senior Deputy Commissioner, 1111 Constitution Avenue NW., Room 3014, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Robert F. Hilgen, Assistant to the Senior Deputy Commissioner, [202] 566–4143 [Not toll-free]..

Michael J. Murphy,

Acting Commissioner.

[FR Doc. 89–13159 Filed 6–1–89; 8:45 am]

BILLING CODE 4830-01-M

Sunshine Act Meetings

Federal Register
Vol. 54, No. 105
Friday, June 2, 1989

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).

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 2:00 p.m. on Tuesday, June 6, 1989, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous minutes.

Resolution amending the delegations of authority with respect to regulation and supervision expenditures.

Memorandum and resolution re: (1) Establishment of the Investigative Files and Records System of Records pursuant to the Privacy Act of 1974, which system of records would relate to those Corporation employees or other persons involved in the Corporation's programs or operations who are or have been under investigation by the Office of the Inspector General in order to detect fraud or abuse; and (2) Proposed amendment to Part 310 of the Corporation's rules and regulations, entitled "Privacy Act Regulations," which amendment would exempt from certain provisions of the Corporation's regulations implementing the Privacy Act of 1974 the Corporation's proposed new Investigative Files and Records System of Records.

Memorandum and resolution re: Proposed amendment to the Corporation's systems of records, entitled "Unofficial Personnel System," maintained pursuant to the Privacy Act of 1974, which amendment would reflect the inclusion of records related to the Corporation's Savings Plan.

Memorandum and resolution re: Notice of compliance with Section 507 of the Competitive Equality Banking Act of 1987, which requires that the Corporation (1) fully consider the adverse economic impact on local communities of its actions taken during the administration and liquidation of loans of a closed bank; and (2) adopt and publish procedures and guidelines to minimize the adverse economic effects caused by its actions.

Reports of actions approved by the standing committees of the Corporation and by officers of the Corporation pursuant to authority delegated by the Board of Directors.

Discussion Agenda

No matters scheduled.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street NW., Washington, DC.

Requests for further information concerning the meeting may be directed by Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898–3813.

Dated: May 30, 1989.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 89–13233 Filed 5–31–89; 11:16 am]

BILLING CODE 6714-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 2:30 p.m. on Tuesday, June 6, 1989, the Federal Deposit Insurance Corporation's Board of Directors will meet in closed session, by vote of the Board of Directors, pursuant to sections 552b (c)(2), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of Title 5, United States Code, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Recommendations with respect to the initiation, termination, or conduct of administrative enforcement proceedings (cease-and-desist proceedings, termination-of-insurance proceedings, suspension or removal proceedings, or assessment of civil money penalties) against certain insured banks or officers, directors, employees, agents or other persons participating in the conduct of the affairs thereof:

Names of persons and names and locations of banks authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(6), (c)(8), and (c)(9)(A)(ii) of the "Government in the Sunshine Act" (5 U.S.C. 552b (c)(6), (c)(8), and (c)(9)(A)(ii)).

Note: Some matters falling within this category may be placed on the discussion agenda without further public notice if it becomes likely that substantive discussion of those matters will occur at the meeting.

Reports of the Director, Office of Corporate Audits and Internal Investigation:

Audit Report re:
New York Regional Office, Cost Center–500, (Memo dated April 28, 1989)
Audit Report re:
Bank Terminations, Minneapolis Consolidated Office, Cost Center–204, (Memo dated May 10, 1989)
Audit Report re:
Audit of Teleprocessing Security (Memo dated May 4, 1989)
Audit Report re:
Audit of the Management and Liquidation of Owned Real Estate–Houston Consolidated Office, (Memo dated May 19, 1989)

Discussion Agenda

Memorandum regarding the Corporation's assistance agreement pursuant to section 13(c) of the Federal Deposit Insurance Act with an insured bank.

Personnel actions regarding appointments, promotions, administrative pay increases, reassignments, retirements, separations, removals, etc.:

Names of employees authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(2) and (c)(6) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2) and (c)(6)).

Matters relating to the possible closing of certain insured banks:

Names and locations of banks authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550–17th Street, NW., Washington, DC.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898–3813.

Dated: May 30, 1989.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 89-13234 Filed 5-31-89; 8:45 am]

BILLING CODE 6714-01-M

SECURITIES AND EXCHANGE COMMISSION

Agency Meeting

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: [54 FR 21525 May 18, 1989]

STATUS: Closed meeting.

PLACE: 450 Fifth Street, N.W., Washington, D.C.

DATE PREVIOUSLY ANNOUNCED: Monday, May 15, 1989.

CHANGES IN THE MEETING: Additional meeting.

The following item was considered at a closed meeting on Thursday, May 25, 1989, at 3:00 p.m.

Consideration of *amicus* participation.

Commissioner Grundfest, as duty officer, determined that Commission business required the above change.

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: Herb Janick at (202) 272-2200.

Jonathan G. Katz,

Secretary.

May 30, 1989.

[FR Doc. 89-13262 Filed 5-31-89; 1:36 pm]

BILLING CODE 8010-01-M

Corrections

Federal Register
Vol. 54, No. 105
Friday, June 2, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

Import Limitation; Country of Origin Quota Adjustment

Correction

In notice document 89-11947 beginning on page 21453 in the issue of Thursday, May 18, 1989, make the following correction:

On page 21454, in the first column, after the signature, "*Administrator*" should read "*Acting Administrator*".

BILLING CODE 1505-01-D

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

Correction

In notice document 89-12380 beginning on page 22465 in the issue of Wednesday, May 24, 1989, make the following correction:

1. On page 22465, in the third column, under the table heading "Periods to be reviewed", the third, fourth, and fifth entries should read "04/01/88-11/20/88", "04/01/88-11/20/88", and "4/01/89-03/31/89" respectively.

2. On page 22466, in the first column, under the table heading "Periods to be reviewed", all three entries should end with the date "12/31/88".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 799

[OPTS 42107; FRL-3572-5]

1,6-Hexamethylene Diisocyanate; Proposed Test Rule

Correction

In proposed rule document 89-11824 beginning on page 21240 in the issue of Wednesday, May 17, 1989, make the following correction:

On page 21242, in the table, in the first table-column, the ninth designated entry should read "9. *In vivo* cytogenetics".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

[OPP-36170; FRL-3574-9]

Standard Evaluation Procedure; Request for Public Comment

Correction

In notice document 89-12321 beginning on page 22483 in the issue of Wednesday, May 24, 1989, make the following correction:

On page 22484, in the 1st column, under **ADDRESS**, in the next to last paragraph, in the 15th line, after "available" insert "for public inspection in Rm. 244 at the address given".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

[OPTS-59867; FRL-3571-8]

Toxic and Hazardous Substances; Certain Chemicals Premanufacture Notices

Correction

In notice document 89-11695 beginning on page 21124 in the issue of Tuesday, May 16, 1989, make the following correction:

On page 21125, in the first column, under **Y 89-108**, in the second line, "polyester" should read "polyether".

BILLING CODE 1505-01-D

FEDERAL MARITIME COMMISSION

Agreements Filed

Correction

In notice document 89-11950 appearing on page 21473 in the issue of Thursday, May 18, 1989, make the following correction.

In the second column, after the second paragraph of the document, insert the following:

Agreement No.: 224-200246

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 178

[Docket No. 85F-0082]

Indirect Food Additives; Adjuvants, Production Aids, and Sanitizers

Correction

In rule document 89-11992 beginning on page 21618 in the issue of Friday May 19, 1989, make the following correction:

§ 178.1010 [Corrected]

On page 21621, in the third column, in § 178.1010(b)(36), in the fifth line "phosphoric" was misspelled.

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-943-09-4214-12; I-2837]

Termination of Classification for Multiple Use Management; Idaho

Correction

In notice document 89-9518 beginning on page 16000 in the issue of Thursday, April 20, 1989, make the following corrections:

1. On page 16001, in the 1st column, the 21st line should read "T. 7 S., R. 16 E.,".

2. On the same page, in the second column, under "T. 8S., R. 21 E.", the fifth line should read "Sec. 8, W½E½, W½;".

3. On the same page, in the same column, the last line should read "NE¼SE¼;".

4. On the same page, in the third column, under "T. 5 S., R. 18 E.,", the second line should read "Sec. 33, S½SW¼, N½SE¼, SW¼SE¼."

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-943-09-4214-12; I-2448]

Termination of Classification for Multiple Use Management; Idaho

Correction

In notice document 89-9517 beginning on page 15999 in the issue of Thursday, April 20, 1989, make the following correction:

On page 16000, in the first column, the second line should read "Sec. 27, S½, S½N½;"

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-943-09-4214-12; I-1639]

Partial Termination of Classification for Multiple Use Management; Idaho

Correction

In notice document 89-9187 beginning on page 15561 in the issue of Tuesday, April 18, 1989, make the following correction:

On page 15561, in the third column, in the paragraph designated "1", in the sixth line, "November 9, 1987" should read "November 9, 1967"

BILLING CODE 1505-01-D

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

RIN 3150-AC44

Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste

Correction

In rule document 89-8828 beginning on page 14925 in the issue of Friday, April 14, 1989, make the following correction:

§ 2.714 [Corrected]

On page 14944, in the second column, § 2.714(1) should be designated § 2.714(i).

BILLING CODE 1505-01-D

Federal Register

Friday
June 2, 1989

Part II

Department of Energy

Federal Energy Regulatory Commission

18 CFR Parts 4 and 16

Hydroelectric Relicensing Regulations Under the Federal Power Act; Final Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 4 and 16

[Docket No. RM87-33-000; Order No. 513]

RIN 1902-AB02

Hydroelectric Relicensing Regulations Under the Federal Power Act

Issued May 17, 1989.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) issued a notice of proposed rulemaking (NOPR) on May 24, 1988, proposing to revise its regulations to incorporate the amendments to the relicensing provisions of the Federal Power Act made by the Electric Consumers Protection Act of 1986 (ECPA).

The final rule implements the relicensing provisions of ECPA by establishing procedures for the processing of applications for licenses to operate existing hydroelectric facilities when their current licenses are approaching expiration.

The final rule provides for the acceleration of license expiration dates under certain circumstances. It provides for potential applicants to have access to existing sites to make studies necessary to prepare their applications.

The final rule establishes a three-stage resource agency consultation process to be followed by potential applicants prior to filing their applications, and provides a mechanism whereby the Director of the Commission's Office of Hydropower Licensing will resolve disputes between potential applicants and resource agencies that arise during the pre-filing consultation process. The final rule requires potential applicants to allow the public to attend the joint meeting at the beginning of the agency consultation process, to solicit the public's comments on relevant resource issues that should be addressed.

The final rule specifies that an existing licensee filing an application for new license in conjunction with a new entity will not be considered an existing licensee for the purposes of the insignificant differences provision of section 15 of the Federal Power Act. Finally, the final rule clarifies that the licensing proceeding following the expiration of a minor license where standard provisions have been waived is a relicensing proceeding such that municipal preference is not applicable.

EFFECTIVE DATE: This rule is effective July 3, 1989.

FOR FURTHER INFORMATION CONTACT: John Whittaker, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 357-8033.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the Federal Register, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in Room 1000 at the Commission's Headquarters, 825 North Capitol Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 357-8997. To access CIPS, set your communications software to use 300, 1200 or 2400 baud, full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this final rule will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in Room 1000, 825 North Capitol Street, NE., Washington, DC 20426.

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

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Appendix A

I. Introduction

The Federal Energy Regulatory Commission (Commission) is revising its regulations governing the relicensing of hydroelectric power projects. The revisions implement, in part, provisions added to the Federal Power Act (FPA) [1] by the Electric Consumers Protection Act of 1986 (ECPA).[2]

II. Background

In ECPA, Congress substantially amended the FPA to restructure the statutory framework for the consideration and processing of applications for relicense for hydroelectric power projects subject to sections 14 and 15 of the FPA. ECPA clarified that a municipality is not entitled to a preference at relicensing, enumerated a number of factors the Commission must specifically consider in acting on relicense applications, and specified the standard the Commission must use in choosing among competing applications. In addition, ECPA established new procedural requirements for the filing and processing of applications for new license.

On May 24, 1988, the Commission issued a notice of proposed rulemaking (NOPR) in which it proposed to revise its regulations to incorporate the amendments to the relicensing provisions of the FPA made by ECPA.[3] The Commission proposed a process for pre-filing consultation with resource agencies, revised requirements regarding the filing and content of applications for new licenses, and procedures for processing and consideration of applications for new licenses. The NOPR also proposed revisions to the procedures governing applications for nonpower licenses and exemptions from licensing upon expiration of existing licenses, and revisions to the regulations for applications for licenses for minor water power projects and minor part water power projects with expiring licenses not subject to sections 14 and 15 of the FPA.[4] Finally, the NOPR proposed new provisions regarding acceleration of license expiration dates, site access for potential competing applicants, and the handling of projects where no timely applications for new licenses are filed.

The Commission received 53 timely comments on the NOPR.[5] In addition, late comments were filed by five entities.[6] Finally, comments replying to statements made in the initial comments on the NOPR were filed by 14 entities.[7] The Commission has reviewed all of these comments in developing the final rule.

All significant comments and revisions in the regulations are discussed in detail in Part IV, *infra*. Following is a summary of the final rule's treatment of major subject areas.

Acceleration. The final rule provides for the acceleration of license expiration dates for any legitimate interest including, but not limited to, installation of new capacity.

Access. The final rule expands both the purposes for which access must be provided and the types of compensation to which existing licensees will be entitled for providing access to potential competitors. In addition, the final rule specifies that certain disputes regarding access are subject to resolution by the Director of the Office of Hydropower Licensing.

Consultation. The final rule adopts the three-stage resource agency consultation process generally as proposed in the NOPR. However, the final rule expands some of the timing provisions of the process and specifies that not all meetings between a potential applicant and a resource agency have to include all other agencies. Also, the scope of the process whereby the Director of the Office of Hydropower Licensing will resolve disputes between potential applicants and resource agencies is expanded to include any matter arising during firststage consultation and to permit agencies to initiate the resolution process.

The final rule also clarifies that the failure of a resource agency to timely participate in a consultation step will not preclude it from engaging in subsequent consultation steps. The final rule clarifies that the confidentiality provisions of the NOPR regarding pre-filing submissions to the Commission apply only if a request for confidential treatment under one of the tests of the Freedom of Information Act is made in accordance with existing Commission regulations. Also, the rule clarifies that materials are protected from disclosure only until the related application is filed.

Finally, the final rule contains provisions requiring potential applicants to allow the public to attend the joint meeting at the beginning of the agency consultation process to solicit the public's comments on relevant resource issues that should be addressed.

Procedures. The final rule does not adopt the NOPR's proposed prohibition on the filing of applications prior to 30 months before the expiration dates of existing licenses. The final rule also specifies that deadlines for correcting deficiencies and filing final amendments will be established on a case-by-case basis.

Standards and Factors. The final rule eliminates potential confusion regarding the factors the Commission will consider at relicensing by simply referring to the appropriate statutory provision. The final rule also clarifies that the Commission, in examining an existing licensee's track record, will consider both compliance matters and actions the licensee has taken which affect the public.

Joint Applicants. The final rule specifies that an existing licensee filing an application for new license in conjunction with a new entity will not be considered an existing licensee for purposes of the insignificant differences provision of section 15 of the FPA.

Minor Licenses. The final rule adopts the NOPR's provisions regarding the waiver of certain provisions of the FPA by applicants for minor license. The final rule also clarifies that the licensing proceeding following the expiration of a minor license where these standard provisions have been waived is a relicensing proceeding. Consequently, municipal preference is not applicable to the proceeding.

III. Reporting Burden

The public reporting burden for this collection of information is estimated to average 832 hours per response for water power projects having more than five megawatt (MW) capacity and 178 hours per response for water power projects having five MW capacity or less, including the time for reviewing instructions, searching existing data

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[1] 16 U.S.C. 791a–825r (1982 and Supp. 1988).

[2] Pub. L. No. 99–495, 100 Stat. 1243 (Oct. 16, 1986).

[3] Hydroelectric Relicensing Regulations Under the Federal Power Act, 53 FR 21,844 (June 10, 1988), IV FERC Stats. & Regs. ¶ 32,461 (May 24, 1988).

[4] As discussed in Part IV.A., *infra*, a minor water power project is one which would have a total installed capacity of 2,000 horsepower or less. A minor part water power project is one that includes only a portion of a complete unit of development.

[5] *See* Appendix A.

[6] Columbia Commission, Warm Springs Tribes, Great Lakes Commission, The Department of Commerce, and the Department of the Interior.

[7] Alabama Power, EEI, Friends of the Earth, Georgia Power, Idaho Power, Long Lake, Mid-Columbia, Nebraska Power, Northern California Agency, Public Pool, Douglas County PUD, Rochester Gas, Wisconsin Department, and Wisconsin Public Service.

sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of this collection of information, including suggestions for reducing this burden, to the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of Management Systems and Analysis, (202) 357–9205]; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission].

IV. Discussion

A. Applicability of Certain Requirements of Part I of the Federal Power Act to Applications for Minor Licenses for Water Power Projects

A "minor water power project" is one that would have a total installed generation capacity of 2,000 horsepower (1.5 megawatts) or less.[8] Under section 10(i) of the FPA,[9] the Commission has the discretionary authority to waive all but three provisions of Part I of the FPA when it issues licenses for minor water power projects.[10] The Commission has invoked section 10(i) to waive the detailed accounting and administrative provisions of the FPA for these small projects because these provisions are unnecessary and expensive for the Commission to administer.

Traditionally, the Commission has waived the following provisions of Part I of the FPA for minor licenses: (1) The requirement for filing a statement of the actual legitimate costs of construction of a project;[11] (2) the requirement that plans affecting navigation be approved by the Chief of Engineers and the Secretary of the Army;[12] (3) the provisions requiring maintenance of depreciation and amortization reserves by licensees;[13] (4) the provision incorporating all of the terms and conditions of the FPA into the license (insofar as it relates to the terms and conditions of the FPA that are waived in the license);[14] (5) the provision requiring reimbursement for storage reservoirs or other headwater improvements that directly benefit the licensee;[15] and (6) certain provisions regarding rate and securities regulation,[16] temporary Federal use of project facilities,[17] and contracts to provide power beyond the term of the license.[18]

Waiver of the above provisions eliminates the requirement to maintain certain accounts and provide information necessary for net investment determinations associated with Federal takeover of licenses, pursuant to section 14 of the FPA,[19] and issuance of new licenses to other than the existing licensees pursuant to section 15 of the FPA.[20] Therefore, the Commission also has traditionally waived these two latter provisions of Part I of the FPA when it issues licenses for minor projects, except for the portion of section 14 that provides the United States and any state or municipality with the right to take over a licensed project at any time by condemnation proceedings upon payment of just compensation.

The Commission's consistent practice has been to routinely waive sections 14 and 15, and the other provisions of Part I of the FPA discussed above, whenever it issues a minor license. However, as discussed in Part IV.P., *infra*, the NOPR included provisions addressing the filing and processing of applications for license for projects with expiring minor or minor part licenses where sections 14 and 15 of the FPA have been waived. Because of the potential significance of these new provisions, the Commission determined that it would be appropriate to replace its routine waiver practice with a mechanism that would enable applicants for minor licenses, both for new projects and existing ones, to indicate whether they wanted these provisions of Part I of the FPA waived. Accordingly, the Commission proposed in the NOPR to add a new paragraph (c) to § 4.60 of its regulations,[21] indicating that the Commission would waive the above provisions of Part I of the FPA when it issued a minor license, unless the applicant indicated in its application that it wanted these provisions applied to its project.

Four entities offered comments on the Commission's proposal to amend § 4.60. American Rivers contends that the Commission has not adequately justified the waiver of these provisions. It maintains that the Commission should, at a minimum, impose the requirements that: (1) A licensee file a statement of original cost of construction of the project (arguing that it is easy to prepare and essential to preserve the option of subsequent Federal takeover); (2) the plans of projects that would affect the navigable capacity of navigable waters be approved by the Chief of Engineers and Secretary of the Army; (3) a licensee pay for headwater benefits; and (4) such licenses remain subject to sections 14 and 15 of the FPA. Trout Unlimited suggests that the provisions be waived only on a case-specific basis after notice of intent to waive in the **Federal Register**, newspaper notice, and notification of appropriate Federal and state agencies by mail.

The Department of Commerce opposes the waiver of the referred portions of FPA sections 6, 10(c), 10(d), 10(f), 15, 16, 19, 20, and 22. It argues that the Commission has not adequately evaluated the costs and benefits of waiving these provisions. Commerce also states that the referenced portion of section 4(e) should not be waived, and questions whether the Commission can be assured that these projects will not create navigation problems. Finally, Washington Wildlife questions the waiver of the navigation provision of section 4(e), and without discussion of its reasons, states that it objects to the waiver of the other referenced provisions.

The Commission believes it is appropriate to continue waiving the above-specified provisions of Part I of the FPA for minor licenses in cases where it is in the public interest to do so and where the applicants do not request otherwise. The small scale and scope of these projects do not justify the level of regulation associated with these provisions or the significant burden on licensees that compliance with these provisions would entail. The

[8] 18 CFR 4.30(b)(17) (1988).

[9] 16 U.S.C. 803(i) (1982).

[10] Section 10(i) prohibits the Commission from waiving the 50-year limit on license terms contained in section 6 of the FPA, 16 U.S.C. 799 (1982), and the provision regarding the payment of annual charges for use of lands within Indian reservations contained in section 10(e) of the FPA, 16 U.S.C. 803(e) (1982). Section 10(j) of the FPA, 16 U.S.C. 803(j) (1982 and Supp. 1988), specifies that its provisions cannot be waived pursuant to section 10(i).

Section 10(i) also authorizes the Commission to waive provisions of Part I of the FPA when it issues minor part licenses. However, except for transmission lines, the Commission no longer issues minor part licenses. *See, e.g.*, Pacific Gas & Electric Company, 29 F.P.C. 1265, 1266 (1963), and Pacific Gas & Electric Company, 56 F.P.C. 994, 1006–08 (1976).

[11] Section 4(b) of the FPA, 16 U.S.C. 797(b) (1982).

[12] Section 4(e) of the FPA, 16 U.S.C. 797(e) (1982).

[13] Sections 10(c) and 10(d) of the FPA, 16 U.S.C 803(c) and 803(d) (1982).

[14] Section 6 of the FPA, 16 U.S.C. 799 (1982).

[15] Section 10(f) of the FPA, 16 U.S.C. 803(f) (1982).

[16] Sections 19 and 20 of the FPA, 16 U.S.C. 812 and 813 (1982). Section 19 vests in the states authority to regulate certain power sales by licensees that are public service corporations. Section 20 vests in the Commission authority to regulate the issuance of securities by licensees in certain instances.

[17] Section 16 of the FPA, 16 U.S.C. 809 (1982).

[18] Section 22 of the FPA, 16 U.S.C. 815 (1982).

[19] 16 U.S.C. 807 (1982).

[20] 16 U.S.C. 808 (1982 and Supp. 1988).

[21] 18 CFR 4.60 (1988); proposed § 4.60(c).

Commission is not aware of any problems caused by its existing practice of waiving these provisions. Congress was fully aware of the Commission's waiver practice when it enacted legislation in 1962 [22] to raise the 100 horsepower limit of section 10(i) to the present 2,000 horsepower limit.[23] As discussed elsewhere herein, the provisions to be enacted as part of this final rule provide adequate means for the filing and processing of applications for license for minor water power projects with expiring licenses not subject to sections 14 and 15 of the FPA.

The commenters' concerns over the waiver of the navigation approval provision of section 4(e) of the FPA are misplaced. In most cases, these minor projects, due to their small size, do not affect navigation. However, should a particular project pose a threat to navigation, the Chief of Engineers and the Secretary of the Army can make their concerns known in their letters of comment filed in response to the public notice issued when the application for the minor project is accepted for Commission processing. The Commission is not aware of any instance where the Chief of Engineers or the Secretary of the Army has objected to waiver of this provision.

Trout Unlimited's suggestions regarding notice of intent to waive these provisions are unnecessary. First, the provisions of § 4.60(c) will put the public on notice of the Commission's waiver policy for minor licenses. Second, agencies consulted pursuant to the provisions of § 4.38,[24] in the case of applications for original license, or new § 16.8, in the case of subsequent licenses, will receive copies of both the draft and final applications. Consequently, they will be aware of applicants' decisions regarding the waiver of these provisions. The Commission is, however, adding language to § 4.60(c) to make clear that waiver of these provisions is not merely up to the applicant. The Commission will not waive any particular provision if it determines that waiver would not be in the public interest in a particular case.

B. Requirement to Show Project Boundary in Exhibit G of Application for Minor Water Power Project License.

Under existing Commission regulations, applications for minor water power projects must include reasonably accurate descriptions of the project location and all project works and features. Applicants for minor water projects are not required to show definite project boundaries on the Exhibit G maps of their applications, unless their proposed projects would occupy United States lands; in that case, definite project boundaries on such United States lands must be shown in order to make clear what United States lands would be authorized for use under the license and to assess annual charges for use of those lands.[25] This regulatory provision is consistent with the Commission's routine waiver practice for minor projects just discussed. Definite project boundaries are necessary only when there is the possibility that the United States will take over a project pursuant to section 14 of the FPA, and thus must know the precise property that would be taken. Since section 14 has traditionally been waived for minor projects, definite project boundaries were not required of minor license applicants.

Consistent with its proposal to allow minor license applicants to elect not to have the Commission waive section 14 and the other provisions of Part I of the FPA,[26] the Commission proposed in the NOPR to amend § 4.61(f)(3) of its minor license application regulations to require applicants to show definite project boundaries on their Exhibit G maps if they requested that the Commission apply section 14 and the other provisions of the FPA.[27] The proposed revisions to § 4.61(f)(3) retained the provision requiring reasonably accurate descriptions of project features, but not definite project boundaries, when section 14 and the other provisions of the FPA would be waived,[28] and the provision requiring definite project boundaries on United States lands.[29]

Several commenters[30] object to the proposed revisions to § 4.61(f)(3), and request that it be modified to require all minor license applicants to show project boundaries on their Exhibit G maps. They argue that a project boundary description is essential to assessment of project impacts and to competent environmental review, particularly regarding fish and wildlife resources.

The Commission does not accept the commenters' suggestion that a project boundary is essential for proper environmental review of proposed projects. Commission analysis includes the impacts of a project wherever they may occur, and the presence or absence of a project boundary does not broaden or restrict that review. The requirement that all minor license applicants include reasonably accurate descriptions of project locations and features, together with the other information included in the applications, provides the Commission with the information necessary for proper environmental review. Furthermore, as indicated previously, existing § 4.61(f)(3) does not require definite project boundaries in most cases. The Commission is not aware of any review problems caused by the lack of a definite project boundary in any of the numerous applications for minor license that have been filed under this regulation.

Definite project boundaries are unnecessary for proper environmental and other review of minor projects. A requirement to show definite project boundaries on Exhibit G maps could be expensive due to the surveying costs associated with developing such boundaries. Therefore, the Commission will not require such boundaries except in those cases where boundaries are needed as a result of potential Federal takeover under section 14 of the FPA. Accordingly, the Commission is adopting the revisions to § 4.61(f)(3) proposed in the NOPR, with one editorial change to ensure that descriptions of project locations are included in the filed Exhibit G maps.

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[22] Act of September 7, 1962, Pub. L. No. 87-647, 76 Stat. 447 (1962).

[23] *See* H.R. Rep. No. 2241, 87th Cong., 2nd Sess. (1962), *reprinted in* 1962 U.S. Code Cong. & Admin. News at 2375-79:

> The original Federal Water Power Act in 1920 created the Commission for the purpose of licensing hydroelectric developments on the waters of the United States over which the Congress has jurisdiction. That act recognized, and its major revision in 1935, the Federal Power Act, continued to recognize, that all of the requirements for licensing a large hydroelectric project were not necessary for small projects. * * *
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> * * * * * *
>
> As stated by the Commission, some of the detailed requirements that it now may waive for projects of not more than 100 horsepower and that it would be authorized by the bill to waive for projects of not more than 2,000 horsepower are those relating to the original cost of the project, the annual charges, the establishment of amortization reserves and depreciation reserves, and other accounting matters which are deemed unnecessary for these small plants, expensive for the licensees to comply with, and expensive for the Commission to administer.

[24] 18 CFR 4.38 (1988).

[25] 18 CFR 4.61(f)(3) (1988).

[26] Proposed § 4.60(c).

[27] Proposed § 4.61(f)(3)(ii).

[28] Proposed § 4.61(f)(3)(i).

[29] Proposed § 4.61(f)(3)(iii).

[30] American Rivers, EPA, International Association, Michigan Department and Washington Wildlife.

C. Applicability of Revised Regulations and Provisions of the Federal Power Act.

Except for the revisions to §§ 4.60 and 4.61 just discussed, the NOPR proposed revisions only to the Commission's existing Part 16 relicensing regulations.[31] Proposed § 16.1 was a general applicability section indicating that Part 16 was to apply to the filing and processing of applications for both projects with existing licenses subject to sections 14 and 15 of the FPA, and projects not subject to those sections.

Three entities commented on proposed § 16.1. Brazos requests that § 16.1 be amended to indicate that applications filed with the Commission prior to the date of enactment of the revised regulations would not be covered by the revised regulations. PG&E requests that the proposed section be amended to indicate that the Commission has the right "to moderate the requirements of these regulations where the size and/or impact of the project is shown to justify such moderation."[32] Finally, Washington Wildlife requests that the section be amended to clarify that the authority of the Departments of Commerce and the Interior to prescribe fishways at projects pursuant to section 18 of the FPA [33] is applicable to relicensing proceedings.

The Commission declines to adopt the revision suggested by Brazos. Section 18 of ECPA specifies that the amendments made to the FPA by ECPA shall take effect with respect to each license or exemption issued under the FPA after the October 16, 1986 date of enactment of ECPA. To the extent that the regulations adopted here implement specific requirements of the FPA as added by ECPA, pending applications cannot be excluded from their applicability. However, appropriate transition provisions are being added to the new regulations that relate to procedural matters not specifically addressed by ECPA, such as proposed § 16.8 relating to agency consultation,[34] to ensure that applicants are not required to retrace unnecessarily any steps of the relicensing process.

The Commission also declines to adopt the "moderation" revision proposed by PG&E. Nothing in ECPA indicates that its revisions to the FPA are to be less stringently applied to small and/or environmentally benign projects. Of course, requests for information made by resource agencies during pre-filing consultation or by the Commission may be less expansive in the case of small and/or environmentally benign projects. Also, in individual cases applicants may file requests for waiver of particular provisions of these regulations if they believe that compliance with these provisions is unnecessary for their projects. The Commission may waive such requirements unless the Commission is prevented from waiving them because of statutory restrictions.[35]

With regard to Washington Wildlife's request regarding section 18 of the FPA, the Commission has never resolved the issue of the applicability to relicensing proceedings of the authority of the Interior Department and the Department of Commerce to prescribe fishways for projects.[36]

Section 18 reads, in pertinent part:

> The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of * * * such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

As the Commission explained in its 1987 order in *Lynchburg Hydro Associates* (*Lynchburg*),[37] which addressed the scope and mandatory nature of the fishway prescription authority in the context of original licensing proceedings, the starting point for interpreting a statute is the language of the statute itself and, absent a clearly expressed legislative intention to the contrary, that language, if unambiguous, must ordinarily be regarded as conclusive. Since section 18 is cast in terms of fishway obligations of "licensees," and does not distinguish between original and subsequent licenses, it appears on its face to be applicable to relicensing proceedings.

As indicated in *Lynchburg*, the legislative history of the section is sparse. Review of that history does not reveal any discussion on the issue of whether the authority of section 18 to prescribe fishways does or does not apply to relicensing proceedings. Consequently, the facial interpretation of section 18 as applying to relicensing proceedings is not contradicted by the legislative history of the section.

From the above, it appears that section 18 should be interpreted as giving the Departments of Commerce and the Interior the authority to prescribe fishways in relicensing proceedings. As the Commission discussed in *Lynchburg*, when it is not feasible to prescribe fishways at the time of issuance of an original license, the Commission will include a condition in the license reserving the authority of Interior or Commerce to prescribe fishways if and when they are needed in the future. Thus, it is possible that fishways may not be prescribed for an original license until near its expiration date. Given this, the Commission believes it would be incongruous to argue that the authority to prescribe fishways does not apply to nearly contemporaneous relicensing proceedings.

The Commission therefore concludes that the authority of Interior and Commerce to prescribe fishways pursuant to section 18 of the FPA is applicable to relicensing proceedings. However, the Commission does not believe it is necessary to codify this statutory interpretation in the relicensing regulation. The Commission is initiating a rulemaking proceeding to develop formal procedures for implementing the provisions of section 10(j) of the FPA.[38] The latter proceeding will also address procedures related to the Departments' prescription of mandatory fishways under section 18 during the Commission's licensing and relicensing processes.

The Commission notes, however, as it did in *Lynchburg*, that the authority to prescribe fishways does not include a broad power to impose mandatory conditions of license:

> The plain language of section 18 gives the Secretaries the authority to "prescribe" "fishways." It is a specific grant of authority, in contrast to the broader grant of authority in section 4(e) of the FPA, * * * which gives the administering Secretary authority to impose conditions "necessary for the adequate protection and utilization" of a reservation physically occupied by licensed project works. Thus, section 18 in our view empowers the Secretary to prescribe fishways at a licensed project, but *not* to

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[31] See 18 CFR Part 16 (1988), as amended by "Information to be Made Available by Hydroelectric Licensees under Section 4(a) of the Electric Consumers Protection Act of 1986", Interim Rule, 52 FR 11,035 (Apr. 7, 1987), III FERC Stats. & Regs. ¶ 30,736 (Mar. 30, 1987) and Final Rule, Order No. 496, 53 FR 15,804 (May 4, 1988), III FERC Stats. & Regs. ¶ 30,812 (Apr. 28, 1988). The interim and final rules established regulations, required by ECPA, governing the notice and information requirements that apply to an existing licensee of a hydroelectric power project.

[32] PG&E at 8.

[33] 16 U.S.C. 811 (1982).

[34] *See* new § 16.8(j).

[35] *See* 18 CFR 375.314(c) (9) (1988).

[36] The comments filed by the Departments of Commerce and the Interior do not specifically address the question of whether they have authority to prescribe fishways in relicensing proceedings. However, from their discussion of how the relicensing process should be integrated with the prescription of fishways pursuant to section 18, both agencies clearly believe they have such authority.

[37] 39 FERC ¶ 61,079 (1987).

[38] *See* Statement of Policy, Order No. 511, 46 FERC ¶ 61,161 (1989).

impose, for the protection, mitigation of damages to, and enhancement of fish resources, more far-reaching conditions with respect to the design and operation of the proposed project.[39]

D. Definitions

1. "New License"

In the NOPR, the Commission proposed to define "new license" for purposes of Part 16 as "a license, except an annual license, for a water power project that is issued under section 15 of the Federal Power Act after an initial license expires." [40] Niagara Mohawk indicates that this definition is inconsistent with that found in § 4.30(b)(19) of the Commission's regulations, and suggests that the Part 16 definition be made to conform to the definition found in Part 4. Washington Wildlife suggests that the Commission should change the definition of new license to "relicense," since the licensing of a project upon the expiration of an existing license is commonly known as a relicensing proceeding, and since defining such licenses as new licenses may cause confusion with new licenses issued for entirely new projects.

The Commission does not believe the recommended changes to the proposed definition of new license are necessary. The definition of new license in § 4.30(b)(19) of the Commission's existing regulations embraces applications for licenses for projects with expiring licenses that are subject to sections 14 and 15 of the FPA, and those that are not (*i.e.*, minor licenses where these provisions of the FPA have been waived).[41] Such a definition is appropriate for Part 4, since it eliminates having to refer to these different situations in those sections of Part 4 intended to apply to both.[42]

However, for purposes of Part 16, it is necessary to distinguish between cases where sections 14 and 15 have been waived and cases where they have not. The definition of new license proposed in § 16.2(a) is intended to cover the latter situation. Unfortunately, a definition to cover the former situation was inadvertently omitted from the NOPR. The Commission is rectifying this by including as new § 16.2(e) a definition for "subsequent license." Also, the Commission is substituting the word "original" for "initial" in the definition of new license, to accurately reflect the language used in section 7(a) of the FPA [43] to describe the first license issued for a project.

The use of the word "relicense" as suggested by Washington Wildlife is inappropriate. Although these proceedings are frequently referred to as relicensing proceedings by the Commission and others, section 15 of the FPA refers to applications in these cases as applications for "new license". The definition used in Part 16 should track the definition used in the statute. The confusion suggested by Washington Wildlife should not occur, since the FPA refers to the first license issued for a project as an "original license."

2. "New License Application Filing Deadline"

The NOPR proposed to define the "new license application filing deadline" as "the date 24 months before the expiration of an existing license." [44] Washington Wildlife suggests that this date be changed to 30 months, to provide more time for the processing of applications prior to the expiration date of existing licenses. The Commission agrees that changing the 24-month date to 30 months would provide more time for processing applications, and that section 15(c)(1) of the FPA [45] itself would not prohibit an earlier deadline, since it only specifies that applications must be filed with the Commission "at least" 24 months prior to expiration. However, the Commission believes that potential competitors need a full three years from the five-year point when existing licensees file their notices of intent, pursuant to section 15(b)(1) of the FPA,[46] in which to review the information made available by existing licensees at that time to determine whether they will compete and to carry out the required consultation with resource agencies in preparing their applications. Accordingly, the Commission declines to establish a 30-month filing deadline.

3. "Resource Agency"

The NOPR proposed to define "resource agency" as "a Federal or state agency with responsibilities in the area of flood control, navigation, irrigation, recreation, fish or wildlife, or cultural or other relevant resources." [47] Resource agencies are participants in the pre-filing consultation process described in this final rule. Four commenters [48] suggest that the Commission specifically add water resource agencies to its definition.

The proposed definition is sufficiently broad to include the appropriate water resource agencies and was not intended to exclude agencies with responsibilities not specifically listed. However, the Commission recognizes the importance of the participation of agencies with responsibilities for water resources and is modifying the definition to include them specifically.[49]

E. Public Notice of Expiring Licenses

Existing Commission regulations specify that the Commission will publish each year in its annual report and in the **Federal Register** a table showing the projects with licenses that will expire during the succeeding five years.[50] In the NOPR, the Commission proposed to continue this practice.[51]

American Rivers suggests that the table be published each year in the **Federal Register**, and that the tables include projects with licenses that will expire during the succeeding six years. American Rivers also suggests that the proposed section make clear that projects whose expiration dates have been accelerated pursuant to proposed § 16.4 will be included in the tables. Washington Wildlife suggests that the tables include projects with licenses that will expire during the succeeding seven years, and be provided to all appropriate fish and wildlife agencies. Finally, Montana Natural Resources suggests that the tables include specific references to the procedures required by section 15(b) (2)–(4) of the FPA.

The intent of proposed § 16.3 was to have the table published each year in both the Commission's annual report and in the **Federal Register** as is

[39] 39 FERC at 61,218 (footnotes omitted) (emphasis added).

[40] Proposed § 16.2(a).

[41] 18 CFR 4.30(b)(19) (1988) defines new license as "any license, except an annual license issued under section 15 of the Federal Power Act, for a water power project that is issued under the Federal Power Act after the initial license for that project." The difference between the definition of new license in § 4.30(b)(19) and in § 16.2(a) is relevant only for existing minor licenses where sections 14 and 15 have been waived; § 4.30(b)(19) applies to renewal applications for such projects, while § 16.2(a) does not.

[42] *See, e.g.*, 18 CFR 4.41, 4.51, and 4.61 (1988).

[43] 16 U.S.C. 800(a) (1982 and Supp. 1988).

[44] Proposed § 16.2(b).

[45] 16 U.S.C. 808(c)(1) (1982 and Supp. 1988).

[46] 16 U.S.C. 808(b)(1) (1982 and Supp. 1988).

[47] Proposed § 16.2(d).

[48] Brazos, Montana Natural Resources, Washington Ecology and Western Council. EPA and South Carolina Department request that the definition be amended to encompass water quality agencies. However, this is unnecessary, since proposed § 16.8 clearly covers such agencies.

[49] EPA suggests that a definition be added for "minor hydroelectric power project," while Niagara Mohawk suggests that a definition be added for a "nonpower project". The Commission declines to include a definition for a "minor hydroelectric power project," since that term is already defined in section 10(i) of the FPA and 18 CFR § 4.30(b)(17) (1988). There is no need to define a "nonpower project," since it is self explanatory, *i.e.*, a project that is maintained for some nonpower purpose, such as recreation or water supply.

[50] 18 CFR 16.2 (1988).

[51] Proposed § 16.3.

currently done. However, to alleviate American Rivers' concern, the Commission is inserting "annually" in the section to make clear that the publication of the table in the Federal Register will occur each year. Also, while the Commission does not believe it is necessary to expand the tables to include projects with licenses expiring during the succeeding seven years as suggested by Washington Wildlife, the Commission is adopting American Rivers' suggestion to expand the coverage of the tables to include the succeeding six years. This will provide more advance notice of upcoming relicensing proceedings to potential competitors, resource agencies and the public.

Projects with expiration dates accelerated pursuant to proposed § 16.4 would be included in the tables. Therefore, there is no need to modify § 16.3 to specify this, as suggested by American Rivers. Also, the Commission does not believe it is necessary to provide copies of the tables directly to appropriate fish and wildlife agencies. As required by section 15(b)(3) of the FPA,[52] the Commission will be providing those and other appropriate resource agencies with notices regarding notices of intent filed by individual licensees.[53] Finally, the Commission sees no need to repeat in the tables the statutory requirements of section 15(b)(2)–(4), as requested by Montana Natural Resources.[54]

F. Acceleration of License Expiration Dates

In the NOPR, the Commission proposed to permit a licensee wishing to install new capacity at its existing project to file a written request to advance the expiration date of the existing license, called a request for acceleration.[55] The purpose of this proposal was to allow an applicant to increase project capacity at an earlier time as a result of financing that could become available with a new long-term license.[56] The NOPR [57] specified that the request would have to contain the same statements and information required to be included in a notice of intent filed pursuant to § 16.6, that the Commission would treat the request as a notice of intent, and that the requester would have to make available to the public at that time the information specified in § 16.16.[58] The Commission proposed to give Federal Register and local newspaper notice of the licensee's request for acceleration, notify appropriate Federal and state resource agencies by mail, provide a 45-day period for comments by interested parties, and, if it determined that the request was in the public interest, issue an order accelerating the expiration date of the license to five years from the date of the Commission order.[59]

Several commenters addressed the issue of the basis for requesting accelerated termination of a license. EEI suggests that licensees be permitted to seek acceleration for improvements other than installation of new capacity, such as dam safety improvements or facilities for the protection and enhancement of fish and wildlife resources. It argues that the rationale for acceleration advanced in the preamble to the NOPR is equally applicable to these situations.

Idaho Power suggests that there are valid bases for acceleration of license expiration dates for other than installation of new capacity, including rehabilitation work for reasons of safety and spillway modifications. Idaho Power also suggests that acceleration could be used to make the expiration dates of licenses for related projects coincide, so that the Commission could consider the projects together in a single relicensing proceeding. Therefore, Idaho Power suggests that a licensee be permitted to request acceleration for any reason.

Montana Power also suggests that there are valid bases for acceleration other than new capacity, citing safety and fish and wildlife concerns. It recommends permitting acceleration for any legitimate reason that is in the public interest and consistent with statutory purposes.

Trout Unlimited suggests that the Commission discourage acceleration in the short term, because of the extremely heavy volume of upcoming relicensing proceedings. Other commenters focus on the interpretation of the term "new capacity". Washington Wildlife recommends that the Commission adopt a guideline specifying that at least a 20 percent increase in project production is needed to justify acceleration of a license expiration date. Montana Power also suggests that the Commission clarify the term "new capacity", and recommends that it encompass only cases where generation is to be increased through additional water usage or through conversion of a plant from a run-of-the-river facility to a peaking facility.

Two commenters address the issue of when a licensee should be required to make the information available to the public pursuant to § 16.7. EEI suggests that, rather than requiring a licensee to make the information available at the time the acceleration request is made, the Commission should wait until it approves the request for accelerated termination and then require the licensee to make the information available within 120 days. EEI contends that compiling the information and making it available in the required form is a burden, and that if the Commission denies the request some of the information will become stale before the original expiration date. Montana Power also cites the needless compilation of information should the request be denied, and suggests that the licensee be required to make the information available within a reasonable time after a request for accelerated termination is granted.

The South Carolina Department asks that the Commission clarify when the 45-day comment period begins, and suggests that the Commission use certified mail to notify agencies of applications for acceleration. Washington Wildlife suggests that the notices issued pursuant to § 16.4(b) include the information specified in § 16.3(b). Montana Power wants to impose time limits within which the Commission must either grant or deny an acceleration request; this would avoid "potential crippling uncertainty" [60] caused by the licensee

[52] 16 U.S.C. 808(b)(3) (1982 and Supp. 1988).

[53] *See* § 16.15(d), promulgated in Order No. 496, *supra*. The final rule in the instant proceeding redesignates § 16.15(d) as § 16.6(d). This section will be referred to hereinafter as § 16.6.

[54] Trout Unlimited and Washington Ecology suggest that § 16.3 be amended to incorporate the provisions of section 15(b)(3). However, those provisions are addressed in § 16.6(d) and need not be referenced in § 16.3.

[55] Proposed § 16.4.

[56] *See* NOPR preamble at 40. All references herein to pages of the NOPR preamble are to the slip opinion because the full text was not published in the Federal Register. Copies of the full text of the NOPR are available from the Commission's Public Reference Room.

[57] Proposed § 16.4(a).

[58] Section 16.16, which was promulgated in Order No. 496, supra, implements the provisions of section 15(b)(2) of the FPA, 16 U.S.C. 808(b)(2) (1982 and Supp. 1988), which requires existing licensees to make available to the public for inspection and copying certain information regarding their projects at the time they file their notices of intent pursuant to section 15(b)(1) of the FPA. The final rule in the instant proceeding redesignates § 16.16 as § 16.7. This section will be referred to hereinafter as § 16.7.

[59] Proposed §§ 16.4(b) and (c).

[60] Montana Power at 8.

not knowing when the Commission might act and therefore having difficulty drafting reliable project schedules and organizing and coordinating its relicensing effort. Also, Montana Power questions why the new expiration date must be five years from the date of the Commission order.

Finally, New York Electric and Rochester Gas request that the Commission clarify that, under the proposed provision, licensees wishing to increase capacity are not required to risk their existing licenses by seeking acceleration, and that the alternative of application for a license amendment to expand capacity remains available to them.

The Commission agrees that there may be valid bases for acceleration other than new capacity. Accordingly, the Commission is revising § 16.4(a)(1) to eliminate the reference to the installation of new capacity, and to add the requirement that a licensee include in its acceleration request a detailed explanation of the basis for its request. Thus, any legitimate interest, including, but not limited to, installation of new capacity, dam safety modifications, and fish and wildlife improvements, may serve as the basis for an acceleration request. The Commission notes, however, that licensees are responsible for conducting routine operation and maintenance on their projects and that such routine operation and maintenance activities will not justify an acceleration request.

The Commission does not believe it is necessary to discourage acceleration requests in the short-term, as suggested by Trout Unlimited. Although a significant number of relicensing proceedings will be initiated in the near future, the Commission does not anticipate that many licensees will attempt to avail themselves of the acceleration procedure. Furthermore, the Commission will be able to weigh potential burdens on Commission resources when it is considering whether to grant acceleration requests.

The Commission also does not believe it is necessary to establish restrictions on the type or size of new capacity installations that will justify an acceleration request, as suggested by Washington Wildlife and Montana Power. The Commission will evaluate the merits of each case individually, and will grant an acceleration request only if it will be in the public interest to do so.

The Commission agrees with EEI and Montana Power that the obligation to make information available pursuant to § 16.7 should be tied to Commission approval of an acceleration request. Ninety days following Commission approval of an acceleration request should be sufficient time for licensees to compile the required information and make it available. Therefore, the Commission is revising § 16.4(a)(2) to specify that, should the Commission grant the request for acceleration, the Commission will deem the request for acceleration to be a notice of intent under § 16.6. Unless the Commission specifies a later period, the licensee will be required to make available the information specified in § 16.7 no later than 90 days from the date the Commission grants the request. Also, the Commission is revising § 16.4(b): (1) To clarify that the notices issued pursuant to that paragraph will be considered as fulfilling the notice provisions of § 16.6(d) should the Commission grant the acceleration request; (2) to specify that the notices issued pursuant to that paragraph must include an explanation of the basis for the acceleration request; [61] (3) to include Indian tribes among those receiving the notices, so as to be consistent with § 16.6(d); and (4) to reduce the number of times the notice is published in a local newspaper from four to one. The reduction in the number of times public notice is issued will reduce costs while still providing the public and resource agencies with ample notice of the request. A comparable change regarding the reduction in the number of times a notice will be issued is being made to § 16.6(d)(2).

As indicated previously, Montana Power questions why the new expiration date of an accelerated license must be five years from the date of the Commission order. The purpose of the five-year period was to preserve the five-year window between the time a licensee is to first make information available and the expiration of the license as established by ECPA. The Commission is revising § 16.4(a)(2) to provide that, unless the Commission specifies a later period, information must be made available no later than 90 days from the date the Commission approves an acceleration request. Therefore, the Commission is also revising § 16.4(c) to specify that the expiration date of an accelerated license will be not less than five years plus 90 days from the date of the Commission order approving the acceleration request. The qualifying language in § 16.4(a)(2) and the "not less than" language in § 16.4(c) are being used in order to provide the Commission with flexibility in setting expiration dates later than five years in situations where that would be appropriate, such as when requests are made to coincide with the expiration dates of related projects, as suggested by Idaho Power.

With regard to the clarification requested by the South Carolina Department, the § 16.4(b) notices will specify when the 45-day comment period will expire. Due to the expense involved, the Commission declines to adopt the South Carolina Department's suggestion that the notices to resource agencies be sent by certified mail.

The Commission is sympathetic to the uncertainty concerns prompting Montana Power's request for a deadline for Commission action on acceleration requests. The Commission will attempt to act on all acceleration requests in a timely manner and intends that a decision on a request will be made within 45 days after the expiration of the comment period. Also, a degree of certainty regarding the scheduling of relicensing activities is provided to those requesting acceleration due to the fact that license expiration dates will always be set at least five years plus 90 days from the date of the Commission order approving the acceleration request.

The Commission also notes that the comments of New York Electric and Rochester Gas are correct. Licensees always have the ability to file applications to amend their licenses to increase the capacity of their projects, and do not have to request acceleration of their licenses to do so.[62] If the term of an existing license is less than the statutory maximum of 50 years,[63] increases in capacity or other improvements requiring substantial new investment may justify an extension of the license term up to 50 years.[64]

[61] Since both the notices issued pursuant to this section and § 16.6(d) will include information comparable to that specified in § 16.3(b), there is no need to specifically reference § 16.3(b) in this provision as requested by Washington Wildlife. EPA suggests that § 16.4 be amended to clarify that a licensee should be obligated to provide information to resource agencies at the time the licensee requests acceleration. Although it is unclear what information EPA is referring to, pursuant to the revisions made to § 16.4 herein, the information required by § 16.7 will be available to all entities, including resource agencies, within 90 days from the date the Commission approves an acceleration request.

[62] The Commission may, however, decline to consider new capacity amendments which are requested by an existing licensee near the expiration date of an existing license if it appears that it would be in the public interest to consider those amendments in the context of a relicensing proceeding where competing redevelopment proposals may be considered.

[63] *See* section 6 of the FPA.

[64] *See, e.g.*, Fieldcrest Mills, 37 FERC ¶ 61,264 (1986).

G. Site Access for Competing Applicants

In the NOPR, the Commission proposed to establish a procedure whereby a potential applicant for a new license for an existing project that has complied with paragraph (b)(1) of the proposed § 16.8 consultation process could enter the project area to conduct a study or gather information required by a resource agency or the Commission, or to hold a site visit for a resource agency.[65] The proposed section would require the potential applicant to notify the existing licensee in writing of its need for access, and to enter the project area at a reasonable time, under reasonable conditions, and in a manner that would not adversely affect the environment. Those conditions included, but were not limited to, reasonable liability conditions and conditions for compensation to the existing licensee for energy generation lost as a result of modification of project operations necessary to provide access. The proposed section is consistent with the Commission's order in *Niagara Mohawk Power Corporation*,[66] and was intended to formalize the procedures ordered in that case.[67]

1. Basis for Access

American Rivers suggests that the permissible purposes for site visits are unduly limited and that they should be expanded to include "any purpose related to the preparation of an application"[68] after completion of the first stage of consultation, and not merely to conduct a study or hold a site visit requested by a resource agency or the Commission. Conversely, EEI and Alabama Power suggest that the purpose for which a site visit may be conducted should be limited to situations in which the potential applicant cannot conduct a study or gather information by other "reasonably diligent efforts."[69] According to EEI, because access to an operating hydroelectric power production site may be intrusive and disruptive, site visits should be a last resort.

American Paper suggests that access be restricted to areas within the project for which the competitor can demonstrate a need for access, and that the party seeking access be required to demonstrate to the existing licensees the basis on which access is requested. Similarly, Rochester Gas suggests that a potential applicant seeking access identify the information that necessitates access for collection, and that the competitor then be permitted to gain access only to those areas of the site that will provide such information.

In its reply comments, the Northern California Agency suggests that the Commission permit potential competitors to have access to sites in order to evaluate the condition of existing equipment, and hence decide how best to develop the site. As to EEI's and Alabama Power's suggestion that potential applicants be permitted access only if they demonstrate that they cannot conduct the study or gather the information by other reasonably diligent efforts, the Northern California Agency contends that it would be unreasonable when such other means would be considerably more time consuming or expensive.

The Commission rejects the recommendation to require potential applicants to show that the information cannot otherwise be obtained or the study conducted through other reasonably diligent efforts before they can obtain access. It would not be an efficient use of the nation's resources, or consistent with the competitive spirit underlying ECPA, to require potential applicants to gather necessary information and conduct necessary studies through means that are more time consuming and expensive than information development through site access. Although the "reasonably diligent" qualifier of the recommended change might insulate potential competitors from having to undertake speculative and exorbitantly expensive studies as a condition precedent to access, the potential for disputes inherent in such language would be great. This in turn could require Commission staff to devote considerable resources to resolving disputes. The intrusion and disruption cited by EEI should be minimized by the requirement that access take place at reasonable times and under reasonable conditions.

The suggestions advanced by American Rivers and the Northern California Agency to expand the permissible purposes for site visits are reasonable. Potential applicants may need site access in order to develop information or conduct studies necessary for their applications that may not be requested by consulted agencies or the Commission. There is no bright line between studies and information needed to develop an application, and those requested by consulted agencies or the Commission. Furthermore, any study or information need could be turned into one requested by a consulted agency or the Commission by a potential applicant's failing to either propose to conduct or actually conduct the study or information gathering.

Accordingly, the Commission is revising proposed § 16.5 to permit site access for the purpose of conducting a study or gathering information not requested by the Commission or a resource agency but necessary to prepare an application.[70] However, to help ensure that access for such purposes does not turn into general fishing expeditions for information, the Commission is making the need for such access a subject for dispute resolution.[71]

American Paper's and Rochester Gas' suggestions requiring a potential applicant to state the purpose and extent of the needed access are reasonable. This information will enable the parties to determine the conditions of access. Accordingly, we will require potential applicants to include a statement of the need for and extent of the access in their notices to existing licensees.

However, to the extent the comments of American Paper and Rochester Gas suggest that existing licensees should be able to deny access based on their conclusion that access is not needed, those suggestions are rejected. If access is needed to conduct studies or site visits or to gather information requested by consulted agencies or the Commission, the existing licensee must provide access to the site. However, the timing and conditions of access may be referred to the Director of the Office of Hydropower Licensing (Director).[72] Disputes regarding the need of a potential applicant to obtain access to conduct studies or gather information not requested by the Commission or a resource agency but necessary to prepare an application may also be so referred.

2. Compensation

Ten commenters[73] address the issue of reimbursement to existing licensees for the costs of site visits, suggesting that reimbursement be for "any and all costs" or "all reasonable costs," rather than merely for the costs of lost generation as proposed in the NOPR. They argue that the personnel costs,

[65] Proposed § 16.5.

[66] 43 FERC ¶ 61,015 (1988).

[67] *See* NOPR preamble at 41.

[68] American Rivers at 8.

[69] EEI at 5A; Alabama Power at 4.

[70] *See* new § 16.5(a)(2).

[71] *See* new § 16.5(b)(1), discussed in Part IV.C.3., *infra*.

[72] *Id.*

[73] Alabama Power, EEI, Idaho Power, New York Electric, Public Pool, Puget Sound Power, Southern California Edison, Rochester Gas, Washington Power and Wisconsin Utilities.

operation and maintenance expenses associated with inspections, and all other costs associated with access, should be reimbursable. According to them, full reimbursement is necessary to avoid forcing an existing licensee into the unfair situation of subsidizing its potential competition.

In reply comments, the Northern California Agency opposes the recommendation to allow existing licensees to recover all reasonable expenses incurred as a result of access. According to the Northern California Agency, this type of provision can be used as a barrier to access while an existing licensee forces a potential competitor to waste time negotiating payment terms. It also argues that costs other than lost generation are likely to be *de minimis*, and that existing licensees should be required to bear these costs as part of their obligations under Part I of the FPA.

The Commission believes that existing licensees should not be required to incur expenses associated with the preparation of applications by potential competitors. Therefore, the Commission is revising § 16.5 to require reimbursement for all reasonable expenses incurred by existing licensees as a result of providing access to potential competitors. However, the Commission stresses that the expenses must be reasonable. Thus, for example, the wages and associated expenses incurred by an existing licensee when sending one or two individuals to one of its unmanned hydroelectric sites to permit a potential competitor to have access to the site would be reimburseable, while the expenses associated with sending a platoon to scrutinize a potential competitor's every step would not.

In order to prevent existing licensees from abusing their right to reimbursement, the Commission is amending § 16.5 to allow disputes over payment to be referred to the Director for resolution. However, in response to the concerns of the Northern California Agency regarding delay, the Commission is specifying that access cannot be denied pending resolution of a dispute over payment.[74]

3. Procedural Matters

Idaho Power and Puget Sound Power suggest that § 16.5 be amended to permit disputes over access to be referred to the Director for resolution. The Northern California Agency recommends that, should a dispute resolution procedure be added, the Commission ensure that the disputes be resolved expeditiously in order to allow potential applicants to meet the filing deadlines established by ECPA.

The Commission agrees that a dispute resolution process will assist in providing reasonable access to potential competitors, and will help deter potential abuses by both existing licensees and potential competitors. Accordingly, the Commission is adding a new paragraph (b) to § 16.5, to permit referral to the Director of disputes regarding: (1) The timing and conditions of access; (2) the need for access to conduct studies and information gathering not requested by the consulted agencies or the Commission but necessary to prepare an application; and (3) reimbursement due existing licensees for providing access. The new procedures will be in accord with those established for resolution of disputes during the agency pre-filing consultation process.[75]

As the Commission stated in *Niagara Mohawk Power Corporation, supra*, it fully expects that in most cases existing licensees and potential competitors will be able to resolve access disputes without coming to the Commission.[76] Thus, the Commission does not expect the dispute resolution process to be used frequently. As urged by the Northern California Agency, when disputes are lodged the Director will attempt to resolve them expeditiously. As discussed *infra*, the Commission intends for the Director to make every effort to resolve referred disputes within 30 days from receipt of all relevant information.

The NOPR proposed in § 16.5 that only potential applicants that had initiated the first stage of agency consultation could obtain access. The Small Business Administration objects to this provision, arguing that access might be required to obtain information needed to compile the § 16.8(b)(1) information package. It therefore suggests, as an alternative, that site access be available if a potential applicant can demonstrate that access is necessary to secure § 16.8(b)(1) information needed by a resource agency to evaluate the project during the first stage of consultation. In addition, Seattle Light, without further explanation, suggests that a potential applicant demonstrate a certain level of commitment to an application before it is granted access to a project site.

The Commission's purpose in providing for an access triggering point was to strike a balance between access for serious competitors and unnecessary inconvenience to existing licensees. The Small Business Administration's suggestion that the balance point should be moved forward has certain merit. Nevertheless, the Commission believes that adherence to the completion of the requirements of § 16.8(b)(1) as the threshold for access will best maintain the balance between providing access which is necessary for serious potential applicants while minimizing unnecessary inconvenience to existing licensees. Furthermore, the information that existing licensees are required to make available to the public pursuant to § 16.7, together with the information on existing projects available for inspection by the public at the Commission, should enable potential applicants to gather the information they need to undertake first-stage agency consultation.[77]

The Interior Department recommends that § 16.5 be amended to recognize that Federal agencies have the right to obtain access to existing projects in order to conduct environmental studies. This is unnecessary because standard articles included by the Commission in licenses already provide for such access.[78]

Finally, the Commission is clarifying that the § 16.5 access provisions are applicable to projects under expiring licenses that are not subject to the provisions of sections 14 and 15 of the FPA, and is removing the provision that prohibits access prior to the filing of the existing licensee's notice of intent. The latter change is to facilitate potential competitors that choose to initiate formal consultation under § 16.8 prior to the filing of the existing licensee's notice of intent.

H. Consultation

Section 4.38 of the Commission's regulations [79] requires applicants,

[74] *See* new § 16.5(b)(2), discussed in Part IV.G.3., *infra*.

[75] *See* § 16.8(b)(5), discussed in Part IV.H.2.e., *infra*.

[76] *See* 43 FERC at 61,050.

[77] For the same reasons, Seattle Light's apparent request to move the balance point back is rejected.

[78] *See, e.g.*, Article 4 of L-1 ("Terms and Conditions of License for Constructed Major Project Affecting Lands of the United States"), 54 F.P.C. 1799, 1800–1801 (Oct. 1975), which provides that the licensee "shall allow * * * other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties."

[79] 18 CFR 4.38 (1988). In the initial stage, a potential applicant must contact all appropriate agencies and provide them with detailed information regarding the proposed project, including detailed maps containing descriptions of the project area and location of proposed project facilities, engineering designs of the proposed project, identification of the environment to be affected, any environmental protection, mitigation and enhancement plans, and stream flow and water regime information. During the second stage, potential applicants must perform all reasonable

Continued

including applicants for new license, to conduct a three-stage consultation process with all relevant resource agencies prior to filing their applications with the Commission. Because of the statutory deadline for filing applications added to the FPA by ECPA and the great number of applications for new license anticipated in the near future, the Commission proposed in the NOPR to implement a revised three-stage consultation process for relicensing proceedings. That process was intended to facilitate more expeditious and responsive consultation, and hence the filing of complete applications by the statutory deadline.[80]

Virtually every entity filing comments on the NOPR addressed the proposed consultation provisions. The commenters were generally supportive of the intent of the proposal and the additional structure the proposal would add to the consultation process. However, even those supporting the proposal recommended that numerous changes be made to the section. The major recommendations, suggestions, and comments of all of the commenters are discussed in detail below.

As a threshold matter, the Commission is clarifying the issue of when consultation with resource agencies can be initiated. In the NOPR, the Commission indicated that existing licensees and other potential applicants would have approximately three years following the filing of existing licensees' notices of intent under section 15(b)(1) of the FPA within which to conduct consultation before having to file their applications under the 24-month application filing deadline established by section 15(c)(1) of the FPA.[81] A number of the commenters, in discussing various aspects of the consultation provisions, interpreted this as a statement by the Commission that consultation with agencies could not begin until the filing of an existing licensee's notice of intention.[82]

This was not the intent of the statement; rather, the statement merely expressed the Commission's belief that most applicants probably would wait until the filing of the section 15(b)(1) notice of intent to initiate agency consultation. Applicants are free to initiate informal consultations, or the formal consultation required by § 16.8, prior to the five-year notice of intent deadline. Indeed, they are encouraged to do so in cases where they expect that necessary studies will require extended periods of time to complete. Conversely, there is no fixed deadline by which consultation must be initiated. However, applicants that postpone the initiation of consultation much after the filing of the section 15(b)(1) notices of intent run the risk of not being able to comply with the requirements of § 16.8.

1. General Requirement to Consult

Proposed § 16.8(a)(1) specified that, before an applicant files an application for new license, nonpower license, exemption, or surrender, it must consult with the relevant Federal and state resource agencies, including the National Marine Fisheries Service, the United States Fish and Wildlife Service, the Federal agency administering any United States lands utilized or occupied by the project, the appropriate state fish and wildlife agencies, and the certifying agency under section 401 of the Federal Water Pollution Control Act (Clean Water Act). Proposed § 16.8(a)(2) specified that the Director or appropriate Regional Director will provide a list of known appropriate Federal and state resource agencies upon request.

Brazos, Washington Ecology, and Western Council suggest that state water resource management agencies be added to the list of agencies specifically enumerated in § 16.8(a)(1). The EPA suggests that it be included in the list of enumerated agencies. The Connecticut Commission suggests that it be included as a consulted agency for any project in the Connecticut River Basin. Brazos and Western Council suggest that § 16.8(a)(2) be modified to specify that, with regard to state resource agencies, the Director shall request and use a list prepared by the governor of each state. Similarly, Montana Natural Resources suggests that the Director solicit lists of state agencies from the states and forward the lists automatically to each applicant.

Consistent with its revision to § 16.2(d), the Commission is adding state water resource management agencies to the list of enumerated § 16.8(a)(1) agencies. Also, due to its significant resource responsibilities, the EPA is being added to the enumerated agency list even though, like state water resource management agencies, it would be considered a resource agency without being specifically named. Finally, § 16.8(a)(1) is being revised to clarify that interstate agencies with relevant resource responsibilities, such as the Connecticut Commission, are to be consulted by applicants.[83]

The suggestion that the Director solicit agency lists from the governor of each state is reasonable, since it will help clarify for applicants the existence and specific responsibilities of relevant state resource agencies. Accordingly, the Commission is instructing the Director to solicit such lists and provide any responses received to applicants upon request. The Commission declines, however, to amend § 16.8(a)(2) to require the Director to use the lists supplied by the governors as the Director's lists, since the governors' lists may not contain all agencies with whom the Director believes applicants should consult.

2. First-Stage Consultation

Under the first stage of the proposed consultation regulation (§ 16.8(b)), potential applicants are to provide to each appropriate resource agency and the Commission basic information regarding the existing project and any proposed changes.[84] After each agency has had 30 days to review this information, the applicant is required to provide an opportunity for a site visit, and hold one or more joint meetings or conference calls with all pertinent agencies to review information and to discuss the data and studies to be provided by the applicant.[85] The potential applicant is to inform the Commission in advance of the time and place of each meeting or conference call so as to enable Commission staff, if they so choose, to attend the joint meetings or participate in the conference calls.[86]

The NOPR specified that each consulted resource agency was to provide the applicant with written comments identifying its "final" determination of necessary studies to be performed or information to be provided by the applicant. The NOPR required that these written agency comments be provided within 30 days after the joint meeting or conference call "during which there is agreement by all

studies requested by the consulted agencies. Again during this second stage, potential applicants are required to provide the agencies with copies of the draft application, the results of all studies, and written requests for the agencies' review and comment thereon. During the third stage, an applicant for a project of less than 5 MW must serve copies of its application on the consulted agencies when it files the application with the Commission. An applicant for a project of 5 MW or more must serve copies of its application on the consulted agencies after receiving notification from the Commission that the application has been accepted for Commission processing.

[80] Proposed § 16.8.

[81] *See* NOPR preamble at 9.

[82] *See, e.g.*, Idaho Power at 3 and Public Pool at 6.

[83] A similar change is being made to the definition of resource agency in § 16.2(d).

[84] Proposed § 16.8(b)(1).

[85] Proposed § 16.8(b)(2).

[86] *See* NOPR preamble at 12.

participants that the information required by § 16.8(b)(1) has been provided."[87]

The NOPR specified that, if an applicant disagrees with a resource agency as to whether a study is reasonable and necessary or as to the manner in which a study should be performed, it can refer the matter to the Director for resolution, except where the study itself or the manner in which an agency requested it be performed is routinely conducted or used on the type of project proposed.[88] It also provided that, if an applicant does not refer the matter to the Director, or if it disagrees with the Director's resolution of the matter and does not conduct the requested study or perform it in the manner specified, it must fully explain the basis for its disagreement in its application.[89] Finally, the NOPR specified that the first stage of consultation ends when all participating agencies provide the required written comments.[90]

a. Commission Attendance at Joint Meetings. Puget Sound Power and Great Northern support the possibility of Commission staff attendance at consultation meetings, in the belief that staff's presence might encourage parties to refrain from extreme positions and work toward reasonable accommodation of each other's interests. Southern California Edison expresses certain reservations about Commission involvement in the consultation process, stating that it would prefer that Commission participation after the initial joint meeting be at the invitation and discretion of the potential applicant. Wisconsin Utilities suggests that the Commission not directly participate in the consultation process except to resolve disputed issues pursuant to § 16.8(b)(4). Wisconsin Utilities expresses concern that Commission presence could be counterproductive, since it could trigger posturing by agencies and applicants attempting to influence the Commission's position on disputed issues, or might undermine the Commission's impartiality if the Director is later required to arbitrate a dispute.

Niagara Mohawk objects to the requirement to provide the § 16.8(b)(1) information package to the Commission. According to Niagara Mohawk, the Commission does not need this information unless and until the Director is called upon to resolve a dispute pursuant to § 16.8(b)(4). Also, Alabama Power and Wisconsin Utilities object to the requirement that the Commission be notified in advance of each meeting, contending that it would be burdensome.

The purpose of giving Commission staff the opportunity to attend the first-stage joint consultation meeting and subsequent meetings during the consultation process is twofold. First, it is to enable the Commission to become familiar with the proposed projects and their associated resource issues, and thus to enable it to more expeditiously resolve any disputes referred under § 16.8(b)(4) and to process applications once they are filed. Second, it is to enable Commission staff, if so-called upon at a meeting, to offer advice and provide guidance regarding normal Commission information needs.[91]

The Commission does not believe that attendance at such consultation meetings will encourage posturing. It should encourage accommodation of interests. Commission staff advice on the Commission's information requirements should aid the consultation process. Commission staff attendance at such meetings should be left to staff's discretion, rather than being subject to the discretion of the applicant. Accordingly, the Commission rejects the recommendations of Southern California Edison and Wisconsin Utilities.

The Commission also declines to adopt Niagara Mohawk's suggestion to eliminate the requirement to provide the § 16.8(b)(1) information package to the Commission. This package contains the information needed by Commission staff to determine if it wants to attend a meeting and to familiarize itself with a project prior to the first-stage joint consultation meeting. Receipt of this information at this time will assist in the prompt resolution of any § 16.8(b)(4) disputes that may arise later. Finally, the Commission rejects the suggestion of Alabama Power and Wisconsin Utilities that the requirement for advance Commission notice of meetings be eliminated. While this requirement will impose an additional duty on applicants, it should not prove to be unduly burdensome and is necessary for Commission staff to become aware of the meetings.

b. Information. As noted previously, § 16.8(b)(1) requires applicants to provide resource agencies with certain basic information regarding the existing project and any proposed changes. The information requirements, which are set out in proposed § 16.8(b)(2) (i) to (vi), include: information regarding the specific location of all existing and proposed project features ((i)); general engineering design information ((ii)); a summary of the operational mode of the existing project and any proposed changes ((iii)); identification of the environment affected, the significant resources present, and the applicant's existing and proposed environmental protection, mitigation, and enhancement plans, to the extent known at the time ((iv)); streamflow and water regime information ((v)); and a tentative schedule and location for the initial joint consultation meeting or conference call ((vi)).

A number of commenters remarked on the types and scope of the information required by § 16.8(b)(1). The Michigan Department suggests that the information required by § 16.8(b)(1) (iii) and (v) be more detailed. Similarly, International Association and the New York Department suggest that the information provisions be expanded to require the submittal of significantly more detailed information on environmental resources and physical characteristics of bypassed and downstream river reaches. They also suggest that applicants be required to secure from state and Federal agencies any available information and management objectives on fishery and wildlife resources and, based on that information and those objectives, prepare preliminary recommendations for environmental mitigation. The EPA suggests that applicants be required to provide more detailed information on water quality and affected wetlands.

The Michigan Department suggests that applicants be required to include information pertaining to their record of compliance with the terms and conditions of their licenses. The New York Department suggests that § 16.8(b)(1)(i) be amended to require applicants to delineate project boundaries so that agencies can analyze the environmental impacts of projects. Montana Natural Resources suggests that applicants be required to identify Federal and Indian lands included in the project and provide a statement of annual fees paid pursuant to section 15(b)(4) of the FPA.[92]

Idaho Power objects to the provisions of proposed § 16.8(b)(1)(v), which requires various streamflow and water regime information. Idaho Power argues

[87] Proposed § 16.8(b)(3).

[88] Proposed § 16.8(b)(4)(i).

[89] Proposed § 16.8(b)(4)(ii).

[90] Proposed § 16.8(b)(5).

[91] Commission staff attending such meetings will not attempt to resolve any disputes that may arise between applicants and resource agencies. Any disputes that the parties want resolved by the Commission must be referred to the Director in accordance with the formal dispute resolution procedures.

[92] 16 U.S.C. 808(b)(4) (1982 and Supp. 1988).

that the information required is unnecessarily complex and will involve submission of large amounts of data to agencies with neither the expertise nor staff to analyze it. Niagara Mohawk suggests that § 16.8(b)(1) (i), (ii), and (iii) be revised by adding the phrase "to the extent known" to reflect the fact that an applicant may not know its final development plans until environmental mitigation measures are developed in consultation with the agencies. Finally, PG&E and the Department of Commerce suggest that a provision be added to § 16.8(b)(1) that would require applicants to include in their information packages, descriptions of the studies they intend to conduct and the methodologies they plan to employ in conducting them.

The Commission is adopting the recommendation of PG&E and the Department of Commerce regarding the applicants' identification of proposed studies and methodologies. This will assist resource agencies in determining what additional studies are needed, and will help applicants and resource agencies to more promptly identify and discuss potential issues regarding selection of appropriate methodologies.[93] The Commission is also adopting in part the recommendation of the New York Department regarding project boundaries, by amending paragraph (b)(1)(i) to require applicants to show any existing project boundaries. However, the Commission declines to require all applicants to show boundaries around all project facilities, since boundaries for new facilities may not be known at this point in the consultation process, or may not be required at all for certain projects.[94] Also, as discussed previously, the Commission's analysis of environmental impacts, and hence the resource agencies' review of potential environmental issues, is not constrained by project boundaries.

As generally discussed in the reply comments of EEI, Georgia Power, and PG&E, the detailed information that International Association, the New York Department, the EPA, and the Michigan Department request to be required of applicants is the type that normally will be developed during the latter stages of the consultation process. Requiring this detailed information at the initiation of the consultation process would essentially compress these latter stages into the first stage. Accordingly, the Commission declines to adopt the detailed environmental information recommendations of these agencies. If these agencies believe that any of this information is necessary for their evaluation of a particular project, they can request that the potential applicant conduct the necessary study or gather the necessary information in preparing its application for the project.

The Commission does not believe that it would be appropriate to require potential applicants to solicit and identify resource information and management objectives of the resource agencies at the initiation of the consultation process, as suggested by International Association and the New York Department. The Commission does not believe it should be the responsibility of potential applicants to inform agencies of the resource information and management objectives of their sister agencies. The resource agencies can and should provide and discuss this information during the initial joint consultation meeting.

The Commission is not requiring applicants to include in their § 16.8(b)(1) information packages, the information on Federal and Indian lands and annual fees as requested by Montana Natural Resources. This information will be included by existing licensees in their applications pursuant to § 16.10(b)(9); it is not necessary for the first stage of consultation. The Commission is not requiring compliance information to be provided to the resource agencies, as suggested by the Michigan Department. This information must be made available to agencies and the public for inspection and copying pursuant to § 16.7(d)(1)(ii).

Idaho Power's objections to the requirements of paragraph (b)(I)(v) regarding streamflow and water regime information are not persuasive. This information should be easily available for projects that have been operating for years. Also, applicants can present this information graphically if that would aid its compilation and understanding. This is a requirement of existing regulations,[95] and the Commission is not aware of applicants' having difficulty in complying with it.

Finally, the Commission rejects Niagara Mohawk's request that § 16.8(b)(1) (i), (ii), and (iii) be conditioned with the phrase "to the extent known." The Commission recognizes that applicants may not know the final configuration of their projects at the time they are required to provide the § 16.8(b)(1) information package, and may wish to modify their projects during the course of completing the application process. However, resource agencies must be provided with some idea of the applicant's development plan or plans at the beginning of the consultation process, in order to be able to determine what studies and other information are required. Insertion of Niagara Mohawk's suggested language would allow applicants to avoid entirely the obligation to inform agencies of their development plans, and therefore is inappropriate. Of course, as just mentioned, applicants are not wedded to proposals discussed in the information package and may modify those proposals during the course of the application and consultation process.[96]

c. Joint Meetings. The majority of the commenters supported the concept of joint consultation, pointing to the fact that joint consultation should reduce the instances of inconsistent or conflicting resource agency requests and recommendations. However, a number of commenters contend that it would not be appropriate or desirable to require joint consultation in every instance.

EEI suggests that applicants should be provided with the option of consulting with agencies jointly or individually, as currently permitted by § 4.38. EEI has reservations as to whether joint consultation would be workable in all cases, since state and Federal agencies are sometimes located in different cities and some projects require consultation with agencies of more than one state. EEI indicates that the use of conference calls, as provided for in proposed § 16.8(b)(2) and elsewhere in § 16.8, is not an adequate substitute for agencies unable to attend a joint meeting, due to their inherent communication difficulties.[97]

[93] *See* new § 16.8(b)(1)(vi). As discussed in Part IV.H.2.d., *infra*, the former text of § 16.8(b)(1)(vi) is being eliminated.

[94] *See* Part IV.B., *supra*, regarding applications for minor licenses.

[95] *See* 18 CFR 4.38(b)(1)(v) (1988).

[96] The Interior Department requests that applicants include in their § 16.8(b)(1) information package the statement required by 18 CFR 4.301(a) (1988) indicating whether the potential applicant will be applying for an exemption or a license involving a new dam or diversion. This request is reasonable and § 16.8(b)(1) is being appropriately modified (see new § 16.8(b)(I)(vii)). The Commerce Department requests that the word "significant" be eliminated from potential applicants' requirement to identify resources in § 16.8(b)(1)(iv). The Commission rejects this recommendation, since it may be impossible to identify every potentially affected resource at the time the § 16.8(b)(1) information package is provided.

[97] Similar comments regarding the joint consultation proposal and the need to provide applicants with the option of joint or individual consultation are expressed by Alabama Power, the Department of Commerce, the Interior Department, Friends of the Earth, Great Northern, Montana Power, PG&E, Puget Sound Power, Southern

Continued

Several commenters[98] suggest that, if joint consultation is required or elected, applicants be required to consult jointly only with agencies having similar areas of interest, expertise, or responsibility. They point out, for example, that no purpose would be served by requiring a state historic preservation agency to attend meetings on fishery issues. Puget Sound Power and Southern California Edison suggest that, if joint consultation is required, it be limited to the first meeting.

The Commission agrees that joint consultation with all consulted agencies during all stages of the consultation process may be impracticable. However, potential applicants should not have the option of deciding whether they will use joint or individual consultation, as requested by EEI and others. The Commission believes that the initial consultation meeting pursuant to § 16.8(b)(2) should be held with all relevant agencies. This will provide each agency with an understanding of the interrelationship of resources, and the impacts a condition it may request might have on a resource within the purview of another agency. The meetings held under § 16.8(c) [99] to resolve disagreements following the submittal of draft applications and agency comments thereon should be attended by all agencies with similar or related areas of interest, expertise, or responsibility.

In accordance with the above, the Commission is modifying § 16.8 as follows. First, § 16.8(b)(2) is being revised to require only a single joint meeting with all pertinent resource agencies during the first stage of agency consultation. Second, the Commission is modifying proposed § 16.8(c)(7) [100] to specify that meetings to resolve substantive disagreements under the second stage of agency consultation must be joint ones attended by all agencies with similar or related areas of interest, expertise, or responsibility. Finally, the Commission is adding a new § 16.8(h) to clarify that applicants may hold meetings with resource agencies other than the single joint meeting required by § 16.8(b)(2) and any joint meeting held to resolve disagreements under stage-two consultation. This new paragraph does not require joint consultation; rather, it requires a potential applicant, prior to holding an additional meeting with a resource agency, to inform all agencies with similar or related areas of interest, expertise, or responsibility of the meeting so that they will be able to attend if they choose.[101]

The Commission clarifies, however, that § 16.8(h) does not apply to every communication between a potential applicant and a resource agency. Telephone calls or meetings between a potential applicant and a resource agency to clarify minor technical or procedural points regarding an agency's request for a study or information, or to otherwise discuss minor issues, do not trigger the requirements of § 16.8(h). Thus, potential applicants will not have to notify other agencies as required by § 16.8(h) with regard to such minor contacts with an agency.

The Commission agrees with the comments regarding the advantages of face-to-face meetings over conference calls. It was not the Commission's intention to imply that conference calls could be substituted for face-to-face joint meetings; rather, the intent was that conference calls could be used to a limited degree to allow an agency to participate in a required joint meeting it was unable to attend in person. In order to avoid confusion on this point, the Commission is revising § 16.8 to eliminate references to conference calls. However, this action should not be construed as a prohibition on conference calls; in appropriate circumstances conference calls can be used to allow a resource agency to participate in a required joint meeting.

d. Timing and Procedures. As discussed previously, proposed § 16.8(b)(1)(vi) required potential applicants to include in their § 16.8(b)(1) information packages a tentative schedule and location for the first-stage joint consultation meeting. Proposed § 16.8(b)(2) required potential applicants to hold a joint meeting after each agency had 30 days in which to review the § 16.8(b)(1) information package. A number of the commenters objected to, or sought clarification of, these provisions.

American Rivers states that the proposed provisions are vague on the issue of who would set the time and place of the joint meetings, and suggests that potential applicants should be made responsible for setting up the meetings. Wildlife Federation suggests that the provision be clarified to specify that the meetings be scheduled at a time and place agreeable to the agencies involved. The Michigan Department and Friends of the Earth also suggest that the provision be revised to require applicants to consult with the agencies to arrive at mutually agreeable dates for consultation meetings, while several commenters [102] object to the apparent unilateral ability of applicants to establish meeting schedules.

The Interior Department objects to the provision's silence on the issue of advance notification to the agencies, and suggests that written notices and agendas be provided two weeks in advance. American Rivers suggests that applicants be required to provide notification to agencies five to ten days in advance of any scheduled meeting. Montana Natural Resources recommends that applicants be required to provide agencies with written notice at least ten days in advance, while Friends of the Earth suggests a 15-day notification period. Finally, the South Carolina Department suggests that the tentative schedule required by proposed § 16.8(b)(1)(vi) be sent to agencies by certified mail at least 30 days in advance of the meeting.

The Commission agrees that potential applicants should consult with resource agencies after submitting the information package in order to arrive at mutually agreeable dates and places for § 16.8(b)(2) joint meetings, and should provide them with advance written notices and agendas. This will assist the agencies in managing their workload and determining which personnel should attend the meetings. Accordingly, the Commission is replacing the provision requiring inclusion of a tentative schedule in the § 16.8(b)(1) information package. The new provisions require potential applicants to consult with the resource agencies in the scheduling of joint meetings, and to provide them with written notice of the time and place of the meetings at least 15 days in advance, together with written agendas of the issues to be discussed.[103] The

California Edison, Washington Wildlife, Wisconsin Utilities, and Washington Power. International Association, New York Electric, and Washington Wildlife agree with EEI that conference calls are not an adequate substitute for face-to-face meetings.

[98] EEI, Great Northern, Idaho Power, PG&E, Wisconsin Utilities, and Washington Power.

[99] See Part IV.H.3., *infra*, for further discussion of the joint meeting and other provisions of the second stage of agency consultation.

[100] This final rule redesignates § 16.8(c)(7) as § 16.8(c)(6).

[101] The reference to agencies with "related" areas of interest in new paragraph (h) and in the provision pertaining to second-stage joint meetings is intended to encompass agencies with an interest in or responsibility over a resource that may be impacted as a result of an action taken with regard to another resource. For example, an agency with an interest in whitewater recreation potential in a project's bypass reach could be considered an agency with a related interest in cases where the applicant for the project is to meet with a fishery agency to discuss instream flows in the project's bypass reach.

[102] Washington Fisheries, Columbia Commission, the Department of Commerce, and Seattle Light. Similar comments were made by the Interior Department.

[103] *See* § 16.8(b)(2)(ii).

provision requiring advance notification to the Commission is being clarified to require that written notice and a written agenda be provided 15 days in advance. Finally, conforming provisions are being added to the portion of § 16.8(c) pertaining to joint meetings to resolve disputes during second-stage consultation,[104] and to new § 16.8(h).[105]

Many of the commenters object to § 16.8(b)(2)'s provision that joint meetings be held after each agency has had 30 days in which to review the § 16.8(b)(1) information package. They contend that additional time is needed for the agencies to review the information prior to the first joint meeting. They suggest that the agencies be provided with 60 days to review the information.[106] American Rivers suggests that the period be extended to 60 days or the section clarified to state that the 30-day period now specified would begin running on the date the agencies actually receive the information. Wildlife Federation suggests that the time period be extended to 60 days or agencies be allowed to obtain 30-day extensions.

Trout Unlimited suggests that extensions of this time period and the other consultation deadlines in § 16.8 be permitted in complex cases. The Department of Commerce recommends either that the period be extended to 60 days or a procedure for extensions be established. The Interior Department suggests that the 30-day period run from the date agencies receive all of the information required by § 16.8(b)(1).

The Commission believes that the 30-day period specified in the NOPR will, in most cases, provide agencies with adequate time to familiarize themselves with proposed projects prior to the first-stage joint consultation meetings. However, the Commission recognizes that, because of heavy workload or the complexity of a case, agencies may sometimes find it difficult to adequately prepare for a joint meeting within 30 days.

In order to accommodate such situations, the Commission is revising proposed § 16.8(b)(2) to specify that a potential applicant must hold the first-stage joint meeting not earlier than 30 days, but not later than 60 days, following the submittal of the § 16.8(b)(1) information package. This extended window will allow applicants to accommodate reasonable agency requests for additional time to prepare for the initial joint meeting. However, the Commission stresses the cooperative nature of the consultation process, and the need for expeditious agency responses to applicants' requests. Consequently, the Commission hopes and expects that the resource agencies will not abuse the extended period for initial joint meetings by insisting on the maximum period for review in all cases. Conversely, the Commission fully expects potential applicants to accommodate reasonable agency requests.

The Commission declines to permit formal extensions of the time in which to conduct the § 16.8(b)(2) joint meeting. A clear non-extendable deadline for the § 16.8(b)(2) joint meeting is required in order to have the expeditious consultation required in relicensing proceedings and meet the filing deadlines mandated by ECPA. The additional time provided, together with diligent and good faith efforts on the part of the resource agencies, should obviate any need for extensions.[107]

The Commission is also clarifying that the 30-to-60 day period will be measured from the date of the applicant's letter transmitting the § 16.8(b)(1) information package to the resource agencies. This date is selected in lieu of the date of receipt by the agencies, as advocated by some of the commenters, since it provides an easily recognizable triggering point for the time period.

As indicated previously, proposed § 16.8(b)(3) specifies that, 30 days after the § 16.8(b)(2) joint meeting, the resource agencies will provide a potential applicant with written comments identifying their final determination of necessary studies or information to be provided by the applicant. However, this section also specifies that the 30-day period would not begin running until "there is agreement by all participants that all the information required by § 16.8(b)(1) has been provided." A number of objections were made to the 30-day deadline and the requirement for agreement on the § 16.8(b)(1) information.

Great Northern recommends that the provision be revised to provide that the deadline for agency comments be measured from the date of the joint consultation meeting, and not from the point that all of the agencies agree that the § 16.8(b)(1) information has been provided. According to Great Northern, the current provision will allow a single agency to delay the entire consultation process. Great Northern contends that the agreement language is not necessary, since applicants will provide all of the § 16.8(b)(1) information initially so as to avoid agency requests for unnecessary studies.

EEI also requests deletion of the agreement language, contending that it will lead to confusion and invite delay. EEI contends that this agreement language is unnecessary, since the Commission's current consultation regulations in § 4.38 do not require it and EEI is not aware of any disputes that have arisen over the submittal of initial consultation information. Georgia Power suggests that the agreement language be eliminated and the dispute resolution process be available for disputes regarding the sufficiency of the § 16.8(b)(2) information package.[108]

American Rivers suggests that § 16.8(b)(3) be revised to clarify that it is up to the resource agencies to determine when all of the required § 16.8(b)(1) information has been provided, and that the deadline for agency responses be measured from the point when all agencies agree that all of the information has been provided. Washington Wildlife contends that the agreement language is very important. The Interior Department indicates that its experience is that not all applicants provide adequate initial consultation information, and recommends that the provision be clarified to specify what happens when an applicant and an agency do not agree that all requested information has been provided. The Interior Department also states that information not referenced in § 16.8(b)(2) may be necessary for the agencies to recommend studies and that, if an applicant does not agree to provide this supplemental information initially,

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[104] *See* § 16.8(c)(6)(ii).

[105] The Commission believes that the 15-day notice reasonably balances the need for advance notice to the agencies with the need for the consultation process to proceed expeditiously. Accordingly, it rejects the South Carolina Department's suggestion that 30 days advance notice be provided. The Commission is not aware of any problem regarding agencies failing to receive notices from applicants in a timely manner; therefore, it sees no need to adopt the South Carolina Department's suggestion that the notices be sent by certified mail.

[106] Connecticut Commission, Friends of the Earth, International Association, Michigan Department, Montana Natural Resources, New York Department, Washington Fisheries, Washington Wildlife, EEI and Rochester Gas.

[107] As discussed elsewhere herein, the Commission is revising the dispute resolution provisions to permit resource agencies to refer disputes regarding any first-stage consultation issue to the Director for resolution. Thus, if an applicant has not provided a resource agency with the information required by § 16.8(b)(1) and therefore has hindered the agency's ability to prepare for the joint meeting, the agency can refer the matter to the Director and, depending on his resolution, the deadline for the § 16.8(b)(2) joint meeting may be extended.

[108] Similar concerns with the proposed agreement language are expressed by National Hydropower, Idaho Power, Southern California Edison, PG&E, and Washington Power.

an agency will be forced to request it when it submits its comment letter. Finally, the Department of Commerce contends that firststage consultation should not be considered complete until all § 16.8(b)(1) information is provided.

The vast majority of the commenters recommend that the 30-day response period for resource agencies be extended, indicating that the period is too short to allow resource agencies to formulate accurate and responsive study requests and that the 30-day limit will prompt boilerplate study requests. A number of commenters [109] recommend that the period be extended to 60 days. Some recommend that it be extended to 90 days.[110] Wildlife Federation suggests that either the period be extended to 60 days or extensions of the current 30-day period be provided for in individual cases. Montana Natural Resources suggests that the period be extended to 45 days in single dam projects and to 60 days in multiple dam projects. The Wisconsin Department suggests that the provision be revised to provide for a 60- to 75-day negotiated period. The Interior Department suggests that either the period be extended to 60 days or the agencies be provided with an opportunity to obtain a single 30- to 45-day extension. Finally, American Rivers suggests that the agencies be provided with the unilateral authority to extend the response period for up to 90 days.[111]

In response to the concerns expressed by the commenters, the Commission is extending the resource agency response period from 30 to 60 days. This will provide a more reasonable time period for the resource agencies to respond and will establish a uniform deadline for all proceedings, thus avoiding the uncertainties inherent in some of the commenters' suggestions for optional extension periods.

The Commission is also eliminating the requirement that all of the agencies must agree that all of the § 16.8(b)(1) information has been provided. The new 60-day response period is measured from the date of the § 16.8(b)(2) joint meeting.

The Commission agrees with the commenters that the agreement language would create potential for delay and would allow a single resource agency to hold the consultation process hostage on a project. However, the Commission recognizes that there may be instances where a potential applicant fails to provide all of the required § 16.8(b)(1) information and that in such situations it would be inequitable and counter-productive to require resource agencies to respond within 60 days. Accordingly, and as discussed in the next part hereof, the Commission is modifying the dispute resolution process to permit resource agencies to refer any matter arising under the first stage of consultation to the Director for resolution. Consequently, agencies that believe they have not been provided with all of the § 16.8(b)(1) information may refer the issue to the Director for resolution, and possibly obtain an extension of time to file their responses under § 16.8(b)(3).[112]

The Commission is also revising this provision to require the resource agencies to include in their responses an explanation of the basis for each request. This must include a discussion of: (1) Their understanding of the resource issues and their goals and objectives for these resources; (2) why each study methodology recommended by them is more appropriate than other available methodology alternatives, including those identified by the applicant in its § 16.8(b)(1) information package; (3) why the use of each study methodology recommended by it is a generally accepted practice; and (4) how the data requested will be useful in meeting their resource goals. This revision, suggested by PG&E and Great Northern, will provide potential applicants with a better understanding of agency requests and should help reduce the potential for disputes.[113]

e. *Dispute Resolution.* In the NOPR, the Commission proposed to permit a potential applicant disagreeing with a resource agency, either as to whether a study is reasonable and necessary or as to the manner in which a study should be performed, to refer the matter to the Director for resolution. However, proposed § 16.8(b)(4) limited referrals to studies or methods of conducting studies not routinely used on the type of project proposed.[114] That section also provided that an applicant that did not refer a dispute to the Director, or that disagreed with the Director's resolution, did not have to conduct the requested study or perform it in the requested manner, but had to fully explain in its application the basis for its disagreement.

EEI suggests that any matter arising during the first stage of consultation be subject to referral. EEI states that questions regarding what are considered "routine" studies or methodologies will arise under the proposed version, and that it would aid the consultation process to make procedural issues subject to resolution. Second, EEI recommends that potential applicants be given the option of either formally referring disputes to the Director in writing or scheduling a conference call among the applicant, the disagreeing agency, and the Director or his designee to resolve the dispute. Third, EEI suggests that a 30-day time limit be placed on the Director to resolve disputes. Fourth, EEI requests that potential applicants be allowed to appeal Director dispute decisions to the Commission. Finally, EEI suggests that the disagreeing agency be permitted to file written responses to potential applicants' referrals, so that the Director will have all the information necessary to resolve disputes.

A number of other commenters generally support EEI's request for expansion of the dispute resolution process to cover all matters arising during the first stage of consultation. These commenters [115] point out that it is not clear what would be considered routine studies in relicensing proceedings, and that a study that is generally considered routine may be meaningless in the context of an individual case. They also reference the need for the Director to resolve disputes over requested studies whose costs would outweigh the environmental or other benefits that could result from the studies.

Washington Fisheries supports the limitation of the dispute resolution process to non-routine studies and methodologies, stating that this limitation will curtail unnecessary and time-consuming challenges. Montana Natural Resources also supports the proposed limitation, but would refer routine study requests to the Director if they are repetitious, duplicative, or unduly burdensome to the applicant. Montana Power, the Michigan Department, and the Interior Department request specification of

[109] Connecticut Commission, International Association, New York Department, Trout Unlimited, EEI, PG&E, Friends of the Earth, Alabama Power, and Public Pool.

[110] Washington Wildlife, Southern California Edison, and Great Lakes Commission.

[111] Concerns about the shortness of the response period were also expressed by Maine Office, Montana Fish and Wildlife, Great Northern, Michigan Department and Washington Fisheries.

[112] Section 16.8(b)(3) is redesignated as § 16.8(b)(4) by this final rule.

[113] The word "final" is also being deleted from this provision. This is discussed in Part IV.H.3.c., *infra*.

[114] Proposed § 16.8(b)(4)(i) (A) and (B).

[115] Alabama Power, American River, Brazos, Georgia Power, Montana Power, National Hydropower, EPA, Puget Sound Power, Rochester Gas, Southern California Edison, Wisconsin Utilities, and Washington Power.

what would be considered a routine study.[116]

Wildlife Federation suggests that § 16.8(b)(4) be revised to specify the standard the Director will use in resolving disputes, and recommends that the Director require a potential applicant to conduct any requested study, unless the applicant can show that the study would be inconsistent with the purposes of the FPA. Montana Natural Resources suggests that the provision be broadened to allow resource agencies to refer disputes to the Director. Some commenters [117] recommend that resource agencies be afforded an opportunity to participate in the dispute resolution process or otherwise make known their views on a referral. Finally, the EPA and Trout Unlimited suggest that proposed § 16.8(b)(4)(ii) be revised to require potential applicants either to conduct all studies found by the Director to be reasonable, or to resolve all disputes with agencies prior to filing their applications.

The Commission finds persuasive the arguments for expansion of the type of matters that can be referred to the Director for resolution. Accordingly, the Commission is revising proposed § 16.8(b)(4) (redesignated § 16.8(b)(5) by this final rule) to delete the reference to non-routine studies, and to permit any disputes arising during the first stage of consultation to be referred to the Director for resolution.[118] However, the Commission reiterates its concern that prompted the use of the "not routinely conducted" language in the NOPR, that potential applicants not use the dispute resolution process to resolve minor or frivolous matters. The Commission urges potential applicants and resource agencies to cooperate during the consultation process to resolve study-related matters among themselves without resort to the dispute resolution process. If the Commission finds that potential applicants are using the process to attempt to avoid clearly reasonable study requests, the Commission will revise the dispute resolution process.

As suggested by Montana Natural Resources, the Commission is revising § 16.8(b)(5) to allow resource agencies to refer to the Director disputes over any matter arising during first-stage consultation. As pointed out by Wisconsin Public Service in its reply comments, this may lead to disruptive exchanges between the Commission and resource agencies during the period when potential applicants' resources would be better utilized in preparing applications. Nevertheless, the Commission believes it is necessary to afford resource agencies this right in order to consider disputes arising out of a potential applicant's failure to provide the information required by § 16.8(b)(1). The Commission is also requiring potential applicants and resource agencies to provide the other party with a copy of its referral, and to permit the other party to submit a written response within 15 days.[119]

The Commission is also clarifying (in new § 16.8(b)(5)(iii)) that all written submissions to the Director and written responses thereto pursuant to the dispute resolution provisions of § 16.8(b)(5) must be filed with the Commission's Secretary in accordance with the Commission's Rules of Practice and Procedure. In addition, the Commission is specifying (in new § 16.8(b)(5)(vi)) that the filing and acceptance of an application will not be delayed, and an application will not be considered deficient or patently deficient pursuant to 18 CFR 4.32 (1988), merely because the application does not include a study or information found to be unreasonable or unnecessary by the Director pursuant to the dispute resolution procedures.

The Commission declines to make the other suggested revisions to the dispute resolution process. As to the request for the establishment of an optional informal dispute resolution process, the Commission does not believe it is necessary to make such a process a part of its regulations. Potential applicants and resource agencies are always free to contact appropriate Commission staff to receive guidance and suggestions on how to resolve disputes regarding studies and other information requests. However, the Commission believes that all actual decisions on referred matters should be made by the Director on the basis of written submissions. Written documentation of the parties' views will reduce the possibility for misinterpretations, and are needed for review of filed applications in cases where applicants decline to follow the decision of the Director.

With regard to the proposal to require the Director to act on referred disputes within 30 days, the Commission acknowledges the need to have such disputes resolved expeditiously. However, as discussed elsewhere herein in relation to similar requests, workload demands may prohibit the Director from acting on such disputes within a specified deadline. Consequently, no deadline will be specified. The Commission is, however, instructing the Director to make every effort to resolve referred disputes within 30 days from receipt of all relevant information.

The arguments advanced by EEI in support of the proposal to allow potential applicants to appeal the Director's decisions to the Commission are not without merit. As pointed out by EEI, the relicensing process may generate significant new study requests by resource agencies, the appropriateness of which the Commission itself has not had an opportunity to address in the past. Also as pointed out by EEI, the consequences of a potential applicant's failure to conduct a study found to be necessary by the Director as a result of a dispute referral could be significant. It could lead to the rejection of the application when it is filed and, if the 24-month filing deadline for relicense applications has passed, prevent the applicant from refiling its application.

Despite the legitimate concerns expressed by EEI, the Commission believes it would be inappropriate to permit appeals to the Commission in these situations. First, while the Commission acknowledges applicants' desire for certainty, appeals of such Director's decisions, except for those related to extensions of time, are clearly interlocutory. Second, the Director's decisions regarding studies and information are advisory and nonbinding. Upon analyzing the reasons set out in an applicant's filed application for not doing a study he found to be necessary during the dispute resolution process, together with the rest of the information contained in the application, the Director may decide that the disputed study is, in fact, not necessary. Third, insertion of the requested appeal provision could lead to a significant and potentially burdensome increase in the number of matters that must be considered by the

[116] Alabama Power, Southern California Edison, and Wisconsin Utilities support EEI's suggestion regarding optional informal dispute resolution procedures, while Montana Power, the Maine Office, and PG&E support EEI's suggestion that a time limit be placed on Director's decisions. Friends of the Earth supports EEI's suggestion that the Director's decisions be appealable to the Commission, while Montana Power requests that this point be clarified.

[117] Washington Ecology, Washington Fisheries, Wisconsin Department, and the Departments of Commerce and the Interior.

[118] *See* new § 16.8(b)(5)(i). As discussed in Part IV.G.3., *supra*, disputes regarding access to existing licensees' projects under § 16.5 can be referred to the Director for resolution. Also, as proposed in the NOPR, under proposed § 16.8(c)(4), disputes regarding studies requested after completion of the first stage of agency consultation can be referred to the Director for resolution. Revisions to § 16.8(b)(5) are being made to clarify this right.

[119] *See* new § 16.8(b)(5)(ii).

Commission itself. Fourth, as discussed elsewhere herein,[120] the Commission is clarifying one major study issue which EEI references in support of its request. Finally, the Commission may entertain requests for declaratory orders on such matters where the relevance of the issue raised to relicense applicants in general is so significant that it would be appropriate to consider the matter despite its interlocutory nature.

The Commission does not believe it is necessary to specify in the regulations the standard the Director will use in resolving first-stage consultation disputes. Clearly, his decisions will be made case-by-case on the basis of whether the requested study is reasonable and necessary in relation to the resource goals and management objectives of the resource agencies, and whether it is a generally accepted practice for potential applicants to use the methodology requested by an agency. The standard advocated by Wildlife Federation is undefinable. Any study on a resource issue, or another matter the Commission must consider under its obligation to consider all aspects of the public interest, is related to the FPA and is thus "consistent" with it, regardless of its reasonableness or necessity.

Finally, the suggestions of Trout Unlimited and the EPA that potential applicants either conduct all studies found reasonable by the Director or resolve all disputes prior to filing their applications are rejected. Those proposals either would remove an applicant's ability to make its full case against a requested study in its application or would allow a single unreasonable resource agency to prevent the filing of an application.

In a related matter, the Interior Department contends that studies it requests in order to formulate fish and wildlife terms and conditions pursuant to sections 10(j) and 30(c) of the FPA[121] should not be subject to the dispute resolution procedures of § 16.8(b)(5). According to Interior, since such studies are an integral part of providing recommendations and mandatory terms and conditions under these provisions of the FPA, the expertise of Interior's Fish and Wildlife Service dictates that it alone have the ability to determine appropriate studies. The Department of Commerce makes similar contentions regarding studies necessary for the prescription of fishways pursuant to section 18 of the FPA.

The Fish and Wildlife Service, the National Marine Fisheries Service, and appropriate state fish and wildlife agencies have authority pursuant to section 30(c) of the FPA to impose on exemptions, mandatory terms and conditions to prevent loss of, or damage to, fish and wildlife resources. However, the legislative history of ECPA, which added paragraph (j) to section 10 of the FPA, clearly shows that section 10(j) does not give these agencies mandatory conditioning authority.[122] In any event, even when mandatory conditioning authority such as under section 4(e) of the FPA is involved, the Commission retains the authority to determine which information and study requests are reasonably necessary for the formulation of terms and conditions.[123] Although mandatory conditioning authority may be involved, the final authority to act on license applications resides exclusively with the Commission. Thus, the Commission is vested with the exclusive authority to establish the process to be followed by applicants and to determine the type and extent of the information needed to carry out the Commission's licensing responsibilities. Virtually any study request can be claimed to be at least tangentially related to fish and wildlife resources. Since the exception advocated by the Departments of Commerce and Interior could essentially negate the whole dispute resolution process, the Commission declines to make the revisions.

Finally, state and Federal fish and wildlife agencies, such as the Fish and Wildlife Service and the National Marine Fisheries Service, in making recommendations regarding the conservation of fish and wildlife resources pursuant to the Fish and Wildlife Coordination Act (FWCA), are required to base those recommendations "on surveys and investigations conducted by" them.[124] Thus, the FWCA imposes some obligation on these agencies to affirmatively study fish and wildlife matters, and indicates that the burden of conducting such studies should not be shouldered entirely by potential applicants for hydroelectric projects. Consequently, if an agency believes a study found to be unreasonable by the Director should be conducted, it may perform that study itself.[125]

f. Termination of First-Stage Consultation. Proposed § 16.8(b)(5) specified that the first stage of consultation ends when all participating agencies provide the written comments required under the provision being redesignated as § 16.8(b)(4) herein. The intent of this provision was to have the first stage end at the deadline for submittal of agency comments specified in § 16.8(b)(4). However, a number of commenters[126] indicate that proposed § 16.8(b)(5) is vague on this point, and should be clarified to eliminate the suggestion that a resource agency could delay the completion of first-stage consultation by withholding its comments. The Commission agrees that the requested clarification should be made and is revising § 16.8(b)(5) (redesignated § 16.8(b)(6) by this final rule) accordingly.[127]

3. Second-Stage Consultation

In the NOPR, the Commission proposed to require a potential applicant to conduct its own studies independently of any other applicant unless otherwise agreed to by the applicants,[128] and to specify that a

[120] *See* Part IV.H.3.b., *infra*.

[121] 16 U.S.C. 823a(c) (1982 and Supp. 1988). The Interior Department suggests that the Commission clarify the regulations to specify whether existing licensees that apply for exemptions would be subject to mandatory fish and wildlife conditions submitted by Fish and Wildlife Service, the National Marine Fisheries Service and appropriate state fish and wildlife agencies pursuant to section 30(c) of the FPA. There is no need to revise the regulations to specify this, since the applicability of mandatory conditioning authority under section 30(c) of the FPA is clear from the requirement in § 16.12 that existing licensees applying for exemptions comply with the Commission's exemption regulations, which reference mandatory fish and wildlife conditions under section 30(c).

[122] *See* H.R. Rep. No. 99-934, 99th Cong., 2nd Sess. at 23-24 (1986).

[123] *See* Scott Paper Company, 37 FERC ¶ 61,216 (1986).

[124] *See* 16 U.S.C. 662 (1982).

[125] As discussed previously, the Commission is initiating a rulemaking proceeding to develop formal procedures for integrating the section 10(j) process into its licensing and relicensing processes.

[126] EEI, Great Northern, Montana Power and Niagara Mohawk.

[127] The Department of the Interior suggests that the first stage of consultation not end until specifically acknowledged by the resource agencies, citing to the possibility that a potential applicant may not have provided the agencies with sufficient information. The Commission sees no need to make this revision since, as discussed previously, the regulations are being revised to allow resource agencies to refer disputes over such things as the adequacy of the § 16.8(b)(1) information package to the Director for resolution.

Georgia Power suggests that resource agency information requests be made subject to dispute resolution. Given the expansion of the dispute resolution process in this final rule to cover all matters arising during the first stage of agency consultation, there is no need to specifically reference information requests. In any event, although the initially proposed dispute resolution process only referenced studies, all requests by agencies for information fall within the scope of the dispute resolution process.

[128] Proposed § 16.8(c)(1).

potential applicant is not obligated to share the results of a study with a competing applicant.[129] The NOPR also required a potential applicant to perform all reasonable studies and obtain all information requested during the first stage of consultation either before filing the application or after the license is issued, depending on the type of study involved.[130]

The Commission also specified in the NOPR that a potential applicant must promptly initiate any study requested by a resource agency following the conclusion of the first stage of agency consultation, unless the Director determined that the study request was unreasonable or unnecessary pursuant to the dispute resolution process.[131] However, the NOPR indicated that the results of any such study would be treated as additional information, and that the filing and acceptance of an application would not be delayed because the study was not complete before the application was filed.[132]

The NOPR also required a potential applicant to provide each resource agency with a copy of its draft application, the results of all studies requested by the relevant agency, and a request for review and comment.[133] Under the NOPR, resource agencies were to have 60 days in which to provide applicants with written comments on the draft application.[134] If the written comments indicated that a resource agency had a substantive disagreement with a potential applicant's proposed mitigation and enhancement measures, the potential applicant was to hold a joint meeting or conference call with all pertinent resource agencies to discuss, and to attempt to reach agreement on, the applicant's plans for environmental mitigation and enhancement measures, with written notice of the meeting provided in advance to the Commission.[135]

The NOPR also required the development of documents detailing potential applicants' and resource agencies' areas of agreement and disagreement,[136] and that applicants describe areas of disagreement in their applications.[137] Finally, the NOPR provided that potential applicants could file their applications either following the submittal of agency comments in cases where no substantive disagreements were raised, or following the holding of joint meetings or conference calls in cases where substantive disagreements were raised.[138]

a. Independent Studies. The provisions of proposed § 16.8 (c)(1) and (c)(2) were addressed by a number of the commenters. Great Northern, Public Pool, and Rochester Gas support these provisions, indicating that they will discourage competitors from simply duplicating the studies and application of the applicant that goes through the consultation and application process first. Conversely, the Northern California Agency contends that the provisions establish a bad policy, since there are occasions when the nature of the study or resource itself makes a single study advisable, such as interviewing elderly persons regarding cultural information and tagging and monitoring limited deer populations. Montana Natural Resources states that it may be desirable for the Commission to require cooperative studies by competitors in certain cases, while the Department of Commerce suggests that cooperative studies should be encouraged.

The Commission is deleting proposed paragraphs (1) and (2) from § 16.8(c). Although the Commission continues to believe that applicants should generally conduct studies independently of each other, there are situations such as those referenced above where cooperative studies would be appropriate. However, the Commission does not believe a reasonable and readily enforceable regulatory provision encompassing all potential situations regarding cooperative studies can be developed.

Furthermore, the proposed provisions are inconsistent with existing Commission policy. As discussed in *WV Hydro, Inc. and the City of St. Marys, West Virginia,*[139] the Commission will not reject an application for containing material duplicated from another application, but will leave to the parties the resolution, in the appropriate legal forum, of the consequences of reproducing copyrighted material. The proposed provisions, by adding to the Commission's regulations an implicit prohibition against the copying of material and studies, would be directly contrary to this policy.

Although the Commission is deleting these provisions, it is not requiring potential applicants to provide copies of their studies to potential competitors. Potential applicants are encouraged to do their own work in developing their applications, instead of merely copying a competitor's materials. An application failing to contain a necessary study or other information may be found to be deficient. In addition, and as discussed in *WV Hydro, supra,* the fact that a competitor copied another applicant's material may be relevant to a Commission decision on the merits of the competing applications. The determination of what weight, if any, to give to copying will be done on a case-by-case basis. Situations may arise where the magnitude of the copying may lead the Commission to conclude that the applicant has little understanding of the proposed project and thus may have difficulty in constructing, operating, and maintaining its project safely and in accordance with the terms and conditions of any license that might be issued.

b. Type of Studies. Many of the commenters [140] object to the classification in proposed § 16.8(c)(3) of which studies must be completed prior to the filing of applications and which ones can be conducted after license issuance. They contend that the classification impermissibly allows the deferral to the post-licensing phase of studies that must be completed prior to licensing. According to some of these commenters, § 16.8(c)(3) violates the decision of the United States Court of Appeals for the Ninth Circuit in *Confederated Tribes of the Yakima Indian Nation* v. *FERC (Yakima);*[141] according to the commenters, it would allow the Commission to avoid resolving fishery and other issues prior to licensing through the use of open-ended license study articles. These commenters find particularly objectionable the references in proposed § 16.8(c)(3)(ii) to turbine-related fish mortality studies and studies to refine project operation or modify project facilities.

The Commission is fully cognizant of its obligation under the FPA to consider and resolve fish, wildlife, and other resource issues prior to issuing licenses, and will continue to meet this obligation in relicensing proceedings. However, as

[129] Proposed § 16.8(c)(2).
[130] Proposed § 16.8(c)(3).
[131] Proposed § 16.8(c)(4)(i).
[132] Proposed § 16.8(c)(4) (ii) and (iii).
[133] Proposed § 16.8(c)(5).
[134] Proposed § 16.8(c)(6).
[135] Proposed § 16.8(c)(7).
[136] Proposed § 16.8(c)(8).
[137] Proposed § 16.8(c)(9).
[138] Proposed § 16.8(c)(10).
[139] 45 FERC ¶ 61,220 (1988).
[140] *See, e.g.,* the comments of American Rivers, EPA, Department of Interior, Department of Commerce, Michigan Department, Wildlife Federation, Washington Fisheries, and Washington Wildlife.
[141] 746 F.2d 466 (9th Cir. 1984), *cert. denied,* 471 U.S. 1116 (1985).

the Commission has explained, the FPA, as interpreted by *Yakima*, does not require the resolution of every detail regarding resource issues prior to licensing.[142] Rather, the Commission is required only to responsibly evaluate the effect of a project on fishery and other resources and to consider possible protection, mitigation, and enhancement measures prior to acting on an application. Open-ended license conditions requiring further studies and actions enable the Commission to assess the effectiveness of mitigation measures, to fine-tune project facilities and operations, to secure information that cannot be obtained prior to license issuance, or to address new circumstances that may arise in the future. They are appropriate as long as they are not used as a substitute for reasoned pre-licensing evaluation of fishery and other issues.[143]

The language of proposed § 16.8(c)(3)(ii) (redesignated § 16.8(c)(1)(ii) by this final rule), was taken verbatim from the Commission's current consultation regulations.[144] It was not intended to sanction the use of post-licensing studies in situations where the studies should be prepared prior to licensing. The Commission will continue to meet its obligations under the FPA, as interpreted by *Yakima*.

The Commission is deleting the reference to turbine-related fish mortality studies as an example of a study that can only be conducted after construction or operation of proposed facilities. This is not a good example because these studies can be conducted prior to licensing in cases where the applicant proposes to continue to use the existing turbines without modification.[145]

The Commission sees no need, however, to delete the reference to studies to refine project operations or modify project facilities. The provision was merely intended to address studies to fine-tune project operations and facilities approved in a new license as a result of post-licensing operating experience. Studies regarding the possible modification of existing facilities and operations would be required prior to licensing.

Washington Wildlife suggests that § 16.8(c) be modified to specify the routine studies the Commission believes are necessary in all cases. Washington Fisheries and the Department of Commerce recommend that the introductory sentence be changed to reference studies "requested by agencies unless waived by the Director." They also recommend that the phrase "suitable mitigation measures" in proposed § 16.8(c)(3)(i)(B) be subject to the phrase "recommended by agencies under section 10(j) of the FPA or specified by agencies under section 18 of the FPA." Finally, Montana Power suggests that a provision be added to allow applicants to complete studies after filing their applications, but before licensing, if a study request by a resource agency would take longer to complete than the time between the conclusion of the first stage of consultation and the application filing deadline.

The changes to the introductory sentence of proposed § 16.8(c)(3) recommended by Washington Fisheries and the Department of Commerce are reasonable clarifying changes and are being made. The Commission declines, however, to identify "routine" studies, as requested by Washington Wildlife. Due to the differences between various types of projects, it is impossible to generically identify routine studies applicable to all projects.

The Commission also declines to make the references to sections 10(j) and 18 of the FPA requested by Washington Fisheries and the Department of Commerce. Reasonable studies needed by state and Federal fish and wildlife agencies to recommend terms and conditions for the protection, mitigation, and enhancement of fish and wildlife resources pursuant to the FWCA as referenced in section 10(j) would clearly fall within the scope of § 16.8(b). But § 16.8(c)(3)(i)(B) (redesignated § 16.8(c)(1)(i)(B) by this final rule) is not limited to fish and wildlife resources. Referencing section 10(j), as requested by these two agencies, would impermissibly exclude other resources from the scope of the provision and therefore is inappropriate.[146]

The Commission is also adding a new § 16.8(c)(1)(ii)[147] to address the extended study situation mentioned by Montana Power. The new provision specifies that studies that cannot be completed prior to the application filing deadline can be completed after filing only if an applicant initiates formal consultation not later than four years prior to the expiration date of the existing license. This will ensure that potential applicants will not delay the initiation of formal consultation in order to push the requirement for conducting studies to the post-filing stage.

In a related matter, several commenters[148] request that redesignated § 16.8(c)(1) be revised to require potential applicants to gather information and conduct studies regarding the condition of resources in the project area that existed prior to the initial licensing and construction of the project. According to the Department of Commerce, *Yakima, supra*, requires the Commission to collect this "baseline" information to evaluate project impacts as if the project had never been constructed.

EEI, in its reply comments, vigorously objects to this suggestion, arguing that in enacting ECPA Congress specifically rejected the idea that the Commission should ignore existing projects and assess environmental values pursuant to a hypothetical pre-project baseline environment.[149] Furthermore, EEI indicates that the collection and analysis of baseline data would require such a high degree of speculation that the exercise would be fruitless in most, if not all, cases. Similar objections were expressed in the reply comments filed by Georgia Power and Wisconsin Public Service.

The Commission agrees with EEI that it would be inappropriate to require potential applicants to gather such baseline data. First, and as indicated by EEI, it is highly doubtful that attempts to ascertain the status of various resources

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[142] *See, e.g.*, Delmar Wagner, 44 FERC ¶ 61,213 at 61,801 (1988).

[143] *Id.*

[144] *See* 18 C.F.R. 4.38(b)(2)(ii) (1988).

[145] Post-licensing turbine mortality studies would be appropriate in cases where the use of new or additional turbines is proposed.

[146] The Commerce Department and some of the other commenters suggest that references to "mitigation" or "mitigation and enhancement measures" at various places in the proposed regulations be modified to specify "protection, mitigation, and enhancement measures" so as to track the language of section 10(j) of the FPA. Since it would be appropriate to follow the statutory language of section 10(j) pertaining to fish and wildlife resources, and since protection, mitigation, and enhancement measures may be appropriate for any resource, the suggested revisions are being made where appropriate. Montana Power's suggestion that all references to "mitigation and enhancement" be modified to "mitigation and/or enhancement" so as to make clear that enhancement of resources is not required in all cases need not be followed, since the conjunctive reference to enhancement is not intended to mean that enhancement is required in every case, only that it is an alternative that may be appropriate.

[147] Proposed § 16.8(c)(3)(ii) is redesignated as § 16.8(c)(1)(iii) by this final rule.

[148] The Departments of Commerce and the Interior, EPA, Wildlife Federation, and Washington Wildlife.

[149] In support of its argument, EEI quotes the following statement from the ECPA Conference Report:

In exercising its responsibilities in relicensing, the conferees expect FERC to take into account existing structures and facilities in providing for these nonpower and nondevelopmental values. No one expects FERC to require an applicant to tear down an existing project.

H.R. Rep. No. 99-934, 99th Cong., 2nd Sess. 22 (1986).

prior to the time a 50-year-old project was constructed would result in the development of any useful information. Second, while *Yakima* clearly requires the Commission to evaluate resource impacts prior to licensing, the Commission sees nothing in that decision that requires it either to pretend that current projects do not exist, or to require applicants to gather information to recreate a 50-year old environmental base upon which to make present day development decisions.

In deciding whether (or under what conditions) to relicense a project, the Commission must determine whether the resources should still be used (totally or partially) for the generation of electricity. That determination is based on weighing the relevant beneficial uses of the resource, and taking into account appropriate measures to, *inter alia*, protect, mitigate and enhance fish and wildlife resources. In so doing, the Commission can evaluate whether enhancement of fish and wildlife resources would be appropriate. Enhancement may in many cases constitute a reduction of the negative impacts attributable to the project since its construction. However, this evaluation and consideration of the appropriateness of requiring enhancement measures is done in the context of today's environment and in relation to today's needs and problems, not in the context of the world as it existed 50 years ago. Consequently, the Commission declines to make the requested revisions regarding baseline studies, and potential applicants do not have to routinely conduct such studies if requested to do so by resource agencies.

Finally, and as discussed previously, the FWCA imposes some obligation on state and Federal fish and wildlife agencies to affirmatively study fish and wildlife matters. Consequently, at least in the speculative area of baseline information, the agencies themselves should conduct any studies they feel are necessary.

c. Additional Studies. As indicated previously, proposed § 16.8(c)(4) provides that potential applicants must promptly initiate any study requested by a resource agency after the conclusion of the first stage of agency consultation, unless the study is determined by the Director to be unreasonable or unnecessary pursuant to the dispute resolution procedures. However, proposed § 16.8(c)(4) also specifies that the study results will be treated as additional information, and that the filing and acceptance of the application will not be delayed because the study was not complete before the application was filed.

Many of the commenters object to requiring potential applicants to conduct studies requested by resource agencies following first-stage consultation. They assert that this runs counter to the expeditious consultation purposes of proposed § 16.8, renders meaningless the deadlines for agency actions to be established by § 16.8, and is inconsistent with the requirement in proposed § 16.8(b)(3) that "final" determinations of requested studies must be made within 30 (now 60) days of the initial joint consultation meeting. EEI suggests that the provision be changed to specify that potential applicants "may" conduct the requested studies in such situations, and that such studies should be required only if ordered by the Commission itself. PG&E recommends that the provision be modified to require resource agencies to submit requests for late studies to the Director, who would then determine if the study should be conducted.[150] Niagara Mohawk suggests that the provision be clarified as to whether applicants can challenge such requests pursuant to the dispute resolution process and what procedures will be followed for such disputes.

The Department of Commerce, Friends of the Earth, and Washington Wildlife support the additional study provisions of proposed § 16.8(c)(4), indicating that the results of initial studies prepared at the request of resource agencies sometimes show the need for additional studies. The EPA and Seattle Light agree that additional studies may be necessary after the first stage of consultation, but the EPA and Washington Fisheries note that the use of the word "final" in proposed § 16.8(b)(3) would seem to prohibit such additional studies. Finally, several commenters[151] object to the provision's statement that the filing and acceptance of an application will not be delayed because of the failure of an applicant to complete such an additional study prior to filing its application.

The Commission believes that the requirement that potential applicants promptly initiate studies requested by agencies after the conclusion of the first stage of agency consultation is necessary. The Commission's experience is that the results of initially-prepared studies frequently point to the need for additional studies required for reasoned evaluation of proposed projects. While retaining this provision may require additional work for potential applicants in some cases, the Commission believes that this provision will actually help to speed the review process along. In those cases where such additional studies are necessary, the study work would be initiated earlier than if required to be conducted as part of a Commission staff additional information request. The Commission believes that in most cases the resource agencies will not abuse their right to request additional studies, since it is in their best interest to ensure that potential applicants are informed of needed studies at the earliest possible time.

In accordance with the above, the provisions of proposed § 16.8(c)(4) are being retained (as § 16.8(c)(2)), and the inconsistent reference to "final" determinations of agency-requested studies in proposed § 16.8(b)(3) (now § 16.8(b)(4)) is eliminated. Also, to address the concerns expressed by Niagara Mohawk, the Commission is making clear that applicants' challenges to such additional studies are subject to the dispute resolution procedures of § 16.8(b)(5). Thus, potential applicants can always challenge the need for any additional study. Finally, in response to the apparent concerns of the EPA, Washington Fisheries, and the Wisconsin Department, the provision's statement that the filing and acceptance of an application will not be delayed does not mean that the Commission will proceed to act on an application in such cases. Rather, the Commission will allow an application to be filed and evaluated as to its conformity with the Commission's filing requirements, but will not take final action on the application until the additional study is completed.[152] Of course, if the Commission does not need the results of the additional study to take action on the application (*i.e.*, a study described in § 16.8(c)(1)(iii)), it can act on the application without waiting for the study to be completed.

d. Timing and Procedures. Montana Power suggests that proposed § 16.8(c)(5) be revised to reflect the fact that potential applicants conduct studies in addition to studies requested by resource agencies, and that such studies should also be provided to the resource agencies for review with the draft application. This change to proposed § 16.8(c)(5) (redesignated § 16.8(c)(4) by

[150] Concerns or proposals similar to those advanced by EEI and PG&E are expressed by Great Northern, Montana Power, Niagara Mohawk, Rochester Gas, Wisconsin Utilities, and others.

[151] EPA, Washington Fisheries, Great Lakes Commission, and the Wisconsin Department.

[152] The provisions of proposed § 16.8(c)(4)(ii) and (iii) are redesignated § 16.8(c)(3)(i) and (ii) by this final rule.

this final rule) is appropriate and is being made.

Washington Wildlife, the Michigan Department, and Montana Natural Resources suggest that the 60-day response period for resource agency comments on draft applications specified in proposed § 16.8(c)(6) be extended to 90 days, while the Department of Commerce and the EPA suggest that provision should be made for extensions in appropriate cases. The Department of Commerce, the Michigan Department, and the EPA also request that the running of the response period be measured from the date the resource agencies receive the draft applications and related information. The South Carolina Department requests that applicants be required to use certified mail to transmit the information to the agencies. Finally, PG&E suggests that a provision be added specifying that applicants do not have to address in their applications any comments submitted by the agencies after the expiration of the 60-day period.

Given the complexity of most relicensing proposals, the Commission believes that it would be appropriate to extend the 60-day response period of proposed § 16.8(c)(6) by an additional 30 days. Accordingly, the Commission is extending the response period of proposed § 16.8(c)(6) (redesignated § 16.8(c)(5) by this final rule) from 60 to 90 days. Also, for the reasons discussed above, the Commission believes it is appropriate to measure the start of the 90-day period from the date of the potential applicant's letter transmitting the information to the agencies, and to not require transmittal by certified mail. Finally, due to the waiver provisions discussed in Part IV.H.5., *infra*, and a potential applicant's ability to appeal a late study request to the Director, the Commission does not believe it is necessary to make the revisions suggested by PG&E.

EEI, PG&E, and Montana Natural Resources suggest that a number of revisions be made to the joint meeting provisions of proposed § 16.8(c)(7) pertaining to optional individual consultation and advance written notice of meetings to resource agencies. As explained in Part IV.H.2.c. and d., *supra*, revisions addressing these issues are being made to proposed § 16.8(c)(7) (redesignated § 16.8(c)(6) by this final rule).[153]

A few of the commenters suggest that additional procedures be added to the consultation process prior to the conclusion of the second stage of agency consultation. Washington Wildlife suggests that applicants be required to provide agencies with draft study plans for approval, and to hold annual consultation meetings with resource agencies to identify progress in completing requested studies, with study updates provided to the agencies and the Commission every six months. The Michigan Department requests that quarterly study reports be provided. Wildlife Federation suggests that some provision be made for agency review and comment on study design and methodology. Finally, the Department of Commerce recommends that the section be revised to require potential applicants to submit detailed study plans to the resource agencies for approval prior to the applicants' initiation of the studies.

The Commission declines to make the suggested revisions regarding additional procedures; it is not necessary to establish further procedures to resolve disputes regarding study minutia. As many of the commenters point out, the consultation process is intended to be a cooperative, on-going process where potential applicants and resource agencies will work together to develop mutually agreeable studies and study methodologies. Thus, the parties should be able to cooperatively resolve disputes regarding implementation of requested studies without the establishment of additional formal procedures.

The previously described revisions to § 16.8(b) requiring potential applicants to describe their study proposals in their § 16.8(b)(1) information packages, and requiring resource agencies to detail in their written comments following initial joint meetings the reasons behind their requests for the use of study methodologies, will help focus and flush out details regarding studies at an early time. Also, disputes regarding methodologies that arise as a result of agencies' written comments following initial joint meetings are disputes arising under the first stage of agency consultation, and thus are subject to the dispute resolution process. Consequently, early Commission assistance will be available to resolve any major study disputes that may arise.

The Commission also does not believe it is necessary to establish generic reporting requirements regarding study progress. Each project is different and the need to touch base with the resource agencies on study progress may vary from project to project. The need for, and timing of, progress reports are matters potential applicants and resource agencies are expected to cooperatively resolve among themselves.

4. Third-Stage Consultation

Proposed § 16.8(d) of the NOPR requires an applicant to serve on every resource agency consulted, and on every agency which is authorized to assume regulatory supervision over the land, waterways, and facilities to be included within a nonpower project, a copy of its application and any deficiency correction, revision, supplement, or amendment to its application. Revisions are being made to the section to clarify that the obligation to serve documents on agencies authorized to assume regulatory supervision of lands and facilities also applies to applicants for surrender and nonpower license. The section is also being revised to clarify that the obligation to serve documents covers applicants' responses to Commission requests for additional information.[154]

5. Agency Waiver

The NOPR contained a provision regarding resource agency waiver of consultation requirements. Specifically, proposed § 16.8(e)(1) provided that a potential applicant would not have to comply with a consultation requirement if "all" of the appropriate resource agencies waive or are deemed to have waived compliance with the requirement. Proposed § 16.8(e)(2) specified that a resource agency would be deemed to have waived compliance with a requirement of this section if it failed either to participate in an initial joint meeting, to identify necessary studies and information following the joint meeting, or to provide written comments on a draft application.

Many of the commenters representing developmental interests support the proposed waiver provisions, indicating that resource agencies that fail to fulfill

[153] Washington Wildlife suggests that proposed § 16.8(c)(9) be revised to require potential applicants to describe their understanding of the resource agencies' positions on issues where there is disagreement and why the applicants do not agree with those positions. This specific requirement is unnecessary, since § 16.8(f) requires potential applicants to include in their filed applications all correspondence from resource agencies, which will explain the basis for the agencies' positions.

[154] Washington Wildlife suggests that resource agencies should be provided with an additional opportunity to review applications before they are filed, to ensure that the Commission understands the resource agencies' positions on issues. This requested revision is unnecessary, since agencies have the opportunity to file comments on filed applications in response to the public notice issued once an application is accepted for Commission processing. *See* § 16.9(d).

their consultation obligations should be excluded from the consultation process. These commenters also suggest that the provision should be revised to clarify that any agency that fails to timely comply with any consultation requirement should be prohibited from participating in any subsequent stage of the consultation process.

The proposed waiver provisions are vigorously opposed by many of the agency and other commenters.[155] These commenters state that it would be inappropriate to penalize agencies for failing to timely meet their consultation obligations, since workload demands and other factors may legitimately prevent them from attending meetings or providing written comments in a timely manner. They recommend that the waiver provisions either be eliminated or revised to provide for advance written notice and other procedures before an agency can be deemed to have waived consultation.

The majority of these commenters have misconstrued the purpose underlying proposed § 16.8(e). The purpose was not to penalize resource agencies failing to timely comply with an obligation imposed on them by excluding them from further consultation on a project. Rather, the purpose was to enable an applicant to proceed to the next step in the consultation process without waiting for an untimely agency to fulfill its obligations under a previous step of the process. The Commission did not intend to imply by this provision that the failure of a resource agency to meet a requirement in a timely fashion would result in its exclusion from further consultation on a project; an untimely agency would be allowed to participate in subsequent consultation steps. Thus, while an agency could not prevent an applicant from holding the initial joint meeting by unreasonably refusing to attend the meeting, the agency would not be prohibited from submitting written comments pursuant to § 16.8(b)(4).

The Commission is revising § 16.8(e) to clarify its intent. The Commission is also clarifying proposed § 16.8(e)(1) to specify that an applicant does not have to comply with a consultation requirement as to a particular agency if that agency waives compliance with that requirement in writing. Of course, if all relevant resource agencies waive in writing compliance with a consultation requirement, a potential applicant does not have to meet the requirement at all.[156]

The Commission acknowledges the possibility of tardy and unresponsive resource agencies expressed by some of the commenters. However, the Commission does not believe it would be consistent with its obligations under the FPA and other statutes to consult with, and consider the views and recommendations of, various specified agencies if it excluded them from the consultation process for relatively insignificant failures to meet consultation deadlines. Furthermore, as discussed previously, studies requested after the conclusion of first-stage agency consultation are subject to the dispute resolution process and do not have to be completed prior to filing an application. Thus, a resource agency that fails to timely comply with a consultation provision would not be able to interfere with a potential applicant's ability to file an application in a timely manner.

6. Documentation of Agency Consultation.

In the NOPR, the Commission proposed (in § 16.8(f)) to require applicants to include in the Exhibit E (Environmental Report) of their filed applications, certain specified information documenting their compliance with the consultation regulations. Included in this provision was a requirement to explain how and why the proposed project would, would not, or should not, comply with relevant comprehensive plans.[157] In response to suggestions made by EEI and Montana Natural Resources, the Commission is revising this provision to clarify that the comprehensive plans intended to be covered by this provision are those referenced in section 10(a)(2)(A) of the FPA [158] as defined by Commission regulations.[159] The Commission is also requiring applicants to indicate whether any relevant state or Federal resource agency has determined the consistency of the proposed project with any such plan.[160]

The EPA suggests that § 16.8(f) be revised to require the Commission to hold a public hearing in any state located upstream or downstream of a project if the state objects to the project and notifies a Regional EPA Administrator that the project will violate the water quality standards of the upstream or downstream state. Wildlife Federation suggests that the section be revised to require potential applicants to include in their applications information regarding cumulative environmental impacts.

Neither of the suggested revisions is necessary. As to the EPA's recommendation, Section 401(a)(2) of the Clean Water Act already requires the Commission to hold hearings under certain circumstances in downstream states whose water quality standards may be violated by a project located in an upstream state.[161] Upstream states may make their views known at any time during the application process. The Commission will fully consider all relevant water quality issues and will hold evidentiary hearings if material issues of fact are in dispute.

With regard to Wildlife Federation's suggestion, as the Commission explained in *Skykomish River Hydro, Inc.*,[162] agencies can request during the agency consultation process the gathering of information related to the project needed to assess cumulative environmental impacts. However, a potential applicant would not be responsible for conducting studies to gather data on other projects that may be necessary to assess cumulative environmental impacts of those projects and the potential applicant's project. Also, the Commission itself will examine cumulative impacts during its National Environmental Policy Act process when appropriate.

7. Confidentiality of Pre-Filing Submissions

The Commission proposed in the NOPR (§ 16.8(g)) to permit potential applicants to request confidential treatment of any information submitted to the Commission during pre-filing consultation, and to treat any such request in accordance with the confidentiality provisions of the

[155] *See, e.g.*, the comments of the Departments of Commerce and the Interior, Wildlife Federation and Friends of the Earth.

[156] As discussed in Part IV.H.3.d., *supra*, PG&E suggests that applicants not be required to incorporate into their filed applications late-filed agency comments on their draft applications. Pursuant to § 16.8(e), an applicant could do this without penalty. However, such applicants should forward to the Commission any such late-filed comments once they are received, together with any comments the applicant has in response to them.

[157] Proposed § 16.8(f)(6).

[158] 16 U.S.C. § 803(a)(2)(A) (1982 and Supp. 1988).

[159] See 18 CFR 2.19 (1988).

[160] Although the ultimate determination regarding the consistency of a project with a section 10(a)(2)(A) comprehensive plan will be made by the Commission, information regarding an agency's determination regarding consistency will assist the Commission in evaluating this issue. Commission staff has reviewed plans filed with the Commission to determine whether they are section 10(a)(2)(A) comprehensive plans. Lists of plans found to be section 10(a)(2)(A) plans are available from the Director.

[161] *See* City of Fort Smith, Arkansas, 44 FERC ¶ 61,160 (1988).

[162] 39 FERC ¶ 61,361 (1987); 42 FERC ¶ 61,283 (1988); and 43 FERC ¶ 61,123 (1988).

Freedom of Information Act (FOIA) embodied in § 388.112 of the Commission's regulations.[163] The Commission also indicated in the preamble to the NOPR[164] that the proposed confidentiality provision pertained only to information released by the Commission, and that other Federal and state agencies have their own regulations and procedures governing the release of information. However, the Commission encouraged resource agencies to consider the Commission's determination that certain pre-filing consultation information is exempt from disclosure in deciding on their treatment of such materials.[165] A number of commenters suggest elimination or revision of this proposed section.

EEI states that, given the large number of resource agencies that must be consulted, the risk of disclosure of confidential information is great. According to EEI, unless additional provisions are added, applicants will postpone consultation as long as possible to avoid possible disclosure of their plans to potential competitors, which would be contrary to the early and expeditious consultation envisioned by § 16.8. It therefore suggests that an additional provision be added to § 16.8(g) that would allow potential applicants to request resource agencies to maintain the confidentiality of information concerning the applicant's plans, supporting studies, or other materials prepared by or on behalf of the applicant. Under EEI's proposal, if a resource agency declines to maintain the confidentiality of any such information, it would waive the opportunity to consult with the applicant with respect to such information.

EEI also suggests language that would permit resource agencies, in consulting with competing applicants, to offer comments or opinions based on their examination of the confidential information, as long as the plans of the applicant requesting confidential treatment and the source of the information were not revealed. Finally, EEI's proposal would exclude from the confidentiality provisions, information required to be made available to the public pursuant to § 16.7, and applications and related documents once they are filed.

Alabama Power supports the proposed confidentiality provisions and suggests that they continue throughout the entire application preparation process. American Paper and Long Lake, apparently under the impression that the confidentiality provisions would continue throughout the licensing process, suggest that the confidentiality provisions apply only until the deadline for filing final amendments. Georgia Power suggests that the Commission require all state and Federal agencies to keep confidential information obtained from potential applicants during consultation; it believes that the Commission has the authority under the FPA to implement such a requirement.[166]

Douglas County PUD and Grant County PUD object to the proposed confidentiality provisions, noting that municipal applicants would be covered by state open-record laws. They contend that it would be inequitable to provide private applicants with confidential treatment while municipal applicants' plans would be available through the state open-record laws. The Northern California Agency contends that it is contrary to the public disclosure provisions of the FPA, as added by ECPA, to require entities wishing to obtain confidential information to go through the FOIA process to obtain it. Seattle Light suggests that the Commission revise the provision to provide guidance regarding the type of information that will be given confidential treatment. Montana Natural Resources suggests that the Commission clarify that state open-record laws are not pre-empted.

American Rivers objects to proposed § 16.8(g), contending that it will interfere with the public's ability to learn about proposed projects. It also contends that eliminating the provision will foster competition, since, if competitors are aware of each other's proposals, they will be more likely to make vigorous efforts to outdo each other. Finally, American Rivers requests that the provision be clarified to indicate whether information is exempt from disclosure merely on the basis of an applicant's request, or only in accordance with the standards for exemption from disclosure established by FOIA. American Rivers' comments are supported by Friends of the Earth. The Department of Commerce indicates that confidential treatment should be allowed only as permitted by FOIA.

FOIA is a disclosure statute, not a confidentiality statute. Therefore, the Commission proceeds under the presumption that all documents should be open for public review, unless a statutory exemption in FOIA provides otherwise.

The purpose of proposed § 16.8(g) was to provide potential applicants with a mechanism to keep study results and technical information regarding their proposals free from wrongful appropriation by potential competitors in those limited situations where exemption from disclosure is justified under one of the tests of FOIA. However, from the comments received it is clear that the scope of the provision was not adequately explained in the NOPR. The provisions of § 16.8(g) were not intended to automatically keep confidential all information submitted throughout the licensing process. First, we intended that any confidential treatment afforded to submitted material would expire upon the filing of the application to which it pertained. Second, all requests for confidential treatment were to be handled in accordance with § 388.112 of the Commission's regulations, which, as explained below, does not guarantee confidentiality.

Under § 388.112, when a request for confidential treatment is made Commission staff preliminarily reviews the requester's written justification for nondisclosure to determine whether the procedures set out therein have been followed and to weed out requests for confidential treatment that are clearly deficient on their face. Information that passes the preliminary review is then placed in a nonpublic file. However, the placing of the information in such a file does not mean that the information qualifies for exemption from disclosure.[167] Requests for that information can be made pursuant to FOIA. If a FOIA request is made for such information, the entity requesting the confidential treatment is provided with an opportunity to respond to the request, after which the Commission or its designee will determine if the information is exempt from disclosure under one of the tests set out in the FOIA.[168]

Third, § 16.8(g) would not affect in any way an existing licensee's obligation under section 15(b)(2) of the FPA to make certain information available to the public for review and reproduction at the time the existing licensee files its notice of intent pursuant to section 15(b)(1) of the FPA. Consequently, existing licensees would

[163] Draft applications submitted to Commission staff for review pursuant to 18 CFR 4.32(h) (1988) fall within the scope of this provision.

[164] *See* NOPR preamble at 38.

[165] *See* NOPR preamble n. 85 at 38.

[166] Rochester Gas, Southern California Edison and others generally support the confidentiality provisions.

[167] *See* 18 CFR 388.112(e) (1988).

[168] *See* 18 CFR 388.112(d) and (e) (1988). *See* 5 U.S.C. § 552(b) (1982) for the grounds which justify an exemption from disclosure.

still have to make available all of the detailed information required by § 16.7.[169]

Fourth, and although the NOPR was not clear on this point, § 16.8(g) was not intended to keep potential applicants' general development plans free from disclosure. As suggested by American Rivers, competitors will be more likely to make their best efforts to outdo each other if they are aware of each others' general development proposals. Although disclosure of this information may encourage applicants to delay the initiation of consultation in some cases, the possibility that an applicant may have its application rejected or dismissed for its failure to complete consultation as required by § 16.8 prior to filing its application should reduce such delay to a minimum. As to the withholding of actual development proposals until the final amendment point, the Commission does not believe that it will be feasible for applicants to substantially revise their proposals and conduct necessary studies related thereto during the limited final amendment periods. Thus, withholding of actual proposals until the final amendment point is unlikely.

Finally, any confidential treatment afforded to study results and other detailed information by this proposal will expire upon the filing of the related application. Consequently, the public will have full opportunity to review and comment on all of the information supporting each development proposal. (The public will already have available to it the information required to be disclosed pursuant to Order No. 496, III FERC Stats. & Regs. ¶ 30,812 (Apr. 28, 1988).)

The Commission continues to believe that § 16.8(g), as described herein, is an appropriate and necessary provision. Accordingly, the Commission is retaining § 16.8(g) as proposed, with a revision to clarify that any confidential treatment afforded to information under the provision expires upon the filing of the related application. The Commission is also revising § 16.8(g) to specify that the § 16.8(b)(1) information packages will not be subject to the provisions of subsection (g). This is consistent with the original intent of § 16.8(g) that general development plans were not to be kept confidential, and is necessary in light of the fact that, as discussed in Part IV.H.8, *infra*, potential applicants will be required to make their § 16.8(b)(1) information packages available to the public for inspection and reproduction prior to conducting the § 16.8(b)(2) joint meeting with resource agencies and the public.

The Commission rejects the suggestions of some of the commenters to extend the confidentiality coverage through the final amendment period or even later, because this would interfere with the public's ability to meaningfully review and comment on filed applications. While the Commission is cognizant of the potential inequities advanced by Douglas County PUD and Grant County PUD, it does not believe that these inequities override the competitive benefits discussed above.

The Commission also declines to articulate the specific types of information that will be protected from disclosure, as suggested by some of the commenters. The Commission believes that decisions regarding the disclosure or non-disclosure of information are best made on a case-by-case basis in accordance with the tests governing privilege set out in the FOIA, as interpreted by the courts. Generally, however, the Commission anticipates that most requests for confidential treatment will be trade secrets and commercial or financial information which is privileged and confidential pursuant to 5 U.S.C. § 552(b)(4) (1982).

The Commission also does not believe it would be appropriate to hold that a resource agency that refuses a request for confidential treatment of information has waived consultation as to that information, as suggested by EEI. This may lead to more instances of agency disclosure of information an applicant wants held confidential. Nevertheless, the Commission does not believe that resource agencies' rights to consult pursuant to various provisions of the FPA and other statutes can be abrogated by their unwillingness or inability to accord confidential treatment. Also, as to state agencies, the Commission does not believe that it would be appropriate to interfere with state open-record laws.[170]

8. Public Participation in Pre-filing Consultation

Several of the commenters suggest that § 16.8 should be revised to provide for public involvement in the consultation process, arguing that the public has no opportunity to participate effectively in the pre-filing consultation process and that this exclusion seriously and unfairly disadvantages the public. They contend that pre-filing consultation has become increasingly important in recent years, evolving from a vehicle for identifying and resolving information requirements into a vehicle for resolving substantive issues outside the formal licensing process, and that the proposed regulations place even more weight on the consultation process to resolve substantive issues. They also maintain that pre-filing consultation is even more significant in relicensing proceedings than in original licensing proceedings, since the heart of relicensing is the development of appropriate mitigation and enhancement measures. Finally, they argue that resource agencies involved in the consultation process cannot adequately represent all aspects of the public interest.

American Rivers suggests that § 16.8 be revised to permit any person or group to become a formal intervenor in the proceeding after the existing licensee's notice of intent is filed and publicly noticed under § 16.6(d), and that those intervenors be included in the entire consultation process and be vested with rights identical to those of the resource agencies. Trout Unlimited, which raises concerns paralleling those of American Rivers on the issues of public participation, suggests that the newspaper notice issued after the filing of the notice of intent indicate that any private citizen or organization can become involved in the consultation process. It suggests that public participants either be granted status equal to that of an agency or that they be notified of meetings and be given summaries of meetings and copies of information provided during the consultation process. Washington Ecology urges modification of the section to permit intervention at the earliest possible time and suggests allowing intervention at the notice of intent stage. It also suggests that notice be given in the Federal Register and that entities be provided with 45 days in which to file motions to intervene.

Wildlife Federation also urges the Commission to allow public intervenors opportunities for formal and informal participation in pre-filing consultation. In Wildlife Federation's view, a formal proceeding has begun as soon as a notice of intent is filed under § 16.6, and an interested public party must be allowed either to intervene formally in those proceedings, or to comment informally, and to participate in meetings and have access to project sites. Wildlife Federation also suggests that if there is concern about breaches of confidentiality during the consultation process, the Commission could encourage the signing of an appropriate

[169] *See* Order No. 496, *supra*.

[170] Of course, as it did in the NOPR, the Commission encourages both Federal and state resource agencies to consider the Commission's determination regarding disclosure in individual cases of study results and other detailed information in determining how they will handle the same materials.

confidentiality agreement by a public participant. In the alternative, Wildlife Federation suggests that the Commission could discourage espionage by competitors by providing that applicants that obtain confidential information about another applicant from intervenors would be subject to denial of their license applications.

Seattle Light also recommends that the Commission specify in its regulations how intervenors may participate in the consultation process, arguing that early participation by interested parties during the consultation process would help reduce unnecessary adverserial confrontation and litigation at the time of relicensing. Finally, Friends of the Earth supports the recommendations of American Rivers and suggests that public intervenors in the consultation process be allowed to have access to existing project sites if necessary for responsible and informed involvement in the proceeding.

A number of the other commenters, in their reply comments, object to the proposals to require public participation in the § 16.8 consultation process. Alabama Power states that it is the responsibility of the resource agencies to determine the extent of the public's concerns and to voice those concerns in the consultation process. Furthermore, suggests Alabama Power, including private organizations with narrow, parochial concerns in the consultation process risks meetings too large and unwieldy to control, numerous unjustified study requests, and an insurmountable number of disagreements referred to the Director under the dispute resolution process.

EEI contends that public participation in the consultation process would be unnecessary, unreasonable, and possibly unworkable. EEI points out that projects evolve during the consultation process and that persons with a perceived interest when the section 15(b)(1) notice is given may have no interest in the project by the time the application is put in final form and filed. Also, EEI contends that allowing private parties to secure intervenor status during consultation could chill communications between the Commission and applicants, agencies, and the potential intervenors themselves as a result of the Commission's *ex parte* regulations,[171] which would become applicable once a formal proceeding was established.

EEI also contends that allowing the public to intervene in the consultation process would destroy the ability of applicants to keep their plans confidential, and that the confidentiality protection measures suggested by Wildlife Federation would be unenforceable. EEI states that interested groups and individuals already have a mechanism for participating in the process, since they can review the information made available by existing licensees pursuant to § 16.7 and, based on that review, communicate any concern they have to the appropriate resource agency, which in turn can then decide if and how those concerns should be addressed during the consultation process. EEI points out that public participation in the consultation process is not required in either original licensing or amendment proceedings. Finally, EEI points out that the proposals for public participation seem to relate only to existing licensees, as a result of their filing of notices of intent, and that potential competitors, since they are not required to file notices of intent, would not be subject to public participation.

Idaho Power contends that allowing private parties to participate in the consultation process would be destructive, since they have no statutory authority or responsibility, are answerable to no one, and have varying degrees of ability and expertise. Idaho Power suggests that private groups should make their concerns known to the entities created by law to oversee the various relevant resources: the state and Federal resource agencies.[172]

The Commission recognizes that some relevant resource issues may not become apparent until raised in response to the public notice issued when the application is filed and accepted.

Consequently, allowing the public to participate in consultation would be beneficial to the extent that relevant issues are identified earlier in the process.

We also recognize that local residents and other interested persons have a strong and legitimate interest in knowing the status of a hydroelectric project in their vicinity. Such persons might well be affected by proposed expansions or improvements. Riparian property owners might be affected by contemplated alterations in reservoir and flow levels. Local residents may have knowledge about environmental problems associated with the past, present or projected future operations of the project, and may have excellent suggestions for ameliorating such problems or potential problems. Finally, even if local residents do not have specific questions, complaints or suggestions, at the very least they clearly have an interest in knowing what is going on in their neighborhood. It is important that potential applicants actively seek out the views of local residents and other interested persons, afford them an opportunity to express those views, and provide meaningful information on the relicensing process.

Accordingly, and in order to have potential applicants obtain the views of the public regarding significant resource issues that should be addressed in any application for new license that may be filed, the Commission is adding a new § 16.8(b)(3) to specify that members of the public may attend and participate in the § 16.8(b)(2) joint meeting with resource agencies. The Commission is also adding a new § 16.8(i) which requires potential applicants to publish notice of the joint meeting at least 14 days in advance in a local daily or weekly newspaper.[173] In order to aid the public in its understanding of the proposed project, this new provision also requires potential applicants to make the § 16.8(b)(1) information package available to the public for inspection and reproduction from the date of the notice to the date of the joint meeting.[174] Finally, new § 16.8(i) specifies[175] that the form and manner in which this information is to be made available for public inspection and reproduction is to be governed by the provisions of redesignated § 16.7(e), as promulgated by Order No. 496, *supra*.

The Commission recognizes that state and federal resource agencies have their own practices and procedures, which may be based on their own underlying statutory authority. The public participation provisions adopted herein are not intended to conflict or be inconsistent with these other statutory and regulatory provisions. The Commission intends for resource agencies to attend the § 16.8(b)(2) joint meetings, and encourages them to participate in those meetings to the full extent that such participation would not be inconsistent with the resource agencies' own practices and procedures, and their statutory and regulatory responsibilities.

We also note that the failure of a resource agency to request the

[171] *See* 18 CFR 385.2201 *et seq.* (1988).

[172] Georgia Power, Public Pool, Rochester Gas, and Wisconsin Public Service express similar concern.

[173] *See* new § 16.8(i)(1).

[174] *See* new § 16.8(i)(2)(i).

[175] *See* new § 16.8(i)(2)(ii). New § 16.8(i)(2)(iii) requires potential applicants to make the § 16.8(b)(1) information package available for inspection by the public at the joint meeting.

preparation of a certain study does not mean that the study will not be done. Applicants are required by the Commission's regulations governing the content of applications [176] to consider and address all relevant resource issues in their applications. The failure of an agency to request a study regarding a resource will not excuse an applicant from addressing that resource issue, either in its application or in response to a Commission deficiency or additional information letter. Thus, potential applicants will be consulting with various interest groups informally in order to adequately address resource issues of interest to these groups, and the public is encouraged to bring any issues not fully covered to the attention of the Commission.

To make the Commission aware of the issues once an application has been filed, private entities are encouraged to forward to the Commission any written correspondence between them and potential applicants and resource agencies.[177] After filing of the license application, private entities, to the extent they believe their concerns have not been addressed, should file comments or interventions with the Commission articulating their position and explaining why they believe additional studies should be performed or additional issues addressed.[178]

Finally, and contrary to the contentions of American Rivers and other commenters, relicensing proceedings are no different from original licensing proceedings in terms of Commission consideration of agreements between applicants and resource agencies regarding environmental protection, mitigation, and enhancement measures. In each case, the Commission will review any agreed-upon measures and independently determine, pursuant to the requirements of the FPA, whether such measures are appropriate and in the public interest. The Commission may decline to incorporate the measures into a license if it concludes that they are not appropriate, and may adopt different measures in lieu thereof.

9. Indian Tribes

In the NOPR, the Commission requested comments on the most appropriate mechanism to ensure that the concerns and recommendations of Indian tribes are fully considered by the Commission in relicensing proceedings.[179] The Commission specifically noted that section 10(a)(2)(B) of the FPA[180] requires the Commission to consider the recommendations, including fish and wildlife recommendations, of, *inter alia*, Indian tribes affected by the project. Also, section 10(a)(3) of the FPA[181] requires the Commission to solicit recommendations from, *inter alia*, those Indian tribes for proposed terms and conditions to be considered by the Commission for inclusion in the license. The Commission also noted in the NOPR that the legislative history of ECPA raises the question of whether Indian tribes should be permitted to participate in the FPA section 10(j) process to resolve disputes between fish and wildlife agencies, license applicants, and the Commission.[182]

Two commenters suggest that a separate rulemaking proceeding should be initiated [183] to consider the involvement of Indian tribes, either because it is not germane to relicensing or because the issue should be discussed with the tribes and the Interior Department before the Commission issues a proposal.

The Columbia Commission interprets the legislative history of ECPA as expressing an intent to "grant the tribes a seat at the decisionmaking table"; "given the clear statutory language creating an affirmative obligation for the Commission regarding the involvement of Indian tribes," the Columbia Commission expresses concern about the absence of regulatory provisions respecting tribal interests.[184] It suggests that affected Indian tribes be given a role in the consultation process similar to those of resource agencies; that notices of meetings, copies of information, and correspondence be transmitted to those tribes; and that draft documents such as license conditions and orders on studies be circulated for comment by those tribes.

The Great Lakes Commission also suggests that Indian tribes be included in the consultation process and that tribes be considered as resource agencies for all consultation purposes. The Great Lakes Commission recommends that the Commission provide funds or otherwise seek funds on behalf of Indian tribes, in order to permit tribes to fully consider and evaluate relicense applications.

The Wisconsin Department states that the Commission, as part of the Federal government, has a trust responsibility for Indian tribes and that licensees should be required to consult with tribes as well as state agencies. It suggests that state agencies and tribes prepare memoranda of understanding to set out procedures for jointly determining which studies should be conducted and how mitigation recommendations will be developed.

Several commenters state that existing law provides the tribes with appropriate mechanisms to bring their concerns and recommendations before the Commission, but that if tribes are permitted to participate in the consultation process they should conform to the requirements placed on resource agencies.[185] The Michigan Department recommends treating tribes as any other intervening party and not as intermediaries between agencies and applicants.

Idaho Power states that it is clear from the statute that Indian tribes were not meant to be included in the FPA section 10(j) process. It notes that, although ECPA specifically addressed the interests of Indian tribes in sections 10(a)(2)(B) and 10(a)(3) and contemplates their participation to the degree they feel their interest requires, it did not make Indian tribes into agencies for purposes of the formal consultation process. American Paper states that the legislative history of ECPA does not support automatic inclusion of Indian tribes in the section 10(j) process, since that would be a modification of the Commission's existing obligations. American Paper suggests that interested tribes be permitted to participate in a specific mediation on a case-by-case basis, and that the standards for such tribal participation include the direct effect the project will have on that tribe's reservation and whether participating fish and wildlife agencies are expected to adequately represent the concerns of the tribe.

Tacoma Utilities also opposes an across-the-board standard for the participation of Indian tribes, because a number of circumstances must be

[176] *See* 18 CFR 4.41, 4.51, and 4.61 (1988). These provisions are applicable to applications for new license. *See* § 16.9(b)(2).

[177] New § 16.8(f)(2) requires applicants to include in their applications any letters from the public containing comments and recommendations.

[178] The Commission recognizes that in some cases potential applicants and resource agencies may refuse to consider private entities' suggestions regarding studies. However, the Commission believes that the relicensing scheme established by ECPA provides both potential applicants and resource agencies with incentives to adequately address the concerns of private entities during consultation. Therefore, the situations where the concerns of private entities are ignored should be minimal.

[179] *See* NOPR preamble at 18.

[180] 16 U.S.C. 803(a)(2)(B) (1982 and Supp. 1988).

[181] 16 U.S.C. 803(a)(3) (1982 and Supp. 1988).

[182] *See* NOPR preamble at 18.

[183] Treaty Council and Tacoma Utilities.

[184] Columbia Commission at 2.

[185] *See, e.g.*, the comments of Douglas County PUD and Grant County PUD.

considered in order to determine how to treat tribes in each specific case. The EPA suggests that comments be solicited by mail from each potentially affected tribe, and from national and regional intertribal organizations where appropriate. Finally, the Department of Commerce suggests that Indian tribes be a part of the consultation process.

As mentioned previously,[186] the Commission will be preparing a NOPR to develop formal procedures for implementing the provisions of section 10(j) of the FPA. Inasmuch as the role Indian tribes will play in the section 10(j) process will be addressed in that rulemaking proceeding, the Commission will defer consideration of the above referenced arguments to that proceeding, in order to avoid prejudging the issues to be considered therein.

As to the Commission's obligations with regard to Indian tribes under sections 10(a)(2)(B) and 10(a)(3) of the FPA, the Commission believes it is required to ensure that Indian tribes are directly notified of existing licensees' intentions regarding their projects and other procedural milestones in relicensing proceedings. It was for that reason that § 16.15(d)(3) (redesignated § 16.6(d)(3) by this final rule) specifies that the Commission will notify appropriate Indian tribes by mail of notices of intent filed by existing licensees pursuant to section 15(b)(1) of the FPA. Consistent with this, the Commission is: (1) Revising § 16.4 to specify that Indian tribes will be mailed copies of requests for acceleration; (2) revising § 16.9(d)(1)(iii) to specify that Indian tribes will receive direct notice of the acceptance of relicense applications by the Commission; (3) revising § 16.9(d)(2)(ii) to specify that Indian tribes will be mailed copies of the procedural notice required to be issued by section 15(c)(1) of the FPA; and (4) revising § 16.10(a) to require applicants to provide the names and mailing addresses of Indian tribes with land on which any part of the proposed project would be located or which the applicant reasonably believes would otherwise be affected by the proposed project.

The Commission does not believe, however, that potential applicants should be required to consult with Indian tribes as part of the formal consultation procedures established by § 16.8. First, the amendments made by ECPA to the FPA clearly require the Commission to solicit and consider the views and recommendations of Indian tribes during the Commission's processing of filed applications. But nothing in ECPA or its legislative history indicates that Indian tribes were required to be made a part of the consultation process that occurs between potential applicants and resource agencies before applications are filed.

Second, Indian tribes will have available to them the same opportunities for making their concerns and views known to potential applicants, resource agencies, and the Commission as do other private entities. Also, and as discussed previously in relation to general public participation in formal consultation, applicants are required to allow the public to review the § 16.8(b)(1) information packages and to attend the § 16.8(b)(2) joint consultation meetings with resource agencies. Thus, the potential applicants will be informally consulting with Indian tribes to ensure that resource issues affecting the tribes are considered and addressed.

The Indian tribes also will be able to work with the Bureau of Indian Affairs of the Interior Department, which has a direct trust relationship with the tribes, to ensure that the tribal views and requests for appropriate studies are communicated to potential applicants during the § 16.8 consultation process. Furthermore, in cases where project facilities are or will be located on Indian reservations as defined in the FPA,[187] the Interior Department will be prescribing mandatory terms and conditions it determines are necessary for the adequate protection and utilization of the reservation pursuant to section 4(e) of the FPA.[188] Thus, the Interior Department will be requesting during the § 16.8 consultation process the studies it deems necessary to formulate these provisions.[189]

Finally, the Commission does not believe that it should provide or arrange for funding to assist Indian tribes in their review of applications. Section 10(e) of the FPA requires the Commission to collect from all licensees reasonable annual charges for the purpose of reimbursing the United States for the costs of administering Part I of the FPA, and, from licensees using tribal lands, reasonable annual charges for use of those lands. Congress has specifically addressed in section 10(e) the conditions and circumstances upon which licensees are to provide funding to be used on behalf on Indian tribes. Therefore, the Commission does not believe it would be consistent with legislative intent to read into section 10(e) an obligation on the part of licensees to fund Indian review of their applications for new license as part of their obligation to pay annual fees for the administration of Part I of the FPA.[190]

10. Miscellaneous

a. Automatic Intervention. The Department of Commerce and Washington Fisheries request that the regulations be revised to provide for automatic intervention in a relicensing proceeding for every agency participating in consultation under § 16.8 for that project. The Commission rejects this suggestion, since it believes that agencies wanting to participate as formal parties to a relicensing proceeding should be required to demonstrate their level of interest in the proceeding through a motion to intervene. However, as indicated in a recent policy statement, late interventions by fish and wildlife agencies will be permitted in the context of section 10(j) proceedings, at least on a temporary basis pending consideration of these and related issues in the rulemaking proceeding on the procedural implementation of section 10(j).[191]

b. Transition Provisions. The Commission is adding a transition provision (new § 16.8(j)) specifying which provisions of § 16.8 have to be complied with by applicants that have initiated or completed agency consultation pursuant to § 4.38 of the Commission's regulations. This provision is in response to concern expressed by a number of the commenters[192] regarding the

[186] *See, e.g.*, Part IV.C., *supra*.

[187] *See* section 3(2) of the FPA, 16 U.S.C. 796(2) (1982).

[188] *See* City of Pasadena Water and Power Department, 46 FERC ¶ 61,004 (1989), where the Commission held that the mandatory conditioning authority of section 4(e) of the FPA applies to relicensing proceedings. The time deadlines and other parameters on the prescription of section 4(e) conditions will be addressed in the rulemaking proceeding regarding section 10(j) of the FPA.

[189] As discussed previously (*see* Part IV. H.2.e., *supra*), the reasonableness and necessity of studies related to mandatory conditioning authority requested of applicants by resource agencies are proper subjects for dispute resolution.

[190] Columbia Commission suggests that § 16.8(a)(2) be revised to specify that the Director will provide lists of affected Indian tribes upon request. However, since the Director will not know the exact configuration of potential projects at this point in time, he would not be able to determine which Indian tribes would be affected by any particular project. In any event, existing licensees are required to identify affected Indian tribes in their section 15(b)(1) notices. *See* § 16.7(b)(10). Also, all applicants must identify affected Indian tribes in their applications. *See* § 16.10(a)(12).

[191] *See* Order No. 511, *supra*.

[192] *See, e.g.*, the comments of EEI, Montana Power, Niagara Mohawk, and Nebraska Power.

applicability of the consultation provisions of § 16.8 to projects where the applicants either have completed consultation pursuant to § 4.38 of the Commission's regulations and filed their applications, or have already initiated consultation on their projects pursuant to § 4.38.

Specifically, § 16.8(j) exempts from § 16.8 applications filed before the effective date of this rule.[193] In addition, the transition provision specifies that applicants do not have to comply with certain steps of § 16.8 if they have already complied with the comparable provisions under § 4.38.[194] Also, the provision requires all potential applicants that have already complied with stage-one consultation under § 4.38 to hold a public meeting to solicit the views of the public regarding significant resource issues that should be addressed in any application for new license that may be filed.[195] The provisions regarding advance public notice of the meeting and availability of certain information are comparable to those specified in § 16.8(i).

The new provision requires all requests for waiver of, or clarification regarding, the application of the transition provisions to a particular proceeding to be submitted to the Director within 90 days from the effective date of this final rule.[196] This will expeditiously clear up any questions regarding which aspects of § 16.8 must be complied with by a potential applicant that has already initiated consultation with resource agencies under § 4.38.

c. Clarification of Commission's Obligations. A few of the commenters, including Washington Wildlife and the Department of Commerce, suggest that the regulations specify how the Commission itself will consult with resource agencies and Indian tribes. To the extent these requests relate to procedures under section 10(j) of the FPA, the requests will be addressed in the context of the rulemaking that is being developed regarding that section. Generally, however, the Commission will continue its practice of seeking the views of resource agencies through: (1) The documentation of agency consultation contained in filed applications; (2) the notices of application acceptances mailed directly to resource agencies and Indian tribes by the Commission; and (3) the requirement that applicants, in responding to Commission deficiency and additional information letters, seek and obtain the views and recommendations of relevant resource agencies in appropriate cases.

I. Notices of Intent From Competitors

Section 15(b)(1) of the FPA requires existing licensees, at least five years prior to the expiration of their licenses, to file notices of intent regarding whether they intend to file applications for new license. Section 16.6 of the regulations contains provisions regarding the filing of these notices of intent by existing licensees.

A number of commenters suggest that the Commission also require potential competitors to file notices of intent. According to Idaho Power, the goal of encouraging competition would be advanced if the existing licensee were to learn of the existence of a competing applicant as soon as that applicant initiates consultation with resource agencies. In Idaho Power's words, "[t]his would tend to sharpen the applicant's approach to the project and ensure that the applicant is not 'blind-sided' by an application filed at the last minute by a competitor."[197] EEI suggests that notices of intent from competitors be filed no later than four and one-half years prior to the expiration of the relevant license.

As pointed out by the Northern California Agency in its reply comments, in Order No. 496, which promulgated § 16.6, the Commission considered and rejected the suggestion that potential competitors be required to file notices of intent. As the Commission explained therein, imposition of such a requirement would be inconsistent with the relicensing scheme established by ECPA and could be anticompetitive.[198] Also, and as clearly illustrated by Idaho Power's comments, requiring such notices of intent from competitors might discourage existing licensees from using their best efforts in developing applications for new license in some cases. This is because existing licensees, not seeing notices of intent from potential competitors, will assume there is no competition and will not have an incentive to "sharpen" their applications. Since the commenters have not advanced any arguments the Commission has not already considered, the Commission once again rejects the suggestion that all competitors be required to submit notices of intent.[199]

J. Filing and Processing of Applications

In the NOPR, the Commission proposed that applications for new license could be filed at least 24 months, but not more than 30 months, before the existing license expires.[200] The NOPR also specified that applications would have to meet the requirements of § 4.32 of the Commission's regulations,[201] but that an applicant would have until 18 months before the expiration of the existing license in which to correct deficiencies in its application.[202] Also,

[193] Section 16.8(j)(1).

[194] Section 16.8(j)(2) and (3).

[195] Section § 16.8(j)(4).

[196] Section 16.8(j)(5).

[197] Idaho Power at 4. Similar requests for the Commission to require competitors to file notices of intent are made by Niagara Mohawk, Seattle Light, EEI, Alabama Power, and others.

[198] *See* III FERC Stats. & Regs. ¶ 30,812 at 31,106–107.

[199] Seattle Light contends that notices of intent from all competitors are necessary in order to coordinate the consultation and application process of the competitors. According to Seattle Light, without such coordination competing applicants will be requested by resource agencies to perform identical studies at different times, and resource agencies will be able to use studies prepared by an applicant that initiates consultation first in formulating study demands on an applicant initiating consultation at a later date. In order to avoid these potential inequities, Seattle Light requests that the Commission: require all applicants to file notices of intent; establish identical deadlines for completing each step of the consultation process for each applicant; and require resource agencies to request identical environmental studies of each competitor during all stages of the consultation process.

As noted above, requiring notices of intent from all competitors would not be consistent with ECPA. Also, while requiring competitors to complete each step of the consultation process at the same time could reduce the potential for disparate treatment of competitors by agencies, the Commission does not believe this requirement would be appropriate since applicants who do not presently hold licenses probably will be unable to initiate consultation as soon as existing licensees due to their need to review and analyze the information made available by existing licensees pursuant to section 15(b)(2) of the FPA. Finally, and while the Commission encourages resource agencies to be consistent in their requests to competing applicants for studies, the Commission does not believe that identical studies can be mandated, because of differences between competing proposals and the continuing development of appropriate methodologies over time.

[200] Proposed § 16.9(b)(1).

[201] Section 4.32 of the Commission's regulations contains the general procedures regarding the filing and processing of applications. Among other things, § 4.32 specifies that the Director: (1) Will provide applicants with 90 days in which to correct deficiencies in their applications and will reject any application when the deficiencies are not timely corrected (§ 4.32(e)(1)); (2) will reject within 60 days any application that patently fails to substantially comply with the regulations governing content of applications and resource agency consultation (§ 4.32(e)(2)); and (3) will provide applicants with appropriate time to provide additional information needed to evaluate their projects and may dismiss an application, hold it in abeyance, or take other appropriate action if the information is not provided in a timely manner (§ 4.32(g)).

[202] Proposed § 16.9(b)(3).

the NOPR specified that an application would have to meet the pertinent requirements of the Commission's regulations governing the content of applications.[203]

The Commission also provided in the NOPR that the Commission's regulation governing material amendments [204] would not apply to applications for new license, except that the Commission would reissue public notice of the application.[205] Also, the NOPR provided that applications dismissed or rejected pursuant to § 4.32 of the Commission's regulations could not be refiled after the new license application filing deadline (24 months prior to the expiration of the license).[206]

The NOPR specified that the Director would review all applications and would notify all applicants of any deficiencies in their applications within 90 days of their filing.[207] In addition, the NOPR specified that all amendments to an application, including correction of any deficiency and the final amendment, must be filed with the Commission no later than 18 months before the expiration of the existing license.[208]

The NOPR indicated that, upon the acceptance of an application, the Commission would publish notice in a local newspaper in accordance with the provisions of section 4(e) of the FPA, and in the **Federal Register**, and would notify appropriate state and Federal agencies by mail.[209] In addition, the NOPR provided that the Commission would issue a notice as required by section 15(c)(1) of the FPA within 60 days from the new license application filing deadline. The notice would indicate any processing deadlines already established under § 4.32, the estimated dates for further processing deadlines under § 4.32, and the final amendment deadline for the project as established in proposed § 16.9(c)(2) (*i.e.*, 18 months prior to the expiration of the existing license). This notice would be published in the **Federal Register**, be provided to appropriate state and Federal resource agencies, and be served on all parties.[210]

As discussed in the NOPR,[211] the purpose of the prohibition on the filing of applications prior to 30 months before the expiration of an existing license was to avoid the filing of competing applications several years apart, and the non-contemporaneous review of data entailed in the filing of such applications. Also, by limiting the time period in which applications could be filed to a six-month period prior to the new application filing deadline, the Commission would ensure that all applications would include the most up-to-date environmental, economic, and other information. The other processing deadlines in proposed § 16.9, including the establishment in § 16.9(c)(2) of a generic final amendment deadline for all proceedings, were intended to promote the expeditious processing of applications for new license, and to avoid confusion regarding processing deadlines by establishing the same date for filing final amendments and correcting deficiencies.

1. Filing Window

Many of the commenters, while supporting the Commission's goal of contemporaneous review of applications for new license, do not believe the six-month filing window and other procedures proposed in § 16.9 are realistic. With regard to the filing window, Great Northern, Rochester Gas, and others, pointing to the large number of applications for new license that will be filed in the next few years,[212] indicate that requiring all applications to be filed within this window of time will create tremendous processing burdens for Commission staff. The commenters also argue that the information contained in the applications will be the same regardless of the time they are filed; if the Commission determines that more up-to-date information is needed to evaluate an application filed significantly before the 24-month filing deadline, the Commission can request the applicant to provide the information. Finally, they argue that the Commission should not delay the filing and processing of existing licensees' applications for new license on the off chance that competing applications may be filed near the 24-month filing deadline. They therefore request that the six-month filing window be eliminated.[213]

The Commission finds the arguments of the commenters persuasive, and therefore is revising § 16.9(b)(1) to eliminate the prohibition on the filing of applications before the 30-month point. However, the Commission is still concerned with the possibility that it may have to repeat evaluations performed on applications filed years prior to the 24-month filing deadline. Consequently, the Commission will not process an application until the final amendment point except to the extent of determining whether it conforms to the Commission's filing requirements (*i.e.*, the processing stage at which an acceptance letter is sent), unless the applicant indicates in its application that it waives the right to make a final amendment pursuant to section 15(c)(1) of the FPA.[214] Absent such waiver, further processing will commence only after the expiration of the final amendment deadline.

2. Processing Deadlines

With regard to the other deadlines, the commenters also contend that, given the upcoming relicensing case load, it is unrealistic to assume that the Commission will be able to review all applications and make deficiency determinations within 90 days.[215] Furthermore, the commenters [216] contend that 90 days provides insufficient time for applicants to correct any deficiencies that are found and to file final amendments. They also contend that the final amendment deadline should be established on a case-by-case basis in order to accommodate the varying degrees of complexity involved in each case.[217] They therefore request that three provision be removed from § 16.9: (1) The provision specifying that deficiency determinations be made within 90 days; (2) the provision specifying that deficiency corrections be made no later than 18 months prior to the expiration of the license; and (3) the provision specifying that the final amendment deadline will be 18 months prior to the

[203] *Id.* Those regulations are embodied in 18 CFR 4.41, 4.51, and 4.61 (1988).

[204] 18 CFR § 4.35 (1988).

[205] Proposed § 16.9(b)(4).

[206] Proposed § 16.9(b)(5).

[207] Proposed § 16.9(c)(1).

[208] Proposed § 16.9(c)(2).

[209] Proposed § 16.9(d)(1).

[210] Proposed § 16.9(d)(2).

[211] *See* NOPR preamble at 3–4.

[212] Approximately 170 licenses expire between January 1, 1990, and December 31, 1993.

[213] Washington Wildlife suggests that the process could be improved by expanding the filing window by between six and twelve months. The Department of Commerce questions whether the 24-to-30-month period will provide the Commission sufficient time to process applications.

[214] If a competing application is eventually filed for the project, the right of the applicant to file a final amendment will be automatically reinstated without further order of the Commission. Although Great Northern correctly indicates that this problem could be eliminated by requiring all potential competitors to file notices of intent, for the reason discussed in Part IV.I., *supra*, the Commission does not believe it would be consistent with ECPA to impose this requirement.

[215] *See, e.g.*, the comments of American Rivers, Idaho Power, Montana Power, and Seattle Light.

[216] *See, e.g.*, the comments of Alabama Power, EEI, Idaho Power, and Montana Power.

[217] *See, e.g.*, the comments of Alabama Power, EEI, Idaho Power, PG&E, Puget Sound Power, Southern California Edison, and Washington Power.

expiration date of the license. In lieu thereof, they request that the final amendment deadline for each particular case be established in the notice to be issued within 60 days of the 24-month filing deadline pursuant to section 15(c)(1) of the FPA, and that applicants be allowed to correct deficiencies in their applications until the final amendment deadline.[218]

The Commission finds these arguments persuasive. Accordingly, the Commission is: (1) Revising proposed § 16.9(b)(3) (redesignated § 16.9(b)(2) by this final rule [219]) to eliminate the provision requiring deficiencies to be corrected no later than 18 months prior to the expiration of the license; (2) revising proposed § 16.9(c) to eliminate the statement that the Director will make deficiency determinations within 90 days [220] and to specify that all amendments, including final amendments, must be filed no later than the date specified in the § 16.9(d)(2) notice; and (3) revising § 16.9(d)(2) so that the FPA section 15(c)(1) notice will specify the deadline for filing final amendments in each proceeding. Revisions are also being made to § 16.9(c)(2) to provide for the establishment in the § 16.9(d)(2) notice of deadlines for the filing of better adapted statements.[221]

The Commission declines, however, to modify § 16.9(b) to allow all applicants until the final amendment deadline to correct deficiencies in their applications, as suggested by some of the commenters. Although the deadline for correcting deficiencies probably will be set to correspond to the final amendment deadline in most cases, the Commission does not believe it would be appropriate to provide for this for all cases. As discussed previously, it will now be possible to file applications more than 30 months prior to the expiration of existing licenses. In order to process those applications expeditiously, the Director must be able to set response periods for correcting deficiencies that will expire prior to any final amendment deadlines that may be established. Accordingly, the regulations leave to the discretion of the Director the determination of the time periods in which to correct deficiencies.[222]

As suggested by some of the commenters,[223] the Commission is adding a new paragraph (3) to § 16.9(d) to require the Director, in cases where two or more mutually exclusive applications for a site are filed, to establish the same final amendment deadline for all such applications. This provision also requires the Director, in cases where two or more mutually exclusive applications for a site are filed, to establish the same deadlines for filing better adapted statements. For the reasons just discussed, the Commission will not require the establishment of identical deadlines for other processing steps.[224]

3. Forfeiture

As indicated previously, redesignated § 16.9(b)(2) provides that applications for license will be processed in accordance with § 4.32 of the Commission's regulations, while proposed § 16.9(b)(5) (redesignated § 16.9(b)(4) by this final rule) provides that, if the Commission rejects or dismisses an application pursuant to § 4.32, the application may not be refiled if the filing deadline for an application for a new license has expired. As a result of these two sections, if the Director rejects or dismisses an application filed before the 24-month filing deadline because it is patently deficient,[225] or because the applicant fails to correct deficiencies [226] or respond to an additional information request [227] in a timely manner, the applicant cannot refile its application if the 24-month filing deadline for the project has passed.

PG&E objects to the operation of these provisions, contending that they could result in the forfeiture of an existing licensee's project "for mere pleading discrepancies." According to PG&E, the guiding principle behind ECPA was Congress' intention to protect existing licensees and their customers from the risk of project loss for reasons not based on the overall public interest. PG&E contends that the operation of these sections would allow the Commission to dismiss for "pleading problems" a relicense application "duly" filed "in good faith" by an existing licensee prior to the only application deadline established by ECPA, and thus would be inconsistent with Congress' intent in enacting ECPA.[228] It therefore requests that § 16.9(b) be revised to specify that any application rejected or dismissed pursuant to § 4.32 could be refiled if the deficiencies or other problems that led to the rejection or dismissal are corrected within a reasonable period of time, as established in the order or letter rejecting or dismissing the application.

PG&E's arguments are not totally unpersuasive. The Commission appreciates the concern about potential forfeiture in the event of a mere pleading discrepancy of a technical nature. The Commission also acknowledges that one of the goals of ECPA was to avoid disruptions to the customers of existing licensees as a result of license transfers unless there was a good public interest reason to do so. However, ECPA and its legislative history clearly show that Congress also intended for the Commission to fully and carefully consider all developmental and non-developmental values, particularly fish and wildlife, in considering relicense applications, and for state and Federal resource agencies to play a major role in the process. Furthermore, the requirement in FPA section 15(c)(1) for a notice establishing expeditious relicensing proceedings indicates Congress' intent that relicensing proceedings not be delayed.

The Commission believes that the primary way the Commission can ensure that these goals of ECPA are met is to apply to applications that are rejected or dismissed, the same § 4.32 processing procedures it uses in all competitive cases when a competition deadline has passed.[229] The possibility

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[218] Seattle Light and New York Electric suggest that the period for filing final amendments be extended to 12 months prior to the expiration date of the license. Friends of the Earth and Rochester Gas suggest that extensions of the final amendment deadline be permitted in appropriate cases.

[219] Proposed § 16.9(b)(2), which contained transition provisions regarding the prohibition on the filing of applications prior to 30 months, is being deleted.

[220] The NOPR (*see* preamble at 9) also requested comments on procedures that would apply if the Commission did not review an application within the 90-day period. Since the 90-day limit is being removed, the comments filed in response to this request have been rendered moot.

[221] See 18 CFR 4.36(d)(2) (1988).

[222] 18 CFR 4.32(e)(1) (1988) provides that applicants for license shall have up to 90 days in which to correct deficiencies in their applications. In order to provide the Director with flexibility in determining deficiency response periods, the Commission is revising redesignated § 16.9(b)(2) to specify that if appropriate, the Director may provide more than 90 days in which to correct deficiencies.

[223] *See, e.g.*, the comments of EEI and PG&E.

[224] The reference in § 16.9(d)(2) to "processing deadlines established under § 4.32" encompasses such things as the date by which the Director will determine if an application is deficient and the dates established for the correction of deficiencies and the submittal of additional information.

[225] *See* 18 CFR 4.32(e)(2)(i) (1988).

[226] *See* 18 CFR 4.32(e)(1)(iii) (1988).

[227] *See* 18 CFR 4.32(g) (1988).

[228] PG&E's comments at 4 and 11.

[229] Under § 4.32(e), if a license application is refiled after being rejected for being patently deficient or because the applicant failed to timely respond to a request to correct deficiencies, the date the application is refiled will be considered as the filing date of the original application. *See* 18 CFR 4.32(e)(2)(iii) (1988). However, if this new filing date is later than the deadline for filing competing development applications established in the public notice issued for a first-filed application, the amended application will be rejected. *See id.* and 18 CFR 4.36(b) (1988).

that an applicant will not be able to refile its application if it is rejected will help ensure: (1) That applicants will include in their applications the environmental and other information the Commission needs to fulfill its obligations under the FPA as amended by ECPA; (2) that applicants adequately consult with state and Federal resource agencies as envisioned by ECPA; and (3) that applicants do not delay the relicensing proceedings by failing to timely correct deficiencies and respond to additional information requests.

No forfeiture of existing licensees' projects will occur as a result of the operation of these provisions if, in PG&E's words, existing licensees file and pursue their applications "in good faith" by filing applications that are not so devoid of the information required by the Commission's regulations as to be patently deficient, and by fully responding to requests to correct deficiencies or supply additional information within the time periods specified in the deficiency or additional information letters. The other revisions being made to § 16.9 will ensure that the time periods for applicants' responses will not be unreasonable. For example, and as indicated previously, § 16.9(b)(2) is being revised to specify that the Director may provide more than 90 days in which to correct deficiencies in applications. Thus, in appropriate cases, the Director may provide more than 90 days to correct deficiencies either in his initial deficiency letters or in response to requests for extensions of time to comply with deficiency correction requests. Finally, the Commission also notes that applicants will have the right to appeal any rejection or dismissal to the Commission, which, if granted, would result in the reinstatement of the application with its original filing date.

4. Material Amendments

As indicated previously, proposed § 16.9(b)(4) (redesignated § 16.9(b)(3) by this final rule) provides that the Commission's material amendment regulation (§ 4.35) will not apply to applications filed under § 16.9, except that the Commission will reissue public notice of the application pursuant to § 16.9(d)(1). The Department of Commerce requests an explanation of the provision, stating that it sees no reason why § 4.35 should not apply to relicensing proceedings in the same manner as it applies to original licensing proceedings.

Under § 4.35, when amendments to applications that are considered as "material" [230] are filed, the filing date of the initial application is deemed to be the date the material amendment is filed for a variety of purposes, including the determination of whether the initial application was timely filed vis-a-vis competition deadlines.[231] On its face, § 4.35 applies to relicensing proceedings.[232] However, application of § 4.35 to relicensing proceedings would mean that an application for new license timely filed by an applicant prior to the 24-month new license filing deadline would be rejected if the applicant were to file a material amendment to the application after the 24-month deadline, even if the amendment were filed prior to the final amendment deadline established for the proceeding.

The Commission believes it is appropriate to waive § 4.35 as to relicensing proceedings to avoid this situation. The provision in section 15(c)(1) for the submittal of final amendments is not specifically limited to minor amendments. In addition, the legislative history of ECPA does not indicate that Congress intended the final amendment process to be limited to minor or non-material amendments. Rather, it indicates that the final amendment provision was intended to allow an applicant to address and resolve any problems or inadequacies in its application,[233] and to revise its application in any way it felt necessary to make its application superior to a competitor's.[234] Thus, the Commission believes it would be appropriate to retain § 16.9(b)(4) (redesignated as § 16.9(b)(3) by this final rule) as proposed in the NOPR, so as to not limit applicants' ability to revise their applications during the final amendment period. However, and as proposed in the NOPR, the § 16.9(d)(1) notice will be reissued to obtain the views of the public and others should an amendment considered material under § 4.35(f) be filed.[235]

5. Miscellaneous

The Michigan Department suggests that § 16.9 be revised to clarify what consultation procedures will be used by applicants for new and nonpower license. However, this is unnecessary, since § 16.8 specifically applies to applicants for "a new license, a nonpower license, an exemption from licensing, or a surrender of a project."

A number of commenters [236] suggest that § 16.9 be revised to state that the Commission will provide copies of Commission deficiency letters to all consulted resource agencies. Although the Commission's normal practice has been to specify in deficiency letters that applicants are required to provide resource agencies with copies of the deficiency letter when the deficiency letter requires consultation with those agencies, the Commission believes it would be appropriate to codify this requirement in the regulations. Accordingly, the Commission is revising § 16.8(d)(2) (which requires applicants to serve on consulted agencies, *inter alia*, all responses to Commission deficiency letters and additional information requests) to require applicants to serve on the agencies the Commission correspondence requesting such information.[237]

Finally, the Department of Commerce requests that the Commission consult with resource agencies at the time an application is filed regarding whether the application is deficient, in cases where the application does not contain the studies or information requested by the agencies during stage-one consultation. Under the Department's proposal, if Commission staff determined that the studies or data were unnecessary, it would provide the resource agencies with a detailed written explanation of its determination, which could then be appealed to the Commission by the agencies.

The Commission declines to adopt the Department of Commerce's suggestions. First, the authority to determine an application's conformity with the Commission's requirements resides with

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[230] *See* 18 CFR 4.35(f) (1988).

[231] *See* 18 CFR 4.35 (a) and (c)(1) (1988).

[232] *See* Niagara Mohawk Power Corporation and Fourth Branch Associates, 46 FERC ¶ 61,159 (1989).

[233] *See, e.g.*, H.R. Rep. No. 99-507, 99th Cong., 2nd Sess. 36 (1986):

It is expected that applicants will submit an initial application to be followed by a brief period of review with the Commission, the fish and wildlife agencies, and others to discuss problems and inadequacies. The Commission can then allow the applicant a brief time to amend the application to resolve these matters. Once the final amendments are filed, the applicant is bound by them.

[234] *See* Rep. Moorhead's explanation, during House floor consideration of the House bill that eventually became ECPA and where the section 15(c)(1) final amendment provision originated, of why the House bill was clarifying that a municipality's unilateral right to amend its application to make it equally well adapted as a competitor's pursuant to section 7(a) of the FPA (right of last amendment) would not apply at relicensing:

The right of last amendment was eliminated to ensure that each applicant will have the opportunity to prove its superiority without prejudice or favor.

132 Cong. Rec. H2001 [April 21, 1986].

[235] The reissuance of public notice is consistent with what is required under § 4.35 when a material amendment is filed. *See* 18 CFR 4.35(c)(3) (1988).

[236] *See e.g.*, the comments of the Department of Commerce, the New York Department, Washington Fisheries, and Washington Wildlife.

[237] *See* new § 16.8(d)(2)(iii).

the Commission, not the resource agencies. Second, since applicants will be required by § 16.8 to include in their applications descriptions of any disagreements with resource agencies and any correspondence from the agencies, the Commission will have sufficient information to determine whether an applicant has complied with the consultation requirements of § 16.8. Third, and as discussed in Part IV.H.3.C., *supra*, the failure of an applicant to conduct certain necessary studies prior to filing its application will not be considered a deficiency. Finally, and also as discussed previously,[238] the Commission does not believe it would be appropriate to preapprove interlocutory appeals to the Commission regarding studies.

K. Standards and Factors for Relicensing

ECPA amended section 15 of the FPA by adding a new paragraph (a)(2), setting out a number of specific factors the Commission must consider, and, in the case of competing applications, must compare in evaluating applications for new license. In addition, ECPA added a new paragraph (a)(3) to section 15 of the FPA requiring the Commission, in the case of an existing licensee, to also take into consideration the existing licensee's record of compliance with the terms and conditions of the existing license,[239] and the actions taken by the existing licensee which affect the public.[240] Finally, Congress specified that a new license shall be issued to the applicant that has the final proposal determined by the Commission to be best adapted to serve the public interest. Insignificant differences between competing applications with regard to the specific factors set out above are not to be determinative or result in the transfer of a project.[241]

In the NOPR, the Commission proposed to add a new § 16.13 to the regulations to codify its obligation to consider the above-referenced specific factors. Paragraph (a) of the section [242] was intended to cover the factors set out in section 15(a)(2)(A)–(G) of the FPA. Paragraph (b) [243] was intended to cover the factors set out in section 15(a)(3) of the FPA, and to establish the test the Commission would use in choosing between the applications of an existing licensee and of a competitor when there were only insignificant differences between the competing applications. Specifically, proposed § 16.13(b) provided as follows:

> (b) If there are only insignificant differences between the final applications of an existing licensee and a competing applicant after consideration of the factors enumerated in paragraph (a), the Commission will base its decision on the existing licensee's record of compliance with the terms and conditions of the existing license.

Finally, the Commission discussed in the preamble to the NOPR the type of items it would examine in evaluating the specific factors of section 15(a) (2) and (3), and solicited suggestions on what other factors it might take into account.[244]

1. Consistency With Statute.

A number of commenters [245] contend that the provisions of proposed § 16.13 misstate the provisions of the statute. They request that § 16.13 be revised either to track the statutory language exactly or to state merely that the Commission will consider the factors enumerated in section 15(a) (2) and (3) in evaluating applications for new license. These commenters also contend that proposed § 16.13(b) and the related discussion in the preamble[246] misstate the provisions of section 15(a)(3) by incorrectly merging into one "compliance" factor the requirement of section 15(a)(3)(A) to consider an existing licensee's record of compliance with the terms and conditions of its existing license, and the requirement of section 15(a)(3)(B) to consider the existing licensee's actions that affect the public. Finally, some commenters[247] contend that proposed § 16.13(b) would incorrectly limit the Commission's review of the items specified in section 15(a)(3) to cases where a non-existing licensee applicant is competing with an existing licensee and there are only insignificant differences between the proposals. They argue that review of the section 15(a)(3) factors must occur in all cases where an existing licensee has filed an application for new license, and not just in cases where there is competition or only insignificant differences between the proposals.

The Commission agrees that the text of § 16.13(a) as proposed in the NOPR misstates the provisions of the statute. For example, proposed § 16.13(a)(1), while accurately reflecting the requirements of section 15(a)(2)(A)(i) of the FPA, omits the reference of section 15(a)(2)(A)(ii) to the plans and abilities of an applicant to comply with other applicable provisions of Part I of the FPA.[248] Accordingly, the Commission is revising § 16.13(a) to state that when the Commission makes its determination regarding whether a proposal is best adapted to serve the public interest, it will consider the factors enumerated in section 15(a)(2) of the FPA and, as discussed next, the factors enumerated in section 15(a)(3) of the FPA.

The Commission also agrees that the text of proposed § 16.13(b) should be revised. The purpose of the paragraph was to codify the test that ECPA and its legislative history [249] indicate should be used when there are only insignificant differences between an application submitted by an existing licensee and an application submitted by another entity: the positive and negative aspects of the existing licensee's track record as defined in section 15(a)(3) (A) and (B) of the FPA. The language of proposed § 16.13(b) was not intended either to merge the section 15(a)(3)(B) and section 15(a)(3)(A) factors or to indicate that the Commission would not consider the existing licensee's actions related to the project that affect the public, as specified by section 15(a)(3)(B). The Commission fully intends to comply with its obligation to consider both of the factors enumerated in section 15(a)(3) of the FPA.

Proposed § 16.13(b) also was not intended to imply that the Commission would not consider an existing licensee's track record pursuant to section 15(a)(3) unless there were an applicant competing against an existing licensee and then only when there were

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[238] *See* Part IV.H.2.e., *supra*.

[239] Section 15(a)(3)(A) of the FPA, 16 U.S.C. 808(a)(3)(A) (1982 and Supp. 1988).

[240] Section 15(a)(3)(B) of the FPA, 16 U.S.C. 808(a)(3)(B) (1982 and Supp. 1988).

[241] Section 15(a)(2) of the FPA, 16 U.S.C. 808(a)(2) (1982 and Supp. 1988).

[242] Proposed § 16.13(a).

[243] Proposed § 16.13(b).

[244] *See* NOPR preamble at 19–32.

[245] *See, e.g.*, the comments of Alabama Power, EEI, Northern California Agency, Niagara Mohawk, PG&E, Southern California Edison, and Washington Power.

[246] *See* NOPR preamble at 20.

[247] *See, e.g.*, the comments of American Rivers, the Northern California Agency, and Niagara Mohawk.

[248] EEI also contends that proposed § 16.13(a) incorrectly omitted any reference to section 15(a)(2)(G)'s catch-all provision ("such other factors as the Commission may deem relevant"). However, proposed § 16.13(a)(7) stated that the Commission would consider "the provisions of section 10 of the Federal Power Act." Since section 10(a)(1) of the FPA requires the Commission to evaluate all relevant public interest considerations (See Udall v. FPC, 387 U.S. 428 (1967)), the reference to section 10 of the FPA in § 16.13(a)(7) would have allowed the Commission to consider any factor it deemed relevant to a particular relicensing proceeding. American Rivers also objects to the use of the FPA section 10 reference, contending that it would not encompass all matters that may be relevant in a relicensing proceeding. However, as just mentioned, section 10(a)(1) of the FPA encompasses any and all relevant public interest considerations.

[249] *See* 132 Cong. Rec. H8950 (Oct. 2, 1986) (colloquy between Rep. Markey and Rep. Moorhead during House floor consideration of the ECPA Conference Report).

insignificant differences between the proposals. The obligation to consider an existing licensee's track record applies even if there are no competing applications. Also, examination of an existing licensee's track record must occur even when significant differences exist between competing proposals. As suggested by the Northern California Agency's comments, an existing licensee's dismal track record could lead the Commission to award a new license to a competitor despite the fact that the existing licensee's proposal was clearly superior to the competitor's.[250] However, since the existing licensee's track record will be the dispositive factor in cases of insignificant differences under all other applicable factors between the proposals of an existing licensee and a competitor, the analysis required by section 15(a)(3) (A) and (B) will be the last one undertaken.

The Commission is revising § 16.13(b) to clarify its intentions regarding the evaluation and timing of existing licensees' track records as expressed above.[251] However, the Commission declines the suggestion advanced by some of the commenters[252] to define what it will consider as being "insignificant differences" between proposals. ECPA and its legislative history provide no guidance for interpreting this phrase. Consequently, the Commission believes that this provision must be developed on a case-by-case basis.[253]

2. Codification of Factors

As indicated previously, the NOPR preamble discussed the type of items the Commission would examine in evaluating the specific factors of section 15(a) (2) and (3). Some of the commenters[254] suggest that the list of examples in the preamble is too restrictive. Other commenters[255] suggest that some or all of the examples discussed in the preamble be incorporated into the text of § 16.13 to provide potential applicants with more guidance regarding the items the Commission will be considering so that applicants will be better able to determine what information should be provided to the Commission. Still others[256] suggest that the Commission's development of the items it will consider under the section 15(a) (2) and (3) factors be on a case-by-case basis. They suggest that compilation at this time of any "exclusive" list, either in § 16.13 itself or in the preamble, could limit the consideration of potentially relevant factors whose relevance may not become apparent until the Commission examines particular cases in the future. Finally, some commenters[257] urge the Commission to clarify that not all of the examples or factors may be relevant in every case.

The discussion in the NOPR of the type of items the Commission will be examining in carrying out its relicensing obligations was not intended to create an exclusive list of all relevant relicensing considerations under section 15(a) (2) and (3) of the FPA. There may be items not referenced in the preamble that may be relevant in a particular case. Conversely, some of the referenced items or even some of the specific factors of the statute may not be of any particular significance in an individual case. The Commission will evaluate any factor or item that may be significant to a particular proceeding, and will consider any arguments advanced by applicants, competitors, resource agencies, interveners or others regarding the appropriateness of evaluating a factor. Accordingly, the Commission declines to develop a list of items and will address such matters on a case-by-case basis.

3. Section 15(a)(2)(A) of the Federal Power Act

Section 15(a)(2)(A)[258] of the FPA requires the Commission to consider the "plans and abilities of the applicant to comply with (i) the articles, terms, and conditions of any license issued to it and (ii) with other applicable provisions of [Part I of the FPA]." In the NOPR, the Commission indicated that the Commission would consider such matters as the plans of an applicant to finance a project, an applicant's personnel, facilities and accomplishments, and whether an applicant has personnel adequate in number and training to construct any additional project works and to operate and maintain the project in a competent manner.[259]

American Paper suggests that the Commission either further explain what is meant by the word "accomplishments," or delete the reference. It argues that the term is so broad as to be meaningless and can be confused with the track record examination required by section 15(a)(3) of the FPA. American Paper also states that the Commission should be aware of the fact that applicants and licensees frequently hire outside contractors to perform activities related to a hydroelectric project.

New York Electric requests that the Commission clarify that it will be considering an applicant's staff or staffing plan, rather than its personnel. It argues that the use of the word "personnel" implies that the Commission will be examining the qualifications of particular persons, which may change over time. Public Pool and others suggest that the Commission determine whether an applicant's personnel are adequate in number, training and experience to operate and maintain the project.

Long Lake indicates that some non-utility applicants are unable to enter into power sales contracts until their licenses are issued. Therefore, it suggests that the Commission only inquire into whether applicants are capable of arranging financing. Also, it suggests that the Commission not compare which of the competing applicants is more capable of arranging financing. Finally, the Northern California Agency suggests that the Commission inquire into an existing licensee's past difficulties in complying with the terms of a previous license in

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[250] *See* H.R. Rep. No. 99-934, 99th Cong. 2nd Sess. 26 (1986):

With regard to [FPA section 15(a)(2)'s statement regarding insignificant differences], the Commission is expected to review the existing licensee's past record of compliance with the existing license terms and conditions and actions related to the project that have affected the public. Both the positive and negative aspects of a licensee's operating history are to be considered. A dismal track record weighs heavily against awarding a new license to an existing licensee just as a good track record should result in the existing licensee being favored.

[251] As discussed in Part IV.M., *infra*, the Commission is deleting proposed § 16.13(c).

[252] *See, e.g.*, the comments of American Paper, Montana Natural Resources, and Small Business Administration. The Department of Commerce requests that the Commission explain how it will define insignificant differences.

[253] Niagara Mohawk contends that the language of ECPA does not support the conclusion that an existing licensee's track record shall be the sole test for choosing among applicants in cases of insignificant differences. However, as indicated previously, the legislative history of ECPA clearly provides for this.

The Department of Commerce contends that energy alternatives and other environmental issues should not be considered insignificant differences. However, this position is directly contrary to the language of section 15(a)(2), which states that insignificant differences between any of the factors enumerated in section 15(a)(2) (A)–(G) shall not be determinative. Energy alternatives are considered under section 15(a)(2)(D), while environmental issues are considered under section 15(a)(2)(G). Of course, as discussed in Part IV.K., *infra*, the plans of an applicant concerning fish and wildlife are not subject to comparative evaluation.

[254] *See, e.g.*, the comments of American Rivers.

[255] American Paper, American Rivers, Southern California Edison and Wisconsin Department.

[256] EEI, Idaho Power and Northern California Agency.

[257] American Paper and Long Lake.

[258] 16 U.S.C. 808(a)(2)(A) (1982 and Supp. 1988).

[259] *See* NOPR preamble at 21–22.

determining the existing licensee's ability to comply with a future license.

The use of the word "accomplishments" in the NOPR was not intended to superimpose on to the section 15(a)(2)(A) analysis, the track record examination required under section 15(a)(3). Rather, it was intended to encompass such matters as whether an applicant has past experience in hydroelectric matters and, in the case of applicants that have never built or operated a hydroelectric project, whether they have managed endeavors of a similar nature.

With regard to the comments of the Northern California Agency, the Commission will not examine an existing licensee's compliance record under section 15(a)(2)(A). This will be examined under section 15(a)(3). Examining that record in the context of section 15(a)(2)(A) would result in double consideration of compliance factors. However, the Commission may under section 15(a)(2)(A) inquire into the reasons behind an existing licensee's past compliance problems to help evaluate whether the existing licensee has corrected the situation and thus is able to comply with the terms and conditions of a new license and other provisions of Part I of the FPA.

As to the inquiry into personnel, the Commission does not intend to examine the qualifications of individuals. Rather, it intends to consider whether applicants' and/or their contractors' overall staffing plans, including numbers of personnel and training programs, are adequate.

Finally, the Commission recognizes that the ability of some applicants to secure financing depends on the issuance of a license. Consequently, the Commission will consider an applicant's ability to secure financing on the assumption that a license will be issued. Also, while the Commission will not compare competing applicants' financing plans under section 15(a)(2)(A), any differences in those plans may be relevant to the inquiry into cost-effectiveness under section 15(a)(2)(F) of the FPA.

4. Section 15(a)(2)(B) of the Federal Power Act

Section 15(a)(2)(B) of the FPA [260] requires the Commission to inquire into the "plans of the applicant to manage, operate, and maintain the project safely." In the NOPR, the Commission stated that it would consider under this section an existing licensee's past safety record with regard to the project.[261]

American Paper suggests that an existing licensee's past safety record be evaluated only under section 15(a)(3), not under section 15(a)(2)(B). For the reasons discussed previously in relation to section 15(a)(2)(A), the Commission will examine an existing licensee's safety record to the extent it involves compliance matters only under section 15(a)(3). However, as explained in the discussion under section 15(a)(2)(A), the reasons behind past compliance problems can be considered under section 15(a)(2)(B) to evaluate whether an existing licensee has corrected the situation and thus is able to fulfill its future plans to safely manage, operate and maintain the project. Also, certain aspects of an existing licensee's past safety record, such as the number of injuries to personnel, are not specifically addressed by Commission order or regulations, and thus are not properly included under the compliance evaluation of section 15(a)(3). Consequently, these items will be considered under section 15(a)(2)(B).[262]

5. Section 15(a)(2)(C) of the Federal Power Act

Section 15(a)(2)(C) of the FPA [263] requires the Commission to consider the "plans and abilities of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service." The Commission stated in the NOPR that under this provision it might consider an applicant's plans to coordinate the operation of its project with other projects on the same watercourse in order to maximize generation and to improve overall efficiency.[264]

American Paper contends that examination of the coordination element should be subject to a separate examination under section 15(a)(2)(G) of the FPA. Long Lake suggests that the Commission consider the applicants' past willingness to coordinate the operation of its project with other existing projects in order to maximize generation and improve overall efficiency.

The Commission believes that examination of future coordination plans can properly occur under section 15(a)(2)(C). As to past actions in this regard, they are to be evaluated pursuant to section 15(a)(3) of the FPA.[265]

6. Section 15(a)(2)(D) of the Federal Power Act

Section 15(a)(2)(D) of the FPA [266] requires the Commission to consider the "need of the applicant over the short and long term for the electricity generated by the project or projects to serve its customers," taking into consideration a variety of factors specified in section 15(a)(2)(D). The Commission's consideration of the need factor and the various components of that analysis were discussed in detail in the NOPR.[267]

Mid-Columbia, Douglas County PUD, Grant County PUD and Public Pool contend that the NOPR did not adequately address the situation where an entity currently receiving power from an existing project pursuant to a contract with the existing licensee that extends beyond the term of the existing licensee's license[268] files an application for new license for the existing project in competition with the existing licensee. They argue that the Commission must recognize the contractual obligation of the existing licensee to provide power to this other entity and, therefore, must consider as part of its analysis of the existing licensee's need for the power, the need of the existing licensee for project power to fulfill its contractual obligation to serve this wholesale customer.

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[260] 16 U.S.C. 808(a)(2)(B) (1982 and Supp. 1988).

[261] *See* NOPR preamble at 23.

[262] The Department of Commerce states that applicants' safety plans should include emergency plans to deal with such matters as pipeline ruptures and slope failures. Commerce also states that, when a risk of dam failure or breach exists, an applicant should provide a plan for permanently rehabilitating the structure instead of being allowed to utilize an intensive maintenance plan.

If an applicant's proposal could potentially cause damage to environmental resources through pipeline ruptures or slope failures, the applicant should address, and the Commission will consider, this potential and any measures proposed by the applicant to deal with such problems. Also, an applicant must evaluate whether a risk of dam failure or breach exists and, if so, evaluate the extent of the risk and describe in detail the measures it proposes to deal with the problem and any associated impacts on life, property and environmental resources. The Commission will evaluate the problem and any proposed solutions and determine the appropriate measures that should be undertaken at the project site.

[263] 16 U.S.C. 808(a)(2)(C) (1982 and Supp. 1988).

[264] *See* NOPR preamble at 23.

[265] *See* Part IV.K.9., *infra*.

[266] 16 U.S.C. 808(a)(2)(D) (1982 and Supp. 1988). This provision also contains a number of detailed elements the Commission must evaluate as part of its analysis of project need.

[267] *See* NOPR preamble at 24–28.

[268] Pursuant to section 22 of the FPA, 16 U.S.C. 815 (1982), contracts to furnish power beyond the termination date of a license must be approved by the Commission and the state public service commission, and, if a new license is not issued to the original licensee upon expiration of the existing license, the new licensee shall assume and fulfill such contracts.

The Commission recognizes that the legislative history of ECPA clearly requires the Commission to consider an applicant's need for power to serve its wholesale customers in cases where an applicant may not be able to directly use all of the power from a project.[269] Consequently, the Commission will consider wholesale power needs when appropriate.

The Commission rejects the commenters' suggestion that it consider as part of the existing licensee's demand need for the power produced by the existing project, the power being supplied to a wholesale customer who is competing with the existing licensee for a new license for the project. First, adopting the commenters' argument would create a truly illusory "need" and upset the need analysis required by section 15(a)(2)(D) of the FPA. Second, the legislative history of ECPA directly addresses this issue and clearly indicates that in this situation the existing licensee is not to include the wholesale customer in its projections of demand.[270] Of course, the cost implications and other impacts on the existing licensee's customers and served communities that would occur in transferring the project to the former wholesale customer would have to be evaluated as part of the broad analysis under section 15(a)(2)(D). Also, the fact that the wholesale customer has a contractual right to receive a portion of the project power for some period of time following expiration of the existing license must be evaluated as part of the analysis of the wholesale customer's overall need for the project.

[269] *See* H.R. Rep. No. 99-934, 99th Cong., 2nd Sess. 27 (1986):

In many cases, applicants may not be able to directly use all of the power from the project. This will not disqualify an applicant. The conference agreement is not intended to alter current law which permits need to be based, in part, upon sales of power in excess of the applicant's direct consumption. This would, of course, have to take into account the benefits to those purchasing the power, such as a reduction in rates, and would have to be tempered by common sense and our intent that licenses ought to be given to applicants who, among other things, actually need the projects.

[270] *See* H.R. Rep. No. 99-934, 99th Cong., 2nd Sess. 27 (1986), in the paragraph that immediately precedes the one set out in the previous note:

Customers are to be defined broadly, and are to include both existing and future customers. In a case where an existing licensee is in competition for the project with one of its customers, the existing licensee is not to be permitted to include that customer in its demand projections to the extent that the customer will no longer be served by the existing licensee. Similarly, where an existing licensee is in competition with an independent power producer, the Commission must recognize the possibility that the small power producer may sell the electricity from the project back to the existing licensee.

New York Electric states that the Commission should recognize that, in the case of investor-owned utilities seeking relicensing of their own projects, the alternative source of power that the applicant is most likely to use to replace power under the license is power produced by the same project operated by others at a significantly increased cost to the utilities' ratepayers. The Northern California Agency argues that the needs analysis is not to be a headcounting test with the larger applicant prevailing, and that the needs analysis should be developed in the context of specific proceedings. Finally, the Department of Commerce argues that if there is no short-term need for project power, then project development should be cancelled, not postponed, and the alternatives analysis should be expanded to include a process for eliminating environmentally damaging alternatives.

The Department of Commerce's statement regarding cancellation (and presumably removal) of existing projects in the absence of short-term need is contrary to the requirement of section 15(a)(2)(D) to consider both short- and long-term need. It is also inconsistent with the legislative history of ECPA that indicates that short-term power surpluses should not be the sole basis upon which to base the needs analysis.[271] And it ignores the significant environmental consequences associated with removal and then reconstruction of existing hydroelectric facilities. In considering the feasibility of alternatives, the Commission will be looking at their potential impacts on the environment. Finally, the Commission recognizes the possibility raised by New York Electric, and acknowledges that the legislative history of ECPA clearly indicates that the analysis of need is not to be a headcounting test with the larger applicant prevailing.[272]

7. Section 15(a)(2)(F) of the Federal Power Act [273]

Section 15(a)(2)(F) of the FPA [274] requires the Commission to consider whether the "plans of the applicant will be achieved, to the greatest extent possible, in a cost effective manner." In the NOPR, the Commission stated that the legislative history of ECPA indicates that this provision was intended to discourage the "gold-plating" of applications by applicants attempting to propose the "best" plans, regardless of cost.[275]

American Paper suggests that the Commission reserve the right to dismiss applications that are obviously gold-plated. New York Electric suggests that the Commission make clear that cost effectiveness will not be the primary basis of comparing projects, since differences in benefit/cost ratios might reflect such things as different levels of reliability, with a more reliable plant having a lower benefit/cost ratio due to redundancy and greater quality.

The Commission does not believe it has the authority to dismiss "gold-plated" applications without fully completing the required relicensing analysis. However, a clearly gold-plated application will lose to a comparable cost-effective proposal submitted by a competitor. Also, the Commission is aware of the reliability and quality factors referenced by New York Electric and will consider such matters in examining cost-effectiveness.

8. Section 15(a)(2)(G) of the Federal Power Act

a. Comparative Analysis of Fish and Wildlife Matters. Section 15(a)(2)(G) of the FPA [276] gives the Commission the authority during the relicensing process to consider "such other factors as it may deem relevant." In discussing this provision in the NOPR, the Commission indicated that the plans of applicants concerning fish and wildlife will not be subject to comparative evaluation. Citing to section 10(j) of the FPA, the Commission stated that it will establish fish and wildlife conditions specific to each project proposal pursuant to section 10 of the FPA. The Commission also stated that in cases where applicants propose different general schemes of development for the same project, it will determine whether the protection, mitigation and enhancement measures of each proposal are adequate under the circumstances of that proposal, and will specify final conditions concerning fish and wildlife in the issued license.[277]

A number of the commenters, including International Association, Wildlife Federation, and Trout Unlimited, object to the Commission's statement that applicants' plans covering fish and wildlife shall not be subject to comparative evaluation.

[271] *See, e.g.*, 132 Cong. Rec. S15383-84 (Oct. 6, 1986) (statement by Senator McClure).

[272] *See, e.g.*, 132 Cong. Rec. H8951 (Oct. 2, 1986) (colloquy between Reps. Markey, Moorhead and Swift).

[273] No significant comments were made regarding the requirements of section 15(a)(2)(E) of the FPA, 16 U.S.C. § 808(a)(2)(E) (1982 and Supp. 1988).

[274] 16 U.S.C. 808(a)(2)(F) (1982 and Supp. 1988).

[275] *See* NOPR preamble at 29.

[276] 16 U.S.C. 808(a)(2)(G) (1982 and Supp. 1988).

[277] *See* NOPR preamble at 31-32.

However, as pointed out in the NOPR and by EEI and others in their reply comments, section 15(a)(2)(G) specifically prohibits the comparative evaluation of applicants' fish and wildlife plans.[278] Consequently, the Commission cannot undertake the comparative analysis requested by these commenters.[279]

Washington Wildlife suggests that the Commission revise the regulations to include the criteria it will use to establish fish and wildlife conditions. The Department of Commerce also recommends specific standards. It suggests that the Commission specify that it will look first at each proposal's plans and capabilities for protection and mitigation and then look at the proposal's potential for enhancement and compensation. According to Commerce, the overriding principle should be that adverse impacts from past and future actions must be fully addressed through protection and mitigation and that enhancement must be provided where such opportunities exist. Finally, although not entirely clear on this point, Commerce appears to argue that it would be inappropriate to evaluate the benefits and costs of protection and mitigation measures incrementally, and that such measures must be evaluated in the context of total costs and revenues, presumably over the entire life of the project.

The Commission is unable to specify precise criteria that it will use in establishing fish and wildlife conditions. The development of such measures will be on a case-by-case basis, pursuant to section 10 of the FPA and the provisions of section 10(j) regarding adequate and equitable protection, mitigation and enhancement measures and consistency with the purposes and requirements of Part I of the FPA. The Commission may evaluate whether enhancement of fish and wildlife resources, which may constitute a reduction of the negative impacts attributable to a project since its construction, would be appropriate. But, as explained previously,[280] the evaluation and consideration of the appropriateness of requiring fish and wildlife measures is to be in the context of today's environment, and in relation to today's needs and problems. Thus, contrary to Commerce's position, there is no set requirement that all past damage to fish and wildlife caused by a project must be "mitigated" in a relicensing proceeding.

In addition, while the Commission agrees that adequate fish and wildlife measures are a cost of doing business, it finds without merit Commerce's apparent argument that the cost of fish and wildlife measures proposed at relicensing can only be considered in the context of total costs and revenues over the life of a project. Such an approach would sanction the adoption of any fish and wildlife measure, no matter how expensive, as long as the costs of the fish and wildlife measure were less expensive than the total of the net revenues of the project over the term of the previous license and the expected net revenues of the project over the term of the new license. Once again, this type of approach ignores the fact that fish and wildlife measures at relicensing must be considered in the context of today's costs, needs and problems.[281]

b. Antitrust. In the NOPR, the Commission stated that it will consider the antitrust provision of section 10(h) of the FPA[282] during relicensing but that applications would not be subject to a comparative evaluation on that issue. The NOPR cited the ECPA Conference Report in support of this position.[283]

The Northern California Agency objects to the Commission's statement, contending that it was impermissible to rely on the Conference Report language to override the clear language of the statute which requires the Commission to consider all of the requirements of section 10 of the FPA, including section 10(h).

The Commission believes that the statute clearly does not contain a requirement for comparative evaluation of applications on section 10(h) grounds. Moreover, the conferees' statement makes clear the intent of Congress that the Commission not subject applications to comparative evaluation on antitrust matters. Furthermore, section 10(h) itself does not require comparative evaluation of antitrust matters at relicensing. Paragraph (2) of section 10(h), which was added by ECPA, only requires the Commission: (1) To include in issued licenses, conditions to prevent or adequately minimize any unjustified contravention of the policies expressed in the antitrust laws; and (2) to refuse to issue a new license to an existing licensee if it is impossible to prevent or adequately minimize the contravention. Thus, although antitrust matters will not be subject to comparative evaluation, the proposal of an existing licensee found superior to a competitor's as a result of the comparative analysis required by section 15(a) (2) and (3) will have to be reviewed pursuant to section 10(h) as is the current practice of the Commission.

c. Requirements of Section 10. As indicated previously, section 15(a)(2) of the FPA requires the Commission to consider the requirements of section 10 of the FPA in evaluating applications for new license under section 15(a). As discussed in the NOPR,[284] this requires consideration of all section 10 procedures and requirements.

Specifically, these requirements include the mandate of section 10(a)(1) that a project adopted shall be "best adapted to a comprehensive plan for improving or developing" the waterway after consideration of all beneficial public uses. Section 10(a)(1), in turn, requires the Commission to consider all purposes referred to in section 4(e) of the FPA. Section 4(e) requires the Commission to give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including relating spawning ground and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality, in addition to the power and development purposes for which a license is issued.[285]

Section 10(a)(2)(A), as amended by ECPA, also requires that the Commission consider the extent to which the project is consistent with a comprehensive plan (where one exists)

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[278] Section 15(a)(2)(G) of the FPA provides as follows:

(G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources affected by the development, operation, and management of the project shall be determined in accordance with section 10, and the plans of an applicant concerning fish and wildlife shall not be subject to a comparative evaluation under this subsection.

[279] Northern California Agency states that § 16.13 as proposed in the NOPR would compel comparative evaluation of applicants' fish and wildlife plans. However, the Commission believes that its revision of § 16.13 to reference the statute will clearly show that comparative evaluation is prohibited.

[280] *See* Part IV.H.3.b., *supra.*

[281] The Departments of Commerce and the Interior, Wildlife Federation and other commenters suggest that the Commission explain in the regulations how the FPA sections 10(j) and 18 processes will be integrated into the relicensing process. However, as explained elsewhere herein, these issues will be addressed in a separate rulemaking proceeding.

[282] 16 U.S.C. 803(h) (1982 and Supp. 1988).

[283] *See* H.R. Rep. No. 99-934, 99th Cong., 2nd Sess. 26 (1986):

However, the conferees agreed that the protection, mitigation and enhancement of fish and wildlife resources proposed by an applicant, and the requirements of section 10(h) are not to serve as part of the basis for the comparative evaluation of competing applications under section 15.

[284] *See* NOPR preamble at 16–19.

[285] As indicated in Part IV.K.8.a., *supra*, fish and wildlife matters are not subject to comparative evaluation.

for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by: (1) An agency established pursuant to Federal law that has the authority to prepare such a plan; or (2) the State in which the facility is or will be located.

Section 10(a)(2)(B) requires the Commission to consider the recommendations of Federal and state agencies exercising administration over flood control, navigation, irrigation, recreation, cultural, and other relevant resources of the state in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project. Section 10(a)(3) requires the Commission to solicit recommendations from those agencies and Indian tribes for proposed terms and conditions to be considered by the Commission for inclusion in the license.

Section 10(a)(2)(C) requires the Commission to consider the electricity consumption efficiency improvement program of the applicant, including its plans, performance, and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant state regulatory authorities applicable to such applicant. Finally, and as discussed previously,[286] the Commission is required to consider antitrust matters pursuant to section 10(h).

The Commission must consider the above requirements of section 10 of the FPA in relicensing proceedings; it has no discretion in this regard. Furthermore, to the extent any of these requirements have significance as factors for the comparative evaluation of applications, the Commission must enumerate its consideration of them under section 15(a)(2)(G).[287]

9. Section 15(a)(3) of the Federal Power Act

As discussed previously,[288] the Commission is revising § 16.13 to track precisely the language of section 15(a)(3)(A) and (B). This will clarify that both an existing licensee's record of compliance with the terms and conditions of the existing license under section 15(a)(3)(A), and the actions taken by an existing licensee which affect the public under section 15(a)(3)(B), will be considered by the Commission.

In discussing the provisions of section 15(a)(3) in the NOPR, the Commission cited a number of examples of the types of matters that will be examined under section 15(a)(3). These examples include an existing licensee's: (1) Compliance with the Commission's general policies on recreational use of project facilities; (2) cooperation with appropriate resource agencies to reduce the project's detrimental impact on fish, wildlife and other resources; (3) setting aside of land adjacent to the project for future environmental purposes; and (4) willingness to adopt measures ensuring the safety of the public. The Commission requested comments on these and other criteria that it should consider under section 15(a)(3).[289]

A number of commenters question the examples listed in the NOPR, stating that they either are incorrectly classified as compliance matters under section 15(a)(3)(A) when they should instead be considered under section 15(a)(3)(B), or may not be relevant in all cases. For example, EEI and others [290] point out that prior to 1963,[291] the Commission did not require applicants to include recreational development plans in their applications and that the Commission did not develop its formal recreational policies until 1965.[292] These commenters also state that the Commission specifically indicated that these recreational requirements and policies were not to apply to existing licenses. They therefore contend that an existing licensee not subject to these recreational provisions should not be penalized under the compliance factor of section 15(a)(3)(A) for failing to comply with these provisions. Furthermore, they contend that, if an existing licensee voluntarily implements some of these recreational provisions, this positive action should be considered in favor of an existing licensee pursuant to section 15(a)(3)(B) of the FPA.

Similar concerns are raised by EEI, Idaho Power and American Paper regarding the setting aside of land. They point out that, unless specifically required by a license provision, the failure of an existing licensee to set aside land is not a compliance factor under section 15(a)(3)(A), and that any voluntary setting aside of land by an existing licensee should be considered as a positive factor under section 15(a)(3)(B). American Paper also cautions that, in reviewing the extent of an existing licensee's cooperation with resource agencies to voluntarily lessen environmental impacts, the Commission must consider the reasonableness of any agency requests.

These comments accurately reflect the type of analysis the Commission will undertake pursuant to section 15(a)(3). Unless specifically required by the terms and conditions of an existing license, an existing licensee's actions regarding recreational development and the setting aside of land will be considered in the context of section 15(a)(3)(B), not section 15(a)(3)(A), of the FPA. Furthermore, all analysis under section 15(a)(3)(B) will have to take into account all relevant factors, including the ability of an existing licensee to engage in such matters.

Thus, in cases where such recreational development at the site would have been impracticable or impossible, the failure of an existing licensee to voluntarily provide for recreational development when not required by its license will not be weighed against the licensee under section 15(b)(3)(B). Conversely, where an existing licensee voluntarily provides for such development, that action will be weighed in favor of the licensee under section 15(b)(3)(B).

American Rivers suggests that the Commission clarify that section 15(a)(3)(A) of the FPA requires consideration of an existing licensee's compliance with all terms and conditions of the existing license. Seattle Light suggests that the Commission articulate in the regulations the specific compliance and public interest matters the Commission will consider. EPA suggests that a licensee's cooperation with resource agencies in lessening a project's detrimental impacts on water quality and wetlands be considered under section 15(a)(3). American Paper states that the existing licensee's willingness to quickly correct safety problems and its maintenance of project works should be considered.

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[286] *See* Part IV.K.8.b., *supra*.

[287] *See* H.R. Rep. No. 99-934, 99th Cong., 2nd Sess. 26 (1986):

Criteria in both bills that were duplicative of section 10 were dropped because the conference agreement modifies section 15 to make clear that requirements of section 10 apply and are considered in relicensing proceedings under section 15. For example, in relicensing proceedings, the Commission may evaluate the section 10 criterion concerning the applicant's plans for the improvement and utilization of the power development potential of the waterway. To the extent that elements of section 10 serve as factors for the comparative evaluation of applications, the Commission shall enumerate its consideration of those factors under section 15(a)(2)(G).

[288] *See* Part IV.K.1., *supra*.

[289] *See* NOPR preamble at 20.

[290] *See, e.g.*, the comments of Alabama Power.

[291] *See* 29 F.P.C. 777 (1963) and 33 F.P.C. 32 (1965).

[292] *See* 34 F.P.C. 1546 (1965).

The Wisconsin Department suggests that the extent of public participation afforded by the licensee, the quality of the licensee's data and submittals, and the lack of controversy on study and mitigation recommendations should be considered. New York Electric suggests that an existing licensee's unit availability record and productivity be evaluated. Finally, Wildlife Federation suggests that the Commission consider, in the context of section 15(a)(2)(G) of the FPA, an existing licensee's record of compliance with the licenses it holds.

The Commission will evaluate an existing licensee's compliance with all provisions of its license. This includes all provisions of Part I of the FPA incorporated into the license and regulatory provisions generally applicable to all licensees, such as the Commission's regulations regarding dam safety.[293] However, as discussed previously,[294] the Commission does not believe it is appropriate or possible to incorporate into regulatory language all factors that will be considered under section 15(a)(3) (A) and (B) or section 15(a)(2).

Congress has provided an express directive in section 15(a)(3)(A) to consider an existing licensee's record of compliance "with the terms and conditions of *the* existing license" (emphasis added). Thus, the Commission does not believe it would be consistent with the intent of ECPA to examine, in the context of either section 15(a)(2)(G) or section 15(a)(3)(A), the existing licensee's record of compliance with all other licenses it holds.

With regard to the suggestions of EPA, American Paper, and New York Electric, those matters will be considered if relevant under section 15(a)(3) (A) or (B), depending on the specific requirements and provisions of the existing license. As to the Wisconsin Department's suggestion regarding analysis of public participation, this might be a factor that could be considered under section 15(a)(3)(B). However, the other two items referenced by the Wisconsin Department appear to be inappropriate for examination under section 15(a)(3), since they pertain to matters related to the filing of an application for new license, not to matters related to an existing licensee's conduct.

In a related matter, the Northern California Agency argues that the Commission should treat as a negative factor in its section 15(a)(3)(B) evaluation, an existing licensee's past assertion of rights under section 6 of the FPA to block a superior use of a nearby project's water supplies. The Commission declines to adopt this suggestion. An existing licensee should not be penalized for legitimately relying on the section 6 prohibition against unilateral alteration of licenses, to protect its ability to operate its project in the manner allowed and required by the existing license. Thus, an existing licensee's reliance on FPA section 6 will not be considered as a negative factor under the section 15(a)(3)(B) evaluation. In summary, while an existing licensee's compliance with specific obligations or responsibilities under its license will be examined under section 15(a)(3), its exercise of legitimate rights provided by the license or the FPA will not.

L. Information Required of Applicants

In the NOPR, the Commission proposed to require applicants for new license to submit certain information not currently required by the regulations.[295] The Commission needs that information to conduct its evaluations under sections 15(a) (2) and (3) of the FPA, meet the information requirement of section 15(b)(4) of the FPA,[296] and carry out its obligations under section 10(a) (1) and (2) of the FPA. These requirements, proposed to be codified in § 16.10, were divided into three parts: (1) information to be supplied by all applicants (proposed § 16.10(a)); (2) information to be supplied by an applicant who is an existing licensee (proposed § 16.10(b)); and (3) information to be supplied by an applicant who is not an existing licensee (proposed § 16.10(c)).

1. Procedures and Format

EEI, Great Northern and others state that § 16.10 is unclear on when and how the information required under the section is to be provided to the Commission. Great Northern suggests that the Commission specify that the § 16.10 information be included at a single place in the license application. EEI suggests that the Commission specify that the information required by § 16.10 be included in a separate document filed with the Commission on the date the corresponding license application is filed. EEI also recommends that applicants be provided with the option of circulating the information required by the section to resource agencies for review and comment prior to filing the information with the Commission.

The Commission believes that the information required by § 16.10 should be incorporated at a single place in the license application, and that resource agencies should be provided with an opportunity to review and comment on this information in reviewing draft applications submitted to them pursuant to § 16.8(c)(4). Incorporation of this information into license applications will facilitate Commission processing and consideration of applications, and will provide resource agencies with additional time to fully evaluate and comment on the information required by § 16.10. Also, the information on costs and impacts to the applicant's customers required by § 16.10 may assist resource agencies in formulating recommended terms and conditions that strike a reasonable balance between the protection, mitigation and enhancement of environmental resources and the needs of an applicant and its customers. Accordingly, the Commission is adding a new paragraph § 16.10(e) that specifies that the § 16.10 information is to be included in the license application as a separate exhibit labeled "Exhibit H."

EEI, National Hydropower, PG&E and Washington Power suggest that § 16.10 be revised to specify that the information to be provided only has to be "commensurate with the scope of the project." They contend that this revision is necessary to address the fact that not all of the specific items of information may be relevant for all projects, particularly small ones. Wisconsin Power raises similar concerns regarding the relevance of all of the specific information items to minor projects.

The Commission declines to adopt the suggestion made by these commenters. The "commensurate with the scope of the project" language could be interpreted by some potential applicants as excusing them from having to address all of the items of information required by § 16.10. All of the items must be discussed by applicants. However, the Commission recognizes that not all of the items may be particularly relevant to an individual project. Consequently, if a potential applicant does not believe a particular item is relevant to its project, it can explain why in addressing the item. Also, the level of detail that must be provided will vary according to the size of the project and the circumstances of each case.[297]

EEI states that some of its members are part of integrated electric systems that conduct resource studies on a

[293] *See* 18 CFR Part 12 (1988).

[294] *See* Part IV.K.2., *supra*.

[295] *See* 18 CFR 4.41, 4.51 and 4.61 (1988).

[296] 16 U.S.C. 808(b)(4) (1982 and Supp. 1988).

[297] Washington Power and Wisconsin Power also request that holders of minor licenses not subject to sections 14 and 15 of the FPA not be required to provide the § 16.10 information. This request is discussed in Part IV.P., *infra*.

system-wide or regional basis. Therefore, EEI suggests that § 16.10 be revised to permit applicants that are part of an integrated system to submit the load, cost and other resource data required by § 16.10 on a system-wide basis. American Paper and Friends of the Earth suggest that it would be helpful to applicants to segregate the § 16.10 information items into separate sections corresponding to the section 15(a) (2) and (3) provisions to which the information items pertain.

The Commission does not believe it is necessary to make the revision suggested by EEI. Nothing in § 16.10 prohibits applicants from submitting the information in the format suggested by EEI, as long as the information is sufficiently detailed to enable the Commission to evaluate the information item in the context of the individual project proposal. The Commission declines to segregate the § 16.10 information, as requested by American Paper and Friends of the Earth, since some of the information items may be relevant to more than one provision of section 15(a) (2) or (3) or other provisions of the FPA.[298]

2. Specific Information Requests

As discussed previously,[299] in evaluating an applicant's need for a project the Commission is required to consider the need of an applicant for project power to serve wholesale customers. Accordingly, and as requested by some of the commenters,[300] the Commission is revising appropriate provisions of § 16.10 to specifically reference wholesale customers.[301]

The Commission is also revising proposed § 16.10(b)(7) to substitute the phrase "a discussion of any actions taken by the existing licensee related to the project which affect the public" for the phrase "a summary of any acquisition of land or land rights associated with the project." This change, which was requested by some of the commenters,[302] is consistent with the previous discussion regarding the scope of section 15(a)(3)(B) of the FPA.[303]

As indicated previously,[304] the Commission will be examining applicants' general staffing plans as part of the analysis it will undertake pursuant to section 15(a)(2)(A) of the FPA. The Commission is amending proposed § 16.10(a)(9) to require the submittal of more specific information in this regard.[305]

A number of commenters [306] suggest that § 16.10 be revised to require applicants to discuss the environmental effects of their proposals and/or the matters addressed during the consultation process with resource agencies. These suggested changes are unnecessary. The Commission's regulations governing the content of the Environmental Reports that are to be included in applications,[307] which govern applications for new license, and the provisions of § 16.8 requiring the documentation of resource agency consultation, will ensure that this information will be provided.

The Department of Commerce and the EPA suggest that § 16.10 be revised to require applicants, when discussing alternative sources of power and the impacts on them and their customers of relying on alternative sources of power should an applicant not receive a license for the project, to also discuss the environmental impacts of such alternatives. The Commission agrees that the environmental impacts of alternatives will have to be considered in evaluating applications for new license. However, the Commission believes that it would be more appropriate to have the collection of such information addressed in the post-filing phase of application processing, through additional information requests. This will permit the Commission to ascertain the specific information gaps that need addressing, and to limit the information demands to those alternatives that it believes are most reasonable.

The Department of Commerce suggests that proposed § 16.10(a)(11), which requires applicants to provide a statement regarding the consistency of their proposals with state and Federal comprehensive plans described in section 10(a)(2)(A) of the FPA, be revised to more accurately track the language of section 10(a)(2)(A). Commerce also suggests that proposed § 16.10(a)(8) be revised to more accurately track the comprehensive development language of section 10(a)(1) of the FPA.

The Commission is deleting proposed § 16.10(a)(11), since it is unnecessary in light of the provisions of § 16.8(f)(6). The Commission is, however, revising proposed § 16.10(a) (7) and (8) to more accurately reflect the provisions of section 10(a)(1) of the FPA.

In a related matter, Washington Ecology requests that applicants discussing the conformity of their projects with a comprehensive plan for improving or developing the waterway, be required to conduct studies and collect data regarding all competing uses of the water to be used by their projects. The Commission declines to adopt this suggestion, since it would place an impossible burden on applicants. The Commission's regulations governing the content of Environmental Reports for applications already require applicants to generally discuss project impacts on reasonable competing uses of the waterway. The Commission believes that the obligation to supply specific data and conduct studies regarding competing uses of the waterway rests with the resource agencies that are responsible for overseeing these other uses. Thus, if a resource agency believes that a proposed project would conflict with another use of the waterway, it can present its position to the Commission and submit any studies or data regarding the other use of the waterway it believes support its position.

Finally, Wildlife Federation, Friends of the Earth and the Department of Commerce suggest that the provisions of § 16.10 pertaining to the submittal of information on conservation be modified to ensure that all applicants will adequately address and consider conservation as an alternative. The Commission does not believe any changes in this regard are necessary, since § 16.10(a)(3)(ii)(A) and (C), and redesignated (a)(11), clearly require that the conservation alternative be addressed. The Commission fully intends to consider conservation and other load management measures in evaluating applications for relicense.[308]

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[298] American Rivers states that the regulations are ambiguous as to whether applicants for nonpower licenses must provide the information specified in § 16.10 and suggest that the regulations need to be clarified on this point. The Commission does not believe any revision is necessary, since § 16.10 is limited to applicants for "new license," which, under the definitions of § 16.2, would not include applications for nonpower license. Applications for nonpower license must include the information specified in § 16.11, not § 16.10.

[299] *See* Part IV.K.6., *supra*.

[300] *See, e.g.*, the comments of Public Pool and Mid-Columbia.

[301] *See* § 16.10(a)(2)(i) and (iii)(A).

[302] *See, e.g.*, the comments of EEI and PG&E.

[303] *See* Part IV.K.9., *supra*.

[304] *See* Part IV.K.3., *supra*.

[305] This revision was suggested by several commenters, including Public Pool.

[306] *See, e.g.*, Trout Unlimited, Michigan Department, Montana Fish and Wildlife, and Washington Wildlife.

[307] *See, e.g.*, 18 CFR 4.51(f) (1988).

[308] Rochester Gas suggests that § 16.10(a)(10) be revised to require applicants proposing to expand project lands to show that the expansion is necessary and economically justifiable. This change is unnecessary, since these issues will have to be addressed in filed license applications pursuant to

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M. Joint Applicants

In the NOPR, the Commission stated that it generally should not consider an existing licensee to be an existing licensee for purposes of section 15 of the FPA and the Commission's relicensing regulations if the licensee files an application for a new license in conjunction with another entity or entities that are not current licensees of the project.[309] Accordingly, the Commission indicated in § 16.13(c) that such joint applicants would not be considered existing licensees. However, the Commission also solicited comments on whether there were circumstances under which an existing licensee should retain that status in applying for a new license if it has joined with other venturers in its application.[310]

A number of commenters [311] agree with the Commission's proposed approach, contending that it is consistent with the Commission's policy regarding the non-availability of municipal preference to hybrid applicants.[312] Some contend that in no case should joint applicants be considered an existing licensee, while others contend that existing licensee status should be afforded to joint applicants only if the new entity to be added will have no operating responsibilities.

The majority of the commenters, however, oppose the Commission's proposed policy.[313] They contend that the joinder of new entities with existing licensees may be financially beneficial to the customers of the existing licensees; such joinder may permit the use of lower cost financing techniques that would not be available to the existing licensees alone. They therefore argue that it would be contrary to the public interest to deprive existing licensees of the ability to reduce the costs of redevelopment to their customers through the use of these financing techniques. Consequently, they request that the Commission either reverse its position or at least defer a decision on this issue and make such determinations on a case-by-case basis, applying relevant policy considerations to the particular facts presented.[314]

Clearly, one of the purposes of the insignificant differences provision of section 15(a)(2) is to avoid the disruptions and economic dislocations that an existing licensee's customers would suffer in the event of a license transfer, unless there is a strong public interest reason for a transfer. Consequently, and as pointed out by the commenters in opposition to § 16.13(c), as long as the customers of an existing licensee would not be adversely affected financially or in terms of power availability, relicense applications filed jointly by existing licensees and new entities would not cause disruptions and economic dislocations. However, and as discussed below, the Commission does not believe the possibility that existing customers may not be adversely affected in some cases justifies the elimination of § 16.13(c).

First, adoption of the proposition that joint applicants should be considered existing licensees would have to be premised upon the situation described above: no adverse financial or power availability impacts to the customers of the existing licensee. Consequently, the Commission would be required to examine these two factual issues on a case-by-case basis following the filing of a joint development application. This in turn would require the Commission to ascertain such things as the appropriate past and future customer base, and financing terms and rates, for alternative development scenarios (one with the new entity and the existing licensee, one with only the existing licensee). In addition to being time- and resource-consuming, this case-by-case analysis would not provide the bright-line test existing licensees and potential competitors need in order to responsibly weigh their development options.

Second, while Congress was concerned about economic dislocations and disruptions that might be suffered by the customers of an existing licensee, there is no indication in the legislative history of ECPA that Congress contemplated, let alone sanctioned, the wholesale selling of portions of existing licensees' projects and future revenue streams to third parties heretofore unrelated to the existing licensee. Indeed, Congress' reference in section 15(a)(3) to the track record of *the* existing licensee, and its intent that the track record be used to determine which applicant should receive a new license in the case of insignificant differences, indicates that Congress intended for the indirect benefits of the insignificant differences provision of section 15(a)(2) to flow only to the exact entity that was the current existing licensee of the project.

Finally, not considering a joint application as one filed by an existing licensee will not significantly impair the existing licensee's ability to enter into financing arrangements with third parties that may ultimately benefit the customers of the existing licensee. As the Commission has held previously, financial arrangements between licensees and non-licensees

are permissible, provided licensees maintain in such arrangements sufficient ownership and control of a project to enable the Commission, through its licensee, to carry out its regulatory responsibilities with respect to that project. Any non-licensee who for financing or other purposes owns or controls rights necessary for the operation of the projects must also be made a co-licensee.

See City of New Martinsville, West Virginia, 32 FERC ¶61,261 at 61,636 (1985).[315] The above-mentioned standard regarding when financiers and other entities must be added as co-applicants will be fully applicable to relicense proceedings. Thus, as long as

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the Commission's regulations regarding the content of applications (18 CFR 4.41, 4.51, 4.61 (1988)).

Rochester Gas also questions the reference to 18 CFR § 4.35 (1988) in proposed § 16.10(a)(13)(i)(B). The purpose of this provision was to make clear that applicants must obtain new water quality certification under section 401(a)(1) of the Clean Water Act if they materially change their proposals after filing their license applications with the Commission. The general applicability of 18 CFR § 4.35 (1988) to relicensing proceedings is discussed in Part IV. j.4., *supra*. In order to eliminate confusion, the Commission is merging the water quality certification provisions of proposed § 16.10(a)(13) with the related provisions in proposed § 16.8(f)(3) (redesignated § 16.8(f)(7) by this final rule). The Commission also notes that the obligation of applicants for new license to obtain water quality certification (or waiver) for their proposals will generally be met in the case of an existing licensee where any pre-existing water quality certification for its project would be applicable to the proposal for which it seeks to obtain a new license.

[309] *See* NOPR preamble at 5.

[310] *See* NOPR preamble at 6.

[311] *See, e.g.*, the comments of American Rivers, the Department of Commerce, Long Lake, Grant County PUD, Wildlife Federation, and New York Electric.

[312] *See* City of Fayetteville Public Works Commission, 16 FERC ¶ 61,209 (1981) (Fayetteville), where the Commission determined that municipal and non-municipal applicants filing joint applications for original license, referred to as "hybrid applicants," are not entitled to municipal preference under section 7(a) of the FPA.

[313] *See, e.g.*, the comments of Alabama Power, EEI, Georgia Power, National Hydropower, Niagara Mohawk, Fourth Branch, PG&E, Wisconsin Department and Washington Power. The Small Business Administration states that it supports the Commission's proposed policy, but that the Commission should not prevent joint applicants when the added party's only role will be to provide necessary financing for improvements.

[314] The Warm Springs Tribe suggests that § 16.13(c) be revised so that an existing licensee that files a relicense application for a complete project in conjunction with an entity that is an existing licensee for only part of the same project be considered an existing licensee for purposes of section 15 of the FPA.

[315] *See* El Dorado Irrigation District and El Dorado Water Agency, 29 FERC ¶61,375 (1984); Linweave, Inc. 23 FERC ¶61,391 (1983); and New York State Electric & Gas Corp., 23 FERC ¶61,034 (1983), for examples of financing and ownership arrangements that do not require joinder of the financier as a co-applicant or co-licensee.

the existing licensee will retain sufficient ownership and control, a third party financier will not have to be added to an existing licensee's application for new license and the existing licensee will not be jeopardizing its status as an existing licensee under section 15(a)(2).

In light of the above, the Commission is retaining paragraph (c) in § 16.13, with slight revisions to accommodate the unique situation raised by the Warm Springs Tribe,[316] and to clarify the effect of the section. An existing licensee filing an application for new license in conjunction with a new entity will not have the status of an existing licensee for the purpose of the insignificant differences provision of section 15(a)(2). In all other respects, an existing licensee filing in conjunction with a new entity must follow the same procedures and will have its application processed in the same manner as an existing licensee filing individually.[317]

Finally, the Northern California Agency expresses concern that an existing licensee might add a co-applicant in order to avoid consideration of an existing licensee's poor track record in complying with the terms and conditions of its existing license. However, since examination of an existing licensee's track record is a relevant consideration under section 10 of the FPA, and since section 10 is applicable to relicensing proceedings, the Commission will fully consider an existing licensee's track record in every case where an existing licensee chooses to file a relicense application in conjunction with a new entity, even though the joint entity will not be considered an existing licensee for purposes of the insignificant differences provision of section 15(a)(2).[318]

N. Annual Licenses

Section 15(a)(1) of the FPA provides that

> [i]n the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the Commission *shall* issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid. [Emphasis added.]

In the NOPR, the Commission proposed in § 16.18 to codify in regulatory language the annual licensing provisions of section 15(a)(1), and to specify the circumstances where an annual license would be issued.[319] In addition, the Commission proposed to codify its long standing practice of considering annual licenses automatically renewed without further order of the Commission if processing of relicense and other applications, and takeover proceedings, are not completed prior to expiration of the current annual license.[320]

A number of commenters object to the automatic renewal provision of § 16.18(c). American Rivers contends that the provision should be revised to prevent the issuance of an unlimited number of annual licenses until action is taken on any pending applications. It contends that the legislative history of ECPA indicates that Congress did not intend to allow the Commission to use annual licenses to delay the changes that will be implemented as part of a new license. Friends of the Earth suggests that § 16.18(c) be deleted and replaced with a provision stating that each annual license will include a schedule for completing studies during the term of the annual license, and a projected date by which the Commission intends to complete action on pending applications.

Wildlife Federation also objects to the automatic renewal provisions of § 16.18(c), contending that this will permit existing licensees to delay relicensing proceedings for years. It suggests that the initial annual license include a schedule for completion of the relicensing proceeding, and that the Commission be required to issue each subsequent annual license. Also, Wildlife Federation suggests that the Commission revise § 16.18 to specify that, if the existing license contains reopener provisions, the Commission will use its authority under such reopener provisions to impose new terms and conditions on the annual license.

The Department of Commerce makes similar suggestions, although it suggests that the Commission specify that it has the authority to impose new terms and conditions for the protection of fish and wildlife resources in every case if necessary. The Northern California Agency suggests that in cases involving competition, and if the relicensing process has not been completed within three years from the expiration date of the existing license, the existing licensee should be required to pay a competing applicant a total of one-half the net value of holding the license during the post-expiration period. Finally, Washington Wildlife suggests that the section be revised to specify that the Commission will require fish and wildlife mitigation measures to be undertaken during the annual license.

The Commission declines to make any of these suggested revisions. As the Commission explained in the *Central Nebraska Public Power and Irrigation District (Central Nebraska)* case,[321] the provision of section 15(a)(1) of the FPA regarding the issuance of annual licenses "under the terms and conditions of the existing license" until the relicensing or takeover proceeding is completed, is mandatory. The issuance of an annual license is a ministerial and non-discretionary act. Thus, although the Commission is cognizant of ECPA's mandate of expedition, the Commission is required to issue annual licenses under the exact terms and conditions of the existing license [322] and has no authority to impose additional terms and conditions regarding schedules, deadlines or payment requirements.

Furthermore, unless the terms and conditions of the existing license reserve to the Commission the authority to impose on the existing licensee, and therefore in the annual license, additional appropriate conditions for the protection of fish, wildlife or other resources, the Commission has no authority to impose on annual licenses

[316] *See* discussion, *supra*.

[317] Long lake is concerned that not treating joint applicants as existing licensees may interfere with the Commission's ability to issue annual licenses to the existing licensee pursuant to section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1) (1982 and Supp. 1988). The Commission's authority to issue annual licenses would not be affected by not treating joint applicants as existing licensees, since the Commission would in such situations issue an annual license to the holder of the existing license.

[318] Wildlife Federation suggests that the Commission promulgate a regulation requiring heightened scrutiny of license transfer applications and forbidding license transfers during the last five years of an existing license. Wildlife Federation contends that this is necessary to prevent third parties from buying out existing licensees merely to obtain an advantage in relicensing. The Commission declines to adopt a prohibition against transfers during the last five years of a license, since there are legitimate public interest purposes served by such transfers. However, the Commission will scrutinize all such transfer requests to determine if the transfer's primary purpose is to gain an advantage at relicensing, such as when a transfer is intended to escape consideration of a poor compliance record. The Commission may deny a transfer request in such a situation or take other appropriate action, such as imputing the transferor's poor compliance record to the transferee in considering the transferee's application for relicense.

[319] Proposed § 16.18(b).

[320] Proposed § 16.18(c).

[321] 39 FERC ¶ 61,378 (1987), *reh'g denied*, 43 FERC ¶ 61,225 (1988), *appeal pending sub nom.* Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, No. 88-1425 (D.C. Cir. filed June 15, 1988).

[322] As suggested by Washington Wildlife, the Commission is revising § 16.18(b) to clarify that the annual license will be under the terms and conditions of the existing license.

additional conditions for the protection of these resources. However, even when the Commission has reserved authority to do so, it cannot impose additional conditions for the protection of these resources unless those additional conditions are based on substantial evidence.[323] In most cases annual licenses will be used to provide the Commission with sufficient time to analyze and resolve factual issues regarding what conditions should be imposed in a new license. Therefore, it is doubtful that the Commission in many cases will have available to it prior to the completion of the relicensing proceeding the substantial evidence needed to support the imposition of additional terms and conditions in an annual license.[324]

The fact that the Commission has no discretionary authority with regard to annual licenses does not mean, however, that the Commission will not be able to prevent existing licensees from delaying relicensing proceedings. As discussed previously,[325] the Commission will be establishing deadlines pursuant to §§ 16.9(b) and 4.32 of the Commission's regulations for the submittal of additional information and correction of application deficiencies. Existing licensees and other applicants that attempt to delay the proceedings by delaying their responses to deficiency correction and additional information requests could have their applications dismissed. Thus, all applicants will have a strong incentive *not* to delay the proceedings through untimely and incomplete responses to Commission information requests. Furthermore, the final amendment deadlines the Commission will be issuing as required by section 15(c)(1) of the FPA will help ensure that the relicensing process is not unduly delayed.

The Commission also notes that delay in the issuance of new licenses may not be the fault of the applicants. Resource agencies may not formulate recommended terms and conditions for licenses early in the application consideration process or may have to provide the Commission with additional data to substantiate their positions. Also, resource agencies may request applicants to provide additional information and may need additional time to resolve issues that were not identified by them and resolved during § 16.8 consultation.

O. Nonpower Licenses

Section 15(f) of the FPA[326] provides the Commission with the authority to issue licenses for nonpower use upon the expiration of an existing power license. Pursuant to section 15(f), nonpower licenses are only temporary licenses which the Commission will terminate whenever it determines that a state, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision over the lands and facilities covered by the nonpower license. Finally, pursuant to section 14(a) of the FPA, nonpower licensees must pay the existing licensee its net investment in its project and reasonable severance damages.[327]

In the NOPR, the Commission proposed provisions regarding the filing and processing of applications for nonpower license, the termination of a nonpower application proceeding, and the duration of nonpower licenses. Specifically, proposed § 16.11(a) would require nonpower applicants to include in their applications, *inter alia*: (1) The information required by § 4.51 or § 4.61 of the Commission's regulations;[328] (2) a description of the proposed nonpower use; (3) a showing of how the nonpower use conforms with a comprehensive plan for the waterway as defined in section l0(a)(1) of the FPA; and, (4) a statement identifying the state, municipal, interstate, or Federal agency authorized and willing to assume regulatory supervision over the lands, waterways, and facilities to be included within the nonpower project.

Proposed § 16.11(b) would allow the Commission to terminate a nonpower application proceeding in cases where the existing project is located on United States lands, and the Federal agency with jurisdiction over the land is able and willing to accept immediate responsibility for the nonpower use. Finally, proposed § 16.11(c) would allow the nonpower license to remain in effect until either the pertinent agency assumes regulatory control over the lands and facilities, or the project structures are removed and the land is restored pursuant to a plan approved by the Commission.

American Rivers objects to the provision of § 16.11(a) requiring identification of the agency authorized and willing to assume regulatory supervision over the project. It contends that identification of the regulatory agency at the application stage is inconsistent with FPA section 15(f), since that section only requires identification of the agency at the point when termination of the nonpower license will occur. American Rivers also objects to § 16.11(b), arguing that it would allow the Federal land management agency to take over a project subject to a nonpower licensing proceeding regardless of the amount of time and effort the nonpower applicant has invested in the proceeding. It recommends that the provision be revised to require the land management agency to provide notice of its intent to exercise its rights under the provision at least 24 months prior to license expiration. Finally, American Rivers requests clarification regarding § 16.11(c), arguing that its provision allowing removal of project structures and restoration of lands by the nonpower licensee conflicts with the requirement in § 16.11(a) that a regulatory agency be identified in all cases.[329]

The purpose of section 15(f) of the FPA is to permit the operation of projects for nonpower purposes under Commission supervision for short periods until an agency with regulatory authority over the site is willing to assume responsibility over the lands and facilities included in the nonpower license. This is why section 15(f) specifically provides that a nonpower license is to be "a temporary license." Thus, the Commission will issue a nonpower license when it is reasonably assured that such an agency will be able to assume regulatory control of the project lands and facilities in the near future. The Commission, therefore, must know at the time it is considering an application for nonpower license whether an authorized agency will be willing to assume these responsibilities. Consequently, and contrary to American Rivers' contentions, the requirement in § 16.11(a) that applicants for nonpower

[323] *See* section 313(b) of the FPA, 16 U.S.C. 8251 (1982).

[324] The Wisconsin Department suggests that the section be revised to specify that annual licenses can be issued to allow applicants time to complete additional necessary prelicensing studies. This revision is unnecessary, since a purpose of the annual licensing provision is to allow the Commission to complete the relicensing process, which would include the gathering of necessary study materials and data.

[325] *See* Parts IV.J.2. and 3., *supra*.

[326] 15 U.S.C. 808(f) (1982 and Supp. 1988).

[327] 16 U.S.C. 807(a) (1982).

[328] The Michigan Department and Trout Unlimited suggest that § 16.11 be revised to require nonpower applicants to provide certain environmental information about their proposals. The revision is unnecessary because §§ 4.51 and 4.61 of the Commission's regulations require that this information be provided.

[329] American Rivers also requests clarification of the reference in § 16.11(a)(vii) to § 16.8(d)(2). The purpose of this provision is to ensure that nonpower applicants have provided all agencies which are authorized to assume regulatory supervision over the site with copies of their applications for nonpower license, as specified in § 16.8(d)(2).

licenses identify the agency that is authorized and willing to assume regulatory responsibility over the site is entirely consistent with the provisions of section 15(f) of the FPA.

As pointed out by American Rivers, the provisions of § 16.11(c)(2) allowing nonpower licensees to terminate their licenses by removing project structures and restoring the land are inconsistent with the requirement of § 16.11(a) for identification of a responsible agency. There would be no need to identify such an agency if a nonpower licensee could terminate its license by removal without such an agency assuming regulatory control. The Commission believes that section 15(f) provides for termination of nonpower licenses only when an authorized agency is to assume regulatory responsibility over the site. Therefore, the Commission is revising § 16.11(c) to eliminate the provision allowing nonpower licensees to remove project structures and restore project lands.

The Commission does not believe it is necessary to revise § 16.11(b), as suggested by American Rivers. The purpose of § 16.11(b) was to avoid the necessity of issuing a nonpower license in cases where the project is located on Federal lands, and the relevant Federal land management agency is willing to immediately assume regulatory responsibility for the nonpower use. While this procedure may result in an applicant's devoting resources to prepare an application for a nonpower license but not receiving a nonpower license, the same result could occur in cases where the Commission denies an application for a nonpower license. Furthermore, in order to fulfill the requirement of § 16.11(a) to identify the agency that will eventually be assuming regulatory responsibility over the site, potential nonpower applicants will have to consult with the Federal land management agency early in the application preparation process. Thus, such applicants will be aware of the agency's willingness to assume responsibility and the time at which the agency would be willing to do so. Consequently, such applicants will have advance notice of the Federal agency's intentions.

In a related matter, Brazos contends that the Commission should revise § 16.11(b) to exclude municipal applicants for nonpower license from its coverage. Brazos contends that municipalities should not be subject to having their property transferred to a Federal agency. No revision to this section is necessary to protect municipalities' ownership rights. Section 16.11(b) only pertains to the transfer from the Commission to the Federal land management agency of regulatory responsibility over the site. It does not affect entities' property rights in project facilities.[330]

P. Minor and Minor Part Licenses not Subject to Sections 14 and 15 of the Federal Power Act

As discussed previously,[331] the Commission's longstanding practice has been to waive sections 14 and 15 and other applicable provisions of the FPA when it issues minor and minor part licenses.[332] Consequently, numerous licenses are not statutorily covered by the substantive and procedural provisions of section 15 of the FPA as amended by ECPA.

In order to clarify the procedures it would use in processing and considering applications for subsequent license for projects covered by expiring minor and minor part licenses where sections 14 and 15 had been waived, the Commission proposed in the NOPR to add a new Subpart E to its relicensing regulations. In summary, the provisions of Subpart E would: (1) Require existing licensees of such projects to file notices of intent and make information available in accordance with sections 15(b) (1) and (2), respectively, of the FPA;[333] (2) require applicants for subsequent license to follow the consultation requirements of § 16.8;[334] (3) require applicants for subsequent license to file their applications at least 24 months prior to the expiration of the existing licenses, in accordance with section 15(c)(1) of the FPA;[335] and (4) require applicants for subsequent license to include in their applications the information specified in § 16.10.[336]

The NOPR also proposed that applications for subsequent license be subject to the same general processing provisions as applications for new license for projects subject to sections 14 and 15 of the FPA.[337] However, since section 15 of the FPA is not applicable to these projects, the Commission indicated that the licensing proceeding for a project with an expiring minor or minor part license where sections 14 and 15 have been waived would be an original licensing proceeding under section 4(e) of the FPA.[338] Thus, the provision of section 15(a)(2) of the FPA that insignificant differences between competing proposals will not result in a transfer of a project would not be applicable to applications for subsequent license. Instead, the Commission would use the standard of section 10(a)(1) of the FPA and the rules of preference applicable to original licensing proceedings,[339] including the preference afforded to municipalities under section 7(a) of the FPA, to choose between competing applicants for subsequent license.[340]

1. Procedures and Standards

The majority of the commenters[341] object to the Commission's proposals in the NOPR to subject holders of minor and minor part licenses where sections 14 and 15 of the FPA have been waived, and applicants for subsequent license for these projects, to the procedural and information requirements applicable to projects subject to section 15. They state that it would be inequitable to require owners of, and applicants for, these small, sometime minuscule, projects to comply with the detailed and burdensome requirements applicable to larger projects. They find particularly objectionable the requirement that they file notices of intent pursuant to section 15(c)(1) of the FPA. They contend that this requirement, in combination with the Commission's proposals to have section 7(a) municipal preference apply to these proceedings, and to not apply the insignificant differences test of

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[330] The Department of Commerce suggests that applicants for new licenses be required to provide the information required of applicants for nonpower licenses under § 16.11(a) if a resource agency requests that the project be converted to nonpower use under a nonpower license. The Commission declines to make this revision. If a state agency wants a site to be converted to nonpower use, it should file an application for nonpower license and prepare the information required by § 16.11(a). If a Federal agency wants a site converted to nonpower use, it should file a recommendation that the United States take over the project as prescribed in section 14 of the FPA.

The procedures for takeover under section 14 of the FPA were specified in proposed §§ 16.14 to 16.17 of the NOPR. No significant comments were received on these provisions. The final rule adopts the provisions as proposed in the NOPR with minor revisions.

[331] *See* Part IV.A., *supra*.

[332] As indicated before in this preamble, except for transmission line licenses, the Commission no longer issues minor part licenses.

[333] Proposed § 16.19.

[334] Proposed § 16.20(c).

[335] Proposed § 16.20(b).

[336] Proposed § 16.20(c).

[337] *Id.*

[338] *See* NOPR preamble at 33 and proposed § 16.19(b).

[339] *See* 18 CFR 4.37 (1988).

[340] Proposed § 16.20(c).

[341] *See, e.g.*, the comments of American Paper, Georgia Power, National Hydropower, Rochester Gas, Wisconsin Power, Wisconsin Utilities and Washington Power. The Michigan Department supports the proposal to require applicants for such projects to comply with the consultation provisions of § 16.8.

section 15(a)(2) to the proceedings, will put existing licensees of these projects in an extremely disadvantageous position vis-a-vis competing municipal applicants.

The commenters also contend that most, if not all, of the items of information contained in § 16.10 are irrelevant to Commission evaluation of their small projects. They further state that requiring them to develop and submit this information could lead many of them to decide not to seek subsequent licenses for the projects.

PG&E objects to the applicability of municipal preference to these proceedings. PG&E contends that application of this preference would be inconsistent with Congress' intent in enacting ECPA to eliminate use of the applicants' status as a decisional factor in choosing among competing applicants at the expiration of existing licenses. In support of its position, PG&E cites section 10 of ECPA,[342] which established special procedures to address nine cases where municipal applicants had filed applications for license in competition with the existing non-municipal applicants. According to PG&E, Congress did not intend municipal preference to be applicable to subsequent licenses for minor projects where the existing licenses waive the application of sections 14 and 15 of the FPA.[343] PG&E argues that this is clearly shown by Congress' inclusion of two minor licenses, where sections 14 and 15 of the FPA had been waived,[344] within the coverage of ECPA section 10, together with that section's provision [345] that the issue of whether municipal preference would be applicable to the proceedings would be based on the ultimate resolution of then ongoing court proceedings.[346]

In section 2 of ECPA, Congress clearly restricted the municipal preference under section 7 of the FPA to preliminary permits and to original licensing and made it inapplicable to relicensing proceedings. Neither the language nor the legislative history of ECPA suggests that Congress intended to eliminate the municipal preference in the relicensing of major projects while retaining it for minor ones. No such distinction appears in the language of ECPA. Both the House and Senate reports accompanying the legislation that was eventually enacted as ECPA explain that ECPA makes the municipal preference "inapplicable in proceedings following expiration of an existing license."[347] Congress was thus attempting to differentiate between an "original" license (*i.e.*, the first license issued for a project), to which the preference would continue to apply, and any license issued following the expiration of an existing license, to which the preference would not apply.

The purpose of Congress was to place all applicants in a relicensing on an equal footing, to deny any applicant or class of applicants a preference, and to require the Commission to award the license to the applicant whose proposal would best serve the public interest. These considerations apply equally to minor licenses as to major ones.

Specifically, section 2 of ECPA revised the municipal preference provisions of section 7(a) to state that the Commission was to afford municipalities a preference "[i]n issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued." Prior to ECPA, that section had required the Commission to afford municipalities a preference "[i]n issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof."

This revision to section 7(a) of the FPA, together with Congress' changing of all references in section 15(a)(1) of the FPA from "original" licensees or licenses to "existing" licensees or licenses,[348] indicates that Congress was attempting to differentiate between "original" licenses and those to be issued following the expiration of an existing license. In light of this, and considering Congress' general intent to eliminate the status of an applicant as a decisional factor in determining which applicant should receive a second or third license for a project, the Commission believes that Congress intended that municipal preference would apply only to preliminary permits and the *first* license issued for a project, regardless of the technical status of the second or subsequent license for a project.

Moreover, there are affirmative indications that Congress expected ECPA to clarify that the municipal preference would be inapplicable to all relicensing proceedings, whether for major or minor projects. In section 10 of ECPA, Congress provided that ECPA's revision to the municipal preference provision of section 7(a) of the FPA would not be applicable to nine listed relicensing cases, including two involving minor projects, if the existing licensees elected not to use the ECPA section 10 procedures. Furthermore, Congress in section 10 of ECPA provided that the amendments to the FPA made by ECPA (including the revisions to section 7(a)) would govern these nine proceedings, if the competing municipalities elected not to use the ECPA section 10 procedures. These actions clearly show that Congress believed that the issue of the applicability of municipal preference at relicensing was identical for both major and minor licenses, and that its clarification that municipal preference was not to apply at relicensing was to encompass both major and minor projects.

The fact that the Commission has made it a practice to waive the provisions of section 15 of the FPA in the case of minor licenses has no bearing on the question of municipal preference. The subsequent licensing of an expired minor license is a relicensing for purposes of ECPA. It is not transformed into an original licensing merely because the Commission, in a previous licensing order, has waived the provisions of section 15 of the FPA as too burdensome for a minor license. Further, while the Commission in this rule is freeing minor licensees from some requirements related to section 15 provisions, applicants for a subsequent minor license will be subject to different requirements than applicants for an original license. They will be required, for example, to file notices of intent and to make certain information available in accordance with section 15(b) of the FPA; to follow the consultation process of § 16.8; and to file applications at least 24 months prior to the expiration of existing licenses. Competing applications for minor licenses will also be evaluated by the same standards as those applicable to major projects under regulations implementing section 15 of the FPA. These provisions recognize the reality that the licensing of a minor project subsequent to the expiration of an earlier license is a relicensing.

In this regard, the prior waiver of sections 14 and 15 and the related provisions of the FPA previously

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[342] *See* 100 Stat. 1252.

[343] In its reply comments, Northern California Agency expresses support for the proposition that municipal preference is applicable to these proceedings.

[344] Project Nos. 596 and 1061.

[345] *See* section 10(b) of ECPA, 100 STAT. 1253.

[346] See Pacific Power & Light Co., 25 FERC ¶ 61,052, *reh'g denied*, 25 FERC ¶ 61,290 (1983), *rev'd en banc on other grounds sub nom.* Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 (D.C. Cir. 1987).

[347] H.R. Rep. No. 507, 99th Cong., 2d Sess. 10 (1986). The Senate Committee language is similar, indicating the preference "does not apply to the issuance * * * of a new license for a previously licensed hydroelectric project. S. Rep. No. 161, 99th Cong., 1st Sess. 4 (1985).

[348] *See* section 4(b) of ECPA, 100 Stat. 1248.

discussed was intended to relieve minor licensees from various burdensome requirements that are inappropriate and unnecessary in the context of minor projects. The waivers were never intended to exclude minor licensees from the relicensing process. Relicensing is not a burden inappropriate to a minor project; on the contrary, it is a process that is as applicable and necessary to minor projects as it is to major projects. Moreover, subsequent to the waiver of sections 14 and 15 in those minor licenses, Congress, through ECPA, has amended section 15 with respect to the relicensing process. The waivers were clearly not intended to apply to portions of a statute that were not in existence at the time the waivers were granted. Therefore, in light of all of the above, the Commission is adding a new provision[349] specifically indicating that section 7(a) of the FPA will not be applicable to minor license proceedings.[350]

With the one exception discussed below, the Commission declines to exempt owners of, and applicants for, subsequent license from complying with the procedural provisions established for major projects covered by section 15 of the FPA. The Commission believes that having these provisions apply to these proceedings will eliminate potential confusion regarding filing deadlines and processing procedures, and will result in better and more informed consultation with agencies. Furthermore, since the Commission is clarifying that municipal preference will not be applicable to these proceedings, the inequities cited by the commenters will not occur.

The Commission is, however, deleting the requirement that applicants for subsequent license provide the information specified in § 16.10. As suggested by the commenters, much of this information may not be relevant to their small projects, and generically requiring the development and submittal of all of this information in all cases would be unduly burdensome. The Commission will seek, through additional information requests, the items of § 16.10 information it deems necessary to evaluate individual applications.

Finally, the Commission is eliminating the reference in § 16.20(c) to the processing of subsequent applications in accordance with the rules of preference of § 4.37 of the Commission's regulations. Those rules of preference, in addition to relying on municipal preference, accord decisional significance to the first-filed application and to other factors clearly inappropriate to these proceedings. The Commission will rely on the standards of sections 10(a) and 15(a) of the FPA in evaluating applications. In minor licensing cases where competing applications are filed, the Commission will apply the same tests as for major licenses, after requesting from the competing applicants the information it deems necessary to evaluate the factors set out in section 15(a) (2) and (3).

2. Transition Provisions

In the NOPR, the Commission proposed certain transition provisions regarding the application of the section 15 procedures to minor licenses where sections 14 and 15 had been waived.[351] In response to concerns raised by the commenters, the Commission is updating the transition provisions,[352] and specifying that holders of existing minor licenses do not have to make available information required by § 16.7 if they have already filed their applications.[353]

3. Continued Operation of Minor Projects

As discussed previously,[354] the Commission's authority and obligation to issue annual licenses to existing licensees in cases where the relicensing proceedings are not completed prior to the expiration of the existing licenses is derived from section 15(a) of the FPA. Since minor licenses in most cases waive the applicability of sections 14 and 15 of the FPA, the Commission has no authority to issue annual licenses for these minor licenses. However, pursuant to the provisions of section 9(b) of the Administrative Procedure Act (APA),[355] when a licensee has made a timely and sufficient application for a renewal of license, the existing license is deemed not to expire until the application has been finally acted upon by the agency. Consequently, if, prior to the end of the term of the existing license, the Commission has not acted on an application for subsequent license filed by the holder of a minor license where sections 14 and 15 of the FPA have been waived, then the existing licensee can continue to operate the project until the Commission acts. Paragraph (a) of § 16.21 codifies this principle.

The ability of an existing minor licensee to continue to operate its project after the term of its license under section 9(b) of the APA is contingent upon the filing of a renewal application by the existing licensee. If such an application is not filed, the existing minor licensee has no express authority to continue to operate its project. However, this could result in a hiatus in the operation of, and direct user responsibility over, projects in cases where a third party, but not the existing licensee, files an application for subsequent license, and the Commission is unable to complete processing of the third party's application prior to the expiration of the existing license. In order to avoid this, the Commission proposed, in § 16.21(b), to issue orders to allow existing licensees to continue to operate their projects after expiration.

Washington Wildlife suggests that the Commission revise § 16.21 to make clear that continued operation of these projects would be under the terms and conditions of the existing license. It also suggests that the Commission specify that it will be requiring existing licensees to implement resource mitigation measures during the period following expiration of the existing licenses. The Department of Commerce

[349] Section 16.20(b)(2). The final rule also redesignates proposed § 16.20(b) as § 16.20(c), and makes minor revisions to the text thereof. The Commission is deleting the provision (section 16.19(b)) stating that applicants for subsequent license for projects with licenses that waive sections 14 and 15 of the FPA must file applications for original license pursuant to section 4(e) of the FPA. New section 16.20(b)(1) specifies that applicants must file their applications under Part I of the FPA. The final rule also redesignates proposed § 16.19(c) and (d) as § 16.19(b) and (c).

[350] In early 1988, Commission staff, consistent with the revisions in § 4.60 proposed in the NOPR (*see* Part IV.A., *supra*, began sending letters to applicants for minor license requesting that they inform the Commission whether they wanted the provisions traditionally waived with minor licenses (*i.e.*, sections 14 and 15 and others) to be waived for their licenses. Those letters also indicated that municipal preference would apply to the ensuing licensing proceeding should the applicant choose to have sections 14 and 15 waived. In light of our determination regarding the non-applicability of municipal preference, minor licensees who received such letters and elected to not seek the waiver may, if they wish, file with the Commission a request to have the waiver apply.

[351] *See* proposed § 16.19(c) (3) and (4) and § 16.20(b) (2) and (3).

[352] *See* § 16.19(b) (3) and (4) and § 16.20(c) (2) and (3). Specifically, § 16.19(b)(3) provides that licensees with licenses expiring before October 17, 1994, must file notices of intent with the Commission no later than 60 days after the effective date of this rule, while § 16.19(b)(4) provides that new notices of intent are not required of applicants that filed such notices or their applications prior to the effective date of this rule. Section 16.20(c) (2) and (3) provide that applications for subsequent license for minor projects with licenses that will expire within four years of the effective date of this rule must be filed at least 12 months before the expiration date of the existing license.

[353] *See* § 16.19(c)(2). Holyoke expresses concern that it would be required to repeat consultation with resource agencies pursuant to § 16.8 even though it had already filed its applications. However, § 16.8(i)(1) specifically indicates that such reconsultation would not be required.

[354] *See* Part IV.N., *supra*.

[355] 5 U.S.C. 558(c) (1982).

objects to § 16.21(b), contending that the Commission does not have the authority to allow operation of projects after expiration of their licenses in cases where the existing licensees do not file renewal applications.

The suggestion of Washington Wildlife, to clarify that operation of these projects will be under the terms and conditions of existing licenses, is appropriate, and the Commission is making the necessary changes to § 16.21. However, the Commission declines to make the other revision suggested by Washington Wildlife. With regard to projects covered by § 16.21(a), it appears that section 9(b) of the APA contemplates that the operation of projects following expiration of existing licenses will be under the terms and conditions of the existing license. Thus, as in the case of annual licenses under section 15(a)(1) of the FPA, the Commission cannot impose additional mitigation requirements unless it had reserved to itself the authority to do so in the existing license. As to projects covered by § 16.21(b), while the Commission would not be constrained by the operation of section 9(b) of the APA, it is doubtful that the Commission would have the substantial evidence to support any such requirements.[356]

Contrary to the contentions of the Department of Commerce, the Commission believes it has the authority to require existing licensees to continue to operate their projects following expiration, as specified in § 16.21(b). As discussed previously, the purpose of this provision was to require existing licensees to continue to operate their projects until the Commission could act on any application for the site filed by a third party.[357] This will permit the Commission to ensure that the safety and environmental provisions of the existing license will continue until the Commission acts on a competing application, or takes other appropriate action regarding termination of the existing licensee's presence at the site. The Commission believes that its authority in this regard clearly falls within the scope of section 309 of the FPA,[358] which provides the Commission with the authority "to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions" of the FPA.

Q. Exemptions

Current Commission regulations state that the Commission will accept an exemption application for a project currently under license, but only if the exemption applicant is the licensee.[359] Accordingly, in the NOPR the Commission specified the requirements regarding the filing of exemption applications by existing licensees of projects with licenses subject to sections 14 and 15 of the FPA (§ 16.12), and by existing licensees of projects with minor licenses not subject to sections 14 and 15 of the FPA (§ 16.22). These regulations would subject existing licensees intending to file exemption applications to the same provisions applicable to applicants for new license regarding notices of intent, access, consultation, application filing deadlines, providing of information, and Commission processing of the applications.[360]

The Small Business Administration objects to making exemption applicants follow the same procedures applicable to applicants for new license, stating that existing consultation and filing provisions are adequate. The Commission believes, however, that, in order to eliminate confusion and to be consistent with the scheme of regulation established by ECPA, the same procedural requirements should be followed by all applicants. However, the Commission is revising § 16.22 to eliminate the requirement that existing licensees having minor licenses not subject to sections 14 and 15 of the FPA, provide the information specified in § 16.10 when filing exemption applications.

R. Prohibitions Against Filing Applications and Additional Procedures

In the NOPR, the Commission proposed that an existing licensee who informed the Commission in its FPA section 15(b)(1) notice of intent that it did not intend to file an application would be prohibited from filing an application for new license.[361] In addition, the Commission proposed to prohibit an existing licensee from filing an application if it failed to do so by the 24-month filing deadline established by section 15(c)(1) of the FPA.[362]

The Commission also proposed in the NOPR that, if an existing licensee informed the Commission in its FPA section 15(b)(1) notice of intent that it would file an application, but failed to do so, and no other applications were filed, or if all timely filed applications were subsequently rejected or dismissed pursuant to § 4.32,[363] the Commission would issue a public notice soliciting applications from potential applicants other than the existing licensee.[364] If one or more notices of intent to file an application were filed with the Commission within 90 days of the notice, the applicants filing the notices of intent could, within 18 months from the dates their notices of intent were filed with the Commission, file applications for license for their projects pursuant to section 4(e) of the FPA.[365]

Existing licensees would be required to file, for the Director's approval, a schedule for the filing of a surrender application.[366] The schedule must be filed either: (1) After the due date for filing notices of intent established in the § 16.24(a) notice, in cases where no notices of intent were filed;[367] or (2) after the due date for applications, in cases where notices of intent were filed but no follow-up license applications were filed.[368] Finally, after the 24-month filing deadline, existing licensees would be required to file, for the Director's approval, a schedule for the filing of a surrender application, if they indicated in their FPA section 15(b)(1) notices of intent that they did not intend to file, and no applications were in fact filed.[369]

The Commission indicated, however, that in cases where an existing licensee stated in its section 15(b)(1) notice of intent that it intended not to file an application, and no notices of intent or applications were filed pursuant to § 16.24(b), the Commission was contemplating offering an existing licensee one last opportunity to choose

[356] *See* Part IV.N., *supra*, for further discussion of this issue.

[357] As proposed in the NOPR, § 16.21(b) used the word "allowing"; however, the intent of the provision was to give the Commission the authority to "require" continued operation. Section 16.21(b) is being revised accordingly.

[358] 16 U.S.C. § 825h (1982).

[359] *See* 18 CFR 4.33(d)(ii) (1988). Commission regulations provide for two types of exemptions from licensing: for a small hydroelectric power project of five megawatts or less (governed by 18 CFR Part 4 Subpart K (1988)), and for a small conduit hydroelectric facility (governed by 18 CFR Part 4 Subpart L (1988)). An existing licensee filing an exemption application must comply with the provisions of Subpart K or L, as appropriate. In the case of five megawatt exemptions, the existing licensee must propose to increase the generating capacity of its project. *See* 18 CFR 4.30(b)(12) (1988).

[360] *See* § 16.12 (b) and (c) and § 16.22(b).

[361] Proposed § 16.23(a).

[362] Proposed § 16.23(b).

[363] Pursuant to § 16.9(b)(4), an application rejected or dismissed pursuant to § 4.32 cannot be refiled after the 24-month new license application filing deadline.

[364] Proposed § 16.24(a).

[365] Proposed § 16.24(b)(1).

[366] The requirements regarding the content of applications for surrender are embodied in 18 CFR Part 6 (1988).

[367] Proposed § 16.24(c)(2).

[368] Proposed § 16.24(c)(3).

[369] Proposed § 16.24(c)(1).

between applying to surrender its project and applying for a license to continue to operate the project.[370] Therefore, it solicited comments on the most appropriate approach to this situation.[371] The Commission also solicited comments on the appropriate treatment of an application filed in response to a notice issued under § 16.24(a) by a combined entity consisting of an existing licensee that failed to file a timely application and another venturer.[372]

The Small Business Administration supports the provisions of § 16.23 (a) and (b). However, it suggests that the section be revised to state that existing licensees failing to timely file notices of intent pursuant to section 15(b)(1) of the FPA be prohibited from filing license applications.[373] It also argues that, in cases where existing licensees indicate in their section 15(b)(1) notices of intent that they are not going to file, and no applications are timely filed, then existing licensees should have a final opportunity to maintain possession of their projects.[374]

New York Electric states that, if the Commission adopts the NOPR proposal not to treat those existing licensees that file applications jointly with a third party as existing licensees, it should revise the negative notice of intent provisions of § 16.23(a) to allow an existing licensee filing a negative notice of intent, to file a timely application in conjunction with another entity.

American Rivers supports the provisions of § 16.24. It also states that it has no objection to existing licensees filing applications in conjunction with third parties in response to a § 16.24(a) notice, as long as the existing licensee is not permitted to enjoy the advantages of incumbency. In addition, it states that it can see no reason why an existing licensee should not be allowed to apply for an original license when no other applications are timely filed pursuant to the § 16.24(b) procedures. However, American Rivers states that existing licensees should be afforded this right only if they file notices of intent pursuant to § 16.24(b), and that those failing to do so should be required to file applications for surrender. Finally, it suggests that the regulations be revised to clarify that existing licensees will be required to file applications for surrender when the Commission determines that no new license should be issued for a project.

Wildlife Federation contends that existing licensees should be provided with an opportunity to file either original applications for license or surrender applications in cases where no other entity expresses an interest in a site by filing notices of intent and license applications pursuant to the § 16.24(b) procedures. However, Wildlife Federation argues that the Commission should state a presumption in favor of requiring existing licensees to file for surrender in such cases.[375]

Long Lake contends that the Commission generally should not permit an existing licensee that indicated in its section 15(b)(1) notice of intent that it would file an application, but does not in fact do so, to file a joint application with another venturer. However, it suggests that it might be appropriate to allow a joint application to be filed when no other applications are filed after notice soliciting such other applications is issued, and when it would be in the public interest to allow a project to continue to be operated under license. Long Lake also contends that an existing licensee should be required to file an application for surrender and dismantle its project when it states in its sections 15(b)(1) notice that it does not intend to file an application, and no other entity files an application.

Rochester Gas and the Wisconsin Department state that an existing licensee should be provided with an opportunity to file a license application, instead of an application for surrender, in cases where no other applications are filed. The Department of Commerce and the Michigan Department contend that existing licensees should not be provided with this opportunity. Finally, Washington Wildlife contends that, if no new license is issued for a project because either no application is filed or the Commission determines that no new license should be granted, the existing licensee, at the request of the resource agencies, should be required to remove project structures.

As recommended by the Small Business Administration and Rochester Gas, and consistent with ECPA's legislative history,[376] the Commission is adding a new section [377] specifying that the failure of an existing licensee to file a timely section 15(b)(1) notice of intent will be deemed a negative notice of intent. As discussed below, this will prohibit the existing licensee from filing an application for the site.

The Commission is retaining the provisions of proposed § 16.23 (redesignated § 16.24 by this final rule [378]), prohibiting existing licensees that file negative section 15(b)(1) notices of intent from filing applications, and prohibiting the filing of applications after the new application filing deadline. Existing licensees should ascertain in a timely manner whether they intend to file. A negative notice of intent could mislead potential competitors. Therefore, the prohibition on filing applications in these circumstances is appropriate.

As to the prohibition on untimely applications by existing licensees, the Commission believes that the legislative history of ECPA [379] requires retention of

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[370] *See* NOPR preamble at 7.

[371] *See* NOPR preamble at 8.

[372] *See* NOPR preamble at 7.

[373] A similar suggestion was made by Rochester Gas.

[374] The Small Business Administration contends that the Commission can address this problem by requesting existing licensees to file applications for annual license pursuant to section 15(a)(1) of the FPA. Although it is not entirely clear on this point, it appears to argue that, if the existing licensee files an application for annual license and the Commission grants such an annual license, the existing licensee would continue to operate its project indefinitely under annual license.

As discussed previously (*see* Part IV.N., *supra*), annual licenses are granted automatically; no application is required on the part of the existing licensee. Also, an annual license will continue only until either the Commission grants a new license, Federal takeover occurs, or the existing licensee vacates the site pursuant to Commission order. Perpetual annual licenses are not authorized. *See* La Courte Oreilles Band v. FPC, 510 F.2d 198, 209–10 (D.C. Cir. 1975).

[375] Wildlife Federation also suggests that the Commission revise the proposed regulations to require existing licensees to file applications either for surrender or conversion to a nonpower license in cases where the Commission determines that it should not issue a power license for a project. Also, it contends that the regulations governing applications for nonpower license (§ 16.11) should be revised to indicate that nongovernmental entities can apply for and obtain nonpower licenses.

The annual license provisions of section 15(a)(1) of the FPA, which are discussed in Part IV.N., *supra*, do not provide the Commission with the authority to require existing licensees to apply for, and continue to operate their projects involuntarily under, nonpower licenses. Consequently, the Commission declines to make the revision. Also, there is no need to revise § 16.11 as suggested by it, since § 16.11 does not limit those who can file applications for nonpower license to governmental entities; any entity, including an existing licensee or a private third party, can file an application for nonpower license under section 15(a)(1) of the FPA as implemented by § 16.11.

[376] *See* H.R. Rep. No. 99–507, 99th Cong. 2nd Sess. 36 (1986):

Failure to meet the [section 15(b)(1) and (c)(1)] deadlines must prejudice the affected entity. FERC has no authority in the bill to waive the deadlines or to find reasons for granting exceptions, grace periods, or otherwise recognizing excuses.

[377] *See* new § 16.23. The provisions of proposed § 16.23 are now embodied in § 16.24.

[378] In order to reflect the differing transition filing deadlines for applications for projects with licenses subject to sections 14 and 15 of the FPA and for those that are not, the text of § 16.24 is divided into two subsections covering the two situations.

[379] *See* discussion, *supra*.

this provision. Also, as discussed previously,[380] the Commission is retaining the proposed provision specifying that existing licensees filing joint applications with third parties would not be considered existing licensees for purposes of the insignificant differences provision of section 15(a)(2). Despite this, the Commission does not believe there is any need to create special processing or re-application provisions for such joint applicants, and declines to adopt those suggestions. The Commission is clarifying that the various prohibitions on the filing of applications by existing licensees apply whether the existing licensee is acting individually or in conjunction with an entity or entities that are not currently licensees of the project.[381]

The Commission is also retaining the provisions of proposed § 16.24 (redesignated § 16.25 by this final rule) regarding the solicitation of applications for license from potential applicants other than the existing licensee, in cases where an existing licensee indicates in its section 15(b)(1) notice that it intends to file, and no other applications are filed by the new application filing deadline. The Commission believes that this provision is necessary to provide an opportunity to compete for the project site for entities that decide not to file applications because of an existing licensee's positive notice of intent. The Commission declines to revise the provision to permit an existing licensee to reenter the competition, since it believes that existing licensees should not be able to compete after having misled other potential applicants.

The Commission is adding a new § 16.26 to address the situation where no applications are timely filed for the project after an existing licensee states in its section 15(b)(1) notice of intent that it does not intend to file an application. This section specifies that the Director, following the expiration of the new application filing deadline, will provide the existing licensee with written notice of the fact that no timely applications for the project have been filed. The existing licensee will then be required to file, within 90 days of the notice, for the Director's approval, a schedule for the filing of a surrender application for the project. The existing licensee, as in the case where no notices of intent or applications are filed in situations covered by § 16.25, will then be required to file its surrender application under the approved schedule and vacate the site in accordance with Commission directions.

The situation addressed by § 16.26 does not involve any misleading actions on the part of the existing licensee. However, and contrary to some of the commenters' suggestions, the Commission believes that in this situation, where no entity expresses an interest in continuing to operate a project, the relicensing process should terminate with no entity, including the existing licensee, having been afforded an additional opportunity to obtain a new license for the site. Allowing additional opportunities to file applications would be contrary to ECPA's mandate of expedition, and could prolong the process for years. Once the license expires or the surrender process is complete, the site would be open for development under applications for license filed pursuant to section 4(e) of the FPA.

The Commission declines to adopt the various suggestions made by the commenters regarding surrender applications. The revision suggested by American Rivers, to clarify that applications for surrender will be required in cases where the Commission determines no license should issue, is unnecessary. The Commission clearly has the authority to require applications for surrender in such cases, and will exercise this authorization whenever it determines that no application for a new or subsequent power license should be issued.

Washington Wildlife's suggestion, that resource agencies be provided with the authority to require an existing licensee to remove its project in cases where no new or subsequent license is to be issued, is inappropriate. As discussed previously, existing licensees will be required to file applications for surrender in these situations. Since the existing licensees are required to consult with resource agencies pursuant to § 16.8 in preparing these applications,[382] the resource agencies will be able to make their views known regarding the most appropriate means for an existing licensee to vacate a site. However, the authority to determine the conditions governing an existing licensee's leaving a site at the expiration of its license, including any conditions regarding the extent and timing of an existing licensee's obligation to remove project facilities and restore the site, resides exclusively with the Commission.

In many cases, existing licenses specify by way of license articles an existing licensee's obligation to file an application for surrender and to comply with Commission orders regarding vacating the site. However, even when an existing license is silent as to these issues, the Commission retains the authority to determine the process an existing licensee will follow in providing the Commission with the information it needs to determine how a project site will be vacated, and the actual conditions governing an existing licensee's vacation of a site. The Commission's authority in this regard is derived from its general authority under section 309 of the FPA to issue orders necessary and appropriate to carry out the provisions of the FPA, and its authority under section 10(c) of the FPA [383] to prescribe rules and regulations necessary to protect life, health, and property.

The Commission's authority under these provisions of the FPA is broad,[384] and permits the Commission to take any reasonable action under the FPA necessary to regulate in the public interest all aspects of hydroelectric use of the nation's waters. Thus, the Commission can require an existing licensee to file an application for surrender, and comply with Commission orders regarding removal of project structures, even in cases where an existing minor licensee not filing an application for subsequent license proposes to cease, at the expiration of its license, the jurisdictional activity that initially required it to obtain a license.[385]

S. Miscellaneous

As discussed previously, applicants for new or subsequent license are required to comply with, *inter alia*, the Commission's regulations governing the content of applications (18 CFR §§ 4.41, 4.51, or 4.61 (1988), as appropriate).[386] A

[380] *See* Part IV.M., *supra*.

[381] *See* §§ 16.24 (a) (1) and (2), (b) (1) and (2), and 16.25(a).

[382] *See* §§ 16.25(d) and 16.26(c).

[383] 16 U.S.C. 803(c) (1982).

[384] *See, e.g.*, Niagara Mohawk Power Corporation v. FPC, 379 F.2d 153 (D.C. Cir. 1967).

[385] One of the purposes of § 16.21(b) is to clarify, for holders of existing minor licenses that do not file applications for subsequent license, that the Commission has the authority to require them to continue operating their projects after expiration, if necessary for the Commission to determine the conditions governing the minor licensee's vacation of the site.

[386] *See* § 16.9(b)(2) and § 16.20(d) (referring to § 16.9(b)(2)). Sections 4.41, 4.51, and 4.61 deal with, respectively, license applications for major unconstructed and major modified projects; major projects involving an existing dam with a total installed capacity of more than five megawatts; and minor water power projects and major water power projects with a total installed capacity of five megawatts or less. The use of the word "appropriate" in § 16.9(b)(2) means that applicants must conform their applications to the section that

Continued

few commenters [387] suggest that the Commission create "stand-alone" relicensing regulations that would contain all provisions applicable to relicense applications and proceedings and would not reference back to the Part 4 regulations. They contend this is necessary to eliminate confusion.

The incorporation into the Part 16 regulations and possible revision of §§ 4.41, 4.51, and 4.61 would be a significant and unnecessary undertaking. The Commission believes its clarification of such issues as the location in applications of the § 16.10 information, and potential applicants' responsibilities regarding the collection of "baseline" data, will eliminate much of the confusion referenced by the commenters. Potential applicants with questions regarding the applicability of specific provisions of the Part 4 regulations can, and are encouraged to, contact Commission staff to obtain any needed clarification.

V. Regulatory Flexibility Certification

The Regulatory Flexibility Act of 1980 (RFA) [388] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities.[389] Pursuant to section 605(b) of the RFA, the Commission hereby certifies that the proposed relicensing regulations, if promulgated, will not have a significant economic impact on a substantial number of small entities, and that, even if the rule were to have a significant economic impact on a substantial number of small entities, it would be to their benefit. The Commission believes that most of the entities affected by the rule do not fall within RFA's definition of "small entity." Even if the rule would have a significant effect on a substantial number of small entities, however, application requirements proposed in this rule are necessary for the Commission to grant a new or subsequent license to an applicant at the expiration of an existing license term. Any applicant may benefit substantially by obtaining a license. The notice and information requirements for licensees are mandated by statute.[390]

VI. Paperwork Reduction Act Statement

The Paperwork Reduction Act (PRA) [391] and the Office of Management and Budget (OMB) regulations [392] require the OMB to approve certain information collection requirements imposed by agency rule. The information collection requirements in this final rule are contained in FERC–500, Application for License for Water Power Projects With More Than 5 MW Capacity, and FERC–505, Application for License for Water Power Projects 5 MW or Less.

Part I of the FPA gives the Commission jurisdiction over the licensing of hydropower projects. The amendments to section 15 of the FPA made by ECPA mandate that the Commission consider additional factors in granting a new license (relicense) and establish new procedures for filing an application for a new license. A number of hydropower projects are expected to apply for license renewal in the near future.

Owners and operators of hydropower projects subject to these rules are the likely respondents. Applications for licenses for water power projects having more than a 5 MW capacity (FERC–500) are estimated to have a total annual reporting time of 40,768 hours. The estimated number of respondents is 49; the frequency of response per year is one; and the estimated average number of hours per response is 832. Applications for licenses for a water power project having a capacity of 5 MW or less (FERC–505) are estimated to have a total annual reporting time of 12,460 hours. The number of respondents per year is estimated to be 70; the frequency of response per year is estimated to be one, and the estimated average number of hours per response is 178.

VII. National Environmental Policy Act Statement

Commission regulations require that an environmental assessment or an environmental impact statement (EIS) be prepared for any Commission action that may have a significant adverse effect on the human environment.[393] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.[394] No environmental consideration is necessary for the promulgation of a rule that is clarifying, corrective, or procedural, or that does not substantially change the effect of legislation or regulations being amended.[395]

This final rule is procedural in nature. It proposes certain information that must be included with an application. Thus, no environmental assessment or environmental impact statement is necessary for the requirements proposed in this rule.

The Department of Commerce asserts that these proposed regulations "provide new requirements which will impair collection of adequate information regarding environmental effects, restrict the abilities of agencies to consult with applicants compared with current practice, and fail to establish standards for Commission action consistent with the Electric Consumers Protection Act (ECPA) and other law." The Department of Commerce then concludes, without further argument or amplification, that an EIS must be prepared because the regulations are not procedural in nature but constitute a substantive change. The Commission disagrees.

The final rule revises the procedures that govern relicensing of hydroelectric power projects subject to sections 14 and 15 of the FPA. Contrary to the suggestions of Commerce, the rule does not substantially change existing Commission regulations providing for pre-filing consultation with all appropriate agencies. The affected projects have been in existence for decades. The regulations do not authorize the construction or operation of any project, but merely determine the procedures by which such construction or operation will be considered on a case-by-case basis in future proceedings. Accordingly, the Commission concludes that these procedural rules will not have any significant adverse effects on the quality of the human environment such as to require the preparation of an EIS.

VII. Effective Date

This rule is effective July 3, 1989. If OMB has not approved the information collection provisions at that time, the Commission will issue a notice delaying the effective date until OMB approval of the final rule.

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governs their projects (*i.e.*, either § 4.41, § 4.51, or § 4.61), not pick and choose among the various provisions of these three sections as they deem appropriate.

[387] *See, e.g.*, the comments of National Hydropower and PG&E.

[388] 5 U.S.C. 601–612 (1982).

[389] Section 601(c) of the RFA defines a "small entity" as a small business, a small not-for-profit enterprise, or a small governmental jurisdiction. A "small business" is defined by reference to Section 3 of the Small Business Act as an enterprise which is "independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. 632(a) (1982).

[390] Comments were received from the Small Business Administration. The Commission's response to these comments is found in Part IV of this preamble.

[391] 44 U.S.C. 3501–3520 (1982).

[392] 5 CFR 1320.21(a)(2) (1988).

[393] Regulations Implementing National Environmental Policy Act, 52 Fed. Reg. 47897 (Dec. 17, 1987), codified at 18 CFR Part 380.

[394] *See* 18 CFR 380.4 (1988).

[395] *See* 18 CFR 380.4(a)(2)(ii) (1988).

List of Subjects

18 CFR Part 4

Electric power, Reporting and recordkeeping requirements.

18 CFR Part 16

Electric power.

In consideration of the foregoing, the Commission amends Parts 4 and 16 of Chapter I, Title 18, Code of Federal Regulations as set forth below.

By the Commission. Commissioner Stalon dissented in part with a separate statement to be issued later. Commissioner Trabandt concurred in part and dissented in part with a separate statement attached. Commissioner Moler concurred with a separate statement attached.

Linwood A. Watson, Jr.,

Acting Secretary.

PART 4—LICENSES, PERMITS, EXEMPTIONS, AND DETERMINATION OF PROJECT COSTS

1. The authority citation for Part 4 continues to read as follows:

Authority: Federal Power Act, 16 U.S.C. 791a–825r, as amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99–495; Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601–2645 (1982); Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); E.O. 12009, 3 CFR 1978 Comp., p. 142.

2. In § 4.60, a new paragraph (c) is added to read as follows:

§ 4.60 Applicability and notice to agencies.

* * * * *

(c) Unless an applicant for a license for a minor water power project requests in its application that the Commission apply the following provisions of Part I of the Federal Power Act when it issues a minor license for a project, the Commission, unless it determines it would not be in the public interest to do so, will waive:

(1) Section 4(b), insofar as it requires a licensee to file a statement showing the actual legitimate costs of construction of a project;

(2) Section 4(e), insofar as it relates to approval by the Chief of Engineers and the Secretary of the Army of plans affecting navigation;

(3) Section 6, insofar as it relates to the acceptance and expression in the license of terms and conditions of the Federal Power Act that are waived in the licensing order;

(4) Section 10(c), insofar as it relates to a licensee's maintenance of depreciation reserves;

(5) Sections 10(d) and 10(f);

(6) Section 14, with the exception of the right of the United States or any state or municipality to take over, maintain, and operate a project through condemnation proceedings; and

(7) Sections 15, 16, 19, 20 and 22.

3. In § 4.61, paragraph (f)(3) is revised to read as follows:

§ 4.61 Contents of application

* * * * *

(f) * * *

(3)(i) If an application for a license for a minor water power project that will not occupy any public lands or reservations of the United States does not contain a statement that the applicant requests the Commission to apply the provisions of Part I of the Federal Power Act enumerated in § 4.60(c), the applicant:

(A) Must provide a reasonably accurate description of the project location and all project works and features; and

(B) Must identify, in Exhibit G of its application, the owners of all lands necessary for the construction and operation of the project; but

(C) Need not show a project boundary.

(ii) If an application for a license for a minor water power project contains a statement that the applicant requests the Commission to apply the provisions of Part I of the Federal Power Act enumerated in § 4.60(c), the applicant must show the project boundary on the map it submits as Exhibit G to its application, as specified in § 4.41(h)(2).

(iii) If an application for a license for a minor water power project proposes that the project would occupy any public lands or reservations of the United States, the applicant must show the project boundaries on public lands and reservations on the map it submits as Exhibit G to its application, as specified in § 4.41(h)(2).

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PART 16—PROCEDURES RELATING TO TAKEOVER AND RELICENSING OF LICENSED PROJECTS

4. The authority citation for Part 16 continues to read as follows:

Authority: Federal Power Act, 16 U.S.C. 791a–825r, as amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99–495; Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); E.O. 12009, 3 CFR 1978 Comp., p. 142.

5. Sections 16.1 through 16.5 are revised and designated Subpart A, to read as follows:

Subpart A—General Provisions

§ 16.1 Applicability.

This part applies to the filing and processing of an application for:

(a) A new license, a nonpower license, or an exemption from licensing for a hydroelectric project with an existing license subject to the provisions of sections 14 and 15 of the Federal Power Act.

(b) A subsequent license or an exemption from licensing for a hydroelectric project with an existing minor license or minor part license not subject to the provisions of sections 14 and 15 of the Federal Power Act because those sections were waived pursuant to section 10(i) of the Federal Power Act.

§ 16.2 Definitions.

For purposes of this part:

(a) "New license" means a license, except an annual license, for a water power project that is issued under section 15(a) of the Federal Power Act after an original license expires.

(b) "New license application filing deadline", as provided in section 15(c)(1) of the Federal Power Act, is the date 24 months before the expiration of an existing license.

(c) "Nonpower license" means a license for a nonpower project issued under section 15(b) of the Federal Power Act.

(d) "Resource agency" means a Federal, state, or interstate agency with responsibilities in the areas of flood control, navigation, irrigation, recreation, fish or wildlife, water resource management, or cultural or other relevant resources of the state or states in which a project is or will be located.

(e) "Subsequent license" means a license for a water power project issued under Part I of the Federal Power Act after a minor or minor part license that is not subject to sections 14 and 15 of the Federal Power Act expires.

§ 16.3 Public notice of projects under expiring licenses.

In addition to the notice of a licensee's intent to file or not to file an application for a new license provided in § 16.6(d), the Commission will publish, in its annual report and annually in the **Federal Register**, a table showing the projects whose licenses will expire during the succeeding six years. The table will:

(a) List the licenses according to their expiration dates; and

(b) Contain the following information: license expiration date; licensee's name; project number; type of principal project works licensed, *e.g.*, dam and reservoir, powerhouse, transmission lines; location by state, county, and stream; location by city or nearby city when appropriate;

whether the existing license is subject to sections 14 and 15 of the Federal Power Act; and plant installed capacity.

§ 16.4 Acceleration of a license expiration date.

(a) *Request for acceleration.* (1) A licensee may file with the Commission, in accordance with the formal filing requirements in Subpart T of Part 385 of this chapter, a written request for acceleration of the expiration date of its existing license, containing the statements and information specified in § 16.6(b) and a detailed explanation of the basis for the acceleration request.

(2) If the Commission grants the request for acceleration pursuant to paragraph (c), the Commission will deem the request for acceleration to be a notice of intent under § 16.6 and, unless the Commission directs otherwise, the licensee shall make available the information specified in § 16.7 no later than 90 days from the date that the Commission grants the request for acceleration.

(b) *Notice of request for acceleration.* (1) Upon receipt of a request for acceleration, the Commission will give notice of the licensee's request and provide a 45-day period for comments by interested persons by:

(i) Publishing notice in the Federal Register;

(ii) Publishing notice once in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated; and

(iii) Notifying appropriate Federal, state, and interstate resource agencies and Indian tribes by mail.

(2) The notice issued pursuant to paragraphs (1) (i) and (ii) and the written notice given pursuant to paragraph (1)(iii) will be considered as fulfilling the notice provisions of § 16.6(d) should the Commission grant the acceleration request and will include an explanation of the basis for the licensee's acceleration request.

(c) *Commission order.* If the Commission determines it is in the public interest, the Commission will issue an order accelerating the expiration date of the license to not less than five years and 90 days from the date of the Commission order.

§ 16.5 Site access for a competing applicant.

(a) *Access.* If a potential applicant for a new license, subsequent license, or nonpower license for a project has complied with the first stage consultation provisions of § 16.8(b)(1) and has notified the existing licensee in writing of the need for and extent of the access required, the existing licensee must allow the potential applicant to enter upon or into designated land, buildings, or other property in the project area at a reasonable time and under reasonable conditions, including, but not limited to, reasonable liability conditions, conditions for compensation to the existing licensee for all reasonable costs incurred in providing access, including energy generation lost as a result of modification of project operations that may be necessary to provide access, and in a manner that will not adversely affect the environment, for the purposes of:

(1) Conducting a study or gathering information required by a resource agency under § 16.8 or by the Commission pursuant to § 4.32 of this chapter;

(2) Conducting a study or gathering information not covered by paragraph (a)(1) but necessary to prepare an application for new license, subsequent license, or nonpower license; or

(3) Holding a site visit for a resource agency under § 16.8.

(b)(1) *Disputes.* Except as specified by paragraph (b)(2), disputes regarding the timing and conditions of access for the purposes specified in paragraphs (a) (1), (2), or (3) of this section and the need for the studies or information specified in paragraph (a)(2) may be referred to the Director of the Office of Hydropower Licensing for resolution in the manner specified in § 16.8(b)(5) prior to the providing of access.

(2) Disputes regarding the amount of compensation to be paid the existing licensee for access may be referred to the Director of the Office of Hydropower Licensing for resolution in the manner specified in § 16.8(b)(5) after the access has been provided.

§ 16.15 [Redesignated as § 16.6]

6. Section 16.15 is redesignated as § 16.6 and paragraph (d)(2) is revised to read as follows:

§ 16.6 Notification procedures under section 15 of the Federal Power Act.

* * * * *

(d) * * *

(2) Publishing notice once in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated; and

* * * * *

§ 16.7 [Removed]

7. Section 16.7 is removed.

§ 16.16 [Redesignated as § 16.7]

8. Section 16.16 is redesignated as § 16.7.

9. Sections 16.8 through 16.13 are revised and, together with newly redesignated §§ 16.6 and 16.7, are designated as Subpart B.

Subpart B—Applications for Projects Subject to Sections 14 and 15 of the Federal Power Act

§ 16.8 Consultation requirements.

(a) *Requirement to consult.* (1) Before it files an application for a new license, a nonpower license, an exemption from licensing, or, pursuant to § 16.25 or § 16.26, a surrender of a project, a potential applicant must consult with the relevant Federal, state, and interstate resource agencies, including the National Marine Fisheries Service, the United States Fish and Wildlife Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands utilized or occupied by the project, the appropriate state fish and wildlife agencies, the appropriate state water resource management agencies, and the certifying agency under section 401 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1341.

(2) The Director of the Office of Hydropower Licensing or the Regional Director responsible for the area in which the project is located will provide a list of known appropriate Federal, state, and interstate resource agencies upon request.

(b) *First stage of consultation.* (1) A potential applicant must provide each of the appropriate resource agencies and the Commission with the following information:

(i) Detailed maps showing existing project boundaries, if any, proper land descriptions of the entire project area by township, range, and section, as well as by state, county, river, river mile, and closest town, and also showing the specific location of all existing and proposed project facilities, including roads, transmission lines, and any other appurtenant facilities;

(ii) A general engineering design of the existing project and any proposed changes, with a description of any existing or proposed diversion of a stream through a canal or a penstock;

(iii) A summary of the existing operational mode of the project and any proposed changes;

(iv) Identification of the environment affected or to be affected, the significant resources present and the applicant's existing and proposed environmental protection, mitigation, and enhancement plans, to the extent known at that time;

(v) Streamflow and water regime information, both existing and proposed, including drainage area, natural flow periodicity, monthly flow rates and durations, mean flow figures illustrating the mean daily streamflow curve for each month of the year at the point of diversion or impoundment, with location of the stream gauging station, the method used to generate the streamflow data provided, and copies of all records used to derive the flow data used in the applicant's engineering calculations;

(vi) Detailed descriptions of any proposed studies and the proposed methodologies to be employed; and

(vii) Any statement required by § 4.301(a) of this chapter.

(2) Not earlier than 30 days, but not later than 60 days, from the date of the potential applicant's letter transmitting the information to the agencies under paragraph (b)(1) of this section, the potential applicant will:

(i) Hold a joint meeting, including an opportunity for a site visit, with all pertinent agencies to review the information and to discuss the data and studies to be provided by the potential applicant as part of the consultation process; and

(ii) Consult with the resource agencies on the scheduling of the joint meeting and provide each resource agency and the Commission with written notice of the time and place of the joint meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(3) Members of the public are invited to attend the joint meeting held pursuant to paragraph (b)(2)(i) of this section. Members of the public attending the meeting are entitled to participate fully in the meeting and to express their views regarding resource issues that should be addressed in any application for new license that may be filed by the potential applicant. Attendance of the public at any site visit held pursuant to paragraph (b)(2)(i) of this section shall be at the discretion of the potential applicant. The potential applicant must make either audio recordings or written transcripts of the joint meeting, and must upon request promptly provide copies of these recordings or transcripts to the Commission and any resource agency.

(4) Unless otherwise extended by the Director of the Office of Hydropower Licensing pursuant to paragraph (b)(5) of this section, not later than 60 days after the joint meeting held under paragraph (b)(2) of this section each interested resource agency must provide a potential applicant with written comments:

(i) Identifying its determination of necessary studies to be performed or information to be provided by the potential applicant;

(ii) Identifying the basis for its determination;

(iii) Discussing its understanding of the resource issues and its goals and objectives for these resources;

(iv) Explaining why each study methodology recommended by it is more appropriate than other available methodology alternatives, including those identified by the potential applicant pursuant to paragraph (b)(1)(vi) of this section;

(v) Documenting that the use of each study methodology recommended by it is a generally accepted practice, and

(vi) Explaining how the studies and information requested will be useful to the agency in furthering its resource goals and objectives.

(5)(i) If a potential applicant and a resource agency disagree as to any matter arising during the first stage of consultation or as to the need to conduct a study or gather information referenced in paragraph (c)(2) of this section, the potential applicant or resource agency may refer the dispute in writing to the Director of the Office of Hydropower Licensing for resolution.

(ii) The entity referring the dispute must serve a copy of its written request for resolution on the disagreeing party at the time the request is submitted to the Director. The disagreeing party may submit to the Director of the Office of Hydropower Licensing a written response to the referral within 15 days of the referral's submittal to the Director.

(iii) Written referrals to the Director of the Office of Hydropower Licensing and written responses thereto pursuant to paragraphs (b)(5)(i) or (b)(5)(ii) of this section must be filed with the Secretary of the Commission in accordance with the Commission's Rules of Practice and Procedure, and must indicate that they are for the attention of the Director of the Office of Hydropower Licensing pursuant to § 16.8(b)(5).

(iv) The Director of the Office of Hydropower Licensing will resolve disputes by letter provided to the potential applicant and the disagreeing resource agency.

(v) If a potential applicant does not refer a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(1) of this section) or a study to the Director under paragraph (b)(5)(i) of this section or if a potential applicant disagrees with the Director's resolution of a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(1) of this section) or a study, and if the potential applicant does not provide the requested information or conduct the requested study, the potential applicant must fully explain the basis for its disagreement in its application.

(vi) Filing and acceptance of an application will not be delayed, and an application will not be considered deficient or patently deficient pursuant to § 4.32 (e)(1) or (e)(2) of this chapter, merely because the application does not include a particular study or particular information if the Director of the Office of Hydropower Licensing had previously found, under paragraph (b)(5)(iv) of this section, that such study or information was unreasonable or unnecessary.

(6) Unless otherwise extended by the Director of the Office of Hydropower Licensing pursuant to paragraph (b)(5) of this section, the first stage of consultation ends when all participating agencies provide the written comments required under paragraph (b)(4) of this section or 60 days after the joint meeting held under paragraph (b)(2) of this section, whichever occurs first.

(c) *Second stage of consultation.* (1) Unless determined otherwise by the Director of the Office of Hydropower Licensing pursuant to paragraph (b)(5), a potential applicant must complete all reasonable and necessary studies and obtain all reasonable and necessary information requested by resource agencies under paragraph (b) of this section:

(i) Prior to filing the application, if the results:

(A) Would influence the financial (e.g., instream flow study) or technical feasibility of the project (e.g., study of potential mass soil movement); or

(B) Are needed to determine the design or location of project features, reasonable alternatives to the project, the impact of the project on important natural or cultural resources (e.g., resource surveys), suitable mitigation or enhancement measures, or to minimize impact on significant resources (e.g., wild and scenic river, anadromous fish, endangered species, caribou migration routes);

(ii) After filing the application but before license issuance, if the applicant complied with the provisions of paragraph (b)(1) of this section no later than four years prior to the expiration date of the existing license and the results:

(A) Would be those described in paragraphs (c)(1)(i) (A) or (B) of this section; and

(B) Would take longer to conduct and evaluate than the time between the conclusion of the first stage of consultation and the new license application filing deadline.

(iii) After a new license is issued, if the studies can be conducted or the information obtained only after construction or operation of proposed facilities, would determine the success of protection, mitigation, or enhancement measures (e.g., post-construction monitoring studies), or would be used to refine project operation or modify project facilities.

(2) If, after the end of the first stage of consultation as defined in paragraph (b)(6) of this section, a resource agency requests that the potential applicant conduct a study or gather information not previously identified and specifies the basis for its request, the potential applicant will promptly initiate the study or gather the information, unless the Director of the Office of Hydropower Licensing determines under paragraph (b)(5) of this section either that the study or information is unreasonable or unnecessary or that use of the methodology requested by a resource agency for conducting the study is not a generally accepted practice.

(3) (i) The results of studies and information gathering referenced in paragraphs (c)(1)(ii) and (c)(2) of this section will be treated as additional information; and

(ii) Filing and acceptance of an application will not be delayed and an application will not be considered deficient or patently deficient pursuant to § 4.32 (e)(1) or (e)(2) of this chapter merely because the study or information gathering is not complete before the application is filed.

(4) A potential applicant must provide each resource agency with:

(i) A copy of its draft application that:

(A) Indicates the type of application the potential applicant expects to file with the Commission; and

(B) Responds to any comments and recommendations made by any resource agency either during the first stage of consultation or under paragraph (c)(2) of this section;

(ii) The results of all studies and information gathering either requested by that resource agency in the first stage of consultation (or under paragraph (c)(2) of this section if available) or which pertain to resources of interest to that resource agency and which were identified by the potential applicant pursuant to paragraph (b)(1)(vi) of this section, including a discussion of the results and any proposed protection, mitigation, or enhancement measure; and

(iii) A written request for review and comment.

(5) A resource agency will have 90 days from the date of the potential applicant's letter transmitting the paragraph (c)(4) information to it to provide written comments on the information submitted by a potential applicant under paragraph (c)(4).

(6) If the written comments provided under paragraph (c)(5) of this section indicate that a resource agency has a substantive disagreement with a potential applicant's conclusions regarding resource impacts or its proposed protection, mitigation, or enhancement measures, the potential applicant will:

(i) Hold at least one joint meeting with the disagreeing resource agency and other agencies with similar or related areas of interest, expertise, or responsibility not later than 60 days from the date of the disagreeing agency's written comments to discuss and to attempt to reach agreement on its plan for environmental protection, mitigation, or enhancement measures; and

(ii) Consult with the disagreeing agency and other agencies with similar or related areas of interest, expertise, or responsibility on the scheduling of the joint meeting and provide the disagreeing resource agency, other agencies with similar or related areas of interest, expertise, or responsibility, and the Commission with written notice of the time and place of each meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(7) The potential applicant and any disagreeing resource agency may conclude a joint meeting with a document embodying any agreement among them regarding environmental protection, mitigation, or enhancement measures and any issues that are unresolved.

(8) The potential applicant must describe all disagreements with a resource agency on technical or environmental protection, mitigation, or enhancement measures in its application, including an explanation of the basis for the applicant's disagreement with the resource agency, and must include in its application any document developed pursuant to paragraph (c)(7) of this section.

(9) A potential applicant may file an application with the Commission if:

(i) It has complied with paragraph (c)(4) of this section and no resource agency has responded with substantive disagreements by the deadline specified in paragraph (c)(5) of this section; or

(ii) It has complied with paragraph (c)(6) of this section if any resource agency has responded with substantive disagreements.

(10) The second stage of consultation ends:

(i) Ninety days after the submittal of information pursuant to paragraph (c)(4) of this section in cases where no resource agency has responded with substantive disagreements; or

(ii) At the conclusion of the last joint meeting held pursuant to paragraph (c)(6) of this section in cases where a resource agency has responded with substantive disagreements.

(d) *Third stage of consultation.* (1) The third stage of consultation is initiated by the filing of an application for a new license, nonpower license, exemption from licensing, or surrender of license.

(2) When an applicant files such application documents with the Commission, or promptly after receipt in the case of documents described in paragraph (d)(2)(iii) of this section, it must serve on every resource agency consulted, and, in the case of applications for surrender or nonpower license, any state, municipal, interstate, or Federal agency which is authorized to assume regulatory supervision over the land, waterways, and facilities covered by the application for surrender or nonpower license, a copy of:

(i) Its application for a new license, a nonpower license, an exemption from licensing, or a surrender of the project;

(ii) Any deficiency correction, revision, supplement, response to additional information request, and amendment to the application; and

(iii) Any written correspondence from the Commission requesting the correction of deficiencies or the submittal of additional information.

(e) *Resource agency waiver of compliance with consultation requirements.* (1) If a resource agency waives in writing compliance with any requirement of this section, a potential applicant does not have to comply with that requirement as to that agency.

(2) If a resource agency fails to timely comply with a provision regarding a requirement of this section, a potential applicant may proceed to the next sequential requirement of this section without waiting for the resource agency to comply.

(3) The failure of a resource agency to timely comply with a provision regarding a requirement of this section does not preclude its participation in subsequent stages of the consultation process.

(f) *Application requirements documenting consultation and any*

disagreements with resource agencies. An applicant must show in Exhibit E of its application that it has met the requirements of paragraphs (b) through (d) of this section, and § 16.8(i), and must include:

(1) Any resource agency letters containing comments, recommendations, and proposed terms and conditions;

(2) Any letters from the public containing comments and recommendations;

(3) Notice of any remaining disagreement with a resource agency on:

(i) The need for a study or the manner in which a study should be conducted and the applicant's reasons for disagreement, and

(ii) Information on any environmental protection, mitigation, or enhancement measure, including the basis for the applicant's disagreement with the resource agency.

(4) Evidence of any waivers under paragraph (e) of this section;

(5) Evidence of all attempts to consult with a resource agency, copies of related documents showing the attempts, and documents showing the conclusion of the second stage of consultation;

(6) An explanation of how and why the project would, would not, or should not, comply with any relevant comprehensive plan as defined in § 2.19 of this chapter and a description of any relevant resource agency determination regarding the consistency of the project with any such comprehensive plan;

(7)(i) With regard to certification requirements for a license applicant under section 401(a)(1) of the Clean Water Act:

(A) A copy of the water quality certification;

(B) A copy of the request for certification, including proof of the date on which the certifying agency received the request in accordance with applicable law governing filings with that agency; or

(C) Evidence of waiver of water quality certification as described in paragraph (f)(7)(ii) of this section.

(ii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act under the same circumstances as set out in § 4.38(e)(2) of this chapter.

(iii) Any material amendment, as defined under § 4.35(f) of this chapter, to plans of development for the existing project proposed in an application for a license requires a new request for certification; and

(8) A description of how the applicant's proposal addresses the significant resource issues raised by members of the public during the joint meeting held pursuant to paragraph (b)(2) of this section.

(g) *Confidentiality of pre-filing submissions.* If a potential applicant requests confidential treatment of any information submitted to the Commission during pre-filing consultation (except for the information specified in paragraph (b)(1)), the Commission will treat that request in accordance with the confidentiality provisions in § 388.112 of this chapter until the date the application is filed with the Commission.

(h) *Other meetings.* Prior to holding a meeting with a resource agency other than a joint meeting pursuant to paragraph (b)(2)(i) or (c)(6)(i) of this section, a potential applicant must provide the Commission and each resource agency with an area of interest, expertise, or responsibility similar or related to that of the resource agency with which the potential applicant is to meet with written notice of the time and place of each meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(i) *Public participation.* (1) At least 14 days in advance of the joint meeting held pursuant to paragraph (b)(2), the potential applicant must publish notice, at least once, of the purpose, location, and timing of the joint meeting, in a daily or weekly newspaper published in the county or counties in which the existing project or any part thereof or the lands affected thereby are situated. The notice shall include a copy of the written agenda of the issues to be discussed at the joint meeting prepared pursuant to paragraph (b)(2)(ii) of this section.

(2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(1) of this section from the date on which the notice required by paragraph (i)(1) of this section is first published until the date of the joint meeting required by paragraph (b)(2) of this section.

(ii) The provisions of § 16.7(e) shall govern the form and manner in which the information is to be made available for public inspection and reproduction.

(iii) A potential applicant must make available to the public for inspection at the joint meeting required by paragraph (b)(2) of this section the information specified in paragraph (b)(1) of this section.

(j) *Transition provisions.* (1) The provisions of this section are not applicable to applications filed before July 3, 1989.

(2) The provisions of paragraphs (a) and (b) of this section are not applicable to potential applicants that complied with the provisions of § 4.38 (a) and (b)(1) of this chapter prior to July 3, 1989.

(3) The provisions of paragraph (c) are not applicable to potential applicants that complied with the provisions of § 4.38(b)(2) of this chapter prior to July 3, 1989.

(4)(i) Any applicant that files its application on or after July 3, 1989 and that complied with the provisions of § 4.38 (a) and (b)(1) of this chapter prior to July 3, 1989 must hold a public meeting, within 90 days from July 3, 1989, at or near the site of the existing project to generally explain the potential applicant's proposal for the site and to obtain the views of the public regarding resource issues that should be addressed in any application for new license that may be filed by the potential applicant. The public meeting must include both day and evening sessions, and the potential applicant must make either audio recordings or written transcripts of both sessions.

(ii) At least 14 days in advance of the meeting, the potential applicant must publish notice, at least once, of the purpose, location, and timing of the meeting, in a daily or weekly newspaper published in the county or counties in which the existing project or any part thereof or the lands affected thereby are situated.

(iii)(A) A potential applicant must make available to the public for inspection and reproduction information comparable to that specified in paragraph (b)(1) from the date on which the notice required by paragraph (j)(4)(ii) is first published until the date of the public meeting required by paragraph (j)(4)(i).

(B) The provisions of § 16.7(e) shall govern the form and manner in which the information is to be made available for public inspection and reproduction.

(C) A potential applicant must make available to the public for inspection at both sessions of the public meeting required by paragraph (j)(4)(i) of this section the information specified in paragraph (j)(4)(iii)(A).

(D) A potential applicant must upon request promptly provide to the Commission and any resource agency copies of the audio recordings or written transcripts of the sessions of the public meeting.

(iv) Any applicant holding a public meeting pursuant to paragraph (j)(4)(i) must include in its filed application a description of how the applicant's proposal addresses the significant resource issues raised during the public meeting.

(5) All requests for waiver of, or clarification regarding, the application of the provisions of this subsection to a proceeding must be submitted to the Director of the Office of Hydropower Licensing not later than 90 days after July 3, 1989 and will be subject to, and processed in accordance with, the provisions of paragraph (b)(5).

§ 16.9 Applications for new licenses and nonpower licenses for projects subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability.* This section applies to an applicant for a new license or nonpower license for a project subject to sections 14 and 15 of the Federal Power Act.

(b) *Filing requirement.* (1) An applicant for a license under this section must file its application at least 24 months before the existing license expires.

(2) An application for a license under this section must meet the requirements of § 4.32 (except that the Director of the Office of Hydropower Licensing may provide more than 90 days in which to correct deficiencies in applications) and, as appropriate, §§ 4.41, 4.51, or 4.61 of this chapter.

(3) The requirements of § 4.35 of this chapter do not apply to an application under this section, except that the Commission will reissue a public notice of the application in accordance with the provisions of § 16.9(d)(1) if an amendment described in § 4.35(f) of this chapter is filed.

(4) If the Commission rejects or dismisses an application pursuant to the provisions of § 4.32 of this chapter, the application may not be refiled after the new license application filing deadline specified in § 16.9(b)(1).

(c) *Final amendments.* All amendments to an application, including the final amendment, must be filed with the Commission and served on all competing applicants no later than the date specified in the notice issued under paragraph (d)(2).

(d) *Commission notice.* (1) Upon acceptance of an application for a new license or a nonpower license, the Commission will give notice of the application and of the dates for comment, intervention, and protests by:

(i) Publishing notice in the **Federal Register**;

(ii) Publishing notice once every week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated; and

(iii) Notifying appropriate Federal, state, and interstate resource agencies and Indian tribes by mail.

(2) Within 60 days after the new license application filing deadline, the Commission will issue a notice on the processing deadlines established under § 4.32 of this chapter, estimated dates for further processing deadlines under § 4.32 of this chapter, deadlines for complying with the provisions of § 4.36(d)(2) (ii) and (iii) of this chapter in cases where competing applications are filed, and the date for final amendments and will:

(i) Publish the notice in the **Federal Register**;

(ii) Provide the notice to appropriate Federal, state, and interstate resource agencies and Indian tribes; and

(iii) Serve the notice on all parties to the proceedings pursuant to § 385.2010 of this chapter.

(3) Where two or more mutually exclusive competing applications have been filed for the same project, the final amendment date and deadlines for complying with the provisions of § 4.36(d)(2) (ii) and (iii) of this chapter established pursuant to the notice issued under paragraph (d)(2) of this section will be the same for all such applications.

(4) The provisions of § 4.36(d)(2)(i) of this chapter will not be applicable to applications filed pursuant to this section.

§ 16.10 Information to be provided by an applicant for new license.

(a) *Information to be supplied by all applicants.* All applicants for a new license under this part must file the following information with the Commission:

(1) A discussion of the plans and ability of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service, including efforts and plans to:

(i) Increase capacity or generation at the project;

(ii) Coordinate the operation of the project with any upstream or downstream water resource projects; and

(iii) Coordinate the operation of the project with the applicant's or other electrical systems to minimize the cost of production.

(2) A discussion of the need of the applicant over the short and long term for the electricity generated by the project, including:

(i) The reasonable costs and reasonable availability of alternative sources of power that would be needed by the applicant or its customers, including wholesale customers, if the applicant is not granted a license for the project;

(ii) A discussion of the increase in fuel, capital, and any other costs that would be incurred by the applicant or its customers to purchase or generate power necessary to replace the output of the licensed project, if the applicant is not granted a license for the project;

(iii) The effect of each alternative source of power on:

(A) The applicant's customers, including wholesale customers;

(B) The applicant's operating and load characteristics; and

(C) The communities served or to be served, including any reallocation of costs associated with the transfer of a license from the existing licensee.

(3) The following data showing need and the reasonable cost and availability of alternative sources of power:

(i) The average annual cost of the power produced by the project, including the basis for that calculation;

(ii) The projected resources required by the applicant to meet the applicant's capacity and energy requirements over the short and long term including:

(A) Energy and capacity resources, including the contributions from the applicant's generation, purchases, and load modification measures (such as conservation, if considered as a resource), as separate components of the total resources required;

(B) A resource analysis, including a statement of system reserve margins to be maintained for energy and capacity; and

(C) If load management measures are not viewed as resources, the effects of such measures on the projected capacity and energy requirements indicated separately;

(iii) For alternative sources of power, including generation of additional power at existing facilities, restarting deactivated units, the purchase of power off-system, the construction or purchase and operation of a new power plant, and load management measures such as conservation:

(A) The total annual cost of each alternative source of power to replace project power;

(B) The basis for the determination of projected annual cost; and

(C) A discussion of the relative merits of each alternative, including the issues of the period of availability and dependability of purchased power, average life of alternatives, relative equivalent availability of generating alternatives, and relative impacts on the applicant's power system reliability and

other system operating characteristics; and

(iv) The effect on the direct providers (and their immediate customers) of alternate sources of power.

(4) If an applicant uses power for its own industrial facility and related operations, the effect of obtaining or losing electricity from the project on the operation and efficiency of such facility or related operations, its workers, and the related community.

(5) If an applicant is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation.

(6) A comparison of the impact on the operations and planning of the applicant's transmission system of receiving or not receiving the project license, including:

(i) An analysis of the effects of any resulting redistribution of power flows on line loading (with respect to applicable thermal, voltage, or stability limits), line losses, and necessary new construction of transmission facilities or upgrading of existing facilities, together with the cost impact of these effects;

(ii) An analysis of the advantages that the applicant's transmission system would provide in the distribution of the project's power; and

(iii) Detailed single-line diagrams, including existing system facilities identified by name and circuit number, that show system transmission elements in relation to the project and other principal interconnected system elements. Power flow and loss data that represent system operating conditions may be appended if applicants believe such data would be useful to show that the operating impacts described would be beneficial.

(7) If the applicant has plans to modify existing project facilities or operations, a statement of the need for, or usefulness of, the modifications, including at least a reconnaissance-level study of the effect and projected costs of the proposed plans and any alternate plans, which in conjunction with other developments in the area would conform with a comprehensive plan for improving or developing the waterway and for other beneficial public uses as defined in section 10(a)(1) of the Federal Power Act.

(8) If the applicant has no plans to modify existing project facilities or operations, at least a reconnaissance-level study to show that the project facilities or operations in conjunction with other developments in the area would conform with a comprehensive plan for improving or developing the waterway and for other beneficial public uses as defined in section 10(a)(1) of the Federal Power Act.

(9) A statement describing the applicant's financial and personnel resources to meet its obligations under a new license, including specific information to demonstrate that the applicant's personnel are adequate in number and training to operate and maintain the project in accordance with the provisions of the license.

(10) If an applicant proposes to expand the project to encompass additional lands, a statement that the applicant has notified, by certified mail, property owners on the additional lands to be encompassed by the project and governmental agencies and subdivisions likely to be interested in or affected by the proposed expansion.

(11) The applicant's electricity consumption efficiency improvement program, as defined under section 10(a)(2)(C) of the Federal Power Act, including:

(i) A statement of the applicant's record of encouraging or assisting its customers to conserve electricity and a description of its plans and capabilities for promoting electricity conservation by its customers; and

(ii) A statement describing the compliance of the applicant's energy conservation programs with any applicable regulatory requirements.

(12) The names and mailing addresses of every Indian tribe with land on which any part of the proposed project would be located or which the applicant reasonably believes would otherwise be affected by the proposed project.

(b) *Information to be provided by an applicant who is an existing licensee.* An existing licensee that applies for a new license must provide:

(1) The information specified in paragraph (a).

(2) A statement of measures taken or planned by the licensee to ensure safe management, operation, and maintenance of the project, including:

(i) A description of existing and planned operation of the project during flood conditions;

(ii) A discussion of any warning devices used to ensure downstream public safety;

(iii) A discussion of any proposed changes to the operation of the project or downstream development that might affect the existing Emergency Action Plan, as described in Subpart C of Part 12 of this chapter, on file with the Commission;

(iv) A description of existing and planned monitoring devices to detect structural movement or stress, seepage, uplift, equipment failure, or water conduit failure, including a description of the maintenance and monitoring programs used or planned in conjunction with the devices; and

(v) A discussion of the project's employee safety and public safety record, including the number of lost-time accidents involving employees and the record of injury or death to the public within the project boundary.

(3) A description of the current operation of the project, including any constraints that might affect the manner in which the project is operated.

(4) A discussion of the history of the project and record of programs to upgrade the operation and maintenance of the project.

(5) A summary of any generation lost at the project over the last five years because of unscheduled outages, including the cause, duration, and corrective action taken.

(6) A discussion of the licensee's record of compliance with the terms and conditions of the existing license, including a list of all incidents of noncompliance, their disposition, and any documentation relating to each incident.

(7) A discussion of any actions taken by the existing licensee related to the project which affect the public.

(8) A summary of the ownership and operating expenses that would be reduced if the project license were transferred from the existing licensee.

(9) A statement of annual fees paid under Part I of the Federal Power Act for the use of any Federal or Indian lands included within the project boundary.

(c) *Information to be provided by an applicant who is not an existing licensee.* An applicant that is not an existing licensee must provide:

(1) The information specified in paragraph (a).

(2) A statement of the applicant's plans to manage, operate, and maintain the project safely, including:

(i) A description of the differences between the operation and maintenance procedures planned by the applicant and the operation and maintenance procedures of the existing licensee;

(ii) A discussion of any measures proposed by the applicant to implement the existing licensee's Emergency Action Plan, as described in Subpart C of Part 12 of this chapter, and any proposed changes;

(iii) A description of the applicant's plans to continue safety monitoring of existing project instrumentation and any proposed changes; and

(iv) A statement indicating whether or not the applicant is requesting the licensee to provide transmission

services under section 15(d) of the Federal Power Act.

(d) *Extended deadline for certain applicants.* If an applicant must file an application under § 16.9 within 90 days after July 3, 1989, that applicant may provide the information required in this section within 90 days after the date on which it files the application.

(e) *Inclusion in application.* Except as permitted in paragraph (d), the information required to be provided by this section must be included in the application as a separate exhibit labeled "Exhibit H."

§ 16.11 Nonpower licenses.

(a) *Information to be provided by all applicants for nonpower licenses.* (1) An applicant for a nonpower license must provide the following information in its application:

(i) The information required by §§ 4.51 or 4.61 of this chapter, as appropriate;

(ii) A description of the nonpower purpose for which the project is to be used;

(iii) A showing of how the nonpower use conforms with a comprehensive plan for improving or developing the waterway and for other beneficial public uses as defined in section 10(a)(1) of the Federal Power Act;

(iv) A statement of any impact that converting the project to nonpower use may have on the power supply of the system served by the project, including the additional cost of power if an alternative generating source is used to offset the loss of the project's generation;

(v) A statement identifying the state, municipal, interstate, or Federal agency, which is authorized and willing to assume regulatory supervision over the land, waterways, and facilities to be included within the nonpower project;

(vi) Copies of written communication and documentation of oral communication that the applicant may have had with any jurisdictional agency or governmental unit authorized and willing to assume regulatory control over the project and the point of time at which the agency or unit would assume regulatory control;

(vii) A statement that demonstrates that the applicant has complied with the requirements of § 16.8(d)(2);

(viii) A proposal that shows the manner in which the applicant plans to remove or otherwise dispose of the project's power facilities;

(ix) Any proposal to repair or rehabilitate any nonpower facilities;

(x) A statement of the costs associated with removing the project's power facilities and with any necessary restoration and rehabilitation work; and

(xi) A statement that demonstrates that the applicant has resources to ensure the integrity and safety of the remaining project facilities and to maintain the nonpower functions of the project until the governmental unit or agency assumes regulatory control over the project.

(2) If an applicant must file an application for a nonpower license under § 16.9 within 90 days after July 3, 1989, that applicant may provide the information required in paragraph (a) (except the information specified in paragraph (a)(1)(i)), within 90 days after the date it files the application.

(b) *Termination of a proceeding for a nonpower license.* The Commission may deny an application for a nonpower license and turn the project over to any agency that has jurisdiction over the land or reservations if:

(1) An existing project is located on public lands or reservations of the United States;

(2) Neither the existing licensee nor any other entity has filed an application for a new license for the project;

(3) No one has filed a recommendation to take over the project pursuant to § 16.14; and

(4) The agency that has jurisdiction over the land or reservations demonstrates that it is able and willing to:

(i) Accept immediate responsibility for the nonpower use of the project; and.

(ii) Pay the existing licensee for its net investment in the project and any severance damages specified in section 14(a) of the Federal Power Act.

(c) *Termination of nonpower license.* A nonpower license will be terminated by Commission order when the Commission determines that a state, municipal, interstate, or Federal agency has jurisdiction over, and is willing to assume regulatory responsibility for, the land, waterways, and facilities included within the nonpower license.

§ 16.12 Application for exemption from licensing by a licensee whose license is subject to sections 14 and 15 of the Federal Power Act.

(a) An existing licensee whose license is subject to sections 14 and 15 of the Federal Power Act may apply for an exemption for the project.

(b) An applicant for an exemption under paragraph (a) must meet the requirements of Subpart K or Subpart J of Part 4 of this chapter, and §§ 16.5, 16.6, 16.7, 16.8, 16.9(b) (1), (2) (except the requirement to comply with §§ 4.41, 4.51, or 4.61 of this chapter), 16.9(c), 16.10(a), 16.10(b), 16.10(d), and 16.10(e).

(c) The Commission will process an application by an existing licensee for an exemption for the project in accordance with §§ 16.9(b)(3), 16.9(b)(4), and 16.9(d).

(d) If a license application is filed in competition with an application for exemption filed by the existing licensee, the Commission will decide among the competing applications in accordance with the standards of § 16.13 and not in accordance with the provisions of § 4.37(d)(2) of this chapter.

§ 16.13 Standards and factors for issuing a new license.

(a) In determining whether a final proposal for a new license under section 15 of the Federal Power Act is best adapted to serve the public interest, the Commission will consider the factors enumerated in sections 15(a)(2) and (a)(3) of the Federal Power Act.

(b) If there are only insignificant differences between the final applications of an existing licensee and a competing applicant after consideration of the factors enumerated in section 15(a)(2) of the Federal Power Act, the Commission will determine which applicant will receive the license after considering:

(1) The existing licensee's record of compliance with the terms and conditions of the existing license; and

(2) The actions taken by the existing licensee related to the project which affect the public.

(c) An existing licensee that files an application for a new license in conjunction with an entity or entities that are not currently licensees of all or part of the project will not be considered an existing licensee for the purpose of the insignificant differences provision of section 15(a)(2) of the Federal Power Act.

10. Section 16.14 is revised and §§ 16.15 through 16.17 are added and designated as Subpart C, to read as follows:

Subpart C—Takeover Provisions for Projects Subject to Sections 14 and 15 of the Federal Power Act

§ 16.14 Departmental recommendation for takeover.

(a) A Federal department or agency may file a recommendation that the United States exercise its right to take over a hydroelectric power project with a license that is subject to sections 14 and 15 of the Federal Power Act. The recommendation must:

(1) Be filed no earlier than five years before the license expires and no later than the end of the comment period specified by the Commission in:

(i) A notice of application for a new license, a nonpower license, or an exemption for the project; or

(ii) A notice of an amendment to an application for a new license, a nonpower license, or an exemption;

(2) Be filed in accordance with the formal requirements for filings in Subpart T of Part 385 of the Commission's regulations and be served on each relevant Federal and state resource agency, all applicants for new license, nonpower license or exemption, and any other party to the proceeding;

(3) Specify the project works that would be taken over by the United States;

(4) Describe the proposed Federal operation of the project, including any plans for its redevelopment, and discuss the manner in which takeover would serve the public interest as fully as non-Federal development and operation;

(5) State whether the agency intends to undertake the operation of the project; and

(6) Include the information required by §§ 4.41, 4.51, or 4.61 of this chapter, as appropriate.

(b) A department or agency that files a takeover recommendation becomes a party to the proceeding.

(c) An applicant or potential applicant for a new license, a nonpower license, or an exemption that involves a takeover recommendation may file a reply to the recommendation, within 120 days from the date the takeover recommendation is filed with the Commission. The reply must be filed with the Commission in accordance with Part 385 of the Commission's regulations and a copy of such a reply must be served on the agency recommending the takeover and on any other party to the proceeding.

§ 16.15 Commission recommendation to Congress.

Upon receipt of a recommendation from any Federal department or agency, a proposal of any party, or on the Commission's own motion, and after notice and opportunity for hearing, the Commission may determine that a project may be taken over by the United States, issue an order on its findings and recommendations, and forward a copy to Congress.

§ 16.16 Motion for stay by Federal department or agency.

(a) Within 30 days of the date on which an order granting a new license or exemption is issued, a Federal department or agency that has filed a takeover recommendation under § 16.14 may file a motion under § 385.2010 of this chapter to request a stay of the effective date of the license or exemption order.

(b)(1) If a Federal department or agency files a motion under paragraph (a), the Commission will stay the effective date of the order issuing the license or exemption for two years.

(2) The stay issued under paragraph (b)(1) of this section may be terminated either:

(i) Upon motion of the department or agency that requested the stay; or

(ii) By action of Congress.

(c) The Commission will notify Congress if:

(1) An order granting a stay under paragraph (b)(1) of this section is issued;

(2) Any license or exemption order becomes effective by reason of the termination of a stay; or

(3) Any license or exemption order becomes effective by reason of the expiration of a stay.

(d) The Commission's order granting the license or exemption will automatically become effective:

(1) Thirty days after issuance, if no request for stay is filed, provided that no appeal or rehearing is filed;

(2) When the period of the stay expires; or

(3) When the stay is terminated under paragraph (b)(2) of this section.

§ 16.17 Procedures upon Congressional authorization of takeover.

If Congress authorizes the takeover of a hydroelectric power project as provided under section 14 of the Federal Power Act:

(a) The Commission or the Director of the Office of Hydropower Licensing will notify the existing licensee in writing of the authorization at least two years before the takeover occurs; and

(b) The licensee must present any claim for compensation to the Commission:

(1) Within six months of issuance of the notice of takeover; and

(2) As provided in section 14 of the Federal Power Act.

11. Section 16.18 is added as Subpart D, to read as follows:

Subpart D—Annual Licenses for Projects Subject to Sections 14 and 15 of the Federal Power Act

§ 16.18 Annual licenses for projects subject to sections 14 and 15 of the Federal Power Act.

(a) This section applies to projects with licenses subject to sections 14 and 15 of the Federal Power Act.

(b) The Commission will issue an annual license to an existing licensee under the terms and conditions of the existing license upon expiration of its existing license to allow:

(1) The licensee to continue to operate the project while the Commission reviews any applications for a new license, a nonpower license, an exemption, or a surrender;

(2) The orderly removal of a project, if the United States does not take over a project and no new power or nonpower license or exemption will be issued; or

(3) The orderly transfer of a project to:

(i) The United States, if takeover is elected; or

(ii) A new licensee, if a new power or nonpower license is issued to that licensee.

(c) An annual license issued under this section will be considered renewed automatically without further order of the Commission, unless the Commission orders otherwise.

12. Sections 16.19 through 16.22 are added as Subpart E, to read as follows:

Subpart E—Projects With Minor and Minor Part Licenses Not Subject to Sections 14 and 15 of the Federal Power Act

Sec.

16.19 Procedures for an existing licensee of a minor hydroelectric power project or of a minor part of a hydroelectric power project with a license not subject to sections 14 and 15 of the Federal Power Act.

16.20 Applications for subsequent license for a project with an expiring license not subject to sections 14 and 15 of the Federal Power Act.

16.21 Operation of projects with a minor or minor part license not subject to sections 14 and 15 of the Federal Power Act after expiration of a license.

16.22 Application for an exemption by a license with a minor or minor part license for a project not subject to sections 14 and 15 of the Federal Power Act.

Subpart E—Projects With Minor and Minor Part License Not Subject to Sections 14 and 15 of the Federal Power Act

§ 16.19 Procedures for an existing licensee of a minor hydroelectric power project or of a minor part of a hydroelectric power project with a license not subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability.* This section applies to an existing licensee of a minor hydroelectric power project or of a minor part of a hydroelectric power project that is not subject to sections 14 and 15 of the Federal Power Act.

(b) *Notification procedures.* (1) An existing licensee with a minor license or a license for a minor part of a hydroelectric project must file a notice of intent pursuant to § 16.6(b).

(2) If the license of an existing licensee expires on or after October 17,

1994, the licensee must notify the Commission as required under § 16.6(b) at least five years before the expiration of the existing license.

(3) Except as provided in paragraph (b)(4) of this section, if the license of an existing licensee expires before October 17, 1994, the licensee must notify the Commission as required under § 16.6(b) no later than September 1, 1989.

(4) The requirement in paragraph (b)(3) of this section does not apply if an applicant filed a notice of intent as required by § 16.6(b) or an application for a subsequent license on or before July 3, 1989.

(5) The Commission will give notice of a licensee's intent to file or not to file an application for a subsequent license in accordance with § 16.6(d).

(c) *Requirement to make information available.* (1) Except as provided in paragraph (c)(2) of this section, a licensee must make the information described in § 16.7 available to the public for inspection and reproduction when it gives notice to the Commission under paragraph (b).

(2) The requirement of paragraph (c)(1) of this section does not apply if an applicant filed an application for a subsequent license on or before [insert the effective date of the rule].

§ 16.20 Applications for subsequent license for a project with an expiring license not subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability.* This section applies to an application for subsequent license for a project with an expiring license that is not subject to sections 14 and 15 of the Federal Power Act.

(b) *Licensing proceeding.* (1) An applicant for a license for a project with an expiring license not subject to sections 14 and 15 of the Federal Power Act must file its application under Part I of the Federal Power Act.

(2) The provisions of section 7(a) of the Federal Power Act do not apply to licensing proceedings involving an application described in paragraph (b)(1).

(c) *Requirement to file.* (1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, an applicant must file an application for subsequent license at least 24 months before the expiration of the existing license.

(2) The requirement in paragraph (c)(1) does not apply if the license is due to expire within three years of July 3, 1989.

(3) An applicant intending to file an application for subsequent license for a project whose license is due to expire within four years of July 3, 1989, must file an application at least 12 months before the date on which the existing license expires.

(d) *Requirements for and processing of applications.* An application for subsequent license must meet the requirements of, and will be processed in accordance with, §§ 16.5, 16.8, 16.9(b)(2), 16.9(b)(3), 16.9(b)(4), 16.9(c), and 16.9(d).

(e) *Applicant notice.* An applicant for subsequent license or exemption that proposes to expand an existing project to encompass additional lands must include in its application a statement that the applicant has notified, by certified mail, property owners on the additional lands to be encompassed by the project and governmental agencies and subdivisions likely to be interested in or affected by the proposed expansion.

§ 16.21 Operation of projects with a minor or minor part license not subject to sections 14 and 15 of the Federal Power Act after expiration of a license.

(a) A licensee of a minor or minor part project not subject to sections 14 and 15 of the Federal Power Act that has filed an application for a subsequent license or exemption may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires until the Commission acts on its application.

(b) If the licensee of a minor or minor part project not subject to sections 14 and 15 of the Federal Power Act has not filed an application for a subsequent license or exemption, the Commission may issue an order requiring the licensee to continue to operate its project in accordance with the terms and conditions of the license until the Commission either acts on any applications for subsequent license timely filed by another entity or takes action pursuant to §§ 16.25 or 16.26.

§ 16.22 Application for an exemption by a licensee with a minor or minor part license for a project not subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability.* This section applies to an existing licensee with a license for a project not subject to sections 14 and 15 of the Federal Power Act.

(b) *Information requirements.* An applicant for an exemption must meet the requirements of, and will be processed in accordance with, Subpart K or Subpart J of Part 4 of this chapter, and §§ 16.5, 16.8, 16.9(b)(2) (except the requirement to comply with §§ 4.41, 4.51, or 4.61 of this chapter), §§ 16.9(b)(3), 16.9(b)(4), 16.9(c), 16.9(d), and 16.20(c).

(c) *Standard of comparison.* If an application for subsequent license is filed in competition with an application for exemption by an existing licensee, the Commission will decide among competing applications in accordance with the standards of § 16.13 and not in accordance with the provisions of § 4.37(d)(2) of this chapter.

13. Sections 16.23, 16.24, 16.25 and 16.26 are added as Subpart F, to read as follows:

Subpart F—Procedural Matters

Sec.

16.23 Failure to file timely notices of intent.
16.24 Prohibitions against filing applications for new license, nonpower license, exemption, or subsequent license.
16.25 Disposition of a project for which no timely application is filed following a notice of intent to file.
16.26 Disposition of a project for which no timely application is filed following a notice of intent not to file.

Subpart F—Procedural Matters

§ 16.23 Failure to file timely notices of intent.

(a) An existing licensee of a water power project with a license subject to sections 14 and 15 of the Federal Power Act that fails to file a notice of intent pursuant to § 16.6(b) by the deadlines specified in § 16.6(c) shall be deemed to have filed a notice of intent indicating that it does not intend to file an application for new license, nonpower license, or exemption.

(b) An existing licensee of a water power project with a license not subject to sections 14 and 15 of the Federal Power Act that fails to file a notice of intent pursuant to § 16.6(b) by the deadlines specified in § 16.20(c) shall be deemed to have filed a notice of intent indicating that it does not intend to file an application for subsequent license or exemption.

§ 16.24 Prohibitions against filing applications for new license, nonpower license, exemption, or subsequent license.

(a) *Licenses subject to sections 14 and 15 of the Federal Power Act.* (1) An existing licensee with a license subject to sections 14 and 15 of the Federal Power Act that informs the Commission that it does not intend to file an application for new license, nonpower license, or exemption for a project, as required by § 16.6, may not file an application for new license, nonpower license, or exemption for the project, either individually or in conjunction with an entity or entities that are not currently licensees of the project.

(2) An existing licensee with a license subject to sections 14 and 15 of the Federal Power Act that fails to file an application for new license, nonpower license, or exemption for a project at least 24 months before the expiration of

the existing license for the project may not file an application for new license, nonpower license, or exemption for the project, either individually or in conjunction with an entity or entities that are not currently licensees of the project.

(b) *Licenses not subject to sections 14 and 15 of the Federal Power Act.* (1) An existing licensee with a license not subject to sections 14 and 15 of the Federal Power Act that informs the Commission that it does not intend to file an application for subsequent license or exemption for a project, as required by § 16.6, may not file an application for subsequent license or exemption for the project, either individually or in conjunction with an entity or entities that are not currently licensees of the project.

(2) An existing licensee with a license not subject to sections 14 and 15 of the Federal Power Act that fails to file an application for subsequent license or exemption for a project by the deadlines specified in § 16.20(c) may not file an application for subsequent license or exemption for the project, either individually or in conjunction with an entity or entities that are not currently licensees of the project.

§ 16.25 Disposition of a project for which no timely application is filed following a notice of intent to file.

(a) If an existing licensee that indicates in the notice filed pursuant to § 16.6 that it will file an application for new license, nonpower license, subsequent license, or an exemption does not file its application individually or in conjunction with an entity or entities that are not currently licensees of the project at least 24 months before its existing license expires in the case of licenses subject to sections 14 and 15 of the Federal Power Act, or by the deadlines specified in § 16.20(c) in the case of licenses not subject to sections 14 and 15 of the Federal Power Act, and no other applicant files an application within the appropriate time or all pending applications filed before the applicable filing deadline are subsequently rejected or dismissed pursuant to § 4.32 of this chapter, the Commission will publish in the Federal Register and once in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated, notice soliciting applications from potential applicants other than the existing licensee.

(b) A potential applicant that files a notice of intent within 90 days from the date of the public notice issued pursuant to paragraph (a):

(1) May apply for a license under Part I of the Federal Power Act and Part 4 of this chapter (except § 4.38) within 18 months of the date on which it files its notice; and

(2) Must comply with the requirements of § 16.8 and, if the project would have a total installed capacity of over 2,000 horsepower, § 16.10.

(c) The existing licensee must file a schedule for the filing of a surrender application for the project, for the approval of the Director of the Office of Hydropower Licensing, 90 days:

(1) After the due date established for any notice of intent issued under paragraph (a), if no notices of intent were received; or

(2) After the due date for any application filed under paragraph (b)(1), if no application has been filed.

(d) Any application for surrender must be filed according to the approved schedule, must comply with the requirements of § 16.8 and Part 6 of this chapter, and must provide for disposition of any project facility.

§ 16.26 Disposition of a project for which no timely application is filed following a notice of intent not to file.

(a) If an existing licensee indicates in the notice filed pursuant to § 16.6 that it will not file an application for new license, nonpower license, subsequent license, or exemption and no other applicant files an application at least 24 months before the existing license expires in the case of licenses subject to sections 14 and 15 of the Federal Power Act, or by the deadlines specified in § 16.20(c) in the case of licenses not subject to sections 14 and 15 of the Federal Power Act, the Director of the Office of Hydropower Licensing will provide the existing licensee with written notice that no timely applications for the project have been filed.

(b) The existing licensee, within 90 days from the date of the written notice provided in paragraph (a), must file a schedule for the filing of a surrender application for the project for the approval of the Director of the Office of Hydropower Licensing.

(c) Any application for surrender must be filed according to the approved schedule, must comply with the requirements of § 16.8 and Part 6 of this chapter, and must provide for disposition of any project facility.

Note: This appendix will not be published in the *Code of Federal Regulations.*

Appendix A—List of Commenters

1. Alabama Power Company (Alabama Power)
2. American Paper Institute (American Paper)
3. American Public Power Association (American Power)
4. American Rivers
5. Brazos River Authority (Brazos)
6. Columbia River Inter-Tribal Fish Commission (Columbia Commission)
7. Confederated Tribes of the Warm Springs Reservation (Warm Springs Tribes)
8. Connecticut River Atlantic Salmon Commission (Connecticut Commission)
9. Denver Water Department (Denver Department)
10. Edison Electric Institute (EEI)
11. Eugene Water and Electric Board (Eugene Board)
12. Friends of the Earth
13. Georgia Power Company (Georgia Power)
14. Great Lakes Indian Fish & Wildlife Commission (Great Lakes Commission)
15. Great Northern Nekoosa (Great Northern)
16. Holyoke, Massachusetts (Holyoke)
17. Idaho Power Company (Idaho Power)
18. International Association of Fish & Wildlife Agencies (International Association)
19. Linweave, Inc.
20. Long Lake Energy Corporation (Long Lake)
21. Maine State Planning Office (Maine Office)
22. Michigan Department of Natural Resources (Michigan Department)
23. Mid-Columbia Public Utility District (Mid-Columbia)
24. Montana Department of Fish, Wildlife & Parks (Montana Fish and Wildlife)
25. Montana Department of Natural Resources and Conservation (Montana Natural Resources)
26. Montana Power Company (Montana Power)
27. National Hydropower Association (National Hydropower)
28. National Wildlife Federation (Wildlife Federation)
29. Nebraska Public Power District (Nebraska Power)
30. New York Department of Environmental Conservation (New York Department)
31. New York State Electric & Gas Corporation (New York Electric)
32. Niagara Mohawk Power Corporation (Niagara Mohawk)
33. Niagara Mohawk/Fourth Branch Associates (Fourth Branch)
34. Northern California Power Agency (Northern California Agency)

35. Pacific Gas & Electric Company (PG&E)
36. Point No Point Treaty Council (Treaty Council)
37. Public Generating Pool (Public Pool)
38. Public Utility District #1 of Douglas County, Washington (Douglas County PUD)
39. Public Utility District #2 of Grant County, Washington (Grant County PUD)
40. Puget Sound Power & Light Company (Puget Sound Power)
41. Rochester Gas & Electric Corporation (Rochester Gas)
42. Seattle City Light (Seattle Light)
43. South Carolina Department of Health & Environmental Control (South Carolina Department)
44. Southern California Edison
45. Tacoma Public Utilities (Tacoma Utilities)
46. Trout Unlimited
47. U.S. Department of Commerce
48. U.S. Department of the Interior
49. U.S. Environmental Protection Agency (EPA)
50. U.S. Forest Service
51. U.S. Small Business Administration (Small Business Administration)
52. Washington Department of Ecology (Washington Ecology)
53. Washington Department of Fisheries (Washington Fisheries)
54. Washington Department of Wildlife (Washington Wildlife)
55. Washington Water Power (Washington Power)
56. Western States Water Council (Western Council)
57. Wisconsin Department of Natural Resources (Wisconsin Department)
58. Wisconsin Power & Light (Wisconsin Power)
59. Wisconsin Public Service Corporation *et al.* (Wisconsin Public Service)
60. Wisconsin Utilities Association (Wisconsin Utilities)

TRABANDT, Commissioner Concurring in Part and Dissenting in Part

There are six issues contained in this Final Rule that deserve further comment. These issues are: (1) The Commission decision to promulgate a section 10(j) rule that would include procedures for implementing sections 4(e), 18, and 10(j) (that would include Indian Tribe participation in the 10(j) process); (2) the impact of joint applications on existing licensee status; (3) interlocutory appeals in the dispute resolution process; (4) applicability of section 4(e) to relicensing proceedings; (5) applicability of section 18 to relicensing proceedings; and (6) public participation during the pre-filing consultation process.

I reluctantly concur with the resolution of the first issue. The second issue is included in this opinion so that I can highlight an important discussion contained in the Final Rule concerning acceptable options for financing projects. The remaining issues listed above were either not adequately resolved or incorrectly resolved causing me to dissent. I concur with all other issues contained in the Final Rule.

1. The Upcoming Section 10(j) Rulemaking

In Order No. 511 issued February 17, 1989, the Commission made public its instruction to staff to prepare a NOPR on the conflict resolution procedures prescribed by section 10(j). I submitted a concurring opinion wherein I made clear my view that current Commission practice: (1) Is completely consistent with the legislative history of the Conference Report enacted by Congress; and (2) implements dispute resolution in an effective and efficient manner for the mutual benefit of license applicants and fish and wildlife resources.

I would also note my dissenting opinion in *Henwood Associates, Inc.*, Project No. 8142, issued May 2, 1989. In *Henwood*, the majority concluded that the Commission's existing section 10(j) procedures have been flawed, despite a spirited Commission defense of those procedures in a January 13, 1989, letter to Chairman Dingell. The majority held that the Director of OHL in his letter to a state agency did not use precise enough language to inform that agency that the conflict to be resolved rested on the unacceptable impact on project viability which would trigger the statutory dispute resolution process of section 10(j), rather than merely on the inconsistencies between the recommendations of the state agency and those of the staff. Consequently, the majority found the entire section 10(j) negotiation to be fatally flawed. In essence, the majority adopted a formal expansion of section 10(j) before the Commission had the benefit of comments in response to the upcoming NOPR.

What makes this upcoming NOPR even more troublesome is that it now will contain procedures for the implementation of other sections contained in the Federal Power Act, notably sections 4(e) and 18. Inasmuch as these procedures will apply to relicensing proceedings, I question why they are not included in the instant Final Rule. There may be some arguable justification for foregoing such action at this juncture (*e.g.* further delay as a result of notice problems possibly requiring the issuance of another NOPR) because of the pressing need to get some relicensing rules out in order to accommodate many current relicense applicants whose licenses are about to expire. But, from a programmatic perspective, it appears at least to me well worth the effort to implement all relicensing procedures at the same time to avoid any confusion as to what course of action is appropriate under each provision of the FPA applicable to relicensing.

Put another way, of what particular value is the pre-filing consultation process adopted here with all the new requirements for applicants, resource agencies and the Commission staff, if we haven't decided yet how to implement in relicensing the statutory requirements under sections 4(e), 10(j) and 18. Those statutory obligations, as a practical matter, are the substantive "guts" of the relicensing process with regard to critical resource issues and the Commission's fundamental responsibility to give "equal consideration" to all resource values. The absence of those sectional implementing procedures in this rule, in my judgment, leaves a large hole in the Final Rule. Because of that conclusion, two things become essential for the subsequent 10(j) rulemaking. First, the Commission must act promptly to issue the Notice of Proposed Rulemaking to fill that hole. And, second, the Final Rule in that separate proceeding must be as consistent and complementary in substance and procedure as possible to avoid unnecessarily complicating or setting back the entire relicensing process.

Finally, in light of the unfortunate results associated with the original decision to do a section 10(j) rulemaking and the subsequent decision in the *Henwood* case, I have serious concerns about the likely direction of the forthcoming Notice of Proposed Rulemaking and the distinct possibility that the end result will be *de facto* mandatory conditioning for resource agencies across the spectrum of sections 4(e), 10(j) and 18, and even conceivably in other aspects of this Final Rule. I believe the Commission invites exactly that possibility with this bifurcated rulemaking approach, the all-or-nothing dynamics of the 10(j) rulemaking, and the probably inevitable "regulatory gamesmanship" that will be forced to occur, as occurred in *Henwood*. Consequently, all interested parties on rehearing should clearly be on notice of these potentialities.

2. Impact of Joint Applications on Existing Licensee Status

As the Final Rule points out, the majority of commenters on this issue

oppose the Commission's policy of not considering an incumbent to be an existing licensee for purposes of section 15 of the FPA and the Commission's relicensing regulations if the licensee files an application for a new license in conjunction with another entity or entities that are not current licensees of the project. These commenters provided much food for thought. My colleagues and I struggled mightily in an effort to determine how best to resolve this issue.

In that effort, we reviewed four separate options and a series of sub-options, before reaching our conclusion. Those options included:

1. Consider joint applicants to be existing licensees if there are no adverse impacts to existing customers in terms of power availability and costs. This is the option used in the March 17 draft, with minor revisions.

2. Consider joint applicants to be existing licensees if the existing licensee retains a specified percentage ownership in project facilities, such as the QF 50% rule.

3. Consider joint applicants to be existing licensees if the existing licensee will receive the majority of the benefits of the project, using the stream of benefits test developed for QF proceedings.

4. State that joint applicants will not be considered existing licensees under any circumstances.

On balance, it appears the best course of action is the one proposed in the Final Rule which essentially affirms what the NOPR proposed. However, I wish to highlight the discussion contained on pages 204 and 205 of the slip opinion. Financial arrangements between existing licensees and third parties that may ultimately benefit the customers of the existing licensee can be entered into without the need to add the third party as a co-applicant. As long as the existing licensee will retain sufficient ownership and control, a third party financier will not have to be added to an existing licensee's application for new license and the existing licensee will not be jeopardizing its status as an existing licensee under section 15(a)(2). In the interest of future certainty and predictability, interested parties may wish to seek further clarification as to the types of financial transactions, as well as any particular formulations of financial interest, that would be acceptable to the Commission.

3. Interlocutory Appeals in the Dispute Resolution Process

Although I appreciate and fully understand the arguments made by my colleagues with respect to the advisory nature of the Director's decisions in the dispute resolution process, I firmly believe that the Director's decisions will be *de facto* binding on the applicants. The Final Rule denies the request of several parties that we provide some form of appeal process as a result, even though the majority acknowledges that this could be a serious matter in some cases (slip op. at p. 83).

A decision by the Director affirming the need for a particular study requested by an appropriate agency could have the effect of forcing an existing licensee to stop pursuing its application for new license because of the significant cost of conducting and completing such a study. The fact that the final regulations permit an applicant to ignore the Director's decision and file an application without the study does not assuage my concern. If the applicant chooses to submit an application without the study, the applicant risks having its application dismissed as patently deficient by the Director. Only then does the applicant have the opportunity to seek an appeal before the Commission. Meanwhile, the applicant would have committed tens of thousands of dollars to the further processing of its application, money that might not have been spent had the applicant been apprised by the Commission as to its views on the matter.

In the alternative, if the applicant knew in pre-consultation that the Commission would be unyielding in requiring the study, the applicant could proceed in an expeditious manner to initiate the study or consider other options. Accordingly, in those instances where the need for a study is in question such that an applicant submits the matter to the Director for resolution pursuant to the dispute resolution process articulated in the Final Rule, I believe the applicant should have the right to appeal on an interlocutory basis, but with streamlined procedures, directly to the Full Commission. Such an appeal should be handled in an expeditious manner.

I note that I am not persuaded that my position on an interlocutory appeal process for the applicant leads *ipso facto* to the inevitable conclusion that there must be public participation in the pre-filing consultation process. I view those two issues as wholly separate and unrelated, because the general public and the applicant stand in two completely different postures at that point in the overall relicensing process, including the later formal proceedings triggered once an application is filed with the Commission. The general public will have full participation *and* effective remedies on any resource issue after the application is filed and, thus, is not bound in any way by the Director's decisions in the pre-filing consultation process. Compare that result with the applicant's potential dilemma inherent in the Final Rule, as discussed above, where the Director's decision *de facto* could bind the applicant as a practical matter. I, therefore, believe that there is a persuasive disassociation of the applicant interlocutory appeal issue and the public participation issue in this rule.

Finally, I would highlight the standard for studies requested by resource agencies adopted in the Final Rule. (Slip op. at. p. 64 and associated regulatory text). Where a dispute is referred to the Director for resolution over the need for and substance of a particular study, the resource agency will be required to demonstrate that the proposed study is consistent with "generally accepted practice" for such analyses in terms of both the objectives of the study and the scope and methodology of the study. This new standard will provide a critical balancing factor in the consultative process to ensure that potential applicants are not required to conduct unnecessary, unreasonable or extraordinary studies, which may be requested otherwise for any number of reasons or purposes unrelated to or inconsistent with the conduct of the relicensing process envisioned by Congress in ECPA. In the event of any disputes over studies between potential applicants and resource agencies, the Director should complete a careful scrutiny of any requested study in dispute and require the resource agency to demonstrate persuasively that the study, as a matter of fact, is necessary, reasonable and fully consistent with generally accepted practice.

4. Applicability of Section 4(e) to Relicensing Proceedings

The majority cites to its decision in the *City of Pasadena Water and Power Department* case (see footnote No. 133 in Final Rule slip opinion at 136) where it determined that section 4(e) mandatory conditioning authority applied to relicensing proceedings. I note that I strongly disagreed with the majority's decision in that case and issued a vigorous dissent. Therefore, it is unnecessary for me here to reiterate my arguments as to why I believe the majority erred in applying section 4(e) authority to relicensing proceedings. I would note, however, that the majority's decision to incorporate implementation of section 4(e) for relicensing in the 10(j) process exacerbates significantly the problems discussed in my dissent.

5. Applicability of Section 18 to Relicensing Proceedings

The majority has included in the Final Rule a determination that the authority of the Interior and Commerce Departments to prescribe fishways for projects under section 18 of the FPA applies to relicensing proceedings. I disagree with this determination.

The majority's decision unnecessarily jeopardizes two important Congressional interests in Commission relicense proceedings: to protect the interests of the investors and the project's customers. (See the dissenting opinion in *City of Pasadena Water and Power Department*, 46 FERC ¶ 61,004 (1989)). The Commission's *Lynchburg* decision cited in the Final Rule, held *inter alia*, that the authority to prescribe fishways could be *reserved* by the responsible agencies prior to the Commission's issuance of an original license. However, this reserved authority had to be expressly requested by the responsible agencies and expressly included in the license. 39 FERC ¶ 61,079 at p. 61,219.

If such authority was reserved in an original license and never acted on, I seriously question whether carrying that reserved authority into a relicense proceeding would be appropriate after 30, 40 or 50 years of operations. The design and installation of fishways at hydroelectric projects is, generally speaking, very costly in terms of construction, operation and maintenance costs, and potential negative impact on project operations and power generation. A potential licensee should be given the opportunity to include in any economic feasibility assessment a reasonable estimate of expected future expenses. It is unreasonable to issue a license to an applicant and not at least put the licensee on notice that significant expenses are yet to come, or to let decades pass without any action under the reserved authority.

With respect to relicense applications that propose to do nothing more than continue the existing operation without any modifications, it appears to me to be grossly inappropriate to permit Interior or Commerce to require the design, construction, operation, and maintenance of costly fish passage facilities without requiring Interior or Commerce to meet at least some threshold standard of extraordinary circumstances. If the responsible agencies did not request or have the Commission expressly reserve the authority to prescribe fishways during the processing of an original license, or if it was reserved but never used during the original term of the license, those agencies should carry a heavy burden of proof when attempting to impose this requirement during the processing of a relicense application.

Moreover, I believe that it is the responsibility of the Commission to evaluate and determine whether the request of Interior or Commerce to prescribe fishways is necessary or appropriate in a relicense proceeding under the general rubric of "equal consideration" of all power and resource values. The language contained in section 18 does not clearly indicate that Interior and Commerce have an unquestionable right to impose fishways on a "relicense" applicant. Indeed, as the Final Rule itself points out (slip op. at p. 22), the legislative history of section 18 is sparse, and nothing in it indicates section 18 does or should automatically apply to relicensing proceedings.

I also place considerable significance from a statutory construction perspective on the decision of Congress to enact the section 15 process in the Electric Consumer Protection Act of 1986 (ECPA). I find it inexplicable that Congress would have enacted section 15 with regard to the subject of fish and wildlife recommendations more generally, if there was any conceivable argument that section 18 should apply to relicensing. In the alternative, if section 18 was deemed to apply to relicensing, Congress surely would have noted that and rationalized its application as part of section 15.

For these reasons, I believe the majority's decision to automatically apply section 18 to relicense proceedings is incorrect and I dissent on that issue.

6. Public Participation During Pre-filing Consultation

The majority adopts in § 16.8 "Consultation Requirements," a new requirement for formal public participation in the joint meeting of the applicant and the resource agencies under paragraph (b)(3) in the first stage of mandatory pre-filing consultation. The purpose of the meeting is for the applicant and the resource agencies to review the applicant's information package and to discuss the data and studies to be provided by the applicant in the relicensing process. The applicant, under § 16.8(i), must give prior public notice and also now make available to the public the same information package provided to the pertinent agencies. Members of the public in attendance at the joint meeting now are entitled to participate fully and express their views regarding resource issues that should be addressed in any new license application. Also, at the discretion of the existing license applicant, the public can participate in the site visit held for officials of the pertinent agencies coincident with the joint meeting. This new requirement for public participation in the joint meeting is justified on several grounds by the majority in the preamble (slip op. 125–129).

With all due respect for my colleagues in the majority, I believe they fundamentally have misapprehended the public participation comments of certain parties in response to the NOPR. There clearly was no need for the majority to concoct a regulatory requirement for public participation in the pre-filing consultation stage of the Final Rule's relicensing process. I believe that, in fact, the procedure adopted by the majority has unnecessarily complicated the pre-filing process and, indeed, may work to inhibit, rather than facilitate, meaningful public participation at this stage of the relicensing process. I, therefore, feel compelled to dissent as to this requirement.

Nothing in the Federal Power Act (FPA) or ECPA requires that the Commission provide for formal public participation in the consultation process that precedes a formal license application proceeding for either original licensing or relicensing. Indeed, FPA section 15, as amended by ECPA, contains specific provisions requiring advance notice to the public of an existing licensee's intent to file an application for a new license. It also requires that extensive data pertaining to the project be made available to the public at the time of the advance notice. Yet, Congress did not accompany these provisions with an expansion of the public's existing right to participate as interveners in formal license application proceedings. So, it is clear that the majority has chosen, in its discretion, to establish such a right, even though it is not required by statute.

Moreover, I believe that the Commission's current licensing process, which begins with the filing of an acceptable license or new license application, provides ample opportunity for meaningful public participation. Following the acceptance of an original or new license application, the Commission publicly notices the application. The notice contains pertinent details describing the location, design, and mode of operation, as well as other facts related to the proposed project that can be used to determine the potential impact the proposed project may have on the environment.

The notice also provides enough information for the public to assess whether riparian or other property rights will be affected by the proposed project.

The public is given an opportunity to meaningfully participate in the license proceeding as parties by filing a motion to intervene within the time prescribed in the public notice. Becoming a party in a license proceeding entitles one to receive all filed documents in the proceeding, and participate fully at each stage of the formal proceeding, and also ensures the right to seek an appeal or rehearing of any Commission action that may be perceived by a party to be adverse to its interest. In any and every imaginable situation, the Commission, if persuaded on the merits by any party's arguments, has more than ample authority in relicensing to address any resource issue and adequately remedy any identified environmental problem. The timing of this public participation does not diminish one iota the Commission's available authority to efficiently and effectively respond to any and all environmental concerns, even where additional analysis or study may be necessary. If rehearing is sought and then subsequently denied by the Commission, a party has a right to seek judicial review of the Commission's decision.

In the relicensing context, an existing licensee is required to notify the Commission five years prior to the expiration of its license whether or not it will apply for a new license for the project (the "notice of intent" or "NOI"). Concurrent with this notification, and as noted above, the existing licensee must make extensive information about the project available for public inspection at its business offices. Upon receipt of the existing licensee's notice of intent, and years before a formal license application is filed at the Commission, the Commission issues a public notice in the local newspaper that identifies the project and states when and where the project information is available. There is, quite simply, no need for and no real benefit from *formal* public participation in the pre-filing consultation process at this time, because no application has yet been filed with the Commission that would trigger a formal licensing proceeding. However, I believe that active, but informal public involvement can, and indeed should, begin at this point in the relicensing process without the need for additional regulatory requirements adopted by the majority.

Any interested person or entity, for example, has the opportunity at this time to contact the applicant in order to find out more about the project. Once an interested person or entity has reviewed the information made publically available pursuant to the NOI, a preliminary assessment of the impacts caused by the project can be made in order to develop an informal dialogue with the applicant as to how to resolve potential problems. There is ample opportunity during the remainder of the consultation process to work informally with the applicant to discuss perceived problems. Clearly, active public discussion at this stage of the process provides a precious "early warning" advantage to the applicant. This "early warning" can be used by the applicant to effectively respond to what could otherwise become after the filing of an application, a protracted bureaucratic process that would include appeals and rehearings and, possibly, evidentiary trial-type hearings before administrative law judges. This potential consequence is obviously not in the applicant's best interest and should provide the incentive necessary for the applicant to pursue meaningful discussion with *all* interested parties.

In addition to contacting and working closely with the applicant, interested persons or entities also have the opportunity to approach the state or Federal resource agencies at this early stage in the process to either assist or seek assistance in reviewing potential problems. For these reasons, I conclude that rules *requiring* formal public participation prior to the time an acceptable license application is filed are neither legally required nor necessarily an appropriate policy. As discussed above, there is ample opportunity for the public to get involved informally during the time frame of the pre-filing consultation process, should anyone wish to do so.

However, I do not mean to diminish the genuine concern my colleagues obviously feel about ensuring public involvement at the earliest stage in the relicensing process. Requiring the potential applicant to hold a public meeting at or near the site of the existing project to obtain the views of the public regarding resource issues that should be addressed in any application for new license would have been an acceptable, and in my view more prudent, alternative method of guaranteeing public involvement prior to the actual filing of an application. To accommodate the meeting participants' varying work schedules, the public meeting could have included both day and evening sessions, and the potential applicant could have been required to publish advance notice of the meeting in a local daily or weekly newspaper. In addition, the potential applicant could have been required to make audio recordings or transcripts of the meeting, and further required to make a copy of the record available to the Commission and any resource agency that requests one.

The formalized regulatory method adopted by the majority, in my view, unjustifiably encroaches on state public participation prerogatives by strongly encouraging state agencies, if not all but requiring them, to participate with the applicant and the interested public at a public meeting prior to the filing of an application with the Commission. Such a requirement will likely have a chilling effect on open and candid exchanges between resource agencies and the applicant. In addition, such a procedure will encourage posturing by various interest groups and resource agencies for their respective constituencies at a stage when candor and cooperation are most important. Including private organizations with narrow parochial concerns at this stage of the process also clearly risks meetings that will be too large and unwieldy to control with numerous requests for otherwise unjustified studies and analysis. Since the public meeting is at such a preliminary point in the process, interests of the various parties could, and in all likelihood will, change by the time the application is filed. And, of course, the eventual formal application may be changed materially from the proposal at the time of the NOI and the beginning of the pre-filing consultation process with the resource agencies. And, indeed, that is one of the several objectives of the process prior to filing of the formal application, *i.e.* developing the most acceptable form of application to be filed.

Moreover, under this rule the applicant is now required to set up this public meeting as part of its compliance responsibilities with our relicensing regulations. Presumably failure to do so could cause the application to be patently deficient or at least deficient, even if all other requirements imposed by our regulations were adequately met. Ironically, original license applicants are not required to do this under the Commission's current regulations, because the Commission heretofore has not considered it necessary or appropriate, even though original licenses govern construction of completely *new* projects, while relicensing will govern consideration of *existing* projects already constructed and operating. Such a requirement for relicense applicants in my view is without any public interest justification,

certainly without any basis in law, and in all likelihood will counterproductively disserve the clear public interest and Congressional intent in an expeditious and effective relicensing process.

Two other aspects of the majority's new public participation requirement cause serious concerns. First, the confidentiality provisions of the NOPR and the earlier drafts of the final rule have been adjusted now to reflect the formal and mandatory participation of the public in the first joint meeting of the applicant and the resource agencies. In some respects, those adjustments will serve to tilt the confidentiality approach against the existing license applicant and extend certain competitive advantages to new competing applicants, solely because of the new public participation. I view that result as generally contrary to the clear intent of Congress for at least a "level playing field," if not more, for existing licenses in ECPA. Second, I am fearful that public participation now in *only* the first joint meeting will be argued by proponents as providing only a symbolic participation gesture. They will probably demand full public participation throughout the entire pre-filing consultation process as the only way to deal responsibly with the public. Thus, this first step in that direction could, in the absence of future restraint by the majority, become a slippery slope to the demise altogether of the important consultative process with resource agencies.

Conclusion

Many challenging and difficult issues have been resolved to my satisfaction in the formulation of this Final Rule. For that reason, I concur generally with regard to this order. At the same time, the issues discussed above will play a critical role in the overall adequacy of the relicensing process over the next several years. I would have preferred strongly to have the Final Rule adopt more acceptable positions on those key issues. Nonetheless, it is time to act on the long pending NOPR and provide some measure of general regulatory certainty and predictability in this important area of our responsibilities. For that reason, I support going forward today. But, at the same time, I believe the Commission on rehearing must address and remedy the serious problems I have outlined in this separate opinion in order to finish the job begun by Congress with the enactment of ECPA in 1986 and advanced by the NOPR last year.

For these reasons, I concur in part and dissent in part.

Charles A. Trabandt,

Commissioner.

Moler, Commissioner, *concurring:*

I am delighted that the final rule adopted by the Commission includes a substantial, meaningful role for the public during the first stage of the prefiling consultation process.

The Commission faces a formidable task in the years ahead as hundreds of existing hydroelectric power project licenses come up for relicensing. An efficient, workable prefiling consultation process is an essential prerequisite if we are to meet the challenge that lies ahead.

The NOPR would have excluded the public from participating during the first stage of the prefiling consultation process. I could not have supported that result. By contrast, the final rule adopts my suggestions to provide the public information about an applicant's plans at the earliest stage of the relicensing process, and to provide for public participation at the initial joint meeting between the applicant and the resource agencies.

I sincerely hope that all parties involved in the prefiling consultation process will make a genuine effort to identify relevant resource issues early in the process, and to resolve resource conflicts wherever possible. I believe that active participation by the applicants, resource agencies, and the public at large in the prefiling consultation process, as well as during the Commission's consideration of any license application, will enhance our mutual understanding of any issues or problems that must be addressed during the relicensing process.

Elizabeth Anne Moler,

Commissioner.

Federal Register

Friday
June 2, 1989

Part III

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1926

Underground Construction; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket No. S-370]

RIN 1218-AA38

Underground Construction

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: The Occupational Safety and Health Administration (OSHA) hereby revises its safety and health regulations for Underground Construction (formerly titled "Tunnels and Shafts") located in 29 CFR 1926.800. The revised standard clarifies the existing 17-year old standard, covers hazards not effectively addressed previously, and reflects the current technology and methods used in underground construction.

EFFECTIVE DATE: This revision of 29 CFR 1926.800 becomes effective August 1, 1989.

ADDRESS: In compliance with 28 U.S.C. 2112(a), the Agency designates for receipt of petitions for review of the standard, the Associate Solicitor for Occupational Safety and Health, Office of the Solicitor, Room S-4004, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Mr. James Foster, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, Room N-3637, U.S. Department of Labor, Washington, DC 20210, Telephone: (202) 523-8151.

SUPPLEMENTARY INFORMATION:

I. Background

Congress amended the Contract Work Hours Standards Act (CWHSA) [40 U.S.C. 327 et seq.] in 1969 by adding a new section 107 (40 U.S.C. 333) to provide employees in the construction industry with a safer work environment and to reduce the frequency and severity of construction accidents and injuries. The amendment, commonly known as the Construction Safety Act [Pub. L. 91-54; August 9, 1969], significantly strengthened employee protection by providing for occupational safety and health standards for employees of the building trades and construction industry in Federal and Federally-financed or Federally-assisted construction projects.

The Occupational Safety and Health Act of 1970 (the OSH Act), [29 U.S.C. 651 et seq.] authorized the Secretary of Labor to adopt established Federal standards issued under other statutes, including the Construction Safety Act, as occupational safety and health standards under the OSH Act. Accordingly, the Secretary adopted the construction standards which were issued under the Construction Safety Act in 29 CFR Part 1518 as OSHA standards on May 29, 1971 (36 FR 10466) and redesignated these rules as 29 CFR Part 1926, on December 30, 1971 (36 FR 25232). The standard entitled "Tunnels and Shafts," § 1926.800, was adopted as an OSHA standard in Subpart S of Part 1926 as part of this process. Section 1926.800 protects underground construction workers from hazards such as cave-ins, contaminated atmospheres, fires and explosions, haulage and hoisting operations, and floods.

In 1971, two major tunnel disasters, in Sylmar, California, and in Port Huron, Michigan, prompted the Assistant Secretary of Labor for Occupational Safety and Health to ask the Agency's construction safety standards staff and the Advisory Committee on Construction Safety and Health (ACCSH) (established under section 107 of the Construction Safety Act and section 7(b) of the OSH Act) to study the existing rules and to recommend any necessary changes. The ACCSH formed a subcommittee on tunnels, which met on January 31, 1972, February 8 and 22, 1972, and on November 1, 20, and 21, 1972. The full ACCSH met on August 30, 1972, December 14, 1972, June 19, 1973, and July 25, 1973. The ACCSH submitted its recommendations to the Secretary of Labor on July 25, 1973 (Ex. 1:15).

On the basis of the ACCSH's findings, OSHA proposed revisions to the tunneling regulations on March 18, 1974 (39 FR 10216). A public hearing on the 1974 proposal was held in Washington, DC, on June 26, 1974. The testimony and comments received in connection with this hearing have been entered into the record of the present rulemaking (Ex. 1:19-28). Based on these comments and changes in the industry, OSHA decided to withdraw the 1974 proposal and to publish a revised proposed rule.

OSHA issued a new proposal to revise 29 CFR 1926.800 on August 5, 1983 (48 FR 35774). Prior to that date, the ACCSH reviewed and made recommendations on several drafts of the revised proposal at several meetings (Ex. 2-5). At those meetings, the Committee consistently urged OSHA to initiate rulemaking on a new proposal (Ex. 2, pp. 136-138; Ex. 3, p. 134; Ex. 4, pp. 8-124). The transcript of the ACCSH's deliberations on the various drafts has been entered into the record (Ex. 1, 4, 7, and 8 [Ex. 1 includes the ACCSH's transcripts prior to March 18, 1974]). The Committee's comments, and those of other interested parties, have been carefully analyzed in connection with the proposed and final rulemakings. Many of the changes in the standard proposed in 1983 reflect the Committee's recommendations and suggestions. Relevant ACCSH comments and recommendations were discussed in the Summary and Explanation section of the Notice of Proposed Rulemaking.

Comments on the 1983 proposal were received from 52 sources including individuals, businesses, labor unions, state governments, federal agencies, and trade associations. An informal public rulemaking hearing was held on March 13-15, 1984, to examine pertinent issues including those specified in a notice published on December 19, 1983 (48 FR 56087). Following the hearing, Administrative Law Judge Charles P. Rippey allowed 60 days for the submission of post-hearing comments and 30 days for the submission of argument and briefs. Judge Rippey certified the 800-page hearing transcript and all related submissions to OSHA and officially closed the record on October 24, 1984.

After the close of the record, OSHA received new relevant data developed by a contractor, JRB Associates/

Science Applications International Corporation (JRB/SAIC). The new information affected costs attributable to underground construction activities which would be classified as "gassy" or "potentially gassy." The contractor also provided estimates related to the cost of providing permissible ventilation systems, with and without reversible controls at the surface. OSHA decided to place the data into the record (Exhibit #54), to invite the public to review it, and to permit the submission of written comments on the contractor's report. Accordingly, OSHA reopened the record for this limited purpose for 60 days (50 FR 33357, August 19, 1985). Copies of the report were sent to those who had participated at the hearing. OSHA received no comments challenging the contents and conclusions reported in the JRB/SAIC study.

OSHA appreciates the contribution of the parties who assisted in assembling the record during this rulemaking. OSHA has developed this Final Rule based on a full consideration of the entire record of this proceeding, including the materials discussed or relied on in the proposal, the record of the hearing, and all written comments and exhibits received.

Accidents resulting in injuries and fatalities continue to occur during underground construction operations despite the promulgation of the OSHA Construction Standards in 1971. An in-depth discussion of the hazards appeared in the Notice of Proposed Rulemaking published on August 5, 1983 (48 FR 35774). OSHA has determined that these hazards pose a significant risk to the underground construction industry and that the requirements contained in this revision of 29 CFR 1926.800 are reasonably necessary to protect against that risk. For a further discussion of significance of risk, see Section III, Summary of the Regulatory Impact and Regulatory Flexibility Assessment.

In accordance with section 6(b)(8), 29 U.S.C. 655(b)(8), of the OSH Act, OSHA has reviewed various national consensus standards, such as ANSI A10.16–1981, Safety Requirements for Construction of Tunnels, Shafts, and Caissons; ANSI/NFPA 58–1986, Storage and Handling of Liquified Petroleum Gases; and ANSI/NFPA 495–1985, Manufacture, Transportation, Storage, and Use of Explosive Materials, that cover working conditions addressed in this Final Rule. Where appropriate, OSHA has incorporated provisions from those national consensus standards as part of the Final Rule. OSHA believes that the final standard will better effectuate the purposes of the Occupational Safety and Health Act of 1970 than the national consensus standards which have not been made a part of this Final Rule, because this Final Rule is more comprehensive and provides greater flexibility in its requirements for safety.

II. Summary and Explanation of the Final Rule

In light of the testimony at the public hearing and the written comments, OSHA has modified aspects of the 1983 proposal. The following table lists those portions of the proposal that remain unchanged or those that have been revised only editorially, not substantively. The reasons supporting the Final Rule, including any significant modifications of the 1983 proposal, are discussed below and in the narrative accompanying the proposal (48 FR 35777–35809).

TABLE OF PARAGRAPHS NOT SUBSTANTIVELY CHANGED FROM PROPOSED RULE

Proposed paragraph Nos.	Final rule paragraph Nos.
(b)(1)	(b)(1)
(c)	(o)(2)
(f)	(e)
(g)(1) (iv) and (v)	(f) (3) and (4)
(j)(1)(ii)	(j)(1)(i)
(j)(1)(iv)(A)	(j)(1)(iii)(A), (j)(1)(ii)(B)
(j)(1)(iv) (C) and (D)	(j)(1)(iii) (C) and (D)
(j)(1)(v)	(j)(1)(iv)
(j)(1)(vii)	(j)(1)(vi)
(j)(1)(ix)	(j)(1)(ix)
(j)(1)(x)	(j)(1)(viii)
(j)(2) (i), (ii) and (iv)	(j)(2) (i), (ii) and (iii)
(j)(3)	(j)(3)
(k)(1)	(k)(2)
(k)(3)	(k)(6)
(k)(4)	(k)(7)
(k)(5)	(k)(8)
(k)(6)	(k)(9)
(k)(7)(i)	(k)(10)(i)
(m)(2)	(m)(1)
(m)(3)	(m)(2)
(m)(4)(i)	(m)(3)
(m)(5) (i) and (ii)	(m)(5) (i) and (ii)
(m)(6)	(m)(6)
(m)(8)	(m)(8)
(m)(9)	(m)(9)
(m)(10)	(m)(10)
(m)(11)	(m)(11)
(m)(12)	(m)(12)
(n)(2)	(n)(3)
(o)(1)	(o)(1)
(o)(2)(i)(A)	(o)(3)(i)(A)
(o)(2)(i)(B)	(o)(3)(i)(B)
(o)(2)(ii)	(o)(3)(ii)
(o)(2)(iii)	(o)(3)(iii)
(0)(2)(iv)	(o)(3)(iv)(B)
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(o)(2)(viii)	(o)(3)(vii)
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(q)(11)	(q)(11)
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(r)(13)	(r)(14)
(r)(14)	(r)(15)
(r)(15)	(r)(16)
(r)(16)	(r)(17)
(r)(17)(ii)	(r)(18)(ii)
(s)(3)	(s)(2)
(s)(4)	(s)(3)
(t)(1)(ii)(A)(*1*)	(t)(1)(iv)(A)
(t)(1)(ii)(A)(*2*)	(t)(1)(iv)(B)
(t)(1)(ii)(D)(*1*)	(t)(1)(ii)
(t)(1)(ii)(D)(*2*)	(t)(1)(iii)
(t)(1)(ii)(G)	(t)(1)(i)
(t)(1)(iii)(E)(*2*)	(t)(1)(viii)
(t)(1)(iii)(G)(*1*)	(t)(1)(v)
(t)(1)(iii)(G)(*2*)	(t)(1)(vi)
(t)(1)(iii)(G)(*3*)	(t)(1)(vii)
(t)(3)(ii)	(t)(2)
(t)(4)(i)(B)	(t)(3)(xi)
(t)(4)(i)(C)	(t)(3)(xii)
(t)(4)(i)(D)	(t)(3)(viii)
(t)(4)(i)(E) (*1*) and (*2*)	(t)(3)(ix)
(t)(4)(i)(F)	(t)(3)(x)
(t)(4)(i)(H)	(t)(3)(xix)
(t)(4)(i)(I)	(t)(3)(xx)
(t)(4)(i)(J)	(t)(3)(xiv)
(t)(4)(ii)(A)	(t)(4)(vii)
(t)(4)(ii)(B)	(t)(4)(viii)
(t)(4)(ii)(C)	(t)(4)(ix)
(u)(2)	(i)(1)
(u)(4)	(i)(3)
(u)(5)	(i)(4)
(u)(6)	(i)(5)

Paragraph (a) Scope and Application

Proposed paragraph (a)(1) stated that the revised standard would apply to underground tunnels, shafts, chambers, passageways, and cut-and-cover excavations which have been covered sufficiently to present the underground construction hazards addressed in the standard. It should be noted that the current standard has been applied to certain cut-and-cover excavations since 1976. Since 1979, it has applied to any phase of cut-and-cover operations being conducted during and as part of the

construction of tunnels which also have been covered so as to create conditions in which hazards characteristic of tunnel operations are present (See OSHA Instruction STD 3.11, Dec. 10, 1979) (Ex. 15–5). In the Final Rule, paragraph (a)(1) remains as proposed except that, as a result of several comments, the reference to cut-and-cover excavations has been modified.

A number of commenters questioned the application of the revised standard to cut-and-cover operations (Exs. 17–12, 17–13, 17–24, 17–31, 17–37, 17–38, 17–45, and 21–13). For example, Kenny Construction Company asserted that there is no consensus on the degree of cover of an excavation that will correlate to the hazards addressed in § 1926.800, and that individual judgments will vary as to when hazards characteristic of tunnel operations are present (Ex. 17–31). Mr. Frederick F. Foote, a construction safety consultant, commented that the phrase "sufficiently covered to present underground construction hazards" leaves too much to the subjective judgment of OSHA compliance officers (Ex. 17–12).

OSHA was also urged to develop a separate standard for cut-and-cover operations (Ex. 17–13). However, the cut-and-cover proposal was strongly endorsed by the United Brotherhood of Carpenters and Joiners of America. Joseph L. Durst, Jr., Director of the Union's Health and Safety Department, characterized the inclusion of cut-and-covered excavations as "one of the most improved elements of this proposal" and stated that it filled a void between the current underground construction standard and the excavation standards at 29 CFR 1926.652 and 1926.655 (March 1984 Hearing Transcript at pp. 766–768).

In the Final Rule, OSHA has revised the application of the standard to cut-and-cover excavations by stating that if the excavation is covered so as to create conditions chracteristic of underground construction and the excavation is also physically connected to other ongoing underground construction operations which are within the scope of this section, then the cut-and-cover excavation is also within the scope. For example, a cut-and-cover subway station that has active tunneling operations at either end of it would be within the scope of this standard because the excavation occurring during these other tunneling operations creates the hazards and the cover over the excavation contains them, thereby creating conditions within the cut-and-covered portion similar to an actual tunnel. OSHA believes that this more clearly expresses the regulatory intent without substantively altering the scope of the current standard. Although OSHA recognizes that hazards may differ in degree from one worksite to another, the Agency cannot explicitly anticipate every unique circumstance in fashioning safety and health standards for general application to underground construction. In the last ten years, OSHA has found that the application of § 1926.800 to certain cut-and-cover operations is generally well understood by the industry as well as by OSHA compliance officers. The record in this proceeding does not demonstrate a need for a separate cut-and-cover standard. Accordingly, OSHA will continue to apply the underground construction standard to cut-and-cover operations.

OSHA emphasizes that the scope of this Final Rule remains consistent with the overall philosophy expressed in the Preamble to the proposal (48 FR 35777–78), that this standard should apply to the construction of any underground facility or to any underground operation that is physically connected to tunneling operations so as to present hazards typical of tunnel construction. Although OSHA stated (48 FR 35778) that certain pipejacking and manhole construction operations would be covered by this standard, it appears that this point needs further clarification. For example, one commenter asserted that pipeline and manhole work does not involve all of the same conditions as tunnel work, and recommended that OSHA use the criteria of a passageway excavated by employees and equipment working below the earth's surface in determining the scope of this standard (Ex. 17–24).

OSHA intends that § 1926.800 protect employees working in both pre-existing manholes and manholes under construction if the manhole is both physically connected to an active underground construction operation and also covered to such an extent that the manhole presents the underground construction hazards addressed in this section.

OSHA also intends to apply these rules to certain pipejacking operations, based on the location of the employees performing the work. For example, if an employee is working underground, then this section applies, regardless of whether the ground support is advanced by pushing pipe or is fabricated within the heading. However, if an employee is working outside of the portal in an open pit (for example, operating horizontal boring and pipejacking equipment) and is not exposed to underground construction hazards, then this section does not apply. (That type of an operation is more appropriately covered by other OSHA construction standards, including Excavations (§ 1926.650–652) and Confined Spaces (§ 1926.21(b)(6).)

Paragraph (a)(2) explains that § 1926.800 does not apply to foundation operations for above-ground structures that are not physically connected to an underground construction operation, or to surface excavation, as both are addressed in Subpart P (Excavations) of this Part; or to underground electrical transmission and distribution lines, as addressed in Subpart V (Power Transmission and Distribution) of this Part.

OSHA specifically solicited comments on whether other types of construction should be exempted from the scope of this section (48 FR 35778). AT&T (Ex. 17–5) recommended that telecommunications manholes specifically be exempted, contending that the construction of manholes is more appropriately covered under Subpart P. OSHA agrees that the construction of such manholes would be covered by Subpart P, and not by § 1926.800, if such manholes are not physically connected to an underground construction operation. However, it should be noted that once a manhole is physically connected to an underground construction job, OSHA believes that an employee within the manhole who is exposed to hazards typical of underground construction should be afforded the same protections that § 1926.800 provides.

OSHA received comments that foundation operations such as underpinning and drilled-pier shafts should be included within the scope of this standard, rather than excluded (see, for example, Exs. 17–2 and 17–36). OSHA has considered the hazards cited by these comments (for example, workers who descend into a large machine-drilled shaft for cleanup or geotechnical inspection and are exposed to confined spaces, moving ground, and bad air) and has decided that these hazards will be covered by Subpart P, § 1926.55 (Gases, vapors, fumes, dusts, and mists), § 1926.57 (Ventilation), and the confined spaces requirements of § 1926.21(b)(6). It should also be noted that Subpart P is currently being revised (see 52 FR 12288) and that revision will address bell-bottom pier holes and other similar footing excavations. In addition, the revision will address cave-in protection, air-monitoring, and other hazards for these types of excavations.

Several commenters recommended the development of a confined spaces standard to cover certain operations—such as work performed by small crews and unspecified sizes of sewer jobs

(Exs. 17–4, 17–6, 17–9, 17–13, 17–22, 17–29, 17–51). For example, Mr. Edward Bovee, with Underground Construction Company, Inc., (Ex. 17–37) stated that a three-man crew working on a sewer manhole connected to a sewer main is adequately covered in the California confined space standard. In response, it must first be noted that under this Final Rule, manhole work on an existing sewer is beyond the scope of this standard. However, for operations within the scope of this standard, OSHA does not agree that employees should be excluded from the additional protections afforded by § 1926.800 simply because a crew is composed of only three employees.

A number of comments (Exs. 17–6, 17–13, 17–24, 17–31, 21–13) questioned the necessity of such proposed requirements as two 5-person rescue crews, a formal check-in/check-out system, and a nine-point safety program, including flood control, in connection with activities such as constructing manholes connected to sewer systems, setting a concrete box culvert or steel pipe in an open-cut operation, or jacking an open-ended pipe beneath a highway. OSHA has addressed these comments generally by clarifying (see below) when manhole construction and pipe-jacking operations are to be considered within the scope of this standard, and also by revising the provisions concerning rescue crews, safety programs, and check-in/check-out systems to reflect the size or extent of the job.

Paragraph (b) Access and Egress

OSHA proposed, at paragraph (b)(1), a general requirement written in performance language for safe means of access to and egress from all work stations. OSHA explained that this proposed revision was editorial in nature, in that it clarified the existing standard, at § 1926.800(a)(2), by adding the word "egress," but without further change (see 48 FR 35778). Although OSHA was unaware of any confusion attributable to the performance language in the current standard, OSHA solicited comments on the appropriateness of including more detailed access/egress provisions such as those found in the ANSI and Michigan tunneling standards (see 48 FR 35779). The record does not, however, indicate a need for more detailed provisions, so the current standard, with editorial revision, is retained in this Final Rule.

OSHA has revised proposed paragraph (b)(2) to specify the hazard to which the standard is intended to apply (see 48 FR 35779). The proposal simply required the employer to provide "protection" for employees walking in areas where mobile equipment is present. The Final Rule clarifies that the hazard contemplated by the standard is being "struck by" such equipment.

OSHA has revised proposed paragraph (b)(3) to reflect comments made by Granite Construction (Ex. 17–24), among others (Exs. 17–4, 17–21, 17–32), who suggested more flexible performance language that allows the employer to select appropriate effective methods of controlling unauthorized entry.

Paragraph (c) Check-in/Check-out

Paragraph (a)(6) of the current standard requires a check-in and check-out system that will provide positive identification of every employee underground. In addition, the standard requires that an accurate record and location of the employees be kept on the surface.

OSHA proposed to revise the existing standard in two ways: First, by requiring a check-in/check-out system at each above-ground entrance that would provide the employer with an accurate record of each person underground (see proposed paragraph (d)(1)); and second, by requiring each person underground to wear or carry a means of positive personal identification (see proposed paragraph (d)(2)). OSHA stated that this check-in/check-out system would enable the employer to identify how many and which workers are underground (see 48 FR 35779).

OSHA solicited comment on various methods for check-in and check-out, especially concerning the effectiveness, maintenance costs, and any other associated problems (see 48 FR 35780). In response, OSHA received numerous comments, but few in favor of the proposed changes. These comments focused on the four issues discussed below.

The first issue pertains to the need for positive identification of every employee underground. Some commenters acknowledged the need to account for the number of employees underground in the event of an accident to assist rescue/recovery operations (Exs. 17–19 and 17–21A). Nevertheless, they argued that the intent of the standard is satisfied by knowing the number, but not necessarily the identities, of employees underground. OSHA recognizes that a check-in/check-out system may not contribute directly to safety during normal operations. However, at the time of an underground emergency, such as a cave-in or an explosion, the ability to determine accurately the number of employees underground is of significant value—both to those employees who may be trapped underground, and also to those members of the rescue crew who would be at risk during rescue operations. OSHA acknowledges that the benefits to be derived from this rule pertain most directly to having an accurate count of the employees still underground, rather than to knowing the identify of each such employee. Therefore, OSHA has deleted the positive identification requirement contained in the current standard at § 1926.800(a)(6).

The second issue, closely related to the issue of positive identification just discussed, pertains to the proposed requirement that each person underground wear or carry a means of positive identification. OSHA's rationale for this proposed requirement was to determine which employees were still underground. OSHA further stated that the rescue team cannot be sure that all employees have been rescued unless a means of positive identification is provided (see 48 FR 35780).

One commenter praised the rule as excellent and necessary, especially in high risk situations, although no rationale was provided (Ex. 17–14). Three commenters criticized the proposal (Exs. 17–17, 17–19, 17–21A) on the check-in/check-out system (Ex. 21A).

OSHA has analyzed the record and does not find sufficient justification to require positive identification to be worn by each employee underground, in addition to maintaining an accurate above-ground count of the number of employees underground. Although OSHA expects that most employers who currently use a system of identifying workers who are underground will continue to do so, the record fails to establish that an employer's failure to implement such a system subjects employees to a greater risk underground. Therefore, OSHA has dropped the proposed requirement that each person underground wear or carry a personal identification tag.

The third issue pertains to the elements required for a check-in/check-out system. While OSHA did not propose specific components for the system, is was anticipated that a board and tags would be used (see 48 FR 35779). Indeed, OSHA's experience under the current standard has been that employers typically use a brass tag system. Moreover, the use of the term "record" in both the current standard and the proposal certainly implies a tangible component, such as a written list or a board with tags.

Some commenters argued that the proposed language was too stringent, particularly on smaller jobs where a less

formal system may be just as effective and less burdensome (Exs. 17–21A, 17–32, and 17–33). For example, C and E Construction Company (Ex. 17–33) contended that the brass tag system was unnecessary for crews of up to 10 men. On the other hand, Air Products and Chemicals, Inc. (Ex. 17–30) and Perini Corporation (Ex. 17–23) endorsed a brass tag system. OSHA agrees that the brass tag system is a good method of accounting for employees underground and does not want to discourage its use. Nevertheless, OSHA sees merit in the assertion that other methods of accounting for personnel underground may also be reliable, particularly on smaller jobs (see Ex. 17–21–A, 17–32, and 17–33). The true test of whether any system is reliable is whether the employer knows at all times the number of employees underground. The record in this rulemaking does not demonstrate the clear superiority of one method over others generally. Nor does the record support a particular number of employees as the threshold at which a more formal system involving hardware of some kind, such as the brass-tag system, should be required.

Therefore, Final Rule paragraph (c) simply requires that the employer maintain a procedure that will ensure an accurate count of the number of persons underground in the event of an emergency. While the method of compliance is not prescribed in this Final Rule, and may be effective without the use of a record, the employer remains responsible for assuring that an accurate count of the number of persons underground is available to above-ground personnel in the event of an emergency (see paragraph (g)(3) below). Only through planning and routinely following procedures will the employer know accurately the number of persons who were underground prior to the emergency, how many persons were able to evacuate, and how many persons remain to be rescued.

The fourth issue, which pertains to multiple above-ground entrances, is closely related to the issue just discussed. OSHA received comments which noted that requiring check-in/check-out systems at multiple entrances would duplicate recordkeeping and be extremely impractical for many tunneling projects (Exs. 17–8, 17–21A, and the March 1984 Hearing Transcript, p. 203). However, OSHA also received comment advocating a requirement that employers with jobsites having multiple points of access ensure reliable communication between the different check-out points to facilitate accounting for personnel (Ex. 17–16). In light of these comments, and the deletion of the requirements for positive identification and for a tangible record above ground of each person underground, OSHA has also deleted the requirement for a check-in/check-out system to be maintained at each above-ground entrance. Nevertheless, even though an employer's worksite has more than one entrance or exit, paragraph (c) of the Final Rule requires the employer by whatever means to ensure that an accurate count of persons underground is available to above-ground personnel in preparing rescue efforts. See also paragraph (g)(3) of this Final Rule. Thus, the standard affords the employer flexibility in selecting the appropriate method, in light of jobsite conditions.

OSHA also proposed an exemption from the check-in/check-out system requirement for certain underground facilities where major construction had essentially been completed and environmental and structural hazards had been eliminated. OSHA received generally positive response to this part of the proposal (see, for example, Exs. 17–13 and 17–21A) and has therefore retained the exemption in this Final Rule.

Paragraph (d) Safety Instruction

OSHA received many comments on its proposed nine-point safety program in which commenters suggested that OSHA should require employees to be instructed only in subjects that were relevant to the particular worksite (Exs. 17–4, 17–13, 17–21A, 17–22, 17–24, 17–32). For example, the Associated General Contractors of America, Inc., argued that if employees are working in conditions which pose no threat of flooding, they should not have to be versed in flood control measures (Ex. 17–13). OSHA agrees that employees should receive instruction in the recognition and avoidance of hazards specific to their worksite rather than receive general, boiler-plate type of instruction, and has revised the rule to require only that employees be instructed in topics that are appropriate for the jobsite.

In addition, the National Institute of Occupational Safety and Health (NIOSH) suggested that fire prevention and protection be included in the safety instruction (Ex. 17–27). OSHA agrees that this would be consistent with OSHA's emphasis on prevention of fires in underground construction areas and, accordingly, has added that topic to the list.

OSHA has also clarified that check-in/check-out should be part of the emergency procedures covered in the employer's safety instruction. OSHA believes that the effectiveness of the check-in/check-out procedure will be proportional to the effort an employer invests in planning, and also to how well each employee has been instructed to perform his or her assigned function.

OSHA proposed in paragraphs (e)(1) and (e)(3) that a written outline of the safety program be available at the jobsite and be distrubuted to and discussed with each employee. As OSHA noted at 48 FR 35780, the current standard does not require a written safety program or a written outline of the safety program, although § 1926.20(b) requires employers to initiate and maintain such accident prevention programs as may be necessary to comply with Part 1926, and many contractors produce written safety and health programs during OSHA inspections to demonstrate compliance with this rule (see Ex. 21–13, Attachment 1).

The purpose of distributing a written outline and discussing it with each employee was to inform the employees of the program. While OSHA concurs with those comments that extolled the value of training (see Exs. 17–13, 17–22 and March 1984 Hearing Transcript, p. 642), OSHA has decided that employees can be instructed in the hazards, safeguards, and work rules without the necessity of using a written outline. Therefore, the Final Rule does not require a program to be available in outline form at the worksite, or issued to the employee or discussed with the employee. OSHA will look for evidence of the effectiveness of the accident prevention effort at the worksite by observing physical conditions and interviewing employees to determine their knowledge of the safety instructions.

Paragraph (e) Notification

The question of whether the notification to the on-coming shift of any safety-related incidents should be in writing (48 FR 35781) elicited divergent comments. Mr. Frederick Foote, Safety Consultant (Ex. 17–12), and Air Products and Chemicals, Inc. (Ex. 17–30), both strongly supported a log of significant information to be signed by and passed between shift bosses. The United Brotherhood of Carpenters and Joiners criticized the proposed language, pointing out that there was no specification in the rule of how the notification would be accomplished, or who would be notified (Ex. 17–11). The Associated General Contractors of America approved OSHA's proposed performance language (Ex. 17–13), and Salgado Eastern Corporation

acknowledged the "good sense" of cautioning other employees concerning existing or potential hazards, but opposed having to "fill any more file cabinets with useless records" (Ex. 17–32).

OSHA believes that the record supports an explicit obligation on the part of employers to establish a procedure so that the on-coming shift is cautioned about potentially hazardous conditions. Nevertheless, the record does not support adding to the employer's recordkeeping burden a requirement that such notification be in writing. Therefore, OSHA has retained the performance language in paragraph (e)(1), as proposed.

Paragraph (e)(2) is substantively similar to what was proposed in paragraph (g)(2), which required employers engaged in underground construction to maintain direct communications for coordination of activities with other employers whose operations may affect the safety of their employees. Most commenters agreed with the necessity to maintain direct communications with other employers whose operations may affect the safety of their employees (see Exs. 17–13, 17–22, 17–23, and 17–30). However, Kenny Construction (Ex. 17–21A) contended that the project owner or manager, not the contractor, is the only party with the authority to require compliance with a coordination procedure. OSHA acknowledges the value of active involvement by project managers and owners in this coordination among contractors. Nevertheless, under the OSH Act, Congress made each employer ultimately responsible for the safety and health of his or her own employees. Therefore, under this standard, the employer must initiate contact with other employers who may affect the safety of his employees.

Comments were divided concerning whether employers should maintain a written record of such inter-employer coordination. Mr. J. T. Barr, with Air Products and Chemicals, Inc., (Ex. 17–30) urged that OSHA require regular meetings of both operations officials and safety coordinations, with written records of salient points. However, AGC of America, and the Carolinas Branch (Exs. 17–13, 17–22), did not believe that a written record need be kept, but did endorse inter-employer coordination. OSHA believes that it is the actual coordination activity among employers that yields the benefits to employees, and this may be either oral or written. OSHA considered all these comments and found insufficient evidence in the record to justify requiring a written record of coordination among employers.

Paragraph (f) Communications

Paragraph (f)(1) is substantively the same as proposed paragraph (g)(1)(i), except that the requirement for hoist station communication has been moved to paragraph (t)(5)(i)(J). The current standard, at § 1926.800(b)(4), requires that telephone or other signal communications be provided between the work face and the tunnel portal, but does not prescribe a particular distance for the spacing of the components. The proposal explicitly permitted natural voice communication to be used in situations where the unassisted voice could be readily understood above workplace noise. OSHA solicited comment on the desirability of using the proposed performance language, as opposed to designating specific intervals for the spacing of the components, such as those listed in the California and Michigan tunneling standards (see 48 FR 35781). OSHA received little comment on this issue. Of the comments received, two generally endorsed the proposed change (Exs. 17–13 and 17–51), while another commenter stated that tunnels less than 500 feet long do not need communication systems unless the tunnel has a compressed air atmosphere (Ex. 17–32). OSHA has determined that the evidence in the record is too inconclusive to warrant specific distance intervals. Thus, OSHA has concluded that employee safety is best served by requiring a powered system when natural unassisted voice communication is ineffective, without regard to specific distance intervals.

During the public hearings, Mr. H.B. Butcher of Fenix and Scisson, Inc., questioned the feasibility of proposed paragraph (g)(1)(i):

> Radio transmission could cause premature firing of electric blasting caps * * * and the Institute of Manufacturers of Explosives cautions against this possibility * * *. The alternative to radio transmission is hard wire telephone lines. In order to meet the requirement of providing communications to each working face, considerable quantities of wire must be installed permanently with a substantial additional amount of wiring being moved continuously (March 1984 Hearing transcript, pp. 569–571).

OSHA believes, nevertheless, that radio is both a feasible and a cost-effective means of voice communication. The hazard of triggering electric blasting caps can be avoided by switching to non-electric detonators. Alternatively, voice-activated communications systems, similar to those used in mines, could be used in the vicinity of electric detonators. In addition, for large tunnel sites, the use of wired telephones appears to be common; virtually all large sites visited by JRB (OSHA's contractor) had wired telephones (see Ex. 11, Appendix C, pp. 42–124). For small tunnel sites, OSHA expects that power-asssisted bullhorns could be used. OSHA therefore concludes that this provision is technologically feasible and appropriate.

Paragraph (f)(2) is also substantially the same as proposed paragraph (g)(1)(ii). Fenix and Scisson (Ex. 17–20) questioned whether a telephone and a bell signal system would qualify as "two effective means of communication" as stated in the proposed standard. OSHA's intent is to permit the employer to choose the two means of communication as long as one is a voice communication system, and both are "effective." C and E Construction (Exs. 17–33) recommended a gas-operated horn, with a simple set of signals posted at the portal and on top, as a second communication system. Although the standard does not prescribe a horn or a bell, OSHA expects that either signal system, supplementing a voice communication system, could be "effective" for this purpose.

Paragraphs (f)(3) and (f)(4) [proposed paragraphs (g)(1) (iv) and (v), respectively] received only supportive comment (e.g., Exs. 17–13) and therefore remain unchanged in the Final Rule.

Paragraph (f)(5) revises proposed paragraph (g)(1)(vi) and incorporates public comments. Kenny Construction (Exs. 17–21A) stated that "Sporadic maintenance activities or activities in completely supported sections of a tunnel or shaft do not require a special communication system. The risk of an accident is insignificant and would not justify the cost of such a system. The rule should apply only to employees working alone in hazardous areas." A.G.C. (Exs. 17–13 and 17–22) also recommended the inclusion of the "in hazardous locations" qualifier. CAL/OSHA Rule 8410(b) and MSHA 57.18–25 both specify protection for an employee working alone in a hazardous location, such as one with a hydrogen sulfide atmosphere, or one where remotely controlled equipment is operating. Based on these comments, OSHA has determined that the limiting phrase "working in hazardous locations" should be added. OSHA has also clarified the proposed language "except when in view of other persons" by prescribing that the employee be "under observation by other persons" and not simply viewable.

Mr. Ben Hill, International Union of Operating Engineers, asked for a

specification of distance to define "working alone" (March 1984 Hearing Transcript, pp. 731–732). OSHA believes that, in the context of working in a hazardous location, the conditions of not being watched and being unable to be heard are more valid criteria for defining "working alone" than simply distance, and the Final Rule reflects that belief.

Paragraph (g) Emergency Provisions

OSHA's current standard at § 1926.800(b)(2) requires emergency hoisting facilities to be "readily available at shafts more than 50 feet in depth, unless hoisting facilities are provided that are independent of electrical power failures."

OSHA proposed in paragraph (i)(1) to require advance arrangements for emergency hoisting capability to be on site or close at hand at jobsites where hoisting would expedite emergency procedures, such as underground construction operations dependent upon shafts for access. OSHA stated that this requirement would apply even at shafts where the primary hoist is powered independently of that shaft's electrical system. OSHA also stated that this rule would apply to all shafts used for access, regardless of depth, since injured employees at the bottom of shafts less than 50 feet deep may need hoisting assistance (see 48 FR 35783). Both Section 8.2 of the ANSI standard, and Rule 408.41463 of the Michigan standard require emergency hoisting facilities to be readily available unless hoisting facilities are provided that are independent of electrical power failures.

Commenters contended that emergency hoisting is not necessary if a crane is the primary hoisting means. Salgado Construction stated that the chance of a crane being down at the same time someone is injured is very remote (Ex. 17–32). C and E Construction asserted that a secondary hoist system is cost-prohibitive and unnecessary, except in the remote possibility that the primary hoist is electric (Ex. 17–33). Al Johnson Construction Company stated, without elaboration, that backup systems would be burdensome in many cases (Ex. 17–19).

OSHA reemphasizes that this backup hoisting capability does not necessarily have to be provided at every jobsite, but only at underground construction operations were a shaft is used as a means of egress. In the proposal, OSHA provided examples of conditions where such a back-up capability would not be required (see 48 FR 35783). In addition, OSHA also stated that the emergency hoisting capability need not be on the jobsite; it could be on call from a source that could respond on a timely basis.

Therefore, after considering these comments and the ANSI and Michigan Standards, OSHA has substantively retained the rule as proposed, but is only requiring an emergency hoisting means to be readily available when the primary hoist function could become inoperative due to an electrical power failure.

OSHA proposed in paragraph (i)(2) to require self-rescuers for all employees at work stations in underground areas where employees might be trapped by smoke or gas. This revision was developed to help clarify paragraph (b)(3) of the current standard, which had been interpreted by some always to require self-rescuers only at the advancing face, regardless of whether employees at that face might be trapped by smoke or gas.

Paragraph (g)(2) of the Final Rule retains that concept as proposed. The standard also reemphasizes OSHA's intention that the obligation to provide self-rescuers is not limited solely to employees at the advancing face. OSHA expects the employer to make a careful analysis of worksite conditions (such as the use of combustible fuels or hydraulic fluids; the presence of sources of ignition; the likelihood of liberation of flammable gases based on geological studies and air monitoring records; and the direction of air flow in relation to work stations) when deciding whether a particular work station presents conditions in which an employee might be trapped by smoke or gas, and consequently would need respiratory protection for escape. OSHA fully expects that such an analysis could result in a decision to not provide self-rescuers based on a lack of hazards such as combustible fuels and materials, sources of ignition, flammable gases in combination with good ventilation and air quality.

In response to OSHA's request for comments related to self-rescuer use (48 FR 35783), OSHA received favorable comment concerning both the carbon monoxide (CO) type of self-rescuer and the self-contained type. The Associated General Contractors of America—the Colorado Chapter, the Carolinas Branch, and the National Office (Exs. 17–51, 17–13, 17–22)—stated that the CO self-rescuer is adequate, and that self-contained self-rescuers should not be required. On the other hand, Mr. Dan McAuliffe, with the International Union of Operating Engineers, urged the use of self-contained self-rescuers in the parts of the country that have gas problems, provided that the apparatus was not so heavy as to be impractical (March 1984 Hearing Transcript, p. 735). The record (Ex. 11, pp. 4–13 and 4–14) indicates that lightweight, compressed-oxygen emergency self-rescuers, rated for one hour under escape conditions (longer periods if the user is passively awaiting rescue), have been approved by MSHA and NIOSH.

OSHA proposed, in paragraph (i)(2), a cross-reference to § 1926.103(b) which requires that the selection of respiratory protection be based on the worksite conditions. That paragraph applies industry-wide to construction, and gives employers the flexibility to tailor their respiratory protection program to the variables at each worksite.

Mr. Bruce Summers, with Granite Construction Company (Ex. 17–48), stated that OSHA should not reference § 1926.103 for the selection and maintenance requirements for respirators until the self-contained self-rescuer can be made economically feasible. Mr. Summers stated that the present cost of such equipment would be prohibitive for all tunnel operations. Contrary to this apprehension, however, the cross-reference to § 1926.103 does not effectively prescribe the use of self-rescuers in all underground construction operations and, most importantly, does not require the self-contained type of self-rescuers for all tunnel operations. Paragraph (g)(2) of the Final Rule only requires self-rescuers for those employees who might be trapped by smoke or gas.

OSHA finds that the record does not support a requirement for one type of self-rescuer over the another in all circumstances. However, the record does support a requirement that the selection of the self-rescuer be in accordance with § 1926.103(b). It remains the employer's duty to select the type and capacity of approved self-rescuer based on the worksite conditions. Moreover, retaining the cross-reference to §1926.103 addresses the concerns raised by Mr. J.T. Barr, with Air Products and Chemicals (Ex. 17–30), that the standard include a requirement that the self-rescuer must have adequate capacity for the situation at hand.

The last sentence in paragraph (i)(2) of the proposal explicitly required employees to be trained in the use of self-rescuers. OSHA has deleted this sentence because it is redundant with §1926.103(c)(1), which already imposes a duty upon employers to train properly those employees who might be required to use self-rescuers.

Objections were raised because the proposal merely required that self-rescuers be kept at work stations, rather than worn on the belts of workers (see for example, March 1984 Hearing

Transcript, pp. 726–735; and Exs. 17–46). Nevertheless, the current standard at § 1926.800(b)(3) does not require that self-rescuers be worn on the person of the employee, and the record in this proceeding does not support such a change. Therefore, the Final Rule does not specify how or where the self-rescuer must be kept, although the standard clearly requires that it must be in the immediate area of any employee who might be trapped by smoke or gas in the event of an emergency such as a fire. Either having an employee wear the self-rescuer on his or her belt or having a cache of self-rescuers within the immediate work area of employees who might need them would fulfill the requirements of the performance language.

OSHA has slightly modified proposed paragraph (i)(3), designated person, to make paragraph (g)(3) of the Final Rule compatible with changes made to other parts of the standard, such as check-in/check-out (paragraph (c)) and evacuation procedures (paragraph (d)). The final rule provides that in addition to securing aid in an emergency, the designated person is also assigned to keep an accurate count of the number of employees underground (see paragraph (c) above).

OSHA has revised proposed paragraph (i)(4) to clarify that a flashlight need not be MSHA-approved. Although the proposed standard required an MSHA-approved hand-lamp or cap-lamp, OSHA stated in the accompanying text that an "approved" flashlight would meet the proposed requirement (48 FR 35784). Paragraph (g)(4) of the Final Rule requires the lamp to be "acceptable," which is defined in new paragraph (u), Definitions, to mean "Any device, equipment, or appliance that is either approved by MSHA and maintained in permissible condition, or is listed or labeled for the class and location under Subpart K of this Part."

The requirements for rescue teams proposed in paragraph (i)(5) provoked many comments. The majority of the commenters—including six underground construction contractors (Exs. 17–4, 17–21A, 17–23, 17–24, 17–32 and 17–33)—agreed with OSHA's proposal to allow locally available teams to provide rescue services to an underground construction site. The record indicates that using locally available rescue teams saves both training and equipment costs, and that police and fire department paramedics are better trained and experienced to handle emergencies (Exs. 17–4 and 17–32). However, many commenters did not support the proposed requirement that two 5-person rescue teams be available at all underground construction sites, and recommended that OSHA revise the rule to correlate the rescue capability to the number of employees working underground (see, for example, Exs. 17–1, 17–8, 17–13, 17–19, 17–21A, 17–22 and 17–24). On the basis of these comments, OSHA has determined not to change the size criteria in the existing standard (at § 1926.800(e)(1)(xii)) which requires the training of at least two rescue teams (10 employees divided between shifts) when 25 or more employees work underground at one time, and of not less than five employees at smaller operations. However, OSHA has retained the proposed requirements that the primary team be available either on the jobsite or within one-half hour travel time, and that the second team be available within two hours travel time.

As proposed (48 FR 35784), an employer could use a locally available team in lieu of training and equipping his own employees. The current standard, at § 1926.800(e)(1)(xxi), implies that rescue team members be employees of the underground construction employer, although OSHA has allowed local rescue services to fulfill this requirement. OSHA has removed any ambiguity regarding the use of local rescue teams. The standard requires the employer to ensure that rescue team members have the proper training and equipment to effect a rescue at the underground construction jobsite; can respond within the specified travel time; and are familiar with the environment and configuration of the underground worksite (see testimony of Mr. Dave Bell, United Brotherhood of Carpenters and Joiners of America, March 1984 Hearing Transcript, p. 786).

In paragraph (i)(5)(ii), OSHA proposed to continue the current requirement for annual training of rescue team members, and added a requirement for practicing the use of the self-contained breathing apparatus (SCBA) for at least 30 minutes every month. Objections were raised regarding the proposed practice frequency and duration. For example, Mr. G.B. Knight, with S.A. Healy Company, stated that annual training should only require a refresher course, rather than the entire course, after the first year. Mr. Knight also questioned the need for monthly practice on SCBA after the initial training, asserting that the trained person is not likely to lose the ability to use the equipment (Ex. 17–29). Similarly, Mr. I.J. Meyerson, with Boeing Aerospace Company, stated that 30 minutes of SCBA practice is excessive to the point that it would exhaust the air supply. Mr. Meyerson contended that, aside from causing great expense, the proposal would produce no apparent increase in proficiency, as compared to frequent donning and operation without taking 30 minutes per session and without wasting standby air supplies. He recommended that the paragraph be revised to require that rescue team members be trained and practice often enough to maintain the necessary proficiency (Ex. 17–39). On the basis of the above comments, OSHA has determined that the proposed 30-minutes-practice requirement is not necessary, and that the annual training requirement provides the requisite degree of safety.

Therefore, the Final Rule provides, at paragraph (g)(5)(iv), that at all underground construction sites where flammable or noxious gases are encountered or anticipated in hazardous quantities, rescue team members shall practice donning and using self-contained breathing apparatus monthly. At other sites, rescue team members must have at least an annual review of their qualifications (see paragraph (g)(5)(iii)).

Paragraph (h) Hazardous Classifications

[Note: In the August 5, 1983 Proposed Rule, OSHA solicited comments related to the first aid, medical service, and sanitation needs for underground construction operations, and reserved paragraph (h) for the possible inclusion of such requirements in the Final Rule (48 FR 35782–83). However, the record does not demonstrate the need to supplement the existing standards in §§ 1926.50 and 1926.51 of this Part which cover these topics. Rather than leave paragraph (h) reserved, OSHA has used this available space to place criteria for the classifications of "Potentially Gassy" and "Gassy Operations."]

The proposal added new provisions and revised the existing provisions governing the hazards associated with flammable gas in a new paragraph entitled "Gassy Operations." OSHA also proposed—in paragraph (j)(1)(xii)—air monitoring criteria (five percent of the Lower Explosive Limit (LEL) for methane, 10 percent LEL for other flammable gases, and 20 percent LEL for petroleum vapors in any open workings) which would cause an operation to be classified as "gassy." The LEL of a material is the minimum concentration of vapor in air below which propagation of a flame will not occur in the presence of an ignition source. OSHA's proposal would have required an underground construction operation to be classified as gassy whenever a one-time reading at the prescribed percent LEL was detected. Furthermore, once classified as gassy, the operation would be

operated thereafter as gassy, with no provision for reverting to a less hazardous classification.

OSHA received many comments related to the new gassy requirements. The majority of these comments focused on three areas of concern. The first area was the use of three different percentages of the LELs for specific gases and vapors. The second area was whether an underground construction operation should be classified as gassy based on a one-time reading of the flammable gas, or if the flammable gas should continue for some interval of time. The third area that OSHA received comment on was whether a gassy operation must remain classified as gassy or if it can be reclassified to a less stringent classification.

Many comments suggested that the proposed three-tier air monitoring requirements far exceeded the capabilities of most underground construction contractors, or, more specifically, the capabilities of those competent persons assigned to perform air monitoring. These comments also questioned the ability of flammable gas monitors currently used underground to discriminate between various flammable gases. For example, Mr. Bruce G. Summers, with Granite Construction Company (Ex. 17–24), stated that three different tiers could lead to confusion and would require at least three differently calibrated instruments for flammable gases or vapors alone, noting that most instruments for detection of flammable gases are calibrated on methane, which covers the majority of flammable gases encountered. Mr. Summers suggested that, for clarity and simplicity, a concentration of five percent or more of the LEL of methane or other flammable gas should be used to define "gassy."

Mr. Joseph Hadden, with MSHA, testified that rather than a three-tiered system, all flammable gases should be measured against a one-level system (March 1984 Hearing Transcript, p. 172), the then-current MSHA method for classifying an operation as gassy in metal and non-metal mines (30 CFR 57.21001, 1983 edition).

Dr. Verne Brown (Ex. 30) stated that the three-tiered distinction for LELs would require an analysis of atmospheric combustible gas vapors beyond the competence of most firms engaged in underground construction, and perhaps beyond the sophistication of the instruments available to such firms. He stated that portable, hand-held gas detectors are the existing practical instrument for the construction industry. Mr. Brown further stated that instrumentation is primarily calibrated for methane and cannot identify mixtures of gases; this can only be done using gas chromatography (March 1984 Hearing Transcript, pp. 353–395). Thus, in his view, the three-tiered gassy crtieria would force the use of laboratory analytical equipment for gas chromatography.

Dr. Brown also testified that if OSHA maintained the five percent LEL methane criterion, it would very likely result in more than 50 percent of the tunnel construction projects being classified as gassy. OSHA has not been able to verify this estimate, but agrees that a larger percentage of the tunnels would indeed be classified as "gassy" under the five percent LEL criterion.

In light of the instrumentation feasibility limitations, the Final Rule refers to "methane or other flammable gases" rather than specifying particular gases. Moreover, the comments have persuaded OSHA to drop the proposed three-tiered "gassy" classification system based on different percentages of LEL. Although OSHA proposed three different LELs as gassy classification criteria, the Agency believes that one level is adequate for employee safety. In addition, the Final Rule establishes 10 percent of the LEL as the level, above which an underground operation is classified as potentially gassy or gassy. This percentage is consistent with the criterion used to determine safe entry of personnel in OSHA's Shipyard Employment Standards (see 29 CFR 1915.12(a)(2)). The December 1979 NIOSH Criteria for a Recommended Standard related to Working in Confined Spaces also uses 10 percent Lower Flammable Limit as the recommended maximum concentration of flammable gas.

It should be noted that the 10-percent level in paragraphs (h) (1) and (2) establish criteria for classifying operations as potentially gassy or gassy, and for triggering the additional requirements for such conditions. Other provisions of the standard require precautionary action to be taken wherever five percent or more of the LEL for methane or other flammable gases is detected (see paragraph (j)).

The second area that provoked comment was OSHA's proposal to classify an underground construction operation as gassy whenever a one-time reading of the specified (five, ten, or twenty) percent LEL was detected (48 FR 35813 and 35818). OSHA received comment charging that this approach was excessively and unjustifiably stringent (see, for example, Exs. 17–19, 17–21A, 31 and 37). Mr. John Kenny, with Kenny Construction, argued that the contractor should be given the opportunity to dilute the gas and restore the atmosphere to normal levels before declaring the job "gassy" or shutting it down (March 1984 Hearing Transcript, p. 496). Mr. Michael F. Duffy, representing the American Mining Congress, pointed out that in June 1983 MSHA had abandoned the "all or nothing" approach to classifying gassy mines adopted in OSHA's proposal and had proposed a "radically different approach," categorizing mines according to the circumstances under which flammable gas occurs and the degree of hazard involved (Ex. 37). Mr. Duffy urged that OSHA delay the revision of the gassy portion of the Underground Construction standard until the Agency could review the completed MSHA classification scheme.

Mr. A. A. Mathews, an internationally recognized expert in tunnel construction, served as a consultant to OSHA contractor JRB/SAIC during this rulemaking (Ex. 23). Mr. Mathews stated that a suitable criterion for distinguishing a continuous gassy condition from an isolated pocket of gas would be the persistence of the excess concentration for some period of time. Mr. Mathews acknowledged that establishing a reasonable time period is a judgment call; he suggested three days. He also endorsed a three-day criterion as a suitable length of time to determine whether an occurrence of hydrogen sulfide gas might be an isolated pocket or a more persistent condition.

It is well known (and was substantiated by many of the commenters) that the costs of an underground construction project increase greatly when it is classified as "gassy." For example, Mr. Charles Kelso, Dillingham Construction Company, stated that after the bid documents were revised to drop the gassy classification on a tunnel job in California, the dollar amount of the bids dropped about 50 percent (March 1984 Hearing Transcript, p. 681). Mr. Ronald Searle, with the U.S. Department of Interior, Bureau of Reclamation, referred to some preliminary engineering studies showing that an underground construction operation costs considerably more to operate under gassy conditions than under non-gassy or potentially gassy conditions. Mr. Searle said that when the Bureau of Reclamation anticipates that an underground construction project is going to be potentially gassy, the Bureau also prescribes certain criteria for the contractor to comply with in the hope that, if gas is encountered, it can be handled before conditions attain the

threshold for a gassy classification (March 1984 Hearing Transcript, pp. 122–123).

OSHA finds merit in these comments, and recognizes that the substantial costs associated with graduating immediately from a non-gassy to a gassy classification are not necessary to protect employees where intermediate, less costly measures suffice to abate the hazard. Therefore, the proposal has been revised to retain protection for employees while relieving the economic burden on employers. OSHA has adjusted the Final Rule so that an underground construction operation where gassy conditions are anticipated would initially be classified as "potentially gassy." Only after the presence of 10 percent of the LEL of flammable gas had continued for three consecutive days would the more stringent classification of "gassy" be required. This phased-in approach allows an assessment to be made of the duration and extent of the flammable gas concentration while providing the opportunity to control or dilute the gas before "gassy" conditions are achieved.

The third area which provoked comment was OSHA's proposed requirement (paragraph (u)(l)) that once an underground construction operation was classified as gassy, it would be operated thereafter as gassy, with no provision for reverting to a less stringent classification based on a reassessment of the air quality. Dr. Verne Brown (Ex. 30) stated that the proposal presumed that an area stays "gassy" and cannot be reduced back to safe levels. Mr. A. A. Mathews recommended that as a job progresses, if the geology encountered is found to be significantly better than anticipated, and if excessive concentrations of gas are not found, the gassy portion of a job can be reclassified (Ex. 23).

OSHA is persuaded by Dr. Brown's and Mr. Mathew's comments and the reasonableness of the three day phase-in period. OSHA agrees that an operation can be declassified without jeopardizing employees. Although the appropriate period of time for completing the declassification was not widely discussed in the comments, OSHA has determined that the three-day span is reasonable and consistent with the statutory purpose. OSHA has therefore added the criterion for declassifying a "gassy" underground construction operation to "potentially gassy" after three consecutive days of less than 10 percent LEL readings on the flammable gas monitor. However, if any of the conditions set forth in paragraph (h)(2) are encountered again, the operation would be reclassified as gassy.

OSHA has also revised the language of proposed paragraph (j)(1)(xii) by replacing the term "in any open workings" with "in any underground work area" for purpose of clarity. "Open workings" is a mining term which may be unfamiliar to many underground construction contractors.

Finally, the criteria for identifying an operation as "gassy" which appeared in paragraph (u)(1) of the proposal, have been moved to paragraph (h)(2) of the Final Rule for reformatting purposes. Most of the remainder of paragraph (u) of the proposal has been moved to paragraph (i).

Paragraph (i) Gassy Operations—Additional Requirements

The requirements for gassy operations that were proposed in paragraphs (u) (2) through (6) have been transferred to paragraph (i). OSHA did not receive substantive comments on these provisions; rather it was the proposed classification system which would have triggered the application of these rules that evoked comment.

The revisions to the classification system discussed above necessitated the addition of paragraph (i)(6) to make the system practical from both a compliance and a cost standpoint. Paragraph (h) requires the employer to classify an operation as "gassy" after air monitoring discloses flammable gas concentrations of 10 percent LEL or more for three consecutive days. During those three days, the employer may take steps to attempt to control the gas by means such as increasing the ventilation or by grouting the entry point for the gas. If the gas is only an isolated pocket, it may bleed off to a negligible amount, removing the need to classify the operation as "gassy." After three days, if the gas remains at or greater than 10 percent LEL, the operation will be classified as "gassy." Thus, when an operation has changed from potentially gassy to a gassy classification, the contractor who has not already come into compliance with the gassy operation equipment requirements at the end of the three-day period would be in violation. OSHA has added paragraph (i)(6) to allow the time necessary to come into compliance with the "gassy" provisions. To ensure the safety of employees, and to prevent this phase-in allowance from being abused, OSHA requires that all operations except the three prescribed in the rule be suspended in the affected area.

Since the suspension of operations is expensive, this will ensure a good faith effort by the employer either to control the gas or to come into compliance with the gassy operation requirements. Normal operations may be resumed as soon as the employer has either implemented the necessary modifications to comply with the gassy operations requirements, or has controlled the gas to the point that the area can be declassified.

Paragraph (j) Air Quality and Monitoring

OSHA noted in the proposal that contaminated air is a hazard that often results in serious injury or death (48 FR 35774–35777). Paragraph (j) contains the requirements related to air quality and monitoring which are intended to reduce that hazard potential. The format is the same as that in the proposed rule. Paragraph (j)(1) contains the general requirements that apply to all underground construction operations.

OSHA had proposed in paragraphs (j)(1)(i) (A)–(D) a list of circumstances during which employees could work temporarily in atmospheres having concentrations of airborne contaminants exceeding the limits prescribed in § 1926.55, provided that respirators were used in accordance with § 1926.103. The Final Rule retains the reference to § 1926.55 for air quality limits and control requirements, but OSHA has deleted the proposed specification of extraordinary work situations because those are already sufficiently covered in §§ 1926.55 and 1926.103, and because the Agency does not intend to exclude, by omitting them from the list, other work situations which may warrant the use of respiratory protection.

OSHA has carried forward proposed paragraphs (j)(1)(ii) (A) and (B) into Final Rule paragraphs (j)(1)(i) (A) and (B) with editorial clarification. These standards assign the competent person to make a reasonable determination as to which substances to monitor and the frequency of such monitoring. Specific topics that the competent person must consider when making such reasonable determinations are contained in paragraph (j)(1)(i)(B). These standards allow the competent person to tailor the monitoring program to suit the jobsite conditions, which may vary greatly. This flexibility enables the competent person to avoid unnecessary monitoring and to focus on the actual air contaminants at that site. The competent person must met the requirements specified on § 1926.32(f).

OSHA proposed in paragraph (j)(1)(iii) that the upper limit of oxygen in all underground work areas not exceed the atmospheric level typical of the locality (approximately 21 percent). OSHA

explained that this new requirement would reduce the likelihood of ignitions and explosions due to oxygen-enriched atmospheres (see 48 FR 35735). OSHA initially made the reference to localities due to a mistaken impression that oxygen concentration varies due to differences in elevation. Although no comments on this point were received, OSHA realizes that it is the density of the air which varies with elevation and not the concentration (percent by volume) of oxygen. Therefore, any reference to local variations in oxygen concentration is inappropriate since the hazard is related to the percent by volume of oxygen in the atmosphere.

In the proposal, OSHA referred to the "National Fire Protection Handbook" as recognizing the increased flammability hazard associated with oxygen-enriched atmospheres (see 48 FR 35786). That Handbook (14th edition) defines an oxygen-enriched atmosphere, at p. 5–40, as "any atmosphere in which the concentration of oxygen exceeds 21 percent by volume, or the partial pressure of oxygen exceeds 160 torr (millimeters of mercury), or both." OSHA proposed the acceptable upper limit of oxygen in accordance with this definition.

OSHA solicited information about accidents related to oxygen-enriched atmospheres, and also on the appropriateness of the proposed 21 percent upper limit (see 48 FR 35786). In response, OSHA received no information pertaining to related accidents, and little comment on the rule itself (see Exs. 17–11 and 17–30). Mr. J.T. Barr responded that the unspecified upper limit of oxygen was not only unclear, but it conflicted with the 23-percent oxygen level discussed in the preamble to the proposal as the appropriate upper limit to minimize the potential for fire or explosion (see 48 FR 35794). Mr. Barr recommended a lower limit of 19.5 and an upper limit of 23 percent oxygen. He stated that the rate of combustion is not accelerated significantly at 23 percent as compared to 21 percent oxygen content, and this allows sufficient leeway to avoid argument over analytical differences. Dr. Verne Brown supported 19.5 percent as the minimum level for oxygen, but recommended that OSHA revise the upper limit of oxygen from 21 percent to a limit as high as 25 percent as recommended in the 1979 NIOSH Criteria for a Recommended Standard-Working in Confined Spaces (Ex. 30). That document states that if testing indicates the oxygen level to be greater than 25 percent, then there shall be no entry into confined spaces, and hot work is prohibited until ventilating techniques have reduced the oxygen level to approximately 21 percent.

OSHA notes that, subsequent to these comments, the National Fire Protection Association has addressed these same concerns in the 1988 standard NFPA 306 Control for Gas Hazards on Vessels. That standard provides that the appropriate upper limit for both employee exposure and hot work is 22 percent by volume. The NFPA selected this limit for reasons of the accuracy of the meter and the precision with which it can be read. This limit is within the range of limits considered by OSHA and discussed by the commenters. OSHA recognizes the expertise of the NFPA in such matters, and is persuaded that the standard should specify an upper limit of oxygen to control flammability hazards in oxygen-enriched atmospheres. Accordingly, OSHA has adopted the NFPA 306 (1988) upper limit. Paragraph (j)(1)(ii)(A) of this Final Rule establishes an upper limit of 22 percent oxygen at normal atmopsheric pressure.

OSHA has revised Final Rule paragraph (j)(1)(iii)(B), formerly proposed paragraph (j)(l)(iv)(B), to conform with the reformatting of other paragraphs, the addition of the potentially gassy classification, and the revision of the proposed three-tiered listing of "methane, petroleum vapors, and other flammable gases" to the more generic phrase "methane and other flammable gases."

OSHA has revised Final Rule paragraph (j)(1)(iv), formerly proposed paragraph (j)(1)(v), to use the term "rapid excavation machines" rather than "tunnel boring machines." However, no revision was made to the requirement for such machines to be equipped with a flammable gas monitor. OSHA explained that "tunnel boring machines," as used in the proposal, are mechanical excavating machines designed to cut through soil or rock (see 48 FR 35786). Therefore, the term rapid excavation machines includes tunnel boring machines, shields, roadheaders, and other similar machines.

OSHA has also revised the proposal concerning monitoring for hydrogen sulfide (H_2S) by clarifying where monitoring must be performed, and by changing the concentration at which an alarm must sound. Paragraph (j)(1)(v)(A) retains the proposed requirement for twice-a-shift monitoring of H_2S once its presence is detected. However, OSHA has added the criterion which allows cessation of the twice-a-shift monitoring after three consecutive days without the detection of additional H_2S.

Proposed paragraph (j)(1)(vi) prescribed that whenever the presence of H_2S was detected, testing for H_2S had to be conducted "in all underground work areas" at the beginning and mid-point of each shift. Several commenters argued that the detection of gas in one work area does not necessarily indicate the presence of hazardous conditions in all other work areas (Exs. 17–24, 17–26, 23, 31). It was pointed out that many projects have work areas that are a long distance apart, often a mile or more (Ex. 31, p. 51). OSHA concurs that if the presence of H_2S has not been detected in other underground work areas, then twice-per-shift monitoring should not be required in those locations. However, the prudent competent person should consider the variables present at that job site to determine the testing frequency in other nearby underground work areas where H_2S has not yet been detected. For example, differing geology or different courses of air could account for H_2S appearing in one work area and not in another work area. Once the presence of H_2S has been detected, the Final Rule requires that monitoring be performed twice a shift in each work area where it was detected.

One commenter stated that OSHA was attempting to resurrect the "action level" concept by requiring monitoring to begin at a level less than the exposure limit; he suggested that OSHA was lowering the exposure limit for H_2S to five ppm (March 1984 Hearing Transcript, p. 356). Plainly, though, OSHA has not revised the exposure limit for H_2S in this proceeding. Moreover, a requirement for monitoring to begin at a level less than the exposure limit is used in other OSHA standards that regulate worker exposure to toxic substances (see, for example, 29 CFR 1910.1017, 1910.1018, 1910.1025, and 1910.1045). It is consistent with OSHA policy and sound industrial hygiene principles to require reasonable precautions to protect workers from recognized hazards.

Mr. Patrick Moore, a specialist in H_2S analyzers, supported the proposed rule to require continuous monitoring once H_2S has been detected in amounts approaching five ppm. Mr. Moore stated that the toxicity of hydrogen sulfide is too great to assume the risk that a one-time detection is merely an isolated pocket (March 1984 Hearing transcript, p. 243).

A written submission provided jointly by the National Utility Contractors Association, the Underground Contractors Association and Kenny Construction Company questioned the availability of equipment to monitor H_2S

at levels of five ppm (Ex. 31, p. 51). By contrast, Mr. Moore stated at the hearing that the technology presently exists to detect, accurately and specifically, hydrogen sulfide concentrations of less than five ppm, as well as concentrations in excess of that amount (March 1984 Hearing Transcript, p. 247). In addition, OSHA notes that numerous H_2S monitors are available that can detect hydrogen sulfide at a concentration of five ppm.

OSHA proposed in paragraph (j)(1)(vi)(D) that the continuous monitor provide a visual and aural alarm when 10 ppm H_2S is reached. Dr. Verne Brown recommended that OSHA use 10 ppm H_2S as the trigger point for requiring continuous monitoring, rather than the proposed five ppm level (March 1984 Hearing Transcript, p. 356). The May 1977 "NIOSH Criteria for a recommended standard * * * Occupational Exposure to Hydrogen Sulfide" recommends that fixed (non-portable) monitoring devices have an alarm to notify employees whenever there is an H_2S concentration greater than 10 ppm.

OSHA's current exposure limit for employees engaged in construction work is 10 ppm H_2S as an eight hour time-weighted average (TWA) (see § 1926.55). The 10 ppm H_2S limit is derived from the 1970 American Conference of Governmental Industrial Hygienists (ACGIH) Threshold Limit Values (TLV) Tables. According to the more recent 1980 ACGIH TLV Tables, nearly all workers may be repeatedly exposed to a TWA concentration of 10 ppm H_2S for a normal 8-hour workday or a 40-hour workweek day after day without adverse effect. In reexamining the proposed language that required an alarm to sound (for an unspecified length of time) when the 10 ppm concentration is reached, OSHA recognizes that, as proposed, workers could have remained working underground with the alarm sounding for the complete shift. The 1977 NIOSH Criteria Document concerning occupational exposure to hydrogen sulfide noted above states that the 10 ppm alarm should be for alert only and should not trigger evacuation. Both the Michigan standard (R325.50213(2)) and the former OSHA General Industry Standard (29 CFR 1910.1000, Table Z–2) established a ceiling limit for exposure to hydrogen sulfide at 20 ppm but do not set an 8-hour TWA. In the recently published Final Rule on Air Contaminants (54 FR 2332), which revised § 1910.1000, new limits for hydrogen sulfide were set at 10 ppm 8-hour TWA with a 15 ppm short term exposure limit (STEL) (15 minutes). (As noted earlier, the current construction standard for H_2S in § 1926.55 sets a 10 ppm TWA, but has no STEL.) As noted in the preamble to the Air Contaminants Final Rule (54 FR 2783), OSHA is in the process of formally consulting with the Advisory Committee on Construction Safety and Health about whether the revised limits should be extended to construction. Such consultation is required prior to proposing new standards that have a major impact on construction (see 29 CFR 1911.10(a)).

Based on the present rulemaking record, OSHA has concluded that, at 10 ppm H_2S, workers must be informed that they are in an atmosphere which has reached the Permissible Exposure Level, but an alarm is not required for this purpose (see Final Rule (j)(1)(v)(c)). The Final Rule, at paragraph (j)(1)(v)(D), requires that the continuous monitor provide a visual and a aural alarm when the concentration of hydrogen sulfide reaches 20 ppm, in order to signal that additional measures, such as respirator use, increased ventilation, or evacuation, might be necessary to maintain exposures below the permissible exposure limit.

An employer may use a monitor with two distinctive alarms, one for 10 ppm notification and the other for 20 ppm evacuation, as long as employees can distinguish between the two alarms. Any other effective method of informing employees that they are at the 10 ppm level would also be permitted under the standard.

As proposed, paragraph (j)(1)(viii) required that precautionary measures be taken whenever a 10 percent LEL flammable gas or petroleum vapor concentration is detected. As explained above regarding paragraph (h), this Final Rule establishes 10 percent LEL methane or other flammable gas as the threshold for classifying an operation as "potentially gassy." Once an operation is classified "potentially gassy," an employer must comply with an additional set of requirements. The current industry practice is to reduce or dilute the flammable gas concentration before it attains the level that would require compliance with the more costly "gassy" or even the "potentially gassy" provisions (March 1984 Hearing Transcript, pp. 123, 155–156, 494–496, 501–502). Obviously, precautionary measures to control flammable gas must be undertaken before the "potentially gassy" threshold is reached. Therefore, paragraph (j)(1)(vii) of this Final Rule requires the employer to begin efforts to reduce or otherwise control the gas concentration at five percent LEL of methane or other flammable gas. The record also suggested the need for a mechanism for discontinuing extra precautionary measures once the air contamination hazard is controlled (Exs. 23, 30, and March 1984 Hearing Transcript, p. 496). Therefore, paragraph (j)(1)(vii) specifies that such steps need be continued only until the gas concentration is reduced to less than five percent LEL unless the employer is operating in accordance with the "potentially gassy" or the "gassy" operation requirements.

OSHA has revised paragraph (j)(2) to include additional air monitoring requirements for both "potentially gassy" and "gassy" operations. This paragraph refers to the criteria that now appear in paragraph (h) pertaining to the classification of potentially gassy and gassy operations. Paragraphs (j)(2) (i), (ii), (iii) and (iv) are substantively the same requirements as those proposed for gassy operations alone.

Paragraph (j)(2)(iii), like proposed (j)(2)(ii), requires a manual flammable gas monitor to be used as needed. OSHA received testimony that, at a minimum, all air quality testing should be performed at the beginning and mid-point of each shift (March 1984 Hearing Transcript, p. 172). Although OSHA does not believe that this is necessary at all underground construction operations (for example, at those which have never tested positive for flammable gas), OSHA believes that this twice-per-shift minimum is warranted in "potentially gassy" and "gassy" operations. Clearly, the increased risk of fire and explosion in these operations warrants the increased frequency of air monitoring over that required in non-gassy operations. Consequently, the Final Rule requires gas tests at the beginning and mid-point of each shift for "potentially gassy" and "gassy" operations at paragraph (j)(2)(iii).

OSHA proposed, in paragraph (j)(1)(xi), to require monitoring for flammable gas prior to re-entry after blasting for all drill and blast operations. Granite Construction (Ex. 17–24) commented that depending on such factors as the nature of the ground, geology, and history, it would not always be necessary to test for flammable gas or petroleum vapor after each blast. Granite Construction also pointed out that in California, this requirement only applies to gassy tunnels. OSHA concurs and has revised paragraph (j)(2)(v) to require additional monitoring for flammable gas during drill and blast operations only in "potentially gassy" and "gassy" environments.

OSHA proposed in paragraph (j)(3) to continue the current requirement, at § 1926.800(c)(1)(i), for maintaining records of air quality tests, but left open the appropriate retention period for such records (48 FR 35789). OSHA stated that § 1910.20 currently requires at least a 30-year retention period, unless a specific standard provides a different period of retention period for records required by proposed paragraph (j)(3). OSHA received several comments on this requirement. For example, Mr. Robert Lange, representing Fenix and Scisson, Inc. (Ex. 17–20), stated that recordkeeping for air quality testing should be maintained for only three years completion of the job, not 30 years as required for toxic chemicals. Kenny Construction (Ex. 17–21A) contended that testing records are useful in investigating the cause of problems which occur during construction, but are not useful after the project has been completed. Mr. Bruce Summers, Granite Construction Co., stated that there is no need to specify any period of time for retention of air quality test records at the worksite. Mr. Summers added that records of employee exposure to toxic substances are addressed in OSHA's "Access to Employee Exposure and Medical Records" standard. That standard, at § 1910.20(d)(1)(ii), provides that each "employee exposure record" shall be preserved and maintained for at least 30 years. Mr. John Dyer, with the Southern California Rapid Transit District (Ex. 17–28), endorsed a 30-year retention requirement for records regarding chemicals whose toxicity can persist; in contrast, he contended that records of flammable atmosphere tests need not be kept for 30 years because conditions after construction do not pose a health hazard.

OSHA also received comment that petroleum vapors are toxic as well as flammable. It was pointed out that since the permissible exposure levels for these hydrocarbon compounds are ten to twenty times lower than their lower explosive limit, it is hardly worthwhile to segregate records of toxic vs. flammable atmospheres (March 1984 Hearing Transcript, p. 355, and Ex. 17–16).

Based on the above comments, the provision has been revised to require that only records of exposures to toxic substances be retained for 30 years, and that all other air quality records be retained only until the project has been completed.

Paragraph (k)—Ventilation

This paragraph contains the requirements pertaining to ventilation of the underground atmosphere. The importance of an effective ventilation system was cited repeatedly by commenters as probably the key factor in controlling air contaminants that are encountered during underground construction. Thus, for example, the Bureau of Reclamation insists that the ventilation system be adequately designed and then approved even before the Bureau permits the contractor to go underground (March 1984 Hearing Transcript, pp. 123–124).

Paragraph (k)(1)(i), derived from proposed paragraph (k)(2)(ii), prescribes in general performance language that fresh air must be supplied in sufficient quantities to prevent dangerous or harmful accumulation of dusts, fumes, vapors or gases in all underground work areas. The proposal specified that mechanical ventilation was required when natural ventilation failed to provide the required air quality and flow. Three commenters recommended that OSHA require mechanical ventilation and not permit reliance upon natural ventilation (Exs. 17–1, 17–14, and 17–17). However, these commenters did not provide sufficient rationale to support why natural ventilation should be prohibited in all cases. Therefore, OSHA has required, in Final Rule paragraph (k)(1)(ii), that mechanical ventilation be used except where natural ventilation provides the necessary air quality.

Paragraph (k)(3) is a revision of proposed paragraph (k)(2)(i), which required at least 30 feet per minute (fpm) airflow in the tunnel bore, shafts, and all other unsealed underground work areas. The current standard, at § 1926.800(c)(2)(v), requires not less than 30 fpm where blasting or rock drilling is conducted or where conditions are present that are likely to produce dust, fumes, vapors, or gases in harmful or explosive quantities. Mr. C.R. Mattson, with the Perini Corporation (Ex. 17–23), stated that the present standard is sufficient. Kenny Construction Company (Ex. 17–21A) stated that the proposal was too broad because only active work areas need ventilation. Mr. Robert Lange, with Fenix and Scisson, Inc., stated that using the term "unsealed areas" does not suit some mining methods, and suggested "in all areas where workers are regularly required to work" as an alternative. Mr. W.R. Bristol, with CAL/OSHA (Ex. 17–1), stated that 30 fpm is inadequate, especially when diesel equipment is operating in the tunnel. Mr. Bruce Summers, with Granite Construction Company (Ex. 17–24), stated that the air-flow should be whatever is necessary to maintain the proper quantity of clean air at the workplace. Based on the record, OSHA has concluded that the language in the current standard best expresses the employer's duty to provide a sufficient velocity of clean air in underground work areas. OSHA also notes that where mobile diesel equipment is used underground, additional ventilation may be necessary to maintain adequate air quality (see the discussion below concerning paragraph (k)(10)(ii)).

OSHA's current standard, at § 1926.800(c)(2)(i), requires mechanical ventilation in all work areas and also that the direction of airflow be reversible. OSHA proposed to add a requirement that the air flow be reversible from above-ground controls (see proposed paragraph (k)(2)(iii)). In the proposal, OSHA cited three other standards that require reversibility of mechanical air flow (48 FR 35790). OSHA has re-examined these standards and has found that only CAL/OSHA requires that the main ventilation system be arranged so that air flow can be reversed from the surface, and only if a fire or some emergency makes this advisable (emphasis added) (California 8437(b)). The other two standards (ANSI's and Michigan's) do not address the location of ventilation controls. Therefore, paragraph (k)(4) retains the current requirement that mechanical ventilation be reversible, but does not prescribe that all mechanical ventilation systems used in underground construction operations be provided with controls located above ground. OSHA has concluded that above-ground controls are warranted only in the case of "gassy" operations (see the discussion below concerning paragraph (k)(12)).

Paragraph (k)(5) of the final rule explicitly requires that after blasting, the employer must exhaust smoke and fumes to the outside atmosphere before work underground is resumed. This new provision is being added to provide protection to employees who must enter the underground worksite after blasting (see explanation of proposed paragraph (k)(2)(iii) at 48 FR 35790.)

OSHA proposed, in paragraph (k)(7)(ii), to continue the current requirement for mobile diesel-powered equipment to be approved by MSHA in accordance with 30 CFR Part 32, formerly commonly referred to as "Schedule 24." In addition, OSHA proposed to allow the use of mobile diesel-powered equipment that is equivalent in all respects to MSHA-approved equipment. This proposed allowance was made to permit the use of equipment that, although it had not

been officially approved by MSHA, had been determined by the employer, the manufacturer or a qualified third party to have met the criteria contained within 30 CFR Part 32 (see 40 FR 35791).

Several commenters objected to the incorporation by reference of 30 CFR Part 32, arguing that MSHA certification and approval is a complicated and time-consuming process. Instead, they urged that OSHA promulgate performance standards prescribing air quality requirements (see, for example, Ex. 17–21A and Ex. 17–24). OSHA has carefully reviewed 30 CFR Part 32, which covers such topics as cooling the exhaust gases, fuel supply system safety, electrical system safety, and ventilation requirements, in addition to the composition of exhaust gas. Mr. Joseph Hadden, with MSHA, stated that 30 CFR Part 32 was developed through significant research and effort and he did not believe that OSHA needed to duplicate that research and effort to develop independently new standards governing the design and use of diesel-powered equipment underground (March 1984 Hearing Transcript, p. 169). 30 CFR Part 32 is also the nationally recognized standard for underground diesel equipment: OSHA's current standard, at § 1926.800(c)(2)(vii), has for years incorporated Schedule 24, and both the ANSI A10.16 and Michigan standards also contain this reference. Moreover, the MSHA standards are widely recognized by the underground equipment industry and are widely available to any interested person through either OSHA or MSHA. Finally, 30 CFR Part 32 is comprehensive in its requirements: OSHA believes that air quality performance standards alone would not provide a level of safety comparable with that provided by 30 CFR Part 32 at this time. Therefore, reference to 30 CFR Part 32 has been retained in paragraph (k)(10)(ii), governing use of mobile diesel powered equipment underground in other-than-"gassy" conditions. (The use of mobile diesel-powered equipment underground in "gassy" conditions is governed by paragraph (i)(2), which incorporates by reference the MSHA requirements in 30 CFR Part 36.).

OSHA solicited comments on the use of water scrubbers and catalytic converters (see 48 FR 35791) and received numerous comments that supported both types of exhaust conditioners (see, for example, Exs. 17–4, 17–13, 17–20, 17–21, 17–23, 17–24). In addition, documentation was submitted to the record to show that catalytic converters have been successfully used on diesel-powered equipment approved under 30 CFR, Part 32 (Exs. 36 and 41). In his opening statement at the hearings, Mr. Barry White, Director of OSHA's Safety Standards Programs, explained that OSHA will allow the use of any equipment that can be shown to meet the approval criteria contained in 30 CFR Part 32, regardless of the type of exhaust conditioner used to meet those criteria. The debate over water scrubbers versus catalytic converters is unimportant at this time, since equipment with both types of exhaust conditioning have been approved by MSHA under 30 CFR Part 32, and are therefore acceptable to OSHA.

OSHA received two comments pertaining to the note that accompanied proposed paragraph (k)(8). The note indicated that diesel engines need at least 100 cubic feet of air per minute for each brake horsepower, in addition to the volume of air supplied to personnel. The National Utility Contractors Association stated that where several pieces of equipment are on the job at the same time, an adjustment to the amount of air per brake horsepower should be made, i.e., 100 percent of 100 cubic feet per minute (cfm) per brake horsepower for the first machine; 75 percent for the second machine; and 50 percent for each successive machine (Ex. 31, pp. 43–45). The J. F. Shea Company also suggested this declining percentage (Ex. 4). Neither of these comments contained specific evidence that such a formula provided adequate ventilation.

In this regard it should be noted that in the MSHA rules in 30 CFR Part 32, § 32.9 provides that if more than one unit is used at a given location, or in any continuous course of air, then the rate of ventilation should be the sum of the requirements for the individual units. Therefore, OSHA has decided to retain the note which accompanied proposed paragraph (k)(8), and will rely on the amount of ventilation determined in accordance with the tests prescribed in 30 CFR Part 32.

Final rule paragraph (k)(11), a revision of proposed paragraph (u)(7), requires specific design criteria for ventilation systems used in "potentially gassy," as well as "gassy" operations. The inclusion of "potentially gassy" classification in this paragraph was necessitated by the addition of the new "potentially gassy" classification in the standard. OSHA has also incorporated in paragraph (k)(11) the requirement proposed in paragraph (u)(2) that only acceptable equipment be used in a "gassy" operations; the rule now specifies that the electrical systems, including the fan motors, must be acceptable.

OSHA proposed, in paragraph (k)(2)(iii), to require above-ground controls for reversing mechanical airflow at all underground construction operations. The Final Rule, in paragraph (k)(13), has been revised so that above-ground controls for reversing the direction of mechanical airflow are required only in gassy operations.

Kenny Construction argued that connecting the in-line booster fans to a central above-ground control will require the installation of a burdensome wiring and switch system which is unjustified, absent some compelling need for surface control (Ex. 31, p. 54). Mr. Vinton Garbesi contended that above-ground reversing mechanisms for tunnel ventilation systems are neither practical nor safety beneficial (March 1984 Hearing Transcript, p. 190).

Mr. Ronald Searle testified that the Bureau of Reclamation requires above-ground controls for all underground operations. Mr. Searle stated that in case an evacuation of the underground becomes necessary, the ventilation system can be controlled from the surface (March 1984 Hearing Transcript, p. 124). Mr. Searle also stated that ventilation control by above-ground rescue crews is critical, adding that controlling underground atmospheres is essential to expediting rescue operations (Ex. 24, p. 4).

The sole evidence cited in the Proposal, at 48 FR 35790, in support of the proposed requirement at (k)(2)(iii) that the direction of mechanical ventilation be reversible by above-ground controls was ANSI, Michigan, and CAL/OSHA. But ANSI and Michigan do not require above-ground controls. Only CAL–OSHA calls for above-ground controls, and only if a fire or emergency makes this advisable (see 8437(b)). However, in light of Mr. Searle's testimony about the value of above-ground controls for control from the surface after evacuation and during rescue work (March 1984 Hearing, pp. 124–125), and the requirements of the CAL/OSHA rule, OSHA believes that the record does support a decision to require above-ground controls in operations where such events are most likely to occur, that is, in "gassy" operations. Therefore, OSHA promulgates Final Rule paragraph (k)(12) as revised.

OSHA proposed, in paragraph (u)(7), that ventilation systems used in gassy operations be provided with explosion-relief mechanisms. No substantive comments were submitted on this provision. However, the August 1985 "Summary Report of Compliance Cost Estimates Pertaining to Permissible

Ventilation and Gassy Tunnels" (Ex. 54) by the contractor JRB/SAIC questioned the feasibility of explosion-relief mechanisms in the typical single-bore tunnel ventilation system. That report also correctly cited 30 CFR 57.21–20(e), an MSHA ventilation requirement pertaining to gassy mines, as the source for OSHA's proposed rule. None of the comments received in response to the limited reopening of the record (50 FR 33357) provided OSHA with any information on this issue. OSHA believes that the JRB/SAIC report raises serious questions about the feasibility of this provision, and has therefore modified the proposed requirement to delete coverage of the typical single-bore tunnel ventilation system. The final rule uses language similar to that of the mining rule to provide coverage of those few underground construction operations that use mine-type ventilation systems with offset surface fans so as to maintain ventilation during an explosion.

Paragraph (l) Illumination

OSHA proposed, in paragraph (l)(1) and Table D–3 of § 1926.56, to revise the minimum level of illumination (see 48 FR 35791–35792). Currently, paragraph (d) of § 1926.800 requires five footcandles in general work areas, and ten footcandles at the heading during drilling, mucking, and scaling operations. Several commenters recommended that OSHA retain the currently required levels of illumination (Exs. 17–12, 17–17, 17–24). In general, the rationale presented by these comments was that the underground environment is wet, dirty, and slippery and that poor lighting conditions exaggerate such hazards. OSHA believes that the record does not support the proposed minimum levels of illumination. Therefore, OSHA has decided to retain the current levels of illumination and has not revised Table D–3 of § 1926.56 of this Part.

Paragraph (l)(2) proposed that acceptable portable lighting be used within 50 feet of any underground heading during explosives handling. Some comments urged that such lighting only be required where electric detonators are used (Exs. 17–1, 17–4, 21–A, 17–24). None of these comments, though, cited any authority to substantiate that their use would provide an adequate level of safety. OSHA consulted publications of the Institute of Makers of Explosives (IME). OSHA recognizes IME as an authoritative source on the subject of safety with explosives and accords great weight to its recommendations. IME is the safety association of the commercial explosives industry in the United States and Canada. Its member companies produce over 75 percent of the commercial explosives consumed in the United States each year. OSHA has relied on IME guidelines in other OSHA standards (see for example 29 CFR Part 1926, Subpart U). The IME Publication Number 17, "Safety in the Transportation, Storage, Handling and Use of Explosive Materials," page 3, states that "where portable lights are needed around explosive materials, only approved electric flashlights or electric lanterns should be permitted." The IME Publication Number 12, "Glossary of Commercial Explosives Industry Terms," page 14, defines Explosive Materials to include, but not be limited to, dynamite and other high explosives; slurries, emulsions and water gels; black powder and pellet powder; initiating explosives; detonators (blasting caps); safety fuse; squibs; detonating cord; igniting cord; and igniters. Therefore, the IME clearly intends the requirement for approved lighting to apply to all explosive materials, not just electric detonators.

OSHA also notes that the Army Corps of Engineers requires that the loading area be illuminated by floodlights located 50 feet from the face. If additional illumination is needed, the loading crew shall be provided with approved head lamps (see Ex. 14–2 at Rule 24.C.03). Therefore, in the Final Rule, OSHA has concluded that any lighting equipment used within 50 feet of the underground heading during explosives handling must be of a portable type that meets the definition of "acceptable."

Paragraph (m) Fire Prevention and Control

OSHA proposed, in paragraph (m)(4)(ii), to prohibit piping diesel fuel from the surface to underground locations. OSHA explained that the purpose was to control a fuel source hazard arising from leaks from the pipe (see 48 FR 35792–93). This proposal drew several comments, all critical of the proposal.

Mr. Bruce Harvey, representing J. S. Redpath Corporation (Ex. 17–8), contended that diesel fuel can be transferred to an underground storage facility using a dry-line supply system without the hazards involved in transporting fuel containers. Mr. Harvey added that the pipe-line would be dry at all times except when actually transmitting diesel fuel.

Mr. Vinton Garbesi, with S and M Constructors, Inc., testified that it is far safer to pipe diesel to a fueling station at the bottom of a shaft than to transport fuel tanks in and out of the shaft. He recommended a dry-type pipe with a transfer pump on the surface and two valves, one at the surface and one at the fueling station (March 1984 Hearing Transcript, p. 191).

Mr. Charles Kelso, Dillingham Construction Company, argued that piping diesel fuel is an efficient, economical and safe way of handling fuel. Mr. Kelso testified that hoisting 55-gallon drums up and down a shaft would expose them to greater risk of damage and subsequent leaks, consequently creating greater hazards than would a dry-line supply system (March 1984 Hearing Transcript, p. 679).

Mr. E. O. Mixon described a dry-pipe system typically used by Kenny Construction Company (March 1984 Hearing Transcript, p. 519–520). When a piece of equipment underground needs fuel, a top man fills a small (50 to 100 gallon) tank located at the shaft collar from a 15,000–20,000 gallon storage tank also on the surface. The bottom man uses a service-station type nozzle to fill the equipment fuel tank, and the top man controls a valve at the shaft collar tank. If something goes awry, at worst the fuel leak to the underground is 50 to 100 gallons, not 15,000 to 20,000 gallons. The 50 to 100 gallons is also less than the typical one-day's supply of underground storage that is currently permitted under § 1926.800(e)(1)(iv).

OSHA sees merit in these comments and has determined that the record supports the use of a dry-line supply system which incorporates many of the components cited in the comments (see, for example, Exs. 17–8, 17–20, 17–21A, and 17–35). OSHA believes that compliance with all the requirements contained in paragraph (m)(4) of this Final Rule will effectively control the hazards and points of possible failure associated with a pipe-line system.

OSHA proposed, in paragraph (m)(5)(ii), to allow the use of acetylene, liquified petroleum gas (LP-Gas) and Methylacetylene Propadiene Stabilized (MPS) gas underground only for welding, cutting and hot work. The existing tunnel standard, at § 1926.800(e)(1)(v), prohibits LP-Gas underground. However, Subpart J—Welding and Cutting, of the OSHA Construction Standards contained in 29 CFR Part 1926, permits the underground use of fuel gases, including LP-Gas, under prescribed conditions, including handling, storage and ventilation requirements (see 48 FR 35793). In an effort to clarify this contradiction in its standards, OSHA published OSHA Instruction STD 3–17.1 in November 1976, which allowed fuel gases,

including LP-Gas, to be used underground.

Kenny Construction opposed the use of LP-Gas underground because of its volatility, alluding to an "unfortunate experience" that they had experienced (Ex. 21). Mr. Dan McAuliffe, testifying for the International Union of Operating Engineers, stated that MPS gas is stored in thinner walled containers than acetylene and should not be used (March 1984 Transcript, p. 727). OSHA's requirements that apply to all fuel gas welding and cutting in construction (29 CFR 1926.350) require that all cylinders meet the Department of Transportation (DOT) requirements published in 49 CFR Part 178, Subpart C, "Specification for Cylinders." These rules, which specify the cylinder wall thicknesses determined to be safe for the storage of each compressed gas, have long been the recognized industry standard.

OSHA has weighed these comments carefully and finds the evidence insufficient to warrant changing the proposal. OSHA believes that the risks that may be associated with the use of fuel gases will continue to be effectively controlled by compliance with the paragraphs referred to in the rule; namely, 29 CFR Part 1926, Subpart J and paragraphs (j), (k), (m) and (n) of this section.

OSHA has revised proposed paragraph (m)(7). OSHA proposed that where it is not feasible to maintain a 100 foot separation between flammable or combustible materials stored above ground and the opening to any underground operation, a one hour fire-rated barrier must be placed between the flammable/combustible material and the opening. The intent was to prevent fire and explosion hazards at the surface opening from endangering employees underground (see 48 FR 35793).

Mr. Mark Hoffman, with Stimm-Fitzpatrick Constructors, asserted that there is insufficient space at some sites to maintain a 100-foot separation (Ex. 17–26). He also argued that such a barrier would not contain smoke and might create a visibility problem. Mr. Hoffman added that if no flammable materials is used in the shaft, such a barrier would be ineffective. He suggested that if combustible or flammable materials or supplies are stored in close proximity to the opening, adequate and clearly marked fire protection equipment should be provided.

OSHA believes that a barrier will both keep the fire and heat away from any access opening to the underground, and enable employees to evacuate the work area. Therefore, OSHA has concluded that the barrier will enhance employee safety, even though a barrier would not contain the smoke from a surface fire. Obviously, the best course would be to prevent the fire from occurring in the first place. In addition, OSHA has deleted from the Final Rule a redundant reference to 29 CFR 1926.152(c): Paragraph (m) already contains a reference to the fire protection requirements covered in Subpart F.

Paragraph (n) Welding, Cutting and Hot Work

Proposed paragraph (n)(1) was deleted from this Final Rule because it was redundant to the final provision in paragraph (j)(1)(iii)(B) that requires the competent person to consider the use of fuel gases and welding, cutting and hot work operations when making the determination for air monitoring. Two commenters interpreted the proposal as requiring additional air monitoring, even if no gas was present (Exs. 17–19, 17–21A), but this was not OSHA's intent. For example, if compliance with the monitoring requirements of paragraph (j) indicated there was no reason to believe that the air should be monitored immediately prior to starting the hot work, and if the competent person had no reason to suspect that the cylinders could be leaking, then the competent person might have sufficient information to support the determination without additional air monitoring.

OSHA proposed in paragraph (n)(2) to limit the number of compressed gas cylinders underground to a one-shift supply. The commenters acknowledged that it is sound safety practice to limit the amount of cylinders underground, but argued that a one-shift limit was unnecessarily stringent. For example, Mr. Mark Hoffman, with Stimm-Fitzpatrick Constructors, stated that the more trips required to carry the cylinders, the more risk was involved (Ex. 17–26). Mr. Vinton Garbesi, with S and M Construction, Inc., stated that, in his experience, accidents involving compressed gas cylinders have generally occurred while they were being transported, and that the proposal would increase the frequency of transportation (March 1984 Hearing Transcript, pp. 191, 192, and 213). As a result of these comments, OSHA is persuaded of the need to reduce the handling of cylinders, as well as to limit the number of cylinders. Therefore, OSHA has increased the amount of fuel gas and oxygen that is permitted underground from the proposed one-shift limit; the Final Rule permits a 24-hour supply. OSHA believes that the 24-hour criterion represents an appropriate balance of reducing handling risks, and minimizing the amount of compressed gas stored underground. It must also be remembered that in all other respects, the regulations in 29 CFR 1926.350 pertaining to transporting and storing of compressed gas cylinders also apply to underground construction.

Paragraph (o) Ground Support

Proposed paragraph (o)(2)(iv) drew several comments pertaining to the variety of bolts in use (Exs. 17–8, 17–21A). For example, Mr. Garbesi noted that the proposed rule overlooked the fact that some rock bolts and dowels do not depend on torsionally applied force, such as split-set stabilizers bolts, and post-tension grouted bolts (March 1984 Hearing Transcript, p. 192). Therefore, the Final Rule, renumbered as final paragraph (o)(3)(iv)(A), provides that a torque wrench is to be used only if the bolt depends on torsionally-applied force.

Proposed paragraph (o)(2)(v) would have required the employer to maintain the torque bolt tension assignments at the jobsite. OSHA received no substantive comments on this proposed requirement. However, because paragraph (o)(3)(iv)(B) requires a competent person to determine that the bolts are properly torqued, OSHA does not believe that a record of tension assignments would improve the protection provided by the standard.

Several comments were received regarding paragraph (o)(2)(vi)—renumbered as final paragraph (o)(3)(v)—concerning "temporary roof supports." The proposed rule, derived from California section 8441.(e), provided for temporary roof supports to protect employees who are either working beyond or installing permanent roof supports. One commenter, Mr. Bruce Summers, with Granite Construction, stated that temporary roof supports are frequently retained as permanent roof supports (Ex. 17–24). Both Mr. Summers and Mr. Brown, representing J.F. Shea Co., Inc. (Ex 17–4), recommended that OSHA adopt the CAL–OSHA rule, from which OSHA's proposed language was derived. OSHA agrees that the performance-oriented CAL–OSHA provision, allowing any effective method of protection, expresses the intended purpose more clearly than the proposal without diminishing employee safety, and has revised the standard accordingly.

Proposed paragraph (o)(3)(ii)(B)—paragraph (o)(4)(ii)(B) in the Final Rule—has been revised in response to comments asserting that the proposed 42-inch casing height is too restrictive

(Exs. 17–4, 17–19, 17–24, 17–28). For example, Mr. John Dyer, with the Southern California Rapid Transit District, conceded the need for a barrier to prevent tripping and falling into the shaft, but questioned the need for the casing to be extended to 42 inches (Ex. 17–28). Mr. L.W. Brown, with J.F. Shea Company, Inc., stated that the objectives of the proposed 42-inch casing height are appropriate (see 48 FR 35795), but that the regulation should be performance-oriented to allow the employer other compliance options (Ex. 17–4). OSHA notes that ANSI A10.16–1981, paragraph 4.7, requires shafts to be guarded by means of a standard guardrail or a tight covering (see Ex. 13). Therefore, OSHA has determined to retain the 12-inch casing height in the existing standard, at § 1926.800(h)(3)(ii), provided that a standard (42-inch) railing is used; that the ground is sloped so as to prevent liquids from running over the 12-inch high casing; and that barriers are used to prevent mobile equipment from jumping over the 12-inch high casing. This system will provide equivalent protection to the proposed requirement.

Paragraph (p) Blasting

The Final Rule indicates a new requirement, in paragraph (p)(2), to make explicit what was implicit in the proposal: That employees shall not enter a work area until air quality meets minimum requirements. In New York, in 1980, three men entered an underground area after a blast without checking air quality; all three were killed by poisonous fumes (Ex. 31, App. 3, p. 13). The addition here reiterates the intent expressed elsewhere in the standard, such as at paragraphs (j)(2)(v) and (k)(5).

Paragraph (q) Drilling

The current standard, at § 1926.800(i)(8), requires the employer to provide mechanical means for lifting drills, roof bolts, mine straps, and other unwieldy heavy material to the top deck of jumbos over ten feet in height. Proposed paragraph (q)(8)(i) retained this requirement, but increased the scope of the standard to the top decks of all jumbos, not just those over ten feet in height. This revision was proposed because the current standard does not provide for mechanical assistance to employees who need it to lift heavy material to the top deck of a jumbo that is less than ten feet in height.

Mr. Vinton Garbesi, with S and M Construction, stated that the regulation should require mechanical hoists or lifts on jumbos, but should leave the circumstances of their use to be determined by the employer (March 1984 Hearing Transcript, p. 193). Mr. Brown, with J.F. Shea Company, commented that a fairly typical roof bolt weighs 22 pounds and is not that unwieldy (Ex. 17–4). OSHA has determined that the list of examples of heavy or unwieldy objects unnecessarily includes the types of roof bolts referred to by Mr. Brown. On the other hand, the list might not accurately illustrate the universe of materials intended to be included. OSHA agrees that the unwieldiness or heaviness of an object depends not only on its configuration, but also on its location and the conditions at the worksite. The list of examples of heavy or unwieldy materials was not intended to be all inclusive. Further, if a list item such as a roof bolt was shown to be not "heavy or unwieldy," it would not require mechanical assistance. Accordingly, OSHA is deleting the list of examples from this provision. Therefore, OSHA has concluded that mechanical lifting means shall be provided on the top deck so that personnel who need to lift any unwieldy or heavy materials will have mechanical assistance, if needed, regardless of the height of the jumbo.

Paragraph (q)(8)(ii) retains the requirement under the existing standard, at § 1926.800(i)(9), that jumbos over 10 feet in height have stairs wide enough for two persons. Several commenters, including Kenny Construction and S and M Constructors, Inc. (Exs. 17–21A, 26), contended that the rule is unnecessary and that the cost of providing two-person-wide stairs would be significant. Nevertheless, the existing standard reflects OSHA's belief that, even though this width may not be necessary for routine access, it would facilitate a rapid evacuation from the deck, or the transport of an injured employee on a stretcher from the deck to the tunnel floor. Both the U.S. Army Corps of Engineers and the Michigan OSHA standards contain this requirement. In addition, because the requirement has been in effect for some years already, this aspect of the revised standards will not cause employers to incur new costs to come into compliance. Accordingly, the record does not provide a compelling basis for altering the current standard.

Proposed § 1926.800(q)(8)(iv)(A) retained the requirement of current paragraph (i)(12), that only employees assisting the operator shall be allowed to ride on jumbos. Mr. Gail Knight, with S. A. Healy Company, stated that a blanket restriction is unjustified; that it is often necessary to transport workers on jumbos, and if additional protection is desired, contractors should equip jumbos with seats or handles (Ex. 21–13, p. 10). OSHA has reexamined the record and sees no reason why employees other than those assisting the operator should not be allowed to ride a jumbo, provided that suitable protection is provided for such riders. Therefore, paragraph (q)(8)(iv)(A) has been revised to allow employees to ride jumbos provided that the jumbo is equipped to allow those employees to ride safely as prescribed in paragraph (r)(6)(ii).

OSHA has revised proposed paragraph (q)(10)(i) to remove a redundant requirement, and also to clarify the intent of the rule. The first sentence of the proposal required an examination for and removal of any misfired charges prior to drilling. This same requirement appears in Subpart U at § 1926.910 and § 1926.911 and need not be repeated here.

The second sentence of proposed paragraph (q)(10)(i) prohibited drilling blasting holes through muck or water. Mr. Garbei stated that most holes in the invert of tunnels are drilled through muck or water. Garbesi acknowledged the need to inspect for and remove misfires. However, OSHA maintains that drilling through muck or water is an unsafe practice, even if an inspection is performed, because of the inherent difficulty of assuring that all misfires have been located and removed. Therefore, OSHA promulgates this paragraph as proposed, continuing the existing requirement.

Paragraph (r) Haulage

Paragraph (r)(2) has been revised to increase safety by ensuring that haulage equipment can be stopped even if the brakes alone are not effective. Mr. Dan McAuliffe, with the International Union of Operating Engineers, stated that under certain conditions, including slope, moisture and temperature, brakes may not be adequate to stop equipment, and he recommended that "sanders" be required (March 1984 Hearing Transcript, pp. 727–728). There is no data in the record to support specific slope or temperature limits. Therefore, OSHA has expressed the requirement using performance-oriented language. If conditions are such that suitable brakes alone are not effective, then sanders or some other means may be used to provide an effective means of stopping. This clarification is consistent with the intent of the proposed rule (see 48 FR 35796).

Proposed paragraph (r)(4)(i) would have required Falling Object Protective Structures (FOPS) on all powered mobile haulage equipment. This provision has not been carried forward into the Final Rule, primarily for feasibility and safety considerations.

For example, S and M Constructors, Inc., contended that the regulation should be modified to recognize that in small diameter tunnels the incorporation of FOPS into conventionally designed locomotives is "dimensionally" not possible while maintaining the operator's field of view to allow safe operation of the locomotive (Ex. 21–1).

Mr. E. O. Mixon, with Kenny Construction Company, contended that FOPS would compound the restricted clearances of most tunnels (Ex. 17–21). In addition, Mr. Mixon argues that locomotive operators have no need for more protection from falling objects than anyone else working underground, and that the next logical extension of this rule would require FOPS for everybody underground. Mr. Bruce F. Harvey, with J. S. Redpath Corporation, recommended that OSHA require overhead protection on manhaul cars only (Ex. 17–8).

In addition to the feasibility concerns associated with FOPS, it was stated that FOPS may be unnecessary in some ground conditions. Michael F. Duffy, of the American Mining Congress, states that the ground support requirements may negate the need to provide FOPS (Ex. 21–11). Mr. Duffy added that in many underground metal-nonmetal mines where stable roof conditions prevail, FOPS are not necessary and are not required by MSHA.

OSHA stated in the proposal at 48 FR 35796 that the same hazard exist for machines used underground as for those used above ground. Since machines used above-ground do not have the benefit of operating within an environment controlled by the ground control requirements of paragraph (o), the Agency no longer sees the need for FOPS underground. Thus, OSHA has not carried the proposed FOPS requirement forward into this Final Rule.

OSHA has revised proposed paragraph (r)(6)(ii) to clarify the exception for train crewmen. OSHA explained, in 48 FR 35797, that the rule was not intended to apply to train crewmen standing on properly designed platforms with suitable handholds, but did not state the exception explicitly in the proposed rule. OSHA has added a requirement for a safe place for train crewmen who ride the locomotive.

Paragraph (r)(6)(ii) also carries forward a requirement for seating for each passenger that protects passengers from being struck, crushed, or caught between other equipment or surfaces. Two commenters objected (see Exs. 17–19 and 17–21(a)) to such seating being required in elevators and shaft conveyances; however, this provision is intended to apply only to haulage equipment and not hoisting equipment. Therefore, OSHA has carried forward this requirement from existing rules 29 CFR 1926.601(b)(8) and 29 CFR 1926.800(k)(7).

The proposed new coupling requirements of paragraphs (r)(12) (i) through (iii) were intended to reduce the need for employees to reach between cars and locomotives, and to reduce the hazards of inadvertent uncoupling, resulting in runaway cars. OSHA solicited comments on the hazards associated with coupling/uncoupling operations and with runaway cars (see 48 FR 35798).

Kenny Construction Company stated that the proposed requirement for automatic couplers would be ineffective in protecting employees from being caught between cars since both manual and automatic couplers can require employee exposure (Ex. 17–21A). OSHA concedes that the use of an automatic coupler which continues to expose employees to the hazards encountered during cleaning, aligning, and hooking/unhoooking operations would not accomplish the desired risk reduction.

Mr. Mixon, with Kenny Construction, also pointed out that unit trains used with tunnel boring machines (TBMs) are seldom uncoupled (March 1984 Hearing Transcript, p. 438). Mr. Knight, with S. A. Healy Company, testified that his employer uses unit trains with cars pinned solidly together and never uncouple them. Mr. Knight added that putting couplings on those cars would increase the risk to workers due to the cars' tendency to become uncoupled under certain conditions (March 1984 Transcript, p. 262).

Several commenters suggested a performance rule that would keep employees from between the cars and allow the employer to chose the method of coupling, such as releasing levers, chains or rods (see, for example, March 1984 Hearing Transcript, pp. 32–33, pp. 514–515). Mr. Ronald J. Searle, with the Bureau of Reclamation, testified that he would like to keep the brakemen from between the cars, and recommended that engines and cars be equipped with automatic couplers or handles for pulling coupler pins (March 1984 Transcript, p. 137–139).

OSHA has reexamined the state and Federal standards cited at 48 FR 35798 and found that all require automatic couplers. However, in addition, some have work practice rules to further reduce the risk to employees. For example, CAL/OSHA prohibits employees from shifting or lining up couplings on moving cars or locomotives (see CAL/OSHA rule 8474(b)). *Bulletin 644–Tunneling: Recommended Safety Rules*, published in 1968 by the U.S. Bureau of Mines, states that persons should not go between cars unless the train is stopped, the motorman is notified and the notice is acknowledged (Ex. 12–34, p. 17). MSHA 57.9–51 contains that same requirement (Ex. 14–3). *Bulletin 644* also contains a rule that trains be brought to a complete stop before cars are coupled or uncoupled, unless the cars are equipped with automatic couplers (Ex. 12–34, p. 18). MSHA 57.9–97 requires that trains be brought to a complete stop, then moved very slowly when coupling or uncoupling cars manually (Ex. 14–3).

After considering these comments and the record evidence, OSHA is convinced that the proposed requirement for automatic couplers would not effectively control the hazards to which employees are exposed during coupling and uncoupling operations. Therefore, rather than merely requiring automatic couplers on all cars, paragraph (r)(12)(i) offers the alternative of using manual couplers and bringing the car to a complete stop during coupling and uncoupling operations. In addition, paragraphs (r)(12) (ii) and (iii) of the final rule contain work practice rules modeled after those discussed above, which incorporate safe work practices such as prohibiting employees from reaching between moving cars.

OSHA proposed in paragraphs (r)(12) (ii) and (iii) requirements for safety chains to be used in addition to couplers for certain types of cars. One commenter, Mr. Audrain Weatherl, with the Laborers International Union of North America, stated that he had seen many runaway trains and urged that a loaded train be attached by chains in addition to the normal coupling (March 1984 Hearing Transcript pp. 635–636). Another commenter, Mr. Ronald Searle, noted that the Bureau of Reclamation had successfully used safety chains to prevent serious accidents during derailment or accidental uncoupling. Mr. Searle added that safety chains were used with side or rotating dumping equipment (Ex. 24). (However, OSHA notes that the Bureau of Reclamation regulations do not require such chains.)

OSHA believes that accidental uncoupling of man cars and of powder cars poses risk to employees (see 48 FR 35798) and, therefore, the Agency has retained the proposed safety chain requirements. It has been renumbered as paragraph (r)(13)(i).

Mr. Vinton Garbesi, with S and M. Constructors, Inc., testified that the weight of a safety chain as strong as a coupler would make it too unwieldy and difficult to use. OSHA concurs that a

safety chain as strong as the coupler might be excessive to prevent runaway cars. Accordingly, OSHA has deleted the phrase "of equivalent strength to the coupler." However, OSHA has replaced that term with the performance language of "capable of maintaining connection between cars" in Final Rule paragraph (r)(13)(iii).

Several commenters objected to proposed paragraph (r)(12)(iii)'s requirement of safety chains on haulage cars when the grade exceeds one percent. They argued that such use of safety chains would be very expensive and might be unsafe.

For example, Mr. Mixon, of Kenny Construction, stated that compliance with this provision could be very expensive because it would require two men per shift to service a rotary dumping mechanism. Each time a muck car was to be inverted 180 degrees to be dumped, the chains would have to be disconnected between cars. Mr. Mixon addded that when the train went back to the head again, the cars would have to be disconnected and reconnected at that point (March 1984 Transcript, p. 406).

Mr. Vinton Garbesi, of S and M Constructors, Inc., stated that in his experience, safety chains on rail equipment are not safe to utilize in high-speed tunnel haulage systems. He added that the coupling and uncoupling of the chain requires employees constantly to place themselves between haulage units, and also that the chains are hazardous when allowed to swing unattached on the end car of a haulage train. Mr. Garbesi recommended that the haulage regulation instruct the employer what has to be done in order to control a train on a grade. He added that this is usually done on steeper grades by having the locomotive downhill of the train at all times (March 1984 Hearing Transcript, p. 196). This suggestion was also endorsed by Mr. Mixon of Kenny Construction (March 1984 Hearing Transcript, pp. 440–441).

No evidence was submitted into the record to refute Mssrs. Garbesi and Mixon's recommendation of positioning the locomotive downhill of the train. OSHA believes that this is a feasible alternative that will be effective in reducing the risk of runaway cars, and has modified paragraphs (r)(13) (i) and (ii) to allow positioning the locomotive downhill of the train as an acceptable alternative to the use of safety chains.

OSHA's intent is to apply the one percent criterion in final rule paragraph (r)(13)(ii) to the overall slope of the tunnel, but not to isolated areas such as California switches. For example, if the overall job is flat, then there is no real potential for runaway cars and no safety chains would be required for haulage cars, even though the slope on the California switch might exceed one percent. OSHA has clarified the rule by adding the phrase pertaining to the existence of potential for runaway cars.

OSHA proposed in paragraph (r)(17)(i) that occupied man cars be pulled and not pushed. OSHA received comments that this new provision was not feasible in all tunnels. For example, Mr. G.B. Knight, with S.A. Healy Company, argued that this proposed rule was not feasible given the tight space restrictions in tunnel construction which typically preclude switching of cars (Ex. 21–13). OSHA notes that both ANSI A10.16–1981, paragraph 9.5.2, and CAL/OSHA 8473(a) require that man-cars shall be pulled, not pushed, by the locomotive, where switching facilities are available. In addition, ANSI has a supplemental precaution to follow when a personnel car must be pushed: Where switching is not available and personnel cars must be pushed, a qualified person must be stationed in the lead car to give signals to the operator if the locomotive operator's vision of the track ahead is hampered. OSHA has, therefore, revised this provision so that paragraph (r)(18)(i) requires that occupied man cars be pulled and not pushed, where switching facilities are available.

Paragraph (s) Electrical Safety

OSHA proposed in paragraph (s)(2) that electrical power lines be both insulated and located away from other systems. In the preamble to the proposal, OSHA stated that the paragraph restated the existing requirements in § 1926.800 (1)(2) (see 48 FR 35799). It was subsequently pointed out that the existing requirement prescribes that powerlines shall be well separated *or* insulated from water lines, telephone lines, and air lines (Ex. 17–8). OSHA did not intend substantively to amend the existing requirement, and believes that either method can be effective. Both are not required together. However, if insulation alone is used, it must be kept free from damage which would create a hazard to employees, as prescribed by Subpart K of this Part.

Paragraph (t) Hoisting

Proposed paragraph (t) was much more comprehensive in addressing underground hoisting operations than the existing standard, at paragraph (m). The rationale for the proposal was explained in 48 FR 35799–35807. OSHA has significantly revised this entire paragraph (t) to eliminate requirements that were redundant with those current requirements in 29 CFR Part 1926, Subpart N–Cranes, Derricks, Hoists, Elevators, and Conveyors; to rely on the recently published 29 CFR 1926.550(g)—Crane or Derrick Suspended Personnel Platforms [53 FR 29116]; and also to respond to numerous comments on the proposed rule.

The following list contains those proposed requirements for cranes and hoists which are not brought forward into this Final Rule because those requirements are already covered by the existing standards in Subpart N.

Proposal Paragraph Number:

(t)(1)(i)(A)
(t)(1)(i)(D)(*2*)
(t)(1)(i)(F)(*4*) (*i*) and (*ii*)
(t)(1)(ii)(*c*)
(t)(1)(ii)(H)
(t)(1)(iii)(B)
(t)(1)(iii)(D)
(t)(1)(iii)(E)(*1*)
(t)(1)(iii)(F)
(t)(2)(iii)
(t)(4)(i)(A)
(t)(4)(ii)(D) (*1*) and (*2*)

The following list contains those proposed requirements which were to apply to cranes and hoists, but which have been modified in this Final Rule to apply only to hoists. A discussion of the rationale for each change will appear in the appropriate section of the preamble, as indicated by the numbering sequence for this final rule.

Proposed paragraph No.	Final rule No.
(t)(1)(i)(B)	(t)(3)(ii)
(t)(1)(i)(C)	(t)(3)(i)
(t)(1)(i)(D)(*1*)	(t)(3)(vii)
(t)(1)(i)(E)(*1*)	(t)(3)(iiii)
(t)(1)(i)(E)(*2*)	(t)(3)(iv)
(t)(1)(i)(F)(*1*)	(t)(4)(iii)
(t)(1)(i)(F)(*2*)	(t)(4)(iv)
(t)(1)(i)(F)(*3*) (*i*) and (*ii*)	(t)(4)(v)
(t)(1)(ii)(B)	(t)(4)(ii)
(t)(1)(ii)(E)	(t)(3)(v)
(t)(1)(ii)(F)	(t)(3)(vi)
(t)(1)(ii)(I)	(t)(3)(xxii)
(t)(1)(ii)(J)	(t)(3)(xxiii)
(t)(1)(ii)(K)	(t)(3)(xiii)
(t)(1)(iii) (A) and (C)	(t)(3)(xviii)
(t)(1)(iv)(A)	(t)(3)(xv)
(t)(1)(iv)(B)	(t)(3)(xvi)
(t)(1)(iv)(C)	(t)(3)(xvii)
(t)(1)(iv)(D)	(t)(4)(vi)
(t)(2)(i)	(t)(3)(i)
(t)(2)(ii)	(t)(4)(i)
(t)(2)(iv)	(t)(4)(vii)

The format of paragraph (t) of this Final Rule is as follows:

(t)(1) General requirements for cranes and hoists
(t)(2) Additional requirements for cranes
(t)(3) Additional requirements for hoists
(t)(4) Additional requirements for personnel hoists

Those final provisions that have been substantively changed from the

proposed provisions are discussed below.

OSHA's introductory note to paragraph (t) has been simplified and clarified. Some of the proposed hoisting requirements were in addition to those contained in Subpart N of this Part, while others modified the Subpart N rules. OSHA also proposed to allow an employer to choose to comply with certain provisions of Subpart N, or disregard that Subpart and comply with requirements in 29 CFR 1926.800(t). The introduction to this Final Rule states that paragraph (t) applies in addition to the crane and hoist provisions in Subpart N of this Part. OSHA has decided to rely on those existing standards and to include in paragraph (t) only those requirements necessary to modify the general rules to address the unique concerns of underground construction.

Paragraph (t)(1) of this Final Rule contains general provisions applicable to all underground construction hoisting operations performed by cranes and hoists.

Final rule paragraph (t)(1)(iii) is a clarification of proposed paragraph (t)(1)(ii)(D)(*2*). Proposed paragraph (t)(1)(ii)(D)(*1*) provided that a hoistway that is not fully enclosed must use a flashing light to warn employees at the shaft bottom and subsurface shaft entrances that a load is being hoisted. Proposed paragraph (t)(1)(ii)(D)(*2*) also set forth a hoisting procedure to be followed when personnel are working in the shaft bottom. The prescribed hoisting procedure was intended to apply to a hoistway that is not fully enclosed; clearly, employees are not exposed to the hazard if the load is being lowered in a fully enclosed hoistway. Although the exclusion for full enclosed hoistways was explicit in proposed paragraph (t)(1)(ii)(D)(*1*) and was, OSHA believes, clearly implicit in proposed paragraph (t)(1)(ii)(D)(*2*), the Final Rule has been revised to make this exclusion explicit in paragraph (t)(1)(iii) as well.

The two provisions of (t)(1) (ii) and (iii) adequately control the hazard, addressed by proposed paragraph (t)(1)(ii)(H), of passing equipment, tools and material over personnel. Such hazards created by crane operations are governed by existing standards 29 CFR 1926.550(b)(2) and ANSI B30.5.

OSHA proposed, in paragraphs (t)(1)(iii)(H) (*1*) and (*2*), to require a secondary bridle connection, capable of holding 150 percent of the load, for cages and skips. This provision was to apply to all hoisting operations performed by cranes and hoists. Several comments were unfavorable to this proposed requirement. For example, one commenter (Ex. 17–8) stated that this provision should not apply to shaft sinking operations where floating crossheads are used to guide the conveyances or buckets, because the crosshead must be disengaged during dumping and when going through the stage area at the bottom of the shaft. Another commenter (Ex. 17–19) stated that wire rope clips for attaching safety bridles to hoist lines should not be permitted because they induce stress concentrations on the rope strands, and they create a condition for accelerated corrosion of the rope. In addition to these negative responses, OSHA notes that back-up bridles are not required by the current OSHA requirements for cranes and hoists. Consequently, OSHA believes the record does not support these proposed provisions pertaining to secondary bridles, and they have not been carried forward into this Final Rule.

OSHA proposed two new requirements for cranes. The first requirement proposed, in paragraph (t)(3)(i), was for a line-out indicator on cranes used in underground construction. Mr. G.B. Knight, with S.A. Healy Company (Ex. 29), and Mr. John Kenny, Jr., with Kenny Construction Company (March 1984 Hearing Transcript, pp. 467–470), stated that the hazards mentioned in the proposal are effectively controlled by marking the wire rope for distance and by communication between the operator and the signalman. The argument was also raised that a line-out indicator might divert the crane operator's attention away from the signalman. Accordingly, OSHA has decided to delete the proposed requirement for a line-out indicator because no supporting data was submitted in response to OSHA's request at 48 FR 35805, and because the record does not refute the testimony submitted by Messrs. Knight and Kenny.

OSHA also proposed, in paragraph (t)(3)(ii), that a crane be equipped with a limit switch to prevent over-travel at the boom tip (commonly called an anti-two-block device). Testimony presented jointly by the National Utility Contractors Association, the Underground Contractors Association, and Kenny Construction Company stated that they had no objection to the proposed requirement for a limit switch (Ex. 31, p. 31). Mr. M. Dumas, with Al Johnson Construction, contended that such a device can be difficult to maintain (Ex. 17–19). Mr. Bruce Summers, with Granite Construction, stated that the unreliability of such devices can create a more hazardous condition than would be prevented by their use (Ex. 17–24). Mr. Thomas McGeorge, with C and E Construction Company, stated that this is a good device when it is working, and should be installed on all new cranes, although it is expensive to retrofit on some of the older cranes (Ex. 17–33). Mr. G. Knight, with S.A. Healy Company, stated that the minimal benefits of such devices are not justified by the cost of retrofitting old cranes (Ex. 29, p. 22).

OSHA believes that maintenance is critical to the proper functioning of any mechanical/electrical device. If these devices are maintained regularly according to manufacturer's instructions, OSHA does not anticipate any greater likelihood of faulty operation than with other similar equipment. OSHA has addressed one of the expressed concerns about limit switches by explicitly forbidding the operator to use the safety device as an operational control. OSHA examined the costs and determined, based on the JRB report, that all cranes used in underground construction—new and old—could be equipped with such devices without causing economic hardship (Ex. 11). Therefore, OSHA has decided that all cranes used in underground construction shall be equipped with a limit switch to prevent two-blocking accidents. This new requirement is found in paragraph (t)(2) of the Final Rule.

Paragraph (t)(3) of this Final Rule contains requirements for hoists that supplement those contained in 29 CFR 1926.552. Additional rules that apply only to personnel hoists are contained in paragraph (t)(4).

Paragraph (t)(3)(i) requires the load hoist drum to be powered in both directions and the automatic application of brakes upon power release or failure. This rule continues the current "power down" requirement for hoists in § 1926.800(m)(1). This final rule is also derived from two proposed paragraphs: § 1926.800(t)(1)(i)(c) and § 1926.800(t)(2)(i).

OSHA has revised proposed paragraph (t)(1)(i)(c), which would have required power-down drums on all cranes and hoists and prohibited "free-wheeling" except for excavation using a clam-shell bucket. Commenters stated that many older friction-clutch types cranes lack this feature (Exs. 17–32 and 17–33). In the recent OSHA rulemaking on Crane or Derrick Suspended Personnel Platforms, § 1926.550(g) (OSHA Docket No. S–409), the Agency determined that power-down is necessary for employee safety when cranes are used to hoist personnel. As

noted earlier, § 1926.550(g) is being applied to crane hoisting of personnel in underground construction. Because the power-down requirement in § 1926.550(g)(3)(i)(D) will provide protection for crane-hoisted personnel, the final underground construction standard itself does not contain such a provision.

In the proposal (48 FR 35800, column 2) OSHA indicated that a power-down requirement would also provide protection for employees in the hoistway (shaft) when cranes are used to hoist materials alone. However, OSHA has determined that the final standard provides other adequate means for protecting employees in the hoistway (see, e.g., paragraphs (t)(1) (i), (ii), and (iii)), and that power-down when using cranes to hoist materials is not necessary for employee safety.

OSHA had also proposed, in paragraph (t)(2)(i), that all cranes and hoists used for personnel have power-down and an automatic-setting brake. This rule has been revised by deleting the reference to cranes, because, as noted above, cranes used to hoist personnel are covered by 29 CFR 1926.550(g), which has this requirement. All hoists covered by § 1926.800 have been required to have power-down (no "free-wheeling") and automatic brakes since 1971 and OSHA continues that requirement in final rule § 1926.800(t)(3)(i).

Final rule § 1926.800(t)(3)(ii) is derived from OSHA's current paragraph (m)(2), which requires controls for powered hoists to be of the "deadman" type with a non-locking switch or control. OSHA proposed, in paragraph (t)(1)(i)(B), that all cranes and hoists have "deadman controls," and stated that the intent of this rule is to assure that the hoist line drum stops when the operator releases the control (see 48 FR 35800). OSHA cited BOR, ANSI, Michigan, and California standards as authority for a requirement for "deadman controls" on all cranes and hoists to support the proposed rule (48 FR 35800). Upon reexamination, OSHA has determined that these standards, like current paragraph (m)(2), apply to hoists, but not to cranes. Therefore, the paragraph has been rewritten to address only hoists, and OSHA will rely on the current standards in § 1926.550 (g)(3)(i)(D) and (g)(3)(ii)(C) (53 FR 29123) to address cranes. In addition, OSHA has clarified its intent in the use of the term "deadman controls" by requiring that control levers return automatically to their center (neutral) position upon release.

The first sentence of proposed paragraph (t)(1)(i)(E)(*1*) required cranes and hoists used for both personnel and material hoisting to be assigned a load rating for each purpose. The National Utility Contractors Association asked who would assign the dual ratings for cranes used to hoist materials and personnel (Ex. 31, pp. 32–33). In response, OSHA notes that the manufacturer of the crane assigns load ratings for material handling and publishes them on the load rating chart. As required by § 1926.550(a)(1), employers must follow the manufacturer's assigned ratings. However, when a crane is used to hoist personnel, which is not the fundamental purpose of a crane, the employer must comply with the additional load rating limitations and requirements in § 1926.550 (g)(3)(i)(B) and (g)(3)(i)(F). Final Rule paragraph (t)(3)(iii) requires that, when a hoist is used both for hoisting personnel and for hoisting material, load and speed ratings must be assigned based on the specific use.

The second sentence of proposed paragraph (t)(1)(i)(E)(1) is addressed in the Final Rule by (t)(3)(v) because it is related to the topic of that paragraph—inspection and maintenance activities. Paragraph (t)(3)(v) is substantively the same as proposed paragraph (t)(1)(ii)(E), but has been clarified to avoid possible misunderstanding, and its application is limited to hoists and not to cranes. OSHA stated in the proposal that the type of inspection or service contemplated by the rule pertained to the rail and guide system, and to lubricating sheaves on the block (see 48 FR 35801–02). For this type of work, the employee may remain on the top of the conveyance, provided the employee is secured by a body belt or harness system. OSHA believes that this is the only type of inspection or maintenance that necessitates working from the top of the conveyance.

Final Rule paragraph (t)(3)(xiv) is a minor revision to proposed rule paragraph (t)(4)(i)(J). OSHA proposed to require a two-way closed circuit communication system for hoist operators to communicate with landing stations. Mr. Harvey, with J. S. Redpath Corporation, stated that these type systems prevent communication from other stations when in use (Ex. 17–8, p. 6). OSHA has therefore revised this paragraph to delete the "two-way" specification. This will enable the operator to communicate with all other stations connected to the closed circuit system.

Paragraph (t)(1)(iv) of the proposal, requiring guides and safeties, did not distinguish either between hoisting materials and hoisting of personnel, or between hoists and cranes. This resulted in two major difficulties in the implementation of the proposed provision. First, many comments questioned the feasibility of providing safeties that will stop and hold 150 percent of the weight of a fully loaded muck bucket. For example, Ronald J. Searle, of the Bureau of Reclamation, said "It is very hard to provide protection against a fully loaded muck bucket. If that [broken rope safeties] can be provided, that is fine. But I would suspect that would not be feasible" (March 1984 Hearing Transcript, p. 153). Mr. John Coyle, of Kiewit Construction, said that in case the rope broke with a 25-ton muck bucket traveling at 100 feet per minute, it would bring the whole shaft down (March 1984 Hearing Transcript, p. 228).

Second, comments also questioned the economic feasibility of providing both guides and safeties for cranes. For example, Mr. Vinton Garbesi, of S and M Constructors, Inc., stated that using shaft guides at depths greater than 75 feet will cause the employer to have to replace the cranes presently in use with hoists and guides, and also that having to operate with the guides during tunnel excavation would cause additional expenses. Mr. Garbesi added that the cost of installing the guides as part of the production phase in shaft sinking will also have a significant impact on the cost. Mr. Garbesi conservatively estimated a 25 to 40 percent increase in excavation costs for shafts (Ex. 26).

Although some commenters, such as Ronald Searle (March 1984 Hearing Transcript, pp. 140–149) and Don Brennan (March 1984 Hearing Transcript, pp. 273–291), stated that it is possible to use guides and safeties with cranes (i.e., the cranes do not have to be replaced by hoists), the record shows that this can only be accomplished by effectively immobilizing the crane. NUCA conducted a detailed analysis of this alternative. Based upon an engineering study conducted by the Elgood-Mayo Corporation, NUCA estimates that:

> One shaft would have incurred at least $191,230 additional direct costs due to guides and safeties. Furthermore, we estimate at least six extra weeks in project duration to erect and disassemble the necessary head frame, shaft cover, etc. for each work site * * *. It should be stressed that these figures are * * * for personnel mancages only. If we were to attempt to add extra costs for a guide and safety system for muckbuckets, assuming that such a system were possible, these costs would escalate dramatically * * * (Ex. 48).

Based on these comments, OSHA has removed cranes from the scope of final rule paragraphs (t)(3) (xv)–(xvii) and is

only requiring guides for material hoists. Guides and safeties are required for personnel hoists (see paragraph (t)(4)(vi)). OSHA believes that the costs associated with this revised provision will be negligible, based on the record evidence that guides and safeties on hoists used for personnel hoisting are current industry practice. The American National Standards Institute (ANSI) A10.4–1963 requires the use of guides (#4–11) and safeties (#4–17) for workmen's hoists. In addition, the two sites visited by JRB that used hoists to carry personnel—sites seven and eight—both used guides and safeties. Site seven had four hoists all fitted with "Canadian broken-rope safeties" and site eight had two hoists equipped with "safety dogs" (Ex. 11).

OSHA proposed, in paragraph (t)(1)(iii)(A), a minimum safety factor of five for load lines on material hoists. OSHA did not receive substantive comment to revise the factor of five, but was encouraged to no longer use the term "safety factor." MSHA stated the term "safety factor" has generally been superseded by "design factor." OSHA acknowledges that the hoisting and wire rope industries have generally replaced the term "safety factor" with "design factor." However, to be consistent with other recent rulemakings (see, for example, § 1926.550(g)), OSHA has used the phrase "shall be capable of supporting, without failure at least five times the maximum intended load" in final rule paragraph (t)(3)(xviii), instead of the term "design factor."

Proposed paragraph (t)(1)(iii)(B) required a wire rope safety factor of ten or more for personnel hoisting with cranes or hoists. OSHA has decided to rely on the recently published standard on "Crane or Derrick Suspended Personnel Platforms," § 1926.550(g)(3)(i)(B). That paragraph requires a design factor of seven (times the maximum intended load), except that where rotation-resistant rope is used, the design factor shall be at least ten. MSHA recommended in 1984 that OSHA adopt the design factors contained in their Wire Rope Standards, 30 CFR Part 57. 19a–21 (Ex. 35, p. 2). Those MSHA rules require factors of safety that range from four to seven, depending on the type of use and the length of wire rope. OSHA notes that these factors of safety are considerably less than the range of factors (7.60 to 10.70) those currently required for personnel hoists in 29 CFR 1926.552(c)(14)(iii). In addition, the MSHA rules contain more stringent maintenance, inspection and rope-replacement criteria than OSHA. Absent these additional safeguards, OSHA does not believe that adopting the MSHA design factors of four to 7 percent would be sufficiently protective. However, a single design factor of 10 may not be appropriate for all hoists used in underground construction, and, as the current standards recognize, the design factor may vary depending on the speed of the hoist. In this regard, it should be noted that the ANSI A10.16 standard continues to refer to the ANSI A10.4 standard for personnel hoists, which in turn contains the same requirements for wire rope design factors as the current OSHA standard. Therefore, OSHA believes that employee safety is best protected by referring to the design factors found in 29 CFR 1926.552(c)(14)(iii) for wire rope on personnel hoists.

OSHA has revised the formula for computation of the design factor that was proposed at paragraph (t)(1)(iii)(c). Final Rule (t)(3)(xviii) contains the method for determining the design factor for wire rope used in underground construction hoists. Other than minor editorial changes, OSHA has deleted the requirement for acceleration and deceleration allowances due to the difficulty that MSHA stated field personnel would have when attempting to determine such factors (Ex. 35, p. 3).

OSHA solicited comments on load testing for hoists used in underground construction (see 48 FR 35806). OSHA proposed, in paragraph (t)(4)(i)(G)(*1*), to increase the frequency of load-testing from annually to quarterly. Mr. Bruce Harvey, with J. S. Redpath, pointed out that such an increase in frequency could result in excessive damage to permanent hoist installations (Ex. 17–8). Al Johnson Construction Company contended that the proposed recordkeeping and stringent checking of hoists seemed excessive (Ex. 17–19). None of the commenters supported the increased frequency, so OSHA has decided to retain an annual frequency for load testing. OSHA has also decided to revise the proposed requirement that a copy of the test records be maintained for the duration of the project (proposed paragraph (t)(4)(i)(G)*(2)*. Final Rule paragraph (t)(3)(xxi) requires that the person performing such inspections and tests certify when the required tests and inspections were performed, identify the hoist, and sign the certification. Only the most recent certification is required to be kept until completion of the project. This certification requirement is consistent with recent OSHA rulemaking practices (see 51 FR 34552 and 52 FR 12120).

OSHA proposed, in paragraph (t)(1)(ii)(I), a requirement for a trial run of all cranes and hoists after repairs or after being out of service for one shift. OSHA has limited the scope of that proposed standard to apply only to hoists in this Final Rule. The requirements for cranes are those existing standards in § 1926.550.

OSHA proposed, in paragraph (t)(2), additional requirements for personnel hoisting by both cranes and hoists. Such hoisting operations would primarily be for the purpose of routine access to the underground via a shaft.

Kenny Construction Company commented that OSHA should apply proposed § 1926.550(g), "Crane or Derrick Suspended Personnel Platforms" (49 FR 6280), in place of the proposed rules in paragraph (t) of this rulemaking, which are related to crane hoisting of personnel (Ex. 31). OSHA has carefully considered this and the many other comments received on the proposed rules of Underground Construction related to the use of cranes to hoist personnel.

OSHA believes the provisions of § 1926.550(g) appropriately address the hazards of personnel hoisting by cranes in underground construction as well as in other construction work. It provides a comprehensive approach to the hazards of hoisting personnel. Section § 1926.550(g) limits the use of cranes to hoist personnel to situations where it is the safest or only method available; however, OSHA believes these limitations are neither appropriate nor necessary for routine access to underground construction operations (where a crane-suspended platform is being used for transportation between levels and not as a work platform) for several reasons. First, the cranes used to hoist personnel for routine access do not need to travel during hoisting. Second, the hoisting takes place in a shaft where wind effects are minimal. And third, the boom angle and length do not need to be adjusted during hoisting. (For more background on paragraph (g) of § 1926.550, the entire record related to that rulemaking is contained in OSHA Docket number S–409.)

Since OSHA has removed personnel hoisting by cranes from the scope of this Final Rule, paragraph (t)(4) now only pertains to hoisting personnel by hoists.

Paragraph (t)(4)(i) requires two means of stopping and holding the load. Mr. Bruce Harvey, with J.S. Redpath, stated that OSHA had created confusion in its proposal by referring to one brake in proposed paragraph (t)(2)(ii), and then referring to two brakes in the accompanying explanation (48 FR

35804). OSHA is not requiring two brakes. Only one of the two required means of stopping the load must be a brake and is required by paragraph (t)(3)(i) of this Final Rule. The other means of stopping could be, for example, a second brake, a torque converter control, or the controls of hydraulic hoist drum system. Based on MSHA testimony (Ex. 35, p. 6), the statement in the proposal that broken-rope safeties are not acceptable as a means of stopping and holding the load has been expanded to include safety catches and arrestment devices.

Final Rule paragraph (t)(4)(vi) requires broken-rope safety devices, safety catches or arrestment devices for personnel platforms operating on guide rails or guide ropes. This rule is derived from proposed rule (t)(1)(iv)(D). Cranes have been removed from the scope of this paragraph because § 1926.550(g) applies to crane operations. The terms "safety catches" and "arrestment devices" were added as a result of MSHA's recommendation (Ex. 35, p. 6). For a further explanation of this paragraph, see the discussion pertaining to paragraphs (t)(3) (xv)–(xvii) earlier in this preamble.

Proposed rule paragraph (t)(4)(ii)(D)(*1*) required overspeed governors to activate at 100 feet per minute over the rated speed. MSHA recommended revising the limit to 15 percent above the rated speed (Ex. 35, p. 7). This recommendation is consistent with language in ANSI A10.4, Safety Requirements for Personnel Hoists, which is already referenced by § 1926.552(c)(16). Therefore, OSHA decided not to address this issue separately in the Final Rule and to continue to rely on that general personnel hoist standard for overspeed protection.

Proposed rule paragraph (t)(4)(ii)(D)(*2*) required devices to limit acceleration and deceleration to six feet per second per second. Mr. Capra, with Systems Control, argued that hoists with an AC-wound motor hoist cannot meet this specification (Ex. 47). Mr. Lange, with Fenix and Scisson, Inc., questioned if OSHA meant something other than the normal overspeed and over and under-winds on a Lilly controller (Ex. 17–20). OSHA's current standard on personnel hoists does not specifically address acceleration/deceleration rates, but controls them indirectly by the § 1926.552 reference to ANSI A10.4, which sets forth provisions pertaining to controls, brakes, and normal and final stopping devices; those current rules apply to all personnel hoists. In response to the comments received, OSHA has not carried forward the proposed specification for acceleration and decelaration rates, but will the continue to rely on the current requirements in these areas.

Paragraph (u) Definitions

OSHA has moved the definition of "acceptable" from a note in the proposal and placed it in this paragraph. OSHA has also added a definition of "rapid excavation machines" in order to include machines such as roadheaders and shields which some persons might not consider to be a tunnel boring machine (see discussion of paragraphs (j)(1)(iv) and (j)(2)(ii) above).

III. Summary of Regulatory Impact and Regulatory Flexibility Analysis of the Underground Construction Standard

Introduction

Executive Order 12291 (46 FR 13197, February 19, 1981) requires that a regulatory analysis be conducted for any rule having major economic consequences on the national economy, individual industries, geographical regions, or levels of government. In addition, the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq., requires OSHA to determine whether a regulation will have a significant impact on a substantial number of small entities.

Consistent with these requirements, OSHA has prepared a Regulatory Impact and Regulatory Flexibility Analysis (RIA) for the Underground Construction standard. This analysis includes a profile of the industries that are covered by the standard, an estimate of the number of exposed workers, a review of the nonregulatory alternatives, and assessments of the technological feasibility, costs, benefits, and overall economic impacts of the final standard. The RIA is available at the OSHA Docket Office.

The Need for Regulation

OSHA has assessed the need for this regulation and has determined that the risks incurred by employees in underground construction warrant a revised standard. Based upon data obtained on site visits to both large and small tunneling projects in 1979 and 1982, JRB Associates, Inc., under contract to OSHA (Ex. 11), found that approximately 10,000 employees (of which about 3,100 are employees of small firms) work underground. Due to the cyclical nature of this work, employment had declined to 8,136 employees working below ground by 1987. Using data from JRB site visits and OSHA Fatality/Catastrophe (FAT/CAT) Reports, OSHA estimates that 6 to 7 fatalities occur among employees doing underground construction work each year. In addition, 2 fatalities each year are caused by worker exposures to gassy atmospheres while working underground. By comparison, 1985 data from the Bureau of Labor Statistics (BLS) indicate that for the same number of full-time workers, there were about 3.1 occupational fatalities in mining and construction, and 0.5 fatalities in manufacturing industries. OSHA estimates that underground construction workers experienced about 1,109 lost-time injuries in 1986, or an average of 13.6 lost-time accidents for every 100 full-time workers. In contrast, BLS reports that the 1985 lost-time accident rate was 6.8 for construction 4.8 for mining, and 4.6 for manufacturing.

These data confirm that significant workplace hazards continue to exist in underground construction work. OSHA's review of these accidents indicates that underground construction fatalities and injuries can be reduced by eliminating such major underground hazards as unsafe means of access and egress, accumulation of toxic or explosive gases, conditions susceptible to ground collapse, and unsafe hoisting operations.

In addition to the specific workplace hazards, OSHA believes that the high accident rate in this industry results from uninformed workers who unknowingly implement unsafe or improper work procedures. Currently, many employees have only a limited understanding of the hazards of underground construction, because this industry has a high labor turnover and therefore a high percentage of new employees. New employees are at serious risk until they obtain accurate information on job-related hazards and safe work procedures. In addition, many workers in this industry do not perform the same task every day, nor do they remain in one place for long periods of time. Consequently, these workers are not as familiar with the associated risks of their assignments as are workers in other industries who perform fairly repetitive tasks. Finally, employees of different trades (e.g., laborers, welders, and electricians) who frequently work together on a project may be unaware of how their own safety is affected by the work of others. In addition, these employees have no reasonable means of determining whether their co-workers are taking the proper precautions to avoid workplace disasters. Thus, OSHA believes that underground construction work remains hazardous at least partly due to changing work surroundings and to new employees who lack sufficient

knowledge of the hazards of tunnel and shaft construction.

Potential Benefits From Regulation

OSHA estimated the potential benefits of the final standard on the basis of JRB's economic impact analysis and on accident data (i.e., lost-time injuries and fatalities) obtained from the following sources: The 1977 report developed by Safety Sciences, Inc. for OSHA entitled, "Technical Assistance in the Development and Evaluation of an OSHA Regulation Strategy for Underground Construction"; the Maryland First Reports of Injury (FRI); the regional files included in OSHA's Management Information System (MIS) data base, the OSHA State Plan data base, and OSHA Fatality/Catastrophe reports.

The annual number of underground construction fatalities that would be prevented due to compliance with the revised standard was estimated on the basis of four of the available data bases (which contain information on fatalities for a number of years). Based on these sources, it was determined that 53 percent of the fatalities each year could be prevented by compliance with the revised standard. OSHA estimates that about 5 fatalities (i.e., 53 percent of the 8 to 9 fatalities that occur each year) would be prevented annually due to compliance with the final standard.

This benefits estimate includes two fatalities each year from worker exposures to gassy atmospheres. With regard to circumstnaces in which gas is present, there have been at least four major tunnel disasters involving the explosion of petroleum vapors since 1971. In Sulmar, California 17 men were killed in 1971; in Port Huron, Michigan 21 men were killed in 1971; in Green Bay, Wisconsin 4 men were killed in 1974; and in November of 1988 a methane gas explosion in a sewer tunnel under construction in Milwaukee, Wisconsin killed 3 men who had re-entered the tunnel (after it had been evacuated due to the detection of high levels of methane) to check on its safety. OSHA has studied these disasters and determined that they were primarily caused by inadequate ventilation and lack of monitoring. Although such disasters do not occur on a regular basis, OSHA beleives these hazards continue to exist. Because this rule addresses these hazards, OSHA has estimated the potential benefits from the requirements which cover these situations.

The annual number of underground construction lost-time injuries that would be prevented due to compliance with the revised standard was estimated on the basis of the Safety Sciences and Maryland FRI data. These two sources contain injury information collected over several years. Based on these two sources, OSHA estimates that 145 out of 780 injuries in the Safety Sciences data base would have been prevented due to compliance with the revised standard. Thus, OSHA estimates that a total of about 229 injuries out of the 1,378 injuries in both data bases (i.e., 16.6 percent) could have been prevented due to compliance with the revised standard. OSHA, therefore, estimates that compliance with the revised standard will prevent about 185 injuries per year (i.e., 16.6 percent of the estimated 1,109 injuries that occur each year).

In sum, as a result of compliance with the final standard, OHSA estimates that the annual lost-time injuries can be reduced by at least 16.6 percent, from 1,109 injuries to 924 injuries, and that annual fatalities can be reduced by at least 53 percent from 8 to 9 to about 3 deaths per year.

Technological Feasibility Determination

In evaluating the technological feasibility of the standard, OSHA carefully examined the economic data and proposed requirements. In their analysis, JRB considered the factors associated with equipment-related and nonequipment-related provisions. In terms of equipment-related provisions, JRB considered the equipment required, the availability of equipment, and the current industry practice. They also examined the differences in compliance methods or the use of equipment for small businesses, the technological advances that have recently or may soon affect methods of compliance, and the use of required equipment by other industries where relevant. JRB also evaluated nonequipment-related provisions resulting in possible procedural or work practice changes.

As a result of that analysis, JRB found that many of the provisions of the 1983 proposal are similar to those of the American National Standards Institute (ANSI), and to the Michigan and California standards. For example, the ANSI standard (§ 4.1) requires accident prevention programs, but does not specifically mention evaluation procedures for these programs. Similarly, both the Michigan and the California standards specifically address emergency and evacuation plans (Rule 408.41463 and section 8426, respectively).

Since the publication of the 1983 proposal, however, OSHA has received much additional information and has concluded that some of the provisions, as drafted in the 1983 proposal, may not have been cost-effective or feasible. Examples of those provisions include requirements for the use of guides and safeties on cranes and falling object protective structures (FOPS) in all tunnels. Based on the record, OSHA made various modifications to those parts of the standard that would have been most difficult to implement. OSHA believes that all of the provisions, as currently drafted, are feasible.

Estimated Costs of Compliance

For the 1983 proposal, OSHA's estimate of the compliance costs associated with the revisions to 29 CFR 1926.800 was based primarily upon data contained in the JRB report. JRB developed and analyzed provisions proposed in the September 1982 OSHA draft of the standard and calculated the total estimated cost for industry end-use sectors, such as mass transit and sewer tunnels, as well as for the entire underground construction industry.

Since the publication of the 1983 proposal, the Agency has received useful comments concerning these compliance cost estimates. In cases where the Agency determined that the provisions as drafted in the 1983 proposal were inappropriate (e.g., guides and safeties), the comments served as the basis for revisions or deletions. Additionally, in cases where the Agency determined that the provisions were necessary, the comments served as the basis for revisions in OSHA's compliance cost estimates.

From a baseline of current industry practice, OSHA estimates, as summarized in table III–1, that full compliance with the provisions of the final standard will cost the underground construction industry a total of about $2.9 million annually—including approximately $883 thousand for large sites and $2.02 million for small sites. Most of these costs are related to new provisions in the standard.

TABLE III-1.—SUMMARY OF COMPLIANCE COST ESTIMATES FOR ALL UNDERGROUND CONSTRUCTION SITES

[1987 Dollars]

Type of cost	Estimated Cost of the Final Standard *		
	Large sites	Small sites	Total
Non-gassy	648,713	1,468,025	2,116,738
Potentially gassy	230,327	554,104	784,431
Gassy	4,759	1,016	5,775
Totals	883,799	2,023,145	2,906,945

Source: U.S. Department of Labor, OSHA, Office of Regulatory Analysis, 1988.
* OSHA's estimate is based on a non-supervisory wage rate of $17.39 per hour and a ten year useful equipment life.

Cost Estimates for Requirements Unrelated to Flammable Gas

Given the current level of compliance in underground construction, OSHA estimates that the total annual compliance costs for those provisions unrelated to the presence of flammable gas will be about $648,713 for large sites and about $1,468,025 for small sites. Similarly, based on an assumption of full compliance with existing standards, the incremental cost of those requirements unrelated to the presence of flammable gas would be $627,471 and $1,428,717 for large and small sites respectively.

The major costs of these requirements are related to lost work time. For example, with regard to large sites the two most expensive provisions—which pertain to equipment used for hauling—account for about 47 percent of the estimated costs. The associated labor costs are for workers to connect and disconnect cars in order to ensure that occupied mancars are pulled (where switching facilities are available) and to ensure that the locomotive is always downhill of the car on steep grades (if safety chains are not used). Similarly, for small sites, the provision requiring that a designated person remain above ground whenever anyone is working underground accounts for almost half of the total estimated compliance costs.

Provisions Pertaining to Flammable Gas

OSHA received considerable comment on the cost estimates associated with provisions of the proposal that pertained to gassy operations in tunnels. The proposal set forth a number of circumstances under which tunnels must be classified and operated as "gassy," including a one-time reading of the lower explosive limit (LEL) for methane, or a 10-percent or more reading of the LEL for other flammable gasses. The proposal specified a number of requirements (i.e., Schedule 31 equipment, signs, permissible ventilation, monitoring, etc.) for tunnels classified as gassy.

In estimating the compliance costs associated with the proposal, OSHA took into account the cost of the additional requirements of the proposal as compared to the current standard, but did not estimate the higher percentage of tunnels being classified as "gassy." This resulted in an underestimation of the total compliance costs associated with these provisions of the proposal.

In reviewing the comments concerning changes in the requirements related to flammable gas, OSHA found that the most common recommendation was for OSHA to give the tunneling contractor some method of avoiding classifying the operation as gassy if alternative methods existed to control the gas problem. Based on these and other comments, OSHA developed a classification scheme for the final underground construction standard that specifies a gradual phase-in of requirements according to the concentration of gas encountered in tunnels, and permits tunnels to be declassified from "gassy" under appropriate conditions.

Cost Estimates for Operations Classified as Potentially Gassy

In addition to a permissible ventilation system, the standard requires the following three types of flammable gas monitoring for operations that would be classified as potentially gassy:

(1) Continuous automatic monitoring when rapid excavation machines are being used
(2) Manual monitoring twice per shift
(3) Monitoring before hot work.

JRB analyzed a geographic distribution of planned tunnel construction in order to determine which prospective sites might be classified as potentially gassy. As a result of their analysis, JRB estimated that 17 percent of the projected tunnel operations for the years 1985 through 2000 will be classified as potentially gassy.

Based upon the assumption that sites visited by JRB (i.e., sites 5, 9 and B) are representative of the entire underground construction industry, OSHA first estimated the costs of bringing those three sites into compliance and then extrapolated the compliance costs to the entire industry. OSHA estimates that the annual cost to comply with the potentially gassy requirements will be about $230,327 for the large sites, and $554,104 for the small sites.

Cost Estimates for Operations Classified as Gassy

The standard requires that any operation exceeding the 10-percent LEL for 3 consecutive days shall be classified as gassy and shall meet the following requirements when employees are working in the tunnel:

(i)(1) Use only acceptable equipment,
(i)(2) Use either Schedule 31 mobile diesel-powered equipment or fully equivalent equipment
(i)(3) Post signs,
(i)(4) Prohibit smoking,
(i)(5) Post fire watch, and
(k)(12) Provide above ground controls for reversing the air flow.

JRB estimated that 1 percent of all underground construction operations during the years 1985–2000 will exceed the 10-percent LEL trigger for 3 consecutive days. In addition, it was estimated that for half of these operations (0.5 percent of all tunnels), the gassy classification will only be temporary because the standard permits constructors to take steps to reduce gas concentrations without first having to meet the gassy operation requirements. Thus, it is estimated that only 0.5 percent of tunnels will be classified as "gassy." Based on this assumption, OSHA estimates that the large sites would incur about $4,759 in added costs, and the small sites about $1,016 in additional compliance costs.

Summary of Costs of Provisions Pertaining to Flammable Gas

Thus, OSHA estimates that the underground construction industry will incur less than $1 million in additional costs to comply with the provisions related to flammable gas. Large sites

will incur about $235,086 in additional annual compliance costs, and small sites will incur about $555,120 in additional annual compliance costs. For both large and small sites, the additional labor associated with atmospheric testing (i.e., provisions (j)(2) (i), (iii), (iv)) is the major cost component. These provisions account for about 98 percent of the estimated $230,327 in annual costs for large sites to comply with the provisions related to potentially gassy operations, and 96.6 percent of all of the costs associated with the provisions related to flammable gas. For small sites, these provisions account for about 86.0 percent of the annual compliance costs associated with provisions related to potentially gassy operations, and 85.8 percent of the annual compliance costs associated with all of the provisions related to flammable gas.

Economic Impact and Regulatory Flexibility Analysis

In accordance with Executive Order 12291 and the Regulatory Flexibility Act of 1980, OSHA assessed the potential economic impact of the final standard on the underground construction industry as a whole and on small entities in particular. Based largely on the JRB Economic Impact Analysis, OSHA estimates that even under its upper bound scenario (which assumes a five year equipment depreciation factor), large and small firms in the underground construction industry will remain viable.

The Agency estimates that the costs of complying with the final rule will be a minimal percentage of total annual revenue, amounting to less than .067 percent for large firms and .76 percent for small firms. OSHA believes that these costs will produce minor effects of less than 1 percent upon most of the important measures of the industry's economic status, such as profit, output, and employment. Thus, OSHA concludes that no large firms will fail as a result of increased compliance costs and that only 1 small firm out of the total 262 small firms might fail due to increased compliance costs.

Even under OSHA's upper bound the costs of compliance will still not exceed .069 percent of revenue for large firms and .87 percent of revenue for small firms. Thus, the final standard will not significantly affect the underground construction industry. Even if small firms incur annual compliance costs of $2.29 million (i.e., OSHA's upper bound cost estimate) and cannot pass any of the added compliance costs on to their customers, OSHA anticipates no change in the stability or competitiveness of the small firms in this industry. Moreover, OSHA believes that the actual impacts will be less than those estimated by this analysis because small or marginal firms can choose to avoid some of these costs by not working on the more difficult potentially gassy or gassy projects.

Thus, OSHA concludes that the compliance costs of the final underground construction standard will not affect the viability of small firms and the potential economic impact on these entities will be minimal.

Cost Effectiveness of Rule

Before promulgating a safety standard, Executive Order 12291 of February 17, 1981, requires the Agency to evaluate the economic effects of the regulatory action. As a means of attaining some perspective on the cost-effectiveness of the standard, OSHA calculated the net benefits of the final rule. In particular, a 1981 study by Levitt and coworkers (Levitt, Raymond, et al., "Improving Construction Safety Performance: The User's Role", Stanford University, Department of Civil Engineering Technical Report #260, August 1981) was used to determine the cost effectiveness of the final rule. Based on the results of this study—that a firm saves about $5,122 (in 1987 dollars) from improved productivity and reduced recordkeeping per lost-workday injury or fatality-prevented-total industry savings amount to about $973,180 per year as a result of compliance with the provisions of the final standard, (i.e., $5,122×185 lost-workday injuries prevented +$5,122×5.0 fatalities prevented). With total compliance cost estimated at $2,906,945, this results in a total effective compliance costs of $1,933,765 per year or a cost of $386,573 per life saved. Similarly, from a baseline of current compliance with the existing standard, the incremental cost per life saved amounts to $758,148. However, these costs are overstated since no allowance has been made for the expected reduction in non-fatal injuries, and the consequent increase in aggregate worker utility that attends such a reduction. Studies which utilize a willingness-to-pay approach to identify the cost of injuries, have estimated costs (and conversely the cost saving of an injury avoided) to be over $32,000 dallars per non-fatal injury avoided.

Environmental Effects

This rule and its major alternatives have been reviewed in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321, et seq.), the regulations of the Council on Environmental Quality (40 CFR Part 1500), and OSHA's DOL NEPA Procedures (29 CFR Part 11). As a result of this review the rule is not anticipated to have a significant effect on air or water quality, solid waste disposal, or land use.

IV. OMB Approval Under the Paperwork Reduction Act

This subpart contains a collection of information in § 1926.800(j)(3). This provision requires employers to maintain a record of their air-quality tests at the job site. OMB has reviewed this collection and has approved it through 1991. The OMB control number is 1218–0067.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Regulatory Analysis, Occupational Safety and Health Administration, 200 Constitution Avenue, NW., Washington, DC 20210; and to the Office of Management and Budget, Paperwork Reduction Project (1218–0067), Washington, DC 20503.

V. State Plan Requirements

The 25 states and territories with their own OSHA-approved occupational safety and health plans must revise their existing standard within six months or show OSHA why there is no need for action, e.g., because an existing state standard covering this area is already "at least as effective" as the revised Federal standard. These states and territories are: Alaska, Arizona, California, Connecticut*, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York*, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, Wyoming.

VI. Federalism

The final standard has been reviewed in accordance with Executive Order 12612 (52 FR 41685; October 30, 1987) regarding Federalism. This Order requires that agencies, to the extent possible, refrain from limiting state policy options, consult with states prior to taking any actions that would restrict state policy options, and take such

*Plan covers only state and local government employees.

actions only when there is clear constitutional authority and the presence of a problem of national scope. The Order provides for preemption of state law only if there is a clear Congressional intent for the Agency to do so. Any such preemption is to be limited to the extent possible.

Section 18 of the Occupational Safety and Health Act (OSH Act), expresses Congress' clear intent to preempt state laws relating to issues with respect to which Federal OSHA has promulgated occupational safety or health standards. Under the OSH Act, a state can avoid preemption only if it submits, and obtains Federal approval of, a plan for the development of such standards and their enforcement. Occupational safety and health standards developed by such Plan-States must, among other things, be as least as effective in providing safe and healthful employment and places of employment as the Federal standards.

This Federal standard for underground construction is drafted so that all construction workers will be protected by general, performance-oriented standards. To the extent that there are state or regional peculiarities that could alter construction methods, states with occupational safety and health plans approved under section 18 of the OSH Act would be able to develop their own state standards to deal with any special problems. Moreover, the performance nature of this proposed standard, of and by itself, allows for flexibility by states and contractors to provide as much safety as possible using varying methods consonant with conditions in each state.

In short, there is a clear national problem related to the occupational safety and health of construction workers. While the individual states, if all acted, might be able collectively to deal with the safety problems involved, most have not elected to do so in the 17 years since the enactment of the OSH Act. Those states which have elected to participate under section 18 of the OSH Act would not be preempted by this proposed regulation, and would be able to address special, local conditions within the framework provided by this performance-oriented standard while ensuring that their standards are at least as effective as the Federal standard. State comments were invited on the proposal and were fully considered prior to promulgation of this Final Rule.

VII. List of Subjects in 29 CFR Part 1926

Construction industry, Construction safety, Electric power, Excavations, Explosives, Fire prevention, Flammable materials, Health, Protective equipment, Respiratory protection, Safety, Signs and symbols, Tools, Tunnels, Welding.

VIII. Authority:

This document was prepared under the direction of Alan C. McMillan, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Accordingly, pursuant to sections 4, 6(b), and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), section 107 of the Construction Act (40 U.S.C. 333), Secretary of Labor's Order No. 9–83 (48 FR 35736), and 29 CFR Part 1911, 29 CFR Part 1926 is amended as set forth below.

Signed at Washington, D.C. this 25th day of May 1989.

Alan C. McMillan,

Acting Assistant Secretary of Labor.

CFR Part 1926 is amended as follows:

PART 1926—[AMENDED]

1. The authority citation for Subpart S of Part 1926 is revised to read as follows:

Authority: Sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); Secs. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable. Section 1926.800 also issued under 29 CFR Part 1911.

2. By revising the title of Subpart S to read as follows:

Subpart S—Underground Construction, Caisson, Cofferdams and Compressed Air

3. By revising § 1926.800 to read as follows:

§ 1926.800 Underground construction.

(a) *Scope and application.* (1) This section applies to the construction of underground tunnels, shafts, chambers, and passageways. This section also applies to cut-and-cover excavations which are both physically connected to ongoing underground construction operations within the scope of this section, and covered in such a manner as to create conditions characteristic of underground construction.

(2) This section does not apply to the following:

(i) Excavation and trenching operations covered by Subpart P of this part, such as foundation operations for above-ground structures that are not physically connected to underground construction operations, and surface excavation; nor

(ii) Underground electrical transmission and distribution lines, as addressed in Subpart V of this part.

(b) *Access and egress.* (1) The employer shall provide and maintain safe means of access and egress to all work stations.

(2) The employer shall provide access and egress in such a manner that employees are protected from being struck by excavators, haulage machines, trains and other mobile equipment.

(3) The employer shall control access to all openings to prevent unauthorized entry underground. Unused chutes, manways, or other openings shall be tightly covered, bulkheaded, or fenced off, and shall be posted with warning signs indicating "Keep Out" or similar language. Completed or unused sections of the underground facility shall be barricaded.

(c) *Check-in/check-out.* The employer shall maintain a check-in/check-out procedure that will ensure that above-ground personnel can determine an accurate count of the number of persons underground in the event of an emergency. However, this procedure is not required when the construction of underground facilities designed for human occupancy has been sufficiently completed so that the permanent environmental controls are effective, and when the remaining construction activity will not cause any environmental hazard or structural failure within the facilities.

(d) *Safety instruction.* All employees shall be instructed in the recognition and avoidance of hazards associated with underground construction activities including, where appropriate, the following subjects:

(1) Air monitoring;
(2) Ventilation;
(3) Illumination;
(4) Communications;
(5) Flood control;
(6) Mechanical equipment;
(7) Personal protective equipment;
(8) Explosives;
(9) Fire prevention and protection; and
(10) Emergency procedures, including evacuation plans and check-in/check-out systems.

(e) *Notification.* (1) Oncoming shifts shall be informed of any hazardous occurrences or conditions that have affected or might affect employee safety, including liberation of gas, equipment failures, earth or rock slides, cave-ins, floodings, fires or explosions.

(2) The employer shall establish and maintain direct communications for coordination of activities with other employers whose operations at the

jobsite affect or may affect the safety of employees underground.

(f) *Communications.* (1) When natural unassisted voice communication is ineffective, a power-assisted means of voice communication shall be used to provide communication between the work face, the bottom of the shaft, and the surface.

(2) Two effective means of communication, at least one of which shall be voice communication, shall be provided in all shafts which are being developed or used either for personnel access or for hoisting. Additional requirements for hoist operator communication are contained in paragraph (t)(3)(xiv) of this section.

(3) Powered communication systems shall operate on an independent power supply, and shall be installed so that the use of or disruption of any one phone or signal location will not disrupt the operation of the system from any other location.

(4) Communication systems shall be tested upon initial entry of each shift to the underground, and as often as necessary at later times, to ensure that they are in working order.

(5) Any employee working alone underground in a hazardous location, who is both out of the range of natural unassisted voice communication and not under observation by other persons, shall be provided with an effective means of obtaining assistance in an emergency.

(g) *Emergency provisions*—(1) *Hoisting capability.* When a shaft is used as a means of egress, the employer shall make advance arrangements for power-assisted hoisting capability to be readily available in an emergency, unless the regular hoisting means can continue to function in the event of an electrical power failure at the jobsite. Such hoisting means shall be designed so that the load hoist drum is powered in both directions of rotation and so that the brake is automatically applied upon power release or failure.

(2) *Self-rescuers.* The employer shall provide self-rescuers having current approval from the National Institute for Occupational Safety and Health and the Mine Safety and Health Administration to be immediately available to all employees at work stations in underground areas where employees might be trapped by smoke or gas. The selection, issuance, use, and care of respirators shall be in accordance with paragraphs (b) and (c) of § 1926.103 of this part.

(3) *Designated person.* At least one designated person shall be on duty above ground whenever any employee is working underground. This designated person shall be responsible for securing immediate aid and keeping an accurate count of employees underground in case of emergency. The designated person must not be so busy with other responsibilities that the counting function is encumbered.

(4) *Emergency lighting.* Each employee underground shall have an acceptable portable hand lamp or cap lamp in his or her work area for emergency use, unless natural light or an emergency lighting system provides adequate illumination for escape.

(5) *Rescue teams.* (i) On jobsites where 25 or more employees work underground at one time, the employer shall provide (or make arrangements in advance with locally available rescue services to provide) at least two 5-person rescue teams, one on the jobsite or within one-half hour travel time from the entry point, and the other within 2 hours travel time.

(ii) On jobsites where less than 25 employees work underground at one time, the employer shall provide (or make arrangements in advance with locally available rescue services to provide) at least one 5-person rescue team to be either on the jobsite or within one-half hour travel time from the entry point.

(iii) Rescue team members shall be qualified in rescue procedures, the use and limitations of breathing apparatus, and the use of firefighting equipment. Qualifications shall be reviewed not less than annually.

(iv) On jobsites where flammable or noxious gases are encountered or anticipated in hazardous quantities, rescue team members shall practice donning and using self-contained breathing apparatus monthly.

(v) The employer shall ensure that rescue teams are familiar with conditions at the jobsite.

(h) *Hazardous classifications.*—(1) *Potentially gassy operations.* Underground construction operations shall be classified as potentially gassy if either:

(i) Air monitoring discloses 10 percent or more of the lower explosive limit for methane or other flammable gases measured at 12 inches (304.8 mm) ±0.25 inch (6.35 mm) from the roof, face, floor or walls in any underground work area for more than a 24-hour period; or

(ii) The history of the geographical area or geological formation indicates that 10 percent or more of the lower explosive limit for methane or other flammable gases is likely to be encountered in such underground operations.

(2) *Gassy operations.* Underground construction operations shall be classified as gassy if:

(i) Air monitoring discloses 10 percent or more of the lower explosive limit for methane or other flammable gases measured at 12 inches (304.8 mm) ±0.25 inch (6.35 mm) from the roof, face, floor or walls in any underground work area for three consecutive days; or

(ii) There has been an ignition of methane or of other flammable gases emanating from the strata that indicates the presence of such gases; or

(iii) The underground construction operation is both connected to an underground work area which is currently classified as gassy and is also subject to a continuous course of air containing the flammable gas concentration.

(3) *Declassification to potentially gassy operations.* Underground construction gassy operations may be declassified to Potentially Gassy when air monitoring results remain under 10 percent of the lower explosive limit for methane or other flammable gases for three consecutive days.

(i) *Gassy operations-additional requirements.* (1) Only acceptable equipment, maintained in suitable condition, shall be used in gassy operations.

(2) Mobile diesel-powered equipment used in gassy operations shall be either approved in accordance with the requirements of 30 CFR Part 36 (formerly Schedule 31) by MSHA, or shall be demonstrated by the employer to be fully equivalent to such MSHA-approved equipment, and shall be operated in accordance with that part.

(3) Each entrance to a gassy operation shall be prominently posted with signs notifying all entrants of the gassy classification.

(4) Smoking shall be prohibited in all gassy operations and the employer shall be responsible for collecting all personal sources of ignition, such as matches and lighters, from all persons entering a gassy operation.

(5) A fire watch as described in § 1926.352(e) shall be maintained when hot work is performed.

(6) Once an operation has met the criteria in paragraph (h)(2) warranting classification as gassy, all operations in the affected area, except the following, shall be discontinued until the operation either is in compliance with all of the gassy operation requirements or has been declassified in accordance with paragraph (h)(3) of this section:

(i) Operations related to the control of the gas concentration;

(ii) Installation of new equipment, or conversion of existing equipment, to comply with this paragraph (i); and

(iii) Installation of above-ground controls for reversing the air flow.

(j) *Air quality and monitoring*—(1) *General.* Air quality limits and control requirements for construction are found in § 1926.55, except as modified by this section.

(i)(A) The employer shall assign a competent person who shall perform all air monitoring required by this section.

(B) Where this paragraph requires monitoring of airborne contaminants "as often as necessary," the competent person shall make a reasonable determination as to which substances to monitor and how frequently to monitor, considering at least the following factors:

(*1*) Location of jobsite: Proximity to fuel tanks, sewers, gas lines, old landfills, coal deposits, and swamps;

(*2*) Geology: Geological studies of the jobsite, particularly involving the soil type and its permeability;

(*3*) History: Presence of air contaminants in nearby jobsites, changes in levels of substances monitored on the prior shift; and

(*4*) Work practices and jobsite conditions: The use of diesel engines, use of explosives, use of fuel gas, volume and flow of ventilation, visible atmospheric conditions, decompression of the atmosphere, welding, cutting and hot work, and employees' physical reactions to working underground.

(ii)(A) The atmosphere in all underground work areas shall be tested as often as necessary to assure that the atmosphere at normal atmospheric pressure contains at least 19.5 percent oxygen and no more than 22 percent oxygen.

(B) Tests for oxygen content shall be made before tests for air contaminants.

(iii)(A) The atmosphere in all underground work areas shall be tested quantitatively for carbon monoxide, nitrogen dioxide, hydrogen sulfide, and other toxic gases, dusts, vapors, mists, and fumes as often as necessary to ensure that the permissible exposure limits prescribed in § 1926.55 are not exceeded.

(B) The atmosphere in all underground work areas shall be tested quantitatively for methane and other flammable gases as often as necessary to determine:

(*1*) Whether action is to be taken under paragraphs (j)(1)(vii), (viii), and (ix), of this section; and

(*2*) Whether an operation is to be classified potentially gassy or gassy under paragraph (h) of this section.

(C) If diesel-engine or gasoline-engine driven ventilating fans or compressors are used, an initial test shall be made of the inlet air of the fan or compressor, with the engines operating, to ensure that the air supply is not contaminated by engine exhaust.

(D) Testing shall be performed as often as necessary to ensure that the ventilation requirements of paragraph (k) of this section are met.

(iv) When rapid excavation machines are used, a continuous flammable gas monitor shall be operated at the face with the sensor(s) placed as high and close to the front of the machine's cutter head as practicable.

(v)(A) Whenever air monitoring indicates the presence of 5 ppm or more of hydrogen sulfide, a test shall be conducted in the affected underground work area(s), at least at the beginning and midpoint of each shift, until the concentration of hydrogen sulfide has been less than 5 ppm for 3 consecutive days.

(B) Whenever hydrogen sulfide is detected in an amount exceeding 10 ppm, a continuous sampling and indicating hydrogen sulfide monitor shall be used to monitor the affected work area.

(C) Employees shall be informed when a concentration of 10 ppm hydrogen sulfide is exceeded.

(D) The continuous sampling and indicating hydrogen sulfide monitor shall be designed, installed, and maintained to provide a visual and aural alarm when the hydrogen sulfide concentration reaches 20 ppm to signal that additional measures, such as respirator use, increased ventilation, or evacuation, might be necessary to maintain hydrogen sulfide exposure below the permissible exposure limit.

(vi) When the competent person determines, on the basis of air monitoring results or other information, that air contaminants may be present in sufficient quantity to be dangerous to life, the employer shall:

(A) Prominently post a notice at all entrances to the underground jobsite to inform all entrants of the hazardous condition; and

(B) Ensure that the necessary precautions are taken.

(vii) Whenever five percent or more of the lower explosive limit for methane or other flammable gases is detected in any underground work area(s) or in the air return, steps shall be taken to increase ventilation air volume or otherwise control the gas concentration, unless the employer is operating in accordance with the potentially gassy or gassy operation requirements. Such additional ventilation controls may be discontinued when gas concentrations are reduced below five percent of the lower explosive limit, but shall be reinstituted whenever the five percent level is exceeded.

(viii) Whenever 10 percent or more of the lower explosive limit for methane or other flammable gases is detected in the vicinity of welding, cutting, or other hot work, such work shall be suspended until the concentration of such flammable gas is reduced to less than 10 percent of the lower explosive limit.

(ix) Whenever 20 percent or more of the lower explosive limit for methane or other flammable gases is detected in any underground work area(s) or in the air return:

(A) All employees, except those necessary to eliminate the hazard, shall be immediately withdrawn to a safe location above ground; and

(B) Electrical power, except for acceptable pumping and ventilation equipment, shall be cut off to the area endangered by the flammable gas until the concentration of such gas is reduced to less than 20 percent of the lower explosive limit.

(2) *Additional monitoring for potentially gassy and gassy operations.* Operations which meet the criteria for potentially gassy and gassy operations set forth in paragraph (h) of this section shall be subject to the additional monitoring requirements of this paragraph.

(i) A test for oxygen content shall be conducted in the affected underground work areas and work areas immediately adjacent to such areas at least at the beginning and midpoint of each shift.

(ii) When using rapid excavation machines, continuous automatic flammable gas monitoring equipment shall be used to monitor the air at the heading, on the rib, and in the return air duct. The continuous monitor shall signal the heading, and shut down electric power in the affected underground work area, except for acceptable pumping and ventilation equipment, when 20 percent or more of the lower explosive limit for methane or other flammable gases is encountered.

(iii) A manual flammable gas monitor shall be used as needed, but at least at the beginning and midpoint of each shift, to ensure that the limits prescribed in paragraphs (h) and (j) are not exceeded. In addition, a manual electrical shut down control shall be provided near the heading.

(iv) Local gas tests shall be made prior to and continuously during any welding, cutting, or other hot work.

(v) In underground operations driven by drill-and-blast methods, the air in the

affected area shall be tested for flammable gas prior to re-entry after blasting, and continuously when employees are working underground.

(3) *Recordkeeping.* A record of all air quality tests shall be maintained above ground at the worksite and be made available to the Secretary of Labor upon request. The record shall include the location, date, time, substance and amount monitored. Records of exposures to toxic substances shall be retained in accordance with § 1910.20 of this chapter. All other air quality test records shall be retained until completion of the project.

(k) *Ventilation.* (1)(i) Fresh air shall be supplied to all underground work areas in sufficient quantities to prevent dangerous or harmful accumulation of dusts, fumes, mists, vapors or gases.

(ii) Mechanical ventilation shall be provided in all underground work areas except when the employer can demonstrate that natural ventilation provides the necessary air quality through sufficient air volume and air flow.

(2) A minimum of 200 cubic feet (5.7 m^3) of fresh air per minute shall be supplied for each employee underground.

(3) The linear velocity of air flow in the tunnel bore, in shafts, and in all other underground work areas shall be at least 30 feet (9.15 m) per minute where blasting or rock drilling is conducted, or where other conditions likely to produce dust, fumes, mists, vapors, or gases in harmful or explosive quantities are present.

(4) The direction of mechanical air flow shall be reversible.

(5) Following blasting, ventilation systems shall exhaust smoke and fumes to the outside atmosphere before work is resumed in affected areas.

(6) Ventilation doors shall be designed and installed so that they remain closed when in use, regardless of the direction of the air flow.

(7) When ventilation has been reduced to the extent that hazardous levels of methane or flammable gas may have accumulated, a competent person shall test all affected areas after ventilation has been restored and shall determine whether the atmosphere is within flammable limits before any power, other than for acceptable equipment, is restored or work is resumed.

(8) Whenever the ventilation system has been shut down with all employees out of the underground area, only competent persons authorized to test for air contaminants shall be allowed underground until the ventilation has been restored and all affected areas have been tested for air contaminants and declared safe.

(9) When drilling rock or concrete, appropriate dust control measures shall be taken to maintain dust levels within limits set in § 1926.55. Such measures may include, but are not limited to, wet drilling, the use of vacuum collectors, and water mix spray systems.

(10) (i) Internal combustion engines, except diesel-powered engines on mobile equipment, are prohibited underground.

(ii) Mobile diesel-powered equipment used underground in atmospheres other than gassy operations shall be either approved by MSHA in accordance with the provisions of 30 CFR Part 32 (formerly Schedule 24), or shall be demonstrated by the employer to be fully equivalent to such MSHA-approved equipment, and shall be operated in accordance with that Part. (Each brake horsepower of a diesel engine requires at least 100 cubic feet (28.32 m^3) of air per minute for suitable operation in addition to the air requirements for personnel. Some engines may require a greater amount of air to ensure that the allowable levels of carbon monoxide, nitric oxide, and nitrogen dioxide are not exceeded.)

(11) Potentially gassy or gassy operations shall have ventilation systems installed which shall:

(i) Be constructed of fire-resistant materials; and

(ii) Have acceptable electrical systems, including fan motors.

(12) Gassy operations shall be provided with controls located above ground for reversing the air flow of ventilation systems.

(13) In potentially gassy or gassy operations, wherever mine-type ventilation systems using an offset main fan installed on the surface are used, they shall be equipped with explosion-doors or a weak-wall having an area at least equivalent to the cross-sectional area of the airway.

(l) *Illumination.* (1) Illumination requirements applicable to underground construction operations are found in *Table D–3* of § 1926.56 of this part.

(2) Only acceptable portable lighting equipment shall be used within 50 feet (15.24 m) of any underground heading during explosives handling.

(m) *Fire prevention and control.* Fire prevention and protection requirements applicable to underground construction operations are found in Subpart F of this part, except as modified by the following additional standards.

(1) Open flames and fires are prohibited in all underground construction operations except as permitted for welding, cutting and other hot work operations in paragraph (n) of this section.

(2) (i) Smoking may be allowed only in areas free of fire and explosion hazards.

(ii) Readily visible signs prohibiting smoking and open flames shall be posted in areas having fire or explosion hazards.

(3) The employer may store underground no more than a 24-hour supply of diesel fuel for the underground equipment used at the worksite.

(4) The piping of diesel fuel from the surface to an underground location is permitted only if:

(i) Diesel fuel is contained at the surface in a tank whose maximum capacity is no more than the amount of fuel required to supply for a 24-hour period the equipment serviced by the underground fueling station; and

(ii) The surface tank is connected to the underground fueling station by an acceptable pipe or hose system that is controlled at the surface by a valve, and at the shaft bottom by a hose nozzle; and

(iii) The pipe is empty at all times except when transferring diesel fuel from the surface tank to a piece of equipment in use underground; and

(iv) Hoisting operations in the shaft are suspended during refueling operations if the supply piping in the shaft is not protected from damage.

(5) (i) Gasoline shall not be carried, stored, or used underground.

(ii) Acetylene, liquefied petroleum gas, and Methylacetylene Propadiene Stabilized gas may be used underground only for welding, cutting and other hot work, and only in accordance with Subpart J of this part, and paragraphs (j), (k), (m), and (n) of this section.

(6) Oil, grease, and diesel fuel stored underground shall be kept in tightly sealed containers in fire-resistant areas at least 300 feet (91.44 m) from underground explosive magazines, and at least 100 feet (30.48 m) from shaft stations and steeply inclined passageways. Storage areas shall be positioned or diked so that the contents of ruptured or overturned containers will not flow from the storage area.

(7) Flammable or combustible materials shall not be stored above ground within 100 feet (30.48 m) of any access opening to any underground operation. Where this is not feasible because of space limitations at the jobsite, such materials may be located within the 100-foot limit, provided that:

(i) They are located as far as practicable from the opening; and

(ii) Either a fire-resistant barrier of not less than one-hour rating is placed between the stored material and the

opening, or additional precautions are taken which will protect the materials from ignition sources.

(8) Fire-resistant hydraulic fluids shall be used in hydraulically-actuated underground machinery and equipment unless such equipment is protected by a fire suppression system or by multi-purpose fire extinguisher(s) rated at of sufficient capacity for the type and size of hydraulic equipment involved, but rated at least 4A:40B:C.

(9) (i) Electrical installations in underground areas where oil, grease, or diesel fuel are stored shall be used only for lighting fixtures.

(ii) Lighting fixtures in storage areas, or within 25 feet (7.62 m) of underground areas where oil, grease, or diesel fuel are stored, shall be approved for Class I, Division 2 locations, in accordance with Subpart K of this part.

(10) Leaks and spills of flammable or combustible fluids shall be cleaned up immediately.

(11) A fire extinguisher of at least 4A:40B:C rating or other equivalent extinguishing means shall be provided at the head pulley and at the tail pulley of underground belt conveyors.

(12) Any structure located underground or within 100 feet (30.48 m) of an opening to the underground shall be constructed of material having a fire-resistance rating of at least one hour.

(n) *Welding, cutting, and other hot work.* In addition to the requirements of Subpart J of this part, the following requirements shall apply to underground welding, cutting, and other hot work.

(1) No more than the amount of fuel gas and oxygen cylinders necessary to perform welding, cutting, or other hot work during the next 24-hour period shall be permitted underground.

(2) Noncombustible barriers shall be installed below welding, cutting, or other hot work being done in or over a shaft or raise.

(o) *Ground support.*—(1) *Portal areas.* Portal openings and access areas shall be guarded by shoring, fencing, head walls, shotcreting or other equivalent protection to ensure safe access of employees and equipment. Adjacent areas shall be scaled or otherwise secured to prevent loose soil, rock, or fractured materials from endangering the portal and access area.

(2) *Subsidence areas.* The employer shall ensure ground stability in hazardous subsidence areas by shoring, by filling in, or by erecting barricades and posting warning signs to prevent entry.

(3) *Underground areas.* (i)(A) A competent person shall inspect the roof, face, and walls of the work area at the start of each shift and as often as necessary to determine ground stability.

(B) Competent persons conducting such inspections shall be protected from loose ground by location, ground support or equivalent means.

(ii) Ground conditions along haulageways and travelways shall be inspected as frequently as necessary to ensure safe passage.

(iii) Loose ground that might be hazardous to employees shall be taken down, scaled or supported.

(iv) (A) Torque wrenches shall be used wherever bolts that depend on torsionally applied force are used for ground support.

(B) A competent person shall determine whether rock bolts meet the necessary torque, and shall determine the testing frequency in light of the bolt system, ground conditions and the distance from vibration sources.

(v) Suitable protection shall be provided for employees exposed to the hazard of loose ground while installing ground support systems.

(vi) Support sets shall be installed so that the bottoms have sufficient anchorage to prevent ground pressures from dislodging the support base of the sets. Lateral bracing (collar bracing, tie rods, or spreaders) shall be provided between immediately adjacent sets to ensure added stability.

(vii) Damaged or dislodged ground supports that create a hazardous condition shall be promptly repaired or replaced. When replacing supports, the new supports shall be installed before the damaged supports are removed.

(viii) A shield or other type of support shall be used to maintain a safe travelway for employees working in dead-end areas ahead of any support replacement operation.

(4) *Shafts.* (i) Shafts and wells over 5 feet (1.53 m) in depth that employees must enter shall be supported by a steel casing, concrete pipe, timber, solid rock or other suitable material.

(ii) (A) The full depth of the shaft shall be supported by casing or bracing except where the shaft penetrates into solid rock having characteristics that will not change as a result of exposure. Where the shaft passes through earth into solid rock, or through solid rock into earth, and where there is potential for shear, the casing or bracing shall extend at least 5 feet (1.53 m) into the solid rock. When the shaft terminates in solid rock, the casing or bracing shall extend to the end of the shaft or 5 feet (1.53 m) into the solid rock, whichever is less.

(B) The casing or bracing shall extend 42 inches (1.07 m) plus or minus 3 inches (8 cm) above ground level, except that the minimum casing height may be reduced to 12 inches (0.3 m), provided that a standard railing is installed; that the ground adjacent to the top of the shaft is sloped away from the shaft collar to prevent entry of liquids; and that effective barriers are used to prevent mobile equipment operating near the shaft from jumping over the 12 inch (0.3 m) barrier.

(iii) After blasting operations in shafts, a competent person shall determine if the walls, ladders, timbers, blocking, or wedges have loosened. If so, necessary repairs shall be made before employees other than those assigned to make the repairs are allowed in or below the affected areas.

(p) *Blasting.* This paragraph applies in addition to the requirements for blasting and explosives operations, including handling of misfires, which are found in Subpart U of this part.

(1) Blasting wires shall be kept clear of electrical lines, pipes, rails, and other conductive material, excluding earth, to prevent explosives initiation or employee exposure to electric current.

(2) Following blasting, an employee shall not enter a work area until the air quality meets the requirements of paragraph (j) of this section.

(q) *Drilling.* (1) A competent person shall inspect all drilling and associated equipment prior to each use. Equipment defects affecting safety shall be corrected before the equipment is used.

(2) The drilling area shall be inspected for hazards before the drilling operation is started.

(3) Employees shall not be allowed on a drill mast while the drill bit is in operation or the drill machine is being moved.

(4) When a drill machine is being moved from one drilling area to another, drill steel, tools, and other equipment shall be secured and the mast shall be placed in a safe position.

(5) Receptacles or racks shall be provided for storing drill steel located on jumbos.

(6) Employees working below jumbo decks shall be warned whenever drilling is about to begin.

(7) Drills on columns shall be anchored firmly before starting drilling, and shall be retightened as necessary thereafter.

(8) (i) The employer shall provide mechanical means on the top deck of a jumbo for lifing unwieldy or heavy material.

(ii) When jumbo decks are over 10 feet (3.05 m) in height, the employer shall install stairs wide enough for two persons.

(iii) Jumbo decks more than 10 feet (3.05 m) in height shall be equipped with

guardrails on all open sides, excluding access openings of platforms, unless an adjacent surface provides equivalent fall protection.

(i) (A) Only employees assisting the operator shall be allowed to ride on jumbos, unless the jumbo meets the requirements of paragraph (r)(6)(ii) of this section.

(B) Jumbos shall be chocked to prevent movement while employees are working on them.

(v) (A) Walking and working surfaces of jumbos shall be maintained to prevent the hazards of slipping, tripping and falling.

(B) Jumbo decks and stair treads shall be designed to be slip-resistent and secured to prevent accidental displacement.

(9) Scaling bars shall be available at scaling operations and shall be maintained in good condition at all times. Blunted or severely worn bars shall not be used.

(10) (i) Blasting holes shall not be drilled through blasted rock (muck) or water.

(ii) Employees in a shaft shall be protected either by location or by suitable barrier(s) if powered mechanical loading equipment is used to remove muck containing unfired explosives.

(11) A caution sign reading "Buried Line," or similar wording shall be posted where air lines are buried or otherwise hidden by water or debris.

(r) *Haulage.* (1)(i) A competent person shall inspect haulage equipment before each shift.

(ii) Equipment defects affecting safety and health shall be corrected before the equipment is used.

(2) Powered mobile haulage equipment shall have suitable means of stopping.

(3) (i) Power mobile haulage equipment, including trains, shall have audible warning devices to warn employees to stay clear. The operator shall sound the warning device before moving the equipment and whenever necessary during travel.

(ii) The operator shall assure that lights which are visible to employees at both ends of any mobile equipment, including a train, are turned on whenever the equipment is operating.

(4) In those cabs where glazing is used, the glass shall be safety glass, or its equivalent, and shall be maintained and cleaned so that vision is not obstructed.

(5) Anti-roll back devices or brakes shall be installed on inclined conveyor drive units to prevent conveyors from inadvertently running in reverse.

(6)(i) (A) Employees shall not be permitted to ride a power-driven chain, belt, or bucket conveyor unless the conveyor is specifically designed for the transportation of persons.

(B) Endless belt-type manlifts are prohibited in underground construction.

(C) General requirements also applicable to underground construction for use of conveyors in construction are found in § 1926.555 of this part.

(ii) No employee shall ride haulage equipment unless it is equipped with seating for each passenger and protects passengers from being struck, crushed, or caught between other equipment or surfaces. Members of train crews may ride on a locomotive if it is equipped with handholds and nonslip steps or footboards. Requirements applicable to Underground Construction for motor vehicle transportation of employees are found in § 1926.601 of this part.

(7) Powered mobile haulage equipment, including trains, shall not be left unattended unless the master switch or motor is turned off; operating controls are in neutral or park position; and the brakes are set, or equivalent precautions are taken to prevent rolling.

(8) Whenever rails serve as a return for a trolley circuit, both rails shall be bonded at every joint and crossbonded every 200 feet (60.96 m).

(9) When dumping cars by hand, the car dumps shall have tiedown chains, bumper blocks, or other locking or holding devices to prevent the cars from overturning.

(10) Rocker-bottom or bottom-dump cars shall be equipped with positive locking devices to prevent unintended dumping.

(11) Equipment to be hauled shall be loaded and secured to prevent sliding or dislodgement.

(12) (i) Mobile equipment, including rail-mounted equipment, shall be stopped for manual connecting or service work.

(ii) Employees shall not reach between moving cars during coupling operations.

(iii) Couplings shall not be aligned, shifted or cleaned on moving cars or locomotives.

(13) (i) Safety chains or other connections shall be used in addition to couplers to connect man cars or powder cars whenever the locomotive is uphill of the cars.

(ii) When the grade exceeds one percent and there is a potential for runaway cars, safety chains or other connections shall be used in addition to couplers to connect haulage cars or, as an alternative, the locomotive must be downhill of the train.

(iii) Such safety chains or other connections shall be capable of maintaining connection between cars in the event of either coupler disconnect, failure or breakage.

(14) Parked rail equipment shall be chocked, blocked, or have brakes set to prevent inadvertent movement.

(15) Berms, bumper blocks, safety hooks, or equivalent means shall be provided to prevent overtravel and overturning of haulage equipment at dumping locations.

(16) Bumper blocks or equivalent stopping devices shall be provided at all track dead ends.

(17) (i) Only small handtools, lunch pails or similar small items may be transported with employees in man-cars, or on top of a locomotive.

(ii) When small hand tools or other small items are carried on top of a locomotive, the top shall be designed or modified to retain them while traveling.

(18) (i) Where switching facilities are available, occupied personnel-cars shall be pulled, not pushed. If personnel-cars must be pushed and visibility of the track ahead is hampered, then a qualified person shall be stationed in the lead car to give signals to the locomotive operator.

(ii) Crew trips shall consist of personnel-loads only.

(s) *Electrical safety.* This paragraph applies in addition to the general requirements for electrical safety which are found in Subpart K of this part.

(1) Electric power lines shall be insulated or located away from water lines, telephone lines, air lines, or other conductive materials so that a damaged circuit will not energize the other systems.

(2) Lighting circuits shall be located so that movement of personnel or equipment will not damage the circuits or disrupt service.

(3) Oil-filled transformers shall not be used underground unless they are located in a fire-resistant enclosure suitably vented to the outside and surrounded by a dike to retain the contents of the transformers in the event of rupture.

(t) *Hoisting unique to underground construction.* Except as modified by this paragraph (t), the following provisions of Subpart N of this part apply: Requirements for cranes are found in § 1926.550 of this part. Paragraph (g) of § 1926.550 applies to crane-hoisting of personnel, except that the limitation in paragraph (g)(2) does not apply to the routine access of employees to the underground via a shaft. Requirements for material hoists are found in § 1926.552 (a) and (b) of this part.

Requirements for personnel hoists are found in the personnel hoist requirements of § 1926.552 (a) and (c) of this part and in the elevator requirement of § 1926.552 (a) and (d) of this part.

(1) *General requirements for cranes and hoists.* (i) Materials, tools, and supplies being raised or lowered, whether within a cage or otherwise, shall be secured or stacked in a manner to prevent the load from shifting, snagging or falling into the shaft.

(ii) A warning light suitably located to warn employees at the shaft bottom and subsurface shaft entrances shall flash whenever a load is above the shaft bottom or subsurface entrances, or the load is being moved in the shaft. This paragraph does not apply to fully enclosed hoistways.

(iii) Whenever a hoistway is not fully enclosed and employees are at the shaft bottom, conveyances or equipment shall be stopped at least 15 feet (4.57 m) above the bottom of the shaft and held there until the signalman at the bottom of the shaft directs the operator to continue lowering the load, except that the load may be lowered without stopping if the load or conveyance is within full view of a bottom signalman who is in constant voice communication with the operator.

(iv) (A) Before maintenance, repairs, or other work is commenced in the shaft served by a cage, skip, or bucket, the operator and other employees in the area shall be informed and given suitable instructions.

(B) A sign warning that work is being done in the shaft shall be installed at the shaft collar, at the operator's station, and at each underground landing.

(v) Any connection between the hoisting rope and the cage or skip shall be compatible with the type of wire rope used for hoisting.

(vi) Spin-type connections, where used, shall be maintained in a clean condition and protected from foreign matter that could affect their operation.

(vii) Cage, skip, and load connections to the hoist rope shall be made so that the force of the hoist pull, vibration, misalignment, release of lift force, or impact will not disengage the connection. Moused or latched open-throat hooks do not meet this requirement.

(viii) When using wire rope wedge sockets, means shall be provided to prevent wedge escapement and to ensure that the wedge is properly seated.

(2) *Additional requirements for cranes.* Cranes shall be equipped with a limit switch to prevent overtravel at the boom tip. Limit switches are to be used only to limit travel of loads when operational controls malfunction and shall not be used as a substitute for other operational controls.

(3) *Additional requirements for hoists.* (i) Hoists shall be designed so that the load hoist drum is powered in both directions of rotation, and so that brakes are automatically applied upon power release or failure.

(ii) Control levers shall be of the "deadman type" which return automatically to their center (neutral) position upon release.

(iii) When a hoist is used for both personnel hoisting and material hoisting, load and speed ratings for personnel and for materials shall be assigned to the equipment.

(iv) Material hoisting may be performed at speeds higher than the rated speed for personnel hoisting if the hoist and components have been designed for such higher speeds and if shaft conditions permit.

(v) Employees shall not ride on top of any cage, skip or bucket except when necessary to perform inspection or maintenance of the hoisting system, in which case they shall be protected by a body belt/harness system to prevent falling.

(vi) Personnel and materials (other than small tools and supplies secured in a manner that will not create a hazards to employees) shall not be hoisted together in the same conveyance. However, if the operator is protected from the shifting of materials, then the operator may ride with materials in cages or skips which are designed to be controlled by an operator within the cage or skip.

(vii) Line speed shall not exceed the design limitations of the systems.

(viii) Hoists shall be equipped with landing level indicators at the operator's station. Marking of the hoist rope does not satisfy this requirement.

(ix) Whenever glazing is used in the hoist house, it shall be safety glass, or its equivalent, and be free of distortions and obstructions.

(x) A fire extinguisher that is rated at least 2A:10B:C (multi-purpose, dry chemical) shall be mounted in each hoist house.

(xi) Hoist controls shall be arranged so that the operator can perform all operating cycle functions and reach the emergency power cutoff without having to reach beyond the operator's normal operating position.

(xii) Hoists shall be equipped with limit switches to prevent overtravel at the top and bottom of the hoistway.

(xiii) Limit switches are to be used only to limit travel of loads when operational controls malfunction and shall not be used as a substitute for other operational controls.

(xiv) Hoist operators shall be provided with a closed-circuit voice communication system to each landing station, with speaker-microphones so located that the operator can communicate with individual landing stations during hoist use.

(xv) When sinking shafts 75 feet (22.86 m) or less in depth, cages, skips, and buckets that may swing, bump, or snag against shaft sides or other structural protrusions shall be guided by fenders, rails, ropes, or a combination of those means.

(xvi) When sinking shafts more than 75 feet (22.86 m) in depth, all cages, skips, and buckets shall be rope or rail-guided to within a rail length from the sinking operation.

(xvii) Cages, skips, and buckets in all completed shafts, or in all shafts being used as completed shafts, shall be rope or rail-guided for the full length of their travel.

(xviii) Wire rope used in load lines of material hoists shall be capable of supporting, without failure, at least five times the maximum intended load or the factor recommended by the rope manufacturer, whichever is greater. Refer to § 1926.552(c)(14)(iii) of this part for design factors for wire rope used in personnel hoists. The design factor shall be calculated by dividing the breaking strength of wire rope, as reported in the manufacturer's rating tables, by the total static load, including the weight of the wire rope in the shaft when fully extended.

(xix) A competent person shall visually check all hoisting machinery, equipment, anchorages, and hoisting rope at the beginning of each shift and during hoist use, as necessary.

(xx) Each safety device shall be checked by a competent person at least weekly during hoist use to ensure suitable operation and safe condition.

(xxi) In order to ensure suitable operation and safe condition of all functions and safety devices, each hoist assembly shall be inspected and load-tested to 100 percent of its rated capacity: at the time of installation; after any repairs or alterations affecting its structural integrity; after the operation of any safety device; and annually when in use. The employer shall prepare a certification record which includes the date each inspection and load-test was performed; the signature of the person who performed the inspection and test; and a serial number or other identifier for the hoist that was inspected and tested. The most recent certification

record shall be maintained on file until completion of the project.

(xxii) Before hoisting personnel or material, the operator shall perform a test run of any cage or skip whenever it has been out of service for one complete shift, and whenever the assembly or components have been repaired or adjusted.

(xxiii) Unsafe conditions shall be corrected before using the equipment.

(4) *Additional requirements for personnel hoists.* (i) Hoist drum systems shall be equipped with at least two means of stopping the load, each of which shall be capable of stopping and holding 150 percent of the hoist's rated line pull. A broken-rope safety, safety catch, or arrestment device is not a permissible means of stopping under this paragraph.

(ii) The operator shall remain within sight and sound of the signals at the operator's station.

(iii) All sides of personnel cages shall be enclosed by one-half inch (12.70 mm) wire mesh (not less than No. 14 gauge or equivalent) to a height of not less than 6 feet (1.83 m). However, when the cage or skip is being used as a work platform, its sides may be reduced in height to 42 inches 1.07 m) when the conveyance is not in motion.

(iv) All personnel cages shall be provided with positive locking door that does not open outward.

(v) All personnel cages shall be provided with a protective canopy. The canopy shall be made of steel plate, at least 3/16-inch (4.763 mm) in thickness, or material of equivalent strength and impact resistance. The canopy shall be sloped to the outside, and so designed that a section may be readily pushed upward to afford emergency egress. The canopy shall cover the top in such a manner as to protect those inside from objects falling in the shaft.

(vi) Personnel platforms operating on guide rails or guide ropes shall be equipped with broken-rope safety devices, safety catches or arrestment devices that will stop and hold 150 percent of the weight of the personnel platform and its maximum rated load.

(vii) During sinking operations in shafts where guides and safeties are not yet used, the travel speed of the personnel platform shall not exceed 200 feet (60.96 m) per minute. Governor controls set for 200 feet (60.96 m) per minute shall be installed in the control system and shall be used during personnel hoisting.

(viii) The personnel platform may travel over the controlled length of the hoistway at rated speeds up to 600 feet (182.88 m) per minute during sinking operations in shafts where guides and safeties are used.

(ix) The personnel platform may travel at rated speeds greater than 600 feet (182.88 m) per minute in completed shafts.

(u) *Definitions.* "Accept"—Any device, equipment, or appliance that is either approved by MSHA and maintained in permissible condition, or is listed or labeled for the class and location under Subpart K of this part.

"Rapid Excavation Machine"—Tunnel boring machines, shields, roadheaders, or any other similar excavation machine.

(Information collection requirements contained in paragraphs (j)(1), (j)(2), and (j)(3) were approved by the Office of Management and Budget under control number 1218–0067)

[FR Doc. 89–12954 Filed 6–1–89; 8:45 am]

BILLING CODE 4510–26–M

federal register

Friday
June 2, 1989

Part IV

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Part 52

Federal Acquisition Regulation (FAR); Household Goods Claims; Proposed Rule

Federal Register

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

Federal Acquisition Regulation (FAR); Household Goods Claims

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 a change to the Federal Acquisition Regulation (FAR) in the clause at 52.247–23 to extend the period for which a contractor would be liable for loss of or damage to household goods.

DATE: Comments should be submitted to the FAR Secretariat at the address shown below on or before August 1, 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 89–36 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. Background

The clause at FAR 52.247–23, used in contracts for the transportation of household goods, currently provides that the contractor is liable for loss of or damage to household goods if the owner reports the loss or damage within a specified period, not to exceed 45 days, after delivery of the household goods. In April 1984, the Department of Defense negotiated a Memorandum of Understanding with the household goods moving industry which gave the property owner 75 days to report the damage. The proposed change would extend the additional time for reporting to the civilian agencies.

B. Regulatory Flexibility Act

The proposed change may have a significant economic impact on a substantial number of small business concerns. However, it is impracticable to assess what impact, if any, might result and for that reason an Initial Regulatory Flexibility Analysis has not been prepared. Responses to this request for comment will be used to assess the effect of the proposed change on small business concerns, and a Final Regulatory Flexibility Analysis will be prepared if required.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed change to the FAR 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 52

Government procurement.

Dated: May 22, 1989.

Harry S. Rosinski

Acting Director, Office of Federal Acquisition and Regulatory Policy.

Therefore, 48 CFR Part 52 is amended as set forth below:

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR Part 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).

52.247–23 [Amended]

2. Section 52.247–23 is amended in the introductory text by inserting a colon following the word "clause" and removing the remainder of the sentence; by removing in the title of the clause the date "(APR 1984)" and inserting in its place "(MAY 1989)"; by removing in two places in paragraph (b) the words "45 days" and inserting in both places "75 days"; and by removing the derivation line following "(End of clause)".

[FR Doc. 89–13058 Filed 6–1–89; 8:45 am]

BILLING CODE 6820–JC–M

Federal Register

Friday
June 2, 1989

Part V

Department of Transportation

Federal Aviation Administration

14 CFR Part 121 et al.

Special Federal Aviation Regulation No. 38; Certification and Operating Requirements; Final Rule and Request for Comments

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 121, 125, 127, 129, and 135

[Docket No. 18510; SFAR No. 38-5]

Special Federal Aviation Regulation No. 38; Certification and Operating Requirements

AGENCY: Federal Aviation Administration [FAA], DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment establishes a new termination date for Special Federal Aviation Regulation [SFAR] No. 38-2 [50 FR 23941; June 7, 1985]. SFAR 38-2 was reinstated by SFAR 38-4 [52 FR 28938; August 4, 1987] and was amended to extend its termination date to allow time for the FAA, in a separate rulemaking action, to prepare a Notice of Proposed Rulemaking (NPRM) [Notice No. 88-16; 53 FR 39852; October 12, 1988] to consolidate the certification rules now in SFAR 38-2, Part 121, and Part 135 into a new Part 119 of the Federal Aviation Regulations (FAR). The FAA stated in SFAR 38-3 and in SFAR 38-4 that having generally reviewed the FAA regulations to determine the most appropriate response to the Airline Deregulation Act of 1978 [ADA or Act] and the termination of Civil Aeronautics Board (CAB) functions following the CAB sunset, it was necessary to establish a new termination date for SFAR 38-2 to allow time for the FAA to complete the rulemaking process that will consolidate the certification rules and incorporate SFAR 38-2 into the FAR. The current termination date for SFAR 38- 2 is June 1, 1989. Because the FAA has not completed this rulemaking process, it is necessary to extend the current termination date 1 year. If new Part 119 is issued before June 1, 1989, or before the new termination date, the FAA intends to publish a notice rescinding SFAR 38-2 concurrently with the new Part 119 final rule in the Federal Register.

DATES: Effective date June 2, 1989. Comments must be received on or before August 1, 1989.

ADDRESSES: Send comments on the rule in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Docket No. 18510, 800 Independence Avenue, SW., Washington, DC 20591, or deliver comments in duplicate to: Federal Aviation Administration, Rules Docket, Room 916, 800 Independence Avenue, SW., Washington, DC. Comments may be examined in the Rules Dockets weekdays, except Federal holidays, between 8:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Coffey, Project Development Branch, AFS-240, Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; Telephone (202) 267-3750.

SUPPLEMENTARY INFORMATION:

Background

On December 12, 1978, the FAA issued SFAR 38 [43 FR 58366; December 14, 1978] in consequence of the ADA (Pub. L. 95-504, 92 Stat. 1705). That Act expresses the Congressional intent that the Federal Government diminish its involvement in regulating the economic aspects of the airline industry. To accomplish this, Congress directed that the CAB be abolished on December 31, 1984, and that various of its functions cease before that date. Anticipating its sunset, the CAB itself curtailed or suspended much of its regulatory activity during the period 1979-1984. On October 4, 1984, additional legislation was enacted further defining the process of CAB sunset. On January 1, 1985, the remaining CAB functions were transferred to the Department of Transportation (DOT).

Because some aspects of FAA safety regulations relied upon CAB definitions and authority, the FAA found it necessary in 1978 to adopt an interim measure to provide for an orderly transition from CAB and FAA interlocking authority to a regulatory regime with no CAB in existence. This action was consistent with the Congressional directive contained in Section 107(a) of the Act that the deregulation of airline economics result in no diminution of the high standard of safety in air transportation that existed when the ADA was enacted. SFAR 38 set forth FAA certification and operating requirements applicable to all "air commerce" and "air transportation" operations for "compensation or hire." (SFAR 38 did not address Part 133 External Load Operations, Part 137 Agriculture Aircraft Operations, or Part 91 training and other special purpose operations.)

On December 27, 1984, the FAA issued SFAR 38-1 [50 FR 450; January 4, 1985], which merely extended the termination date of the regulation and allowed the FAA time to propose and receive comments on revising SFAR 38.

On May 28, 1985, the FAA issued SFAR 38-2 [50 FR 23491; June 7, 1985], which updated SFAR 38 in light of changes since 1978 and clarified provisions stating which FAA regulations apply to each air carrier and each type of operation. This action was necessary because of the changes in the air transportation industry brought about by economic deregulation. Before deregulation, economic certificates were rigidly compartmentalized and each air carrier typically was authorized to conduct only one type of operation (domestic, flag, or charter (supplemental)). The safety certificate issued to the air carrier by the FAA paralleled the authorization granted in the air carrier's economic certificate. Economic deregulation broke down the barriers between the various types of operations. The economic authority granted an air carrier by the DOT is no longer indicative of the safety regulations applicable to the type of operation authorized by the FAA. Thus, it was necessary for the FAA to establish guidelines to determine what safety standards were applicable to an air carrier's particular operation.

On April 30, 1986, the FAA issued SFAR 38-3, which extended the termination date of SFAR 38-2 to allow the FAA time to incorporate its contents into Notice No. 88-16. That notice proposes to consolidate the certification rules in Parts 121 and 135, and to incorporate various provisions of SFAR 38-2 into new Part 119 of the FAR.

On July 15, 1987, the FAA issued SFAR 38-4, which reinstated SFAR 38-2, because it was inadvertently allowed to expire, and extended its termination date to June 1, 1989. That extension allowed the FAA time to incorporate the contents of SFAR 38-2 into Notice No. 88-16.

Good Cause Justification for Immediate Adoption

The reasons which justify the adoption, and the subsequent revision, of SFAR 38 still exist. Therefore, it is in the public interest to establish a new termination date for SFAR 38-2 of June 1, 1990. If the FAA publishes a final rule incorporating SFAR 38-2 into the FAR before the termination date, a notice rescinding SFAR 38-2 will be published concurrently. This action is necessary to permit continued operations under SFAR 38, as amended, and to avoid confusion in the administration of FAA regulations regarding operating certificates and operating requirements.

For this reason, and because this amendment continues in effect the provisions of a currently effective SFAR and imposes no additional burden on any person, I find that notice and public

procedures are unnecessary, impracticable, and contrary to the public interest, and that the amendment should be made effective in less than 30 days after publication. However, interested persons are invited to submit such comments as they desire regarding this amendment. Communications should identify the docket number and be submitted in duplicate to the address above. All communications received on or before the close of the comment period will be considered by the Administrator, and this amendment may be changed in light of the comments received. All comments will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested parties.

International Trade Impact Analysis

The FAA finds this amendment will have no impact on international trade.

Federalism Implications

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

Conclusion

The FAA has determined that this document involves an amendment that imposes no additional burden on any person. Accordingly, it has been determined that: The action does not involve a major rule under Executive Order 12291; it is not significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and its anticipated impact is so minimal that a full regulatory evaluation is not required.

List of Subjects

14 CFR Part 121

Air carrier, Aircraft, Airmen, Air transportation, Aviation safety.

14 CFR Part 125

Aircraft, Airmen, Airports, Airspace, Air traffic control, Air transportation, Chemicals, Children, Drugs, Flammable materials, Handicapped, Hazardous materials, Infants, Smoking.

14 CFR Part 127

Air carriers, Aircraft, Airmen, Airworthiness

14 CFR Part 129

Air carriers, Aircraft, Airmen, Air transportation, Aviation safety, Safety.

14 CFR Part 135

Air carriers, Aircraft, Airmen, Air taxis, Air transportation, Airworthiness, Aviation safety, Safety.

Adoption of the Amendment

In consideration of the foregoing SFAR 38–2 (14 CFR Parts 121, 125, 127, 129, and 135) of the Federal Aviation Regulations is amended as follows:

1. The authority citation for Part 121 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421, 1423, 1424, and 1502; 49 U.S.C. 106(g) (revised Pub. L. 97–449, January 12, 1983).

2. The authority citation for Part 125 continues to read as follows:

Authority: 49 U.S.C. 1354, 1421 through 1430, and 1502; 49 U.S.C. 106(g) (revised Pub. L. 97–449, January 12, 1983).

3. The authority citation for Part 127 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1421, 1422, 1423, 1424, 1425, 1430; 49 U.S.C. 106(g) (revised Pub. L. 97–449, January 12, 1983).

4. The authority citation for Part 129 is revised to read as follows:

Authority: 49 U.S.C. 1346, 1354(a) 1356, 1357, 1421, 1502, and 1522; 49 U.S.C. 106(g) (revised Pub. L. 97–449, January 12, 1983).

5. The authority citation for Part 135 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421 through 1431, and 1502; 49 U.S.C. 106(g) (revised Pub. L. 97–449, January 12, 1983).

Special Federal Aviation Regulation No. 38–2 is amended by removing the words "June 1, 1989" in the last paragraph, and by adding in their place the words "June 1, 1990."

Issued in Washington, DC, on May 26, 1989.

Robert L. Goodrich,

Director, Flight Standards Service.

[FR Doc. 89–13136 Filed 5–30–89; 12:10 pm]

BILLING CODE 4910–13–M

federal register

Friday
June 2, 1989

Part VI

Environmental Protection Agency

40 CFR Parts 122, 123 and 130
National Pollutant Discharge Elimination System; Surface Water Toxics Control Program; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

[FRL-3557-6]

40 CFR Parts 122, 123 and 130

National Pollutant Discharge Elimination System; Surface Water Toxics Control Program

AGENCY: Environmental Protection Agency.

ACTION: Final Rule.

SUMMARY: Today's action amends Parts 122, 123, and 130 of EPA's regulations. The regulations clarify EPA's surface water toxics control program, and incorporate section 308(a) of the Water Quality Act of 1987 into EPA's toxics control program. Section 308(a) of the Water Quality Act added section 304(l) to the Clean Water Act (hereafter referred to as section 304(l)). Section 304(l) requires the states to identify those waters that are adversely affected by toxic, conventional, and nonconventional pollutants, and requires the states to prepare individual control strategies that will control point source discharges of toxic pollutants. The states must submit lists of waters and individual control strategies to EPA for review, and if EPA disapproves a state's decision with respect to a list or an individual control strategy, then EPA must implement the requirements of section 304(l) in cooperation with the state. EPA and the states must accomplish the tasks in section 304(l) according to an ambitious series of deadlines. Today's regulations will strengthen State and Federal controls over discharges to toxic pollutants, and will assist EPA and the states in satisfying the requirements of section 304(l) of the CWA.

EFFECTIVE DATE: These regulations shall be effective on May 26, 1989 at 1:00 p.m. Eastern Daylight Savings Time. In accordance with 40 CFR 23.2, EPA hereby specifies that these regulations shall be considered final agency action for purposes of judicial review at 1:00 p.m. Eastern Daylight Savings Time on May 26, 1989.

FOR FURTHER INFORMATION CONTACT: Paul Connor, Program Development Branch, Office of Water Enforcement and Permits, (EN-336), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 475-9537, or Judith Leckrone, Assessment and Watershed Protection Division, Office of Water Regulations and Standards, (WH-553), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 382-7056. The Public record for this regulation is available at the EPA library, M2904, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

Preamble Outline

I. Authority
II. Background
  A. Biennial Submission of Lists Under section 303(d) and section 305(b) of the CWA
  B. EPA's Surface Water Toxics Control Program
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  D. Purpose and Summary of Today's Regulations
III. Section-by-Section Analysis
  A. Changes to the National Surface Water Toxics Control Program
    1. Amendments to 40 CFR 122.44
      a. A Definition for Whole Effluent Toxicity
      b. Narrative Water Quality Standards
      c. Developing Water Quality-Based Effluent Limits
      d. Technology-Based Controls for Toxic Pollutants
    2. State NPDES Program Requirements
  B. Identification of Waters
    1. Description of the Four Lists
    2. Explanation of Terms Used in section 304(l)(1)(B)
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      b. Due Entirely or Substantially to Discharges from Point Sources
    3. Preparation and Review of the Lists
      a. Use of Existing and Readily Available Data
      b. Documentation of Data and Methodologies
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  C. Individual Control Strategies
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      b. EPA's Point Source-Based Approach
      c. Approval of Permits that are Not Yet Effective
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    2. Technical Review Criteria
  D. EPA Review of Lists and Individual Control Strategies
    1. Partial Approval and Disapproval of State Submittals
    2. Public Participation
      a. Contents of EPA's Notice of Approval or Disapproval
      b. Public Hearings
      c. Petitions for Additional Listings
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    3. Subsequent steps in the 304(l) Process
      a. EPA Implementation of § 304(l)
      b. Judicial Review of Decisions Under § 304(l)
IV. Effective Date
V. Regulatory Analysis
  A. Executive Order 12291
  B. Paperwork Reduction Act
  C. Regulatory Flexibility Act

I. Authority

These regulations are issued under the authority of the Clean Water Act, 33 U.S.C. 1251 et seq.

II. Background

EPA's surface water toxics control program uses several key terms. For the convenience of the reader and for the purposes of this preamble, these terms are described as follows:

"Narrative standard" refers to a narrative water quality criterion adopted by a state under section 303(c) of the Clean Water Act. All states have adopted a narrative criterion that prohibits the discharge of toxic pollutants in toxic amounts.

"Priority pollutant" refers to the 126 pollutants listed in Appendix A to (40 CFR Part 423.) The 126 priority pollutants are derived from the 65 classes of compounds listed at 40 CFR § 401.15.

"Toxic pollutant" means any pollutant listed as toxic under section 307(a)(1) of the CWA. EPA has listed 65 classes of compounds under section 307(a)(1) of the CWA, and these 65 classes are listed at 40 CFR § 401.15.

"Toxics" refers to any pollutant or combination of pollutants which causes toxicity to aquatic life or terrestrial life, or causes adverse human health impacts.

"Whole effluent toxicity" means the aggregate toxic effect of an effluent measured directly with a toxicity test. A toxicity test measures the degree of response to an exposed test organism to a specific chemical or effluent. Like biochemical oxygen demand (BOD), which is also a biological measurement, toxicity can be limited in an NPDES permit.

A. Biennial Submission of Lists Under Section 303(d) and Section 305(b) of the CWA

Many commenters objected to the additional reporting requirements

suggested by EPA's proposal to require a biennial submission of lists under sections 303(d) and 305(b) of the CWA. Most expressed confusion about the extent to which the proposed requirements overlapped with and related to the section 304(l) listing process. Due to this confusion, EPA has decided not to amend the Part 130 regulations in today's rule to include these biennial submissions. Rather, EPA will extend the comment period on this part of the proposal in order to take the necessary time to consider all implications that the proposed amendments might have for the entire section 303(d) reporting and TMDL development program. In the near future EPA will extend the comment period in a separate action in the Federal Register.

B. EPA's Surface Water Toxics Control Program

EPA has described its surface water toxics control program in several documents. These descriptions are not repeated here, but the reader is referred to these documents for more information on EPA's approach for controlling discharges of toxic pollutants. On March 9, 1984, EPA published a document called "Development of Water Quality-Based Permit Limitations for Toxic Pollutants: National Policy" 49 FR 9016 (1984). The policy emphasizes EPA's integrated approach in the NPDES permit program for assessing and controlling the discharge of toxic pollutants to the nation's surface waters.

Two preambles to EPA's rulemakings also describe EPA's surface water toxics control strategy. The preamble to EPA's NPDES regulations (45 FR 33520 (1980)) emphasizes that NPDES permits must contain limitations reflecting the most stringent of technology-based or water quality-based controls for toxic pollutants. The second preamble discussion (49 FR 37998 (1984)) emphasizes the need to establish effluent limitations in NPDES permits to control toxic pollutants. The preamble to the 1984 regulations also describes several regulations in Part 122 that require dischargers to identify and report the presence of toxic pollutants in discharges.

EPA's existing regulations also reflect the Agency's surface water toxics control strategy. Part 131 of EPA's regulations describes the process for developing, reviewing, revising, and approving state water quality standards. Part 122 describes the NPDES permit regulations. These regulations currently require NPDES permits to establish limitations, standards, and conditions necessary to achieve water quality standards, or to attain and maintain specified water quality through effluent limits. Part 125 provides criteria and standards for imposing technology-based treatment requirements, including the control of toxic pollutants. Part 129 contains effluent standards for certain toxic pollutants, and Part 130 describes EPA's program for identifying waters affected by toxic pollutants.

EPA has also developed standard procedures, policies, and guidance documents necessary to support the toxics control program. The "Water Quality Standards Handbook," (October 1983), describes how to develop water quality standards and describes the procedures that a state should follow in adopting water quality standards. (The Handbook is available from the Criteria and Standards Division (WH-585), U.S. EPA, 401 M Street SW., Washington, DC 20460.) Two important guidance documents that support EPA's toxics control program are the "Technical Support Document for Water Quality-Based Toxics Control," (TSD), EPA 440/4-85-032, September, 1985, and the "Permit Writer's Guide to Water Quality-Based Permitting," EPA 440/4-87-005, July, 1987. (Both documents are available from the Permitting Division (EN-336), U.S. EPA, 401 M Street, SW., Washington, DC, 20460.) The Technical Support Document (TSD) provides a detailed technical explanation of biological and chemical techniques to assess and control toxic pollutants and toxicity. The TSD explains how to assess aquatic toxicity and how to calculate the risk to human health of an effluent, explains wasteload allocation modeling, and explains the equations for deriving water quality-based effluent limits. The Permit Writer's Guide gives state and EPA NPDES permit writers a step-by-step methodology for deriving water quality-based effluent limits for toxic pollutants and toxicity.

C. Section 304(l) and Its Relationship to EPA's Surface Water Toxics Control Program

Section 304(l) of the CWA reinforces EPA's on-going program to identify and control discharges of toxics. Under section 304(l) the state's deadline for submitting the four lists to EPA for review and approval was February 4, 1989. The statutory language of section 304(l) requires the listing of waters for which water quality standards will not be achieved due "* * * to discharges from point sources of any toxic pollutants listed pursuant to section 307(a); * * *." The toxic pollutants identified under section 307(a) of the CWA are 65 categories and classes of pollutants that can include thousands of compounds. EPA's water quality criteria and effluent guidelines focus on a list of 126 "priority pollutants" which are common, widely present chemicals for which toxicological data are available. Therefore, EPA will address the 126 priority pollutants when describing the regulatory requirements governing the control of toxic pollutants under section 304(l) of the CWA.

The four lists required by section 304(l) are described as follows, and are identified by their corresponding paragraphs in section 304(l)(1):

1. (A)(i)—A list of those waters in the state which, after application of technology-based effluent limits, cannot reasonably be anticipated to attain or maintain water quality standards for priority pollutants adopted under section 303(c)(2)(B) of the CWA;

2. (A)(ii)—A list of all waters which, after application of technology-based effluent limits, cannot reasonably be anticipated to attain or maintain that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water;

3. (B)—A list of those waters which, after application of technology-based effluent limits, the state does not expect will achieve applicable water quality standards, due entirely or substantially to point source discharges of priority pollutants;

4. (C)—A list of the point sources of the priority pollutants which are believed to be preventing or impairing water quality for waters on the (B) list, and the amount of each priority pollutant discharged by each point source.

In addition to the listing requirements under section 304(l)(1), the states must prepare an individual control strategy (ICS) for each point source on the (C) list. (The definition of an ICS is discussed in more detail in section III.C of this preamble.) An ICS must require reductions in the discharge of priority pollutants from point sources on the (C) list, which reductions are sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve applicable water quality standards as soon as possible but not later than three years after establishment of the ICS. Where EPA approves a state submittal, the deadline for compliance is as soon as possible but not later than June 4, 1992. Where EPA disapproves a state submittal and promulgates an ICS in lieu of the state,

the deadline for compliance is as soon as possible but not later than June 4, 1993.

All ICSs were due to EPA, from states approved by EPA to administer the NPDES program, by February 4, 1989. EPA must approve or disapprove the lists and ICSs by June 4, 1989. When EPA disapproves an ICS, EPA must implement section 304(l)(1) "in cooperation with such state and after notice and opportunity for public comment," by June 4, 1990.

An approved state's obligation to prepare and submit an ICS to EPA is similar to an approved NPDES state's obligation to prepare NPDES permits and submit the permits to EPA for review. However, section 304(l) establishes new deadlines and procedures for issuing and reviewing some NPDES permits. (Many NPDES permits are not subject to section 304(l). Permits that are not subject to section 304(l) should receive the same priority for reissuance or oversight that the permits would receive regardless of section 304(l).)

Today's proposed rulemaking is one of several EPA actions to implement section 304(l). In March 1988, EPA issued guidance entitled "Implementation of Requirements Under section 304(l) of the Clean Water Act, as Amended" (March, 1988). (EPA published a notice of availability for the guidance on March 18, 1988, and the document is available by writing to the Permits Division, Office of Water (EN-336), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.)

EPA has promulgated a final interpretive rule that incorporated into EPA's regulations and provisions of the WQA relating to the NPDES program and section 304(l), 54 FR 246 (1989). The rule codified the statutory requirements of paragraphs (A), (B), and (C) of section 304(l) into 40 CFR § 130.10(d). The rule also codified section 304(l)(1)(D) and §§ 304 (1)(2) and (3) into 40 CFR § 123.46. These new paragraphs describe the requirement that states submit lists of waters and individual control strategies to EPA for review. Today's rulemaking re-promulgates § 123.46(a) of the January 4, 1989 interpretive rule. EPA is re-promulgating this paragraph with changes that reflect more clearly EPA's interpretation of section 304(l)(1)(D). See section III. C for further discussion of this paragraph. Today's final regulations supplement the Janauary 4, 1989 interpretative rule by defining key terms in section 304(l) and describing Federal and state responsibilities under section 304(l).

D. Purpose and Summary of Today's Regulations

The purpose of today's rules is to reinforce EPA's surface water toxics control program, and to specify in more detail the requirements of section 304(l). Section 304(l) does not change the direction of EPA's surface water toxics control program, but rather, establishes ambitious deadlines by which EPA and the states must identify and control priority pollutants. While EPA's toxics control policies require control of all toxic pollutants, including but not limited to toxicity and the priority pollutants, the WQA reflects Congress' intent that priority pollutants be addressed on a rapid schedule. After the deadlines of section 304(l) pass, EPA and the states must continue the toxics control program by determining the presence of toxic pollutants in effluents and receiving waters, developing the necessary policies and regulations to control toxic pollutants and toxicity, and establishing effluent limits in permits.

EPA received a number of comments suggesting that the thirty day comment peirod allowed for this rule was too short. Although EPA has considered all comments received, it remains convinced that thirty days was a sufficient comment period for the following reasons. The principal components of the rule were publicly available before the proposal, in particular the majority of the section 304(l) requirements were a part of the guidance that was made available for public comment. In addition, EPA provided speakers to interested groups regarding the rule several months before proposal, and solicited comments on the development of the proposal. Furthermore, both the proposal and the administrative record were short and not overly technical. The administrative record supporting the proposal was made up of documents that have been not only publicly available, but also in practical use for some time. In short, the proposal did not present a great number of novel, complex or technical issues requiring a lengthly comment period. Given that EPA believes that a thirty day comment period was adequate, EPA decided not to extend the comment period because of the short amount of time in which EPA wished to finalize the rule.

EPA received a number of comments that are not addressed in this preamble. A separate summary of these comments and the Agency's response to them is included in the administrative record for this rulemaking.

Today's regulations amend three parts of the CFR. Changes to EPA's surface water toxics control program are located in Parts 122 and 123 of the CFR. Part 130 incorporates the proposed regulations for listing waters under section 304(l)(1)(A)–(C), and the proposed regulations for individual control strategies prepared under section 304(l) and located in Part 123.

1. Changes to 40 CFR Part 122:

Today's regulations add a definition for whole effluent toxicity to § 122.2. EPA is also adding seven paragraphs to § 122.44(d)(1). The new language describes the procedures the permitting authority shall use to determine whether an NPDES permit must include a water quality-based effluent limit. The proposed regulations also address the procedures for deriving effluent limits from state narrative or numeric water quality criteria. EPA is also changing the title to paragraph (e) of § 122.44 to clarify that paragraph (e) applies to technology-based controls.

2. Changes to 40 CFR Part 130:

Today's regulations amend Part 130 to incorporate the listing requirements of section 304(l)(1). The regulations also establish procedures for EPA's review and approval or disapproval of the lists prepared under section 304(l). These regulations are described in sections III.B and III.D of this preamble.

The proposed regulations included a requirement for a biennial submission of lists under sections 303(d) and 305(b) of the CWA. EPA deleted these requirements from today's final regulations. Many commenters objected to the additional reporting requirements suggested by the proposed regulations. Other commenters were confused about the extent to which the proposed requirements overlapped with and related to the section 304(l) listing process. Due to these comments EPA has decided to address these biennial reporting requirements in a separate action.

3. Changes to 40 CFR Part 123:

The additions to Part 123 establish procedures for EPA's approval and disapproval of the ICSs prepared under section 304(l). Today's rules provide for public participation in reviewing the ICSs, and also establish the criteria EPA will use to evaluate the adequacy of ICSs. These regulations are discussed more fully in sections III.C and III.D of this preamble. Finally, EPA is placing an additional criterion for NPDES state program withdrawal in 40 CFR Part 123. These regulations are described in section III.A of this preamble.

EPA believes that today's rules and preamble will assist the states and the public at large in developing a better understanding of the national surface

water toxics control program. Today's rulemaking will also ensure that the activities carried out under section 304(l) will be consistent with EPA's statutory obligations and national policy for controlling toxic pollutants and whole effluent toxicity.

III. Section-By-Section Analysis

This section discusses today's regulations in four parts. Part A describes regulations that amend and clarify EPA's existing surface water toxics control program. Part B describes the requirements for identifying and listing waterbodies under paragraph 1 of § 304(l). Part C discusses the requirements for preparing and reviewing ICSs, and Part D discusses the procedures for reviewing and approving or disapproving the lists and ICSs.

A. Changes to the National Surface Water Toxics Control Program

1. Amendments to 40 CFR 122.44

Two of the most important components of EPA's surface water toxics control program are the development and implementation of water quality-based permit limits. The permitting authority (either EPA or a state approved by EPA to administer the NPDES program) uses water quality-based limits when effluent limits more stringent than technology-based limits are necessary to attain or maintain water quality standards. Although sections 402(a)(1) and 301(b)(1)(C) of the CWA provide the authority to require NPDES permits to achieve the effluent limits necessary to attain and maintain water quality standards, the existing NPDES regulations do not describe the procedures for developing water quality-based effluent limits. This section explains today's regulations which describe procedures for developing water quality-based effluent limits.

EPA uses an integrated approach to water quality-based permitting. The integrated approach includes both biological and chemical procedures for characterizing effluents and developing effluent limits. EPA's integrated approach to water quality-based permitting is explained more fully in the Technical Support Document and in EPA's National Policy of March 9, 1984 which are described in section II.A of this preamble.

EPA has issued detailed guidance on the integrated approach to water quality-based permitting. Although EPA's existing NPDES regulations provide adequate authority to require water quality-based effluent limits in permits when an excursion above a water quality criterion is either identified or projected, the existing regulations do not describe the procedures for developing such limits. Today's regulations establish minimum consistent procedures for the states, EPA, and the regulated community, to use in developing water quality-based effluent limitations.

a. A Definition for Whole Effluent Toxicity. Today's regulations add a definition for "whole effluent toxicity" to the definitions in 40 CFR 122.2. Whole effluent toxicity is defined as the aggregate toxic effect of an effluent measured directly with a toxicity test. A toxicity test measures the degree of response of an exposed test organism to a chemical or effluent. The proposed definition is the same definition used in the TSD and in the Permit Writer's Guide.

EPA is promulgating a definition for whole effluent toxicity because controls for whole effluent toxicity are an essential component of EPA's integrated approach to toxics control. Where controls on individual pollutants do not adequately protect water quality, assessing and controlling whole effluent toxicity is necessary to reduce or eliminate the toxic impact of the effluent. A definition for the term will assist the public in better understanding how controls on whole effluent toxicity are used in EPA's surface water toxics control program.

A limit on whole effluent toxicity refers to a numeric effluent limitation expressed in terms such as toxic units, no observed effect level (NOEL), LC50, or percent mortality. Effluent limitations may be expressed as chronic toxicity or acute toxicity (or both). Regardless of how the numeric effluent limitations for whole effluent toxicity are expressed, any single violation of the effluent limit is a violation of the NPDES permit and is subject to the full range of state and Federal enforcement actions.

Many commenters suggested that the definition for whole effluent toxicity is too vague, that the definition should describe a "toxicity test," or that EPA should publish maximum allowable water quality criterion for toxicity. EPA is maintaining a broad definition of whole effluent toxicity for several reasons. First, there are a variety of testing procedures that may be used to determine whole effluent toxicity. Although EPA has developed protocols and guidance documents for performing toxicity tests, it would be inappropriate to incorporate these documents into the definition because these protocols are recommended procedures, not mandatory procedures. Second, today's definition does not include a water quality criterion for toxicity because publishing a criterion for whole effluent toxicity is a process carried out under section 304(a) of the CWA, and is therefore inappropriate for this rulemaking. The reader should refer to the recommended values for whole effluent toxicity that are described in the TSD. If EPA chooses to develop formal water quality criteria for toxicity, EPA will publish the criteria pursuant to section 304(a) fo the CWA.

Several commenters asked for clarification of the meaning of "whole" in the term "whole effluent toxicity." Commenters were concerned about whether dilution of the effluent was precluded as a part of whole effluent toxicity testing. The word "whole" in definition refers to the aggregate toxicity of an effluent—not to 100% effluent. Percentages of effluents in permit limits represent that concentration of the effluent which achieves state water quality standards.

Commenters also asked whether in-stream dilution would be considered in determining whole effluent toxicity. These commenters asked if whole effluent toxicity referred to the toxicity of an effluent at the "end of the pipe," or referred to in-stream toxicity of an effluent after mixing. These commenters are confusing the definition of whole effluent toxicity with the development and expression of a permit limit for whole effluent toxicity. Today's definition does refer to "end of the pipe" toxicity because compliance with permit limits is measured at that point. These end-of-pipe limitations are developed using the state's water quality standards, including mixing zones (where allowed) and wasteload allocations, to determine how much effluent toxicity must be limited to attain and maintain applicable water quality standards.

b. Narrative Water Quality Criteria. Today's regulations amend § 122.44(d)(1). Existing paragraph (d) requires NPDES permits to contain effluent limits more stringent than technology-based limits, where more stringent limits are necessary to "achieve water quality standards established under section 303 of the CWA." Today's regulations amend paragraph (d)(1) to clarify that effluent limits established under paragraph (d) must achieve any state narrative water quality criteria as well as numeric water quality criteria.

EPA received no comments opposing this regulation, and therefore the agency is promulgating this regulation without change from the proposed regulation. However, many commenters questioned EPA's use of narrative water quality

criteria in the other amendments to § 122.44(d)(1). For convenience EPA is responding to these comments in the discussion of paragraph (1)(iv) of § 122.44(d).

c. Developing Water Quality-Based Effluent Limits. Today's rulemaking adds seven new subparagraphs to § 122.44(d)(1). The subparagraphs describe the procedures for determining whether a discharge is causing or contributing to an excursion above a water quality criterion, identify those permits that must have water quality-based effluent limits, and describe several principles for developing water quality-based effluent limits. The Agency has determined that additional clarification of § 122.44(d) will assist in the implementation of the national water quality-based toxics control program and the recommendations of EPA's national policy, 49 FR 9016 (1984).

The amendments to § 122.44(d)(1) are intended to describe procedures for implementing existing state water quality standards and are not intended to suggest that states change existing standards. Section 303(c)(2)(B) of the CWA, as amended, addresses state review and adoption of water quality standards for toxic pollutants listed pursuant to section 307(a)(1) of the CWA. EPA has prepared guidance on section 303(c)(2)(B) which is available from: Criteria and Standards Division (WH–585), Office of Water, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

The first of the seven subparagraphs is paragraph (d)(1)(i). EPA originally proposed this paragraph in § 122.44(e)(2), but in placing this language in § 122.44(d)(1) in today's final regulations because the description of water quality-based controls is more appropriate for paragraph (d)(1). The subsequent six paragraphs are re-numbered (ii) through (vii).

The new paragraph clarifies that an NPDES permit must limit any pollutant or pollutant parameter (whether conventional, nonconventional, or toxic), including whole effluent toxicity, that is or may be discharged at a level that causes, has the reasonable potential to cause, or contributes to an excursion above any water quality criterion, including state narrative water quality criteria. The new language clarifies that paragraph (d) applies to any pollutant, whether conventional, nonconventional, toxic, or whole effluent toxicity, and applies to excursions above narrative water quality criteria, not just numeric criteria in state water quality standards.

Some commenters asked for clarification of the phrase "excursions above applicable water quality standards" and the role of effluent limitations in preventing such excursions. Water quality criteria express water quality objectives for protecting aquatic life and human health and for meeting a defined level of water quality protection. Where a discharge has a reasonable potential to cause or contribute to an excursion above a water quality criterion, effluent limitations are necessary to ensure that water quality standards will always be met. This connection is inherent in section 301(b)(1)(C) of the Clean Water Act which requires that water quality standards be achieved through effluent limitations.

As used in today's regulation, "excursion above" refers to any projected or actual concentration of a pollutant that is greater than the applicable water quality criterion. For most water quality standards, an excursion occurs if the projected or actual in-stream concentrations are numerically higher than the applicable criterion. In some cases, however, excursions occur if the ambient values are numerically lower than the criterion (e.g., dissolved oxygen or pH). The phrase "excursions above" in today's regulation applies to both cases.

An "excursion" must also be consistent with the duration and frequency of the applicable water quality standard. Duration refers to the period of time over which the in-stream concentration is averaged for comparision with criteria concentrations, and frequency describes how often criteria can be exceeded without impairing the designated use of the receiving water. An excursion above a water quality standard should account for these elements of the standard.

When referring to excursions, today's regulations use the term "criteria" instead of "standard" because it is more accurate to refer to excursions above water quality criteria. Water quality criteria are the threshold values against which ambient concentrations are compared to determine whether a waterbody exceeds the water quality standard.

The new language will clarify that NPDES permits must establish limits on any pollutant, where necessary to attain and maintain applicable water quality standards. The paragraph also emphasizes the importance of narrative water quality standards. Today's regulations emphasize that narrative standards have the same force and effect as other state water quality standards.

Subparagraph (ii) of § 122.44(d)(1) concerns the procedures for determining whether a discharge must have a water quality-based effluent limit. EPA is promulgating this language without change except for the new paragraph number. To determine whether a discharge causes, has a reasonable potential to cause, or contributes to an excursion above a water quality criterion, and thus requires a water quality-based effluent limit, the permitting authority must use reliable and consistent procedures. Although the procedures can vary considerably from one state to another, most such procedures account for any dilution of the effluent in the receiving water, after considering mixing zones if applicable, any contributions of the pollutant from upstream point and nonpoint sources, the variability of the pollutant in the effluent, and, when evaluating whole effluent toxicity, the sensitivity of the test species in a toxicity test. Some commenters objected to the reference to mixing zones and requested that EPA prohibit mixing zones. EPA believes, however, that it is inappropriate to prohibit mixing zones in this regulation. The use of mixing zones raises issues that are more appropriately addressed in the state water quality standards adoption process. Therefore, EPA is not deleting the reference to mixing zones in paragraph (d)(1)(ii).

Paragraph (d)(1)(ii) requires the permitting authority to consider variability because limited data on the concentration of a pollutant in an effluent result in a large uncertainty when determining whether a discharge causes or has the reasonable potential to cause an excursion above a water quality criterion. Unless effluent variability is adequately considered, the permitting authority may make erroneous decisions concerning whether to develop permit limitations for a pollutant. One commenter suggested that the regulation should establish a national applicable maximum variability factor. EPA has procedures for accounting for variability in the Technical Support Document which may be applied to specific sites. However, EPA is not setting a national standard for variability because there is an element of judgment in making such determinations that is best made by state or regional regulatory authorities. Factors such as the appropriate level of confidence and the adequacy of available data enter into these decisions, and many states have their own procedures for accounting for variability. EPA therefore believes it is more appropriate for each regulatory authority to evaluate variability when determining whether an excursion

above a water quality criterion can occur.

Paragraph (d)(1)(ii) requires the permitting authority to account for species sensitivity when using toxicity tests. Toxicity testing must account for species sensitivity because different test species exhibit different sensitivities to the same effluent.

Subparagraph (ii) addresses discharges that have "the reasonable potential to cause" excursions above water quality criteria. Because the concentration of a pollutant in an effluent and in the receiving water can vary considerably, it is necessary to address discharges that have the reasonable potential to violate water quality criteria. EPA requires water quality-based effluent limits for these discharges in order to ensure compliance with section 301(b)(1)(C) which requires NPDES permits to achieve applicable water quality standards.

Some commenters said that the phrase "reasonable potential to cause" was too vague and could apply to permittees that are not actually exceeding a water quality criterion. EPA does not believe that it is appropriate to be more specific because a permitting authority has a significant amount of flexibility in determining whether a particular discharge has a reasonable potential to cause an excursion above a water quality criterion, taking the factors in subparagraph (ii) into account. The composition and concentration of toxicants in an effluent can vary widely. The flow rates of a discharge can also show significant variability. Some effluents may prevent a water quality standard from being maintained even though individual measurements do not show an actual excursion above the water quality criterion. Without effluent limitations on those discharges, there is a reasonable potential that the water quality criteria would be exceeded at some time. Effluent limitations must attain and maintain water quality standards in order to be consistent with the requirements of the Clean Water Act. Some commenters suggested that all discharges would be required to have limits under this language. EPA does not expect that this will be the case. However, EPA expects that with few exceptions, all major POTWs and major industrial discharges will need to be evaluated to determine whether they have a reasonable potential to cause excursions. Before requiring a water quality-based effluent limit, the permitting authority must have a basis for finding that discharges have the reasonable potential to cause excursions above water quality criteria. When EPA is the permitting authority, the Technical Support Document will normally provide the basis for such a finding.

Some commenters said the language "causes or has the reasonable potential to cause" used in the proposed regulations implies that a single point source discharge must be responsible for the entire pollutant loading that exceeds the water quality criterion. EPA did not intend this, and is persuaded that this point needs clarification. EPA intended for the proposed regulations to apply to any point source that is discharging a pollutant at a level that is exceeding or may exceed a waste load allocation for that discharge. This approach is consistent with EPA's existing regulation and policies for establishing water quality-based effluent limits. The process for identifying water quality-limited segments requiring total maximum daily loads (TMDLs) and wasteload allocations (WLAs) is set forth in EPA's regulations at 40 CFR 130.7. This regulation establishes procedures for identifying and controlling multiple discharges to the same receiving water in order to attain and maintain applicable water quality standards. Under this approach, discharges which contribute to the TMDL for a segment are apportioned a WLA which serves as the basis for effluent limitations for the pollutant or pollutant of concern. To clarify this approach in today's regulations, EPA is adding the phrase "or contributes to" to paragraphs (d)(1) (i) through (vi). This clarification makes no substantive change to today's regulations, but merely clarifies that today's amendments to paragraph (d)(1) are consistent with EPA's existing approach for establishing water quality-based effluent limits.

Some commenters questioned how paragraph (ii) relates to the other paragraphs added to § 122.44(d)(1). The requirements of paragraphs (iii), (iv), (v) or (vi) apply after the permitting authority has determined that water quality-based effluent limits are necessary under paragraph (ii). Paragraph (ii) provides several principles that the permitting authority must follow when determining whether a pollutant or a pollutant parameter is exceeding a water quality criterion. If the permitting authority, after applying the principles in paragraph (ii), determines that a pollutant or a pollutant parameter is exceeding or is expected to exceed a water quality criterion, then the permitting authority uses one or more of paragraphs (iii), (iv), (v) or (vi) to determine the appropriate controls for the pollutant or pollutant parameter. Subparagraph (ii) should assist the permitting authority in determining whether it is necessary, under Federal regulations, to establish limits for a pollutant.

The next two paragraphs that EPA is adding to § 122.44(d) are paragraphs (d)(1)(iii) and (d)(1)(iv). EPA originally proposed these two paragraph's as a single paragraph in (d)(1)(ii). The single paragraph addressed both chemical-specific limits and whole effluent toxicity limits and many commenters were confused about the meaning of the proposed paragraph. Therefore, for the purposes of clarification, EPA divided the one paragraph into two paragraphs. Paragraph (d)(1)(iii) addresses only chemical-specific limits and paragraph (d)(1)(iv) addresses only whole effluent toxicity limits.

Paragraph (d)(1)(iii) requires an NPDES permit to include an effluent limit on an individual pollutant when the permitting authority determines that the discharge of that pollutant is causing, is expected to cause, or contributes to, an excursion above a numeric water quality criterion for that pollutant. This paragraph applies where the state has adopted a numeric water quality standard for the pollutant of concern. Some commenters objected to the language in this paragraph because they claimed the paragraph could potentially require effluent limits for a large number of pollutants in an effluent. EPA believes however that paragraph (d)(iii) will not result in any unnecessary effluent limits in NPDES permits because the permitting authority must satisfy the procedures in paragraph (ii) before establishing limits under paragraph (d)(1) (iii), (iv), (v), or (vi). Paragraph (ii) requires the permitting authority to follow several fundamental principles when determining the need for an effluent limit. Furthermore, the permitting authority must have a basis for determining that a discharge will cause or has the reasonable potential to cause an excursion above the numeric water quality criterion for that pollutant. (Where EPA is the permitting authority, use of the procedures outlined in the Technical Support Document will normally provide such a basis.) Paragraph (iii) does not require limits for every pollutant but only for those pollutants which the permitting authority determines must be limited after applying the procedures described in paragraph (ii).

Paragraph (d)(1)(iv) requires an NPDES permit to include a limit on whole effluent toxicity when the permitting authority determines that the

effluent is causing or is expected to cause an excursion above a state numeric criterion for whole effluent toxicity, where the state has promulgated a numeric water quality criterion for whole effluent toxicity. (Note, where a state has not adopted a numeric water quality criterion for whole effluent toxicity, paragraph (d)(1)(v) may require whole effluent toxicity limits.) The comments on this language focused on EPA's legal authority to regulate whole effluent toxicity, and on the scientific basis for toxicity testing. EPA addresses these comments in the discussion of paragraph (d)(1)(v) later in this section. EPA is not persuaded by the comments challenging the language in paragraphs (d)(1)(iii) and (d)(1)(iv), and is therefore making no substantive changes to the proposed regulations.

The next amendment to § 122.44(d)(1) is subparagraph (v) (originally proposed as subparagraph (iii)). This regulation requires the permitting authority to establish permit limits on whole effluent toxicity when the discharger causes or has the reasonable potential to cause an excursion above a state's narrative water quality criterion.

Subparagraph (v) allows the permitting authority to choose not to develop whole effluent toxicity limits where the permitting authority can demonstrate that chemical-specific limits will attain and maintain applicable water quality criteria, including narrative water quality criteria. One method for making this demonstration would be to use toxicity testing to show that the effluent has no acute or chronic toxic effects on aquatic life in the receiving water. Some commenters said the exemption from whole effluent toxicity limits provided in this paragraph is impractical because the costs of making the demonstration are prohibitive. EPA is not convinced that the costs of showing that chemical-specific limits attain and maintain appropriate water quality standards would be excessive. Over the life of the permit, the costs of the initial demonstrations could be substantially less than the costs of compliance monitoring associated with both types of limits. The most straightforward method of making this demonstration will usually consist of toxicity testing in conjunction with chemical specific testing for the chemicals which are limited in the permit. Costs of toxicity tests typically range from a few hundred dollars for simple screening tests to as much as one or two thousand dollars per month for monthly chronic toxicity analyses. While EPA recognizes that this approach will not always be the easiest and least expensive way to ensure that the narrative criteria are met, EPA believes the option should remain available for those cases where the exemption from whole effluent toxicity limits is a viable and cost-effective option.

The exception described in paragraph (d)(1)(v) is not available under paragraph (d)(1)(iv) because paragraph (d)(1)(iv) relies on numeric criteria for limits on whole effluent toxicity, whereas paragraph (d)(1)(v) relies on narrative criteria. Paragraph (d)(1)(iv) describes a situation where the state has adopted a numeric criterion for whole effluent toxicity which reflects the maximum degree of toxicity determined to be acceptable in the state's surface waters. Narrative criteria for whole effluent toxicity do not necessarily reflect an affirmative determination by the state to establish a numeric criterion for whole effluent toxicity. The exception in paragraph (d)(1)(v), if used under paragraph (d)(1)(iv), could frustrate the state's efforts to establish effluent limits on whole effluent toxicity and implement its surface water toxics control program.

Many commenters objected to whole effluent toxicity limits on the ground that the scientific basis for toxicity testing is not sufficiently developed. These commenters also suggested that EPA should not use toxicity tests until EPA has published toxicity testing procedures pursuant to section 304(h) of the CWA. EPA disagrees. EPA has shown, through testing protocols, site-specific studies, and guidance manuals, that toxicity testing is reliable and has a sound scientific basis. In 1984 EPA concluded that "* * * toxicity testing is sufficiently refined to be used in setting effluent limitations * * *," 49 FR 38009 (1984). EPA's studies since 1984 reinforce this conclusion.

EPA has published a number of toxicity testing protocols that describe reliable and reproducible toxicity tests. *See* for example: *Short Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms,* EPA/600/4–89/001, Second Edition, February 1989; *Methods for Measuring the Acute Toxicity of Effluents to Freshwater and Marine Organisms,* Third Edition, EPA/600/4–85/013, March 1985; and *Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms, EPA 600/4–87/028, May 1988.*

EPA's *Technical Support Document for Water Quality-Based Toxics Control* (TSD) gives detailed technical guidance for each phase of water quality-based toxics control. The TSD describes the technical basis for establishing limits on whole effluent toxicity, and describes the methods for using toxicity testing in the permitting process. The TSD also cites several studies which show that toxicity testing methods, where properly followed, exhibit an acceptable range of variability.

It is not necessary for EPA to publish toxicity testing guidelines pursuant to section 304(h) of the CWA before using biomonitoring and whole effluent toxicity limits in NPDES permits. EPA has published toxicity testing protocols that can be used in NPDES permits. The absence of guidelines under section 304(h) does not affect EPA's authority to use toxicity testing, nor does it affect the reliability of EPA's toxicity testing protocols. EPA's position on this issue is stated in the preamble to EPA's final NPDES regulations, 49 FR 38010 (1984) and is reiterated here: permitting authorities must use their judgment in determining which toxicity testing methods are appropriate for the NPDES permit. (Note that there are other toxicity testing methodologies available. EPA has determined that EPA's methods are protective of aquatic life. If a state wishes to use other methods, those methods must be scientifically defensible and protective of aquatic life. EPA expects that such methods would always be comparable to the procedures in EPA's methodologies and would use test species of equivalent sensitivity.) Until EPA publishes guidelines under section 304(h), the premitting authority must specify in the permit which analytical methodology must be used.

Some commenters also questioned whether toxicity testing can be used to predict biological impact to receiving waters. To address this issue EPA has conducted the "Complex Effluent Toxicity Testing Program." The program has produced eight site-specific studies which show that where exposure is adequately assessed, effluent toxicity correlates directly to in-stream impact. The studies are: *Validity of Effluent and Ambient Toxicity Tests for Predicting Biological Impact:* Scippo Creek, Circleville, Ohio, EPA/600/3–85/044; Ottawa River, Lima, Ohio, EPA/600/3–84/080; Five Mile Creek, Birmingham, Alabama, EPA/600/8–85/015; Skeleton Creek, Enid, Oklahoma, EPA/600/8–86/002; Naugatuck River, Waterbury, Connecticut, EPA/600/8–86/005; Back River, Baltimore Harbor, Maryland, EPA/600/8–86/001; Ohio River, Near Wheeling, West Virginia, EPA/600/3–85/071; Kanawha River, Charleston,

West Virginia, EPA/600/3–86/006. These studies are available from the Center for Environmental Research Information, 26 West St. Clair Street, Cincinnati, Ohio 45268.

Commenters also suggested that EPA does not have the legal authority to require effluent limits on whole effluent toxicity. The commenters argue that the state narrative water quality criterion "no toxics in toxic amounts" cannot be used as a basis for requiring whole effluent toxicity limits. EPA disagrees. State narrative water quality criteria must be attained and maintained in the same way as all water quality criteria. Narrative water quality criteria have the same force of law as other water quality criteria, and NPDES permits must contain effluent limits necessary to attain and maintain all applicable water quality criteria, including narrative criteria.

The Court of Appeals for the District of Columbia Circuit recently upheld EPA's toxicity limits regulation, 40 CFR 125.3(c)(4), in *Natural Resources Defense Council* v. *Environmental Protection Agency*, 859 F.2d 156 (D.C. Cir. 1988). Section 125.3(c)(4) provides that permit writers may express technology-based or water quality-based limits in terms of toxicity as long as the limits reflect the appropriate requirements of the CWA. The court concluded that although toxicity appears to be an attribute of pollutants rather than a pollutant itself, the CWA authorizes the use of toxicity as a measure to regulate effluents. The court's affirmation of the use of whole effluent toxicity limits further supports EPA's authority to require whole effluent toxicity limits and to promulgate today's regulations.

Finally, section 301(b)(1)(C) requires NPDES permits to contain any effluent limitations necessary to meet all applicable water quality standards. A permit would be inconsistent with section 301(b)(1)(C) if the permit did not contain effluent limits necessary to attain and maintain both narrative and numeric water quality criteria. For these reasons, EPA believes its authority to regulate discharges using whole effluent toxicity limits is well established.

Some commenters said EPA should use whole effluent toxicity testing only as a trigger for further investigation into the cause of the toxicity, and should not use whole effluent toxicity as an enforceable effluent limit. EPA cannot incorporate these suggestions. EPA requires whole effluent toxicity limits where necessary to meet water quality standards. EPA does not believe that a whole effluent toxicity trigger alone is fully effective because it does not, by itself, restrict the quantity, rate, or concentration of pollutants in an effluent. Whole effluent toxicity limitations are enforceable in the same way as any other effluent limitation in an NPDES permit. Section 309 of the CWA provides that any single violation of an effluent limitation can be subject to an enforcement action, and section 309 applies to whole effluent toxicity limits in the same way as any other effluent limitation.

Several commenters asked if state narrative water quality criteria, that are used as the basis for establishing effluent limits under paragraphs (d)(1)(v) and (vi), apply to all waters regardless of their designated use. Narrative water quality criteria apply to all designated uses at all flows unless specified otherwise in a state's water quality standards. It is EPA's policy that no acutely toxic conditions may exist in any state waters, regardless of designated use. State narrative water quality criteria and interpretations of their narrative water quality criteria may be more protective than levels necessary to prevent acutely toxic conditions. For more information, please refer to the Water Quality Standards Handbook, December 1983.

State narrative water quality criteria provide the legal basis for establishing effluent limits under paragraphs (d)(1)(v) and (d)(1)(vi) of today's regulations. There is flexibility in the state's interpretation of its narrative water quality criteria. When a state adopts a narrative water quality criteria, EPA's regulations at 40 CFR 131.11(a)(2) require the state to "provide information identifying the method by which the state intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria." When interpreting a state's narrative water quality criteria, the premitting authority may use a proposed numeric criterion for the pollutant of concern, an explicit state policy, or a proposed or final state regulation interpreting its narrative criteria provided the interpretation will fully protect the designated use. In the absence of an explicit state policy or regulation that fully protects the designated use, the permitting authority will use the procedures summarized in paragraphs (d)(1)(ii) and (d)(1)(vii) of today's regulations for applying a state's narrative water quality criteria. (Note that states may evaluate the designated use of a waterbody by performing a use attainability analysis pursuant to 40 CFR Part 131, and depending on the results of the use attainability analysis may, after providing for public notice and an opportunity to comment, upgrade or downgrade the designated use of the waterbody.)

Subparagraph (vi), (originally proposed as subparagraph (iv)), addresses the situation in which a state has not adopted a numeric water quality criterion for a toxic, conventional, or nonconventional pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above an applicable narrative water quality criterion. In this situation the permitting authority does not have a numeric criterion to use for deriving a water quality-based effluent limit. EPA emphasizes that paragraph (d)(1)(vi) is not used to establish effluent limits on a pollutant if the state has adopted a numeric water quality criterion for that pollutant.

Several commenters said the phrase "* * * for a specific chemical pollutant that is known to adversely affect or threaten human health or aquatic life * * *" in proposed paragraph (vi) could have been read to require an effluent limit for every priority pollutant, even if the pollutant is not present in the effluent. Other commenters said this language should apply to discharges that are "known or suspected" to adversely affect aquatic life or human health. EPA agrees that these points needed clarification. As a result of these comments, EPA amended the introductory language of paragraph (vi) to clarify that water quality-based effluent limits are required only for pollutants that are "* * * present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable state narrative water quality standard." This language clarifies that water quality-based effluent limits are required only for pollutants present in an effluent at concentrations of concern to the permitting authority. EPA also added the words "or has reasonable potential" to the introductory language in paragraph (vi). This language is consistent with the language in paragraphs (i) through (v). This language is necessary to assure that effluent limits attain and maintain water quality standards, and the language is discussed more fully under the discussion of paragraph (ii). The new language also clarifies that an applicable state narrative water quality criterion provides the legal basis for establishing effluent limits under this paragraph. This revised language clarifies the scope and applicability of paragraph (d)(1)(vi).

Paragraph (d)(1)(vi) describes three options available to the permitting

authority for using narrative criteria as the basis for establishing effluent limits. Option A allows the permitting authority to establish water quality-based effluent limitations using a "calculated numeric water quality criterion" which the permitting authority demonstrates will attain and maintain applicable water quality standards. When using this approach, states may derive values different from the values in the EPA's water quality criteria documents to reflect site-specific factors, including predicted local human consumption of aquatic foods, as well as the state's determination of an appropriate risk level, and any more recent scientific data that may not be included in EPA's criteria documents. Under this option the permitting authority should use all available scientific information on the effect of a pollutant on human health and aquatic life. Available information includes but is not limited to, risk assessments, exposure data, and site-specific water quality parameters. (The proposed regulations included only two options under this paragraph. Today's final regulation includes a third option—"option C," which is described later in this section of the preamble. Today's final regulations also reverse the order of proposed options A and B. Proposed option A appears in today's final regulation as option B, and proposed option B appears as option A in the final regulation. The remainder of this discussion refers to the options as they appear in today's final regulation.)

Option A received a mixed reaction from commenters. Some commenters objected to option A because it requires a water quality-based effluent limit for a pollutant before a state adopts a numeric water quality criterion for that pollutant. Other commenters supported option A because the option gives the permitting authority flexibility in developing water quality-based effluent limits. Many of the commenters who oppose option A suggested that option A circumvented the state's role in developing water quality standards. EPA responds to this concern in the discussion of option B. It is worth noting, however, that this should be a minor concern for option A because option A does not necessarily rely on EPA's water quality criteria. Option A allows the permitting authority to use any criteria that protect aquatic life and human health. Thus option A gives the states maximum flexibility in developing water quality-based effluent limits for pollutants for which the state has not adopted a water quality criterion.

One commenter objected to option A because it appeared to be similar to state "translator mechanisms" for developing water quality standards under section 303(c)(2)(B). Some states use a procedure or "translator mechanism" to derive site-specific numeric water quality criteria and to develop water quality-based effluent limits. EPA's guidance implementing section 303(c)(2)(B) of the CWA provides that the use of a translator mechanism can be consistent with section 303(c)(2)(B) of the CWA. (*See* EPA's Guidance for State Implementation of Water Quality Standards for section 303(c)(2)(B).) Translator mechanisms that are used to satisfy section 303(c)(2)(B) of the CWA must be approved by EPA before the translator mechanism becomes part of the state's water quality standards. Such approved translator mechanisms can be used to develop effluent limitations under paragraph (d)(1)(iii) of today's regulations, but may not be used to develop effluent limitations under paragraph (d)(1)(vi). Paragraph (d)(1)(vi) is used only in the absence of a state numeric water quality criterion (including a criterion derived from an approved translator mechanism). The options in paragraph (d)(1)(vi) provide a regulatory basis for developing water quality-based effluent limitations as an interim measure until a numeric criterion for the pollutant of concern is available. State policies or procedures, even procedures which calculate derived criteria but are not approved by EPA, may be used to develop effluent limits under option A of paragraph (d)(1)(vi). However, if the state has adopted a policy or procedure in its standards that is approved by EPA and results in a derived or calculated numeric criteria, the permitting authority must develop effluent limits according to paragraph (d)(1)(iii) and may not use paragraph (d)(1)(vi).

The commenter also claimed that translator mechanisms do not provide adequate opportunity for public participation. When using a translator mechanism the state must provide an opportunity for public participation in the development of derived numeric criteria. The permit development process also gives the public an opportunity to comment on the effluent limitations developed from the criteria derived using a translator mechanism.

Several commenters stated that option A should describe scientifically sound procedures that must be followed when deriving numeric criteria. EPA believes it is inappropriate for this regulation to provide detailed technical procedures for developing numeric criteria because option A is intended to provide flexibility to the states when developing water quality-based effluent limitations. EPA emphasizes however, that scientifically valid procedures must be used to develop criteria that protect aquatic life and human health. The regulation suggests the use of EPA's Water Quality Standards Handbook, but other procedures may be used provided the resulting numeric water quality criteria attain and maintain all applicable water quality standards. Because there is more than one procedure that can be used to develop water quality-based effluent limitations under option A, EPA is making no changes to this language in option A.

EPA believes that option A offers a reasonable approach to developing water quality-based effluent limits in the absence of state numeric water quality standards, and EPA is not persuaded by the objections to option A. Therefore, EPA is promulgating option A with only the minor changes discussed above.

The second option in paragraph (d)(1)(vi), (option B), allows the permitting authority to establish effluent limits using EPA's Water Quality Criteria guidance documents, if EPA has published a criteria document for the pollutant pursuant to section 304(a) of the CWA. (EPA criteria documents provide a comprehensive summary of available data on the effects of a pollutant, and include maximum ambient concentrations that protect aquatic life and human health.) In the absence of a state numeric criterion for a pollutant, the permitting authority would use the appropriate EPA Water Quality Criteria document to calculate effluent limits for the pollutant in order to comply with applicable state narrative water quality criteria (*e.g.* "no toxics in toxic amounts").

Many commenters objected to option B because they claimed that EPA does not have the legal authority to require the use of EPA's water quality criteria in developing effluent limitations. EPA reiterates that section 301(b)(1)(C) requires that NPDES permits contain effluent limits that achieve narrative water quality criteria. This obligation applies regardless of whether or not a state has adopted a numeric water quality criterion for a pollutant of concern. EPA's water quality criteria should not be used as a substitute for state water quality standards, but rather, option B may be used as one of three options to interpret state narrative water quality criteria until the state adopts a numeric water quality criterion for the pollutant. Further, EPA is not requiring states to use EPA's water quality criteria. EPA is offering the

water quality criteria as one of three options available to the state for interpreting and applying narrative water quality criteria. EPA's water quality criteria provide one reasonable approach for interpreting state narrative water quality criteria because EPA's criteria account for the effects of a pollutant on aquatic life and human health.

Many commenters also suggested that option B circumvents the state's traditional role in establishing water quality standards. The commenters argue that section 303(c) of the CWA reserves for the states the sole authority to establish water quality standards, and that option B would somehow prevent a state from exercising its authority under section 303(c). EPA disagrees that the use of option B in implementing the narrative criterion would prevent a state from adopting numeric water quality criteria. To the contrary, section 303(c)(2)(B) requires states to adopt water quality standards for certain toxic pollutants as soon as possible. States must adopt standards according to the provisions of section 303(c) and when the water quality standards are adopted, the NPDES permits must contain effluent limits necessary to meet each standard. Option B applies only in the absence of state numeric water quality criteria. If a state has a numeric water quality criterion for the pollutant of concern, then paragraph (vi) does not apply. Option B is not intended to substitute EPA's water quality criteria for state water quality standards. Option B simply provides a mechanism for implementing narrative water quality criteria. Although states are required to adopt all necessary water quality standards under section 303, some states have not yet done so. Thus EPA is promulgating paragraph (vi) as an interim measure to control a pollutant of concern until the state promulgates a water quality criterion for the pollutant. However, EPA's legal obligation to ensure that NPDES permits meet all applicable water quality standards, including narrative criteria, cannot be set aside while a state develops water quality standards. This legal obligation applies to more than state adopted water quality standards. Section 301(b)(1)(C) requires that NPDES permits achieve "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to any state law or regulations (under authority preserved by section 510) or any other Federal law" including international treaties or agreements that have force as domestic law.

Some commenters suggested that EPA must incorporate the criteria documents by reference in order to use them in option B. The Administrative Procedures Act, 5 U.S.C. 552(a)(1) and 552(a)(1), requires agencies to publish in the **Federal Register** or incorporate by reference, with the approval of the Director of the Federal Register, all "substantive rules * * *" Although NPDES permits must be developed in accordance with today's regulations, water quality criteria documents do not "impose mandatory obligations upon members of the public and permit issuance authorities * * *" *See Appalachian Power Co.* v. *Train* 566 F.2d 451, 455 (4th Cir. 1977). The regulations provide other options that a state may use to determine the appropriate interpretation of its narrative water quality criteria.

The preamble to the proposed regulations solicited comment on a third option for subparagraph (vi). The third option proposed to allow the establishment of effluent limits on pollutants other than toxicants of concern such as an indicator parameter. An indicator parameter could be a conventional pollutant like total suspended solids (TSS), the control of which may be tied to a concomitant decrease in metals concentration. Another example of an indicator parameter is total toxic organics (TTO). Effluent limitations on TTO can be used to control the organic pollutants in an effluent, and are useful where an effluent contains many organic compounds. In such a case, the permitting authority must demonstrate that compliance with a limitation on the indicator parameter or some other effluent limit would ensure the control of the toxicant of concern to a level that will attain and maintain applicable state narrative water quality criteria, and will protect aquatic life and human health. EPA received mixed comments on this option. Some commenters liked the flexibility provided by the option, whereas other commenters pointed out the technical problems of demonstrating that controls on one pollutant also control other pollutants.

EPA's existing regulations allow the permitting authority to use indicator parameters for technology-based controls (see 40 CFR 125.3(c)(4), 125.3(h), and 122.44(e), and certain effluent limitation guidelines.) In the case of effluent limitations guidelines, EPA has data and other information showing that controls on one pollutant sometimes control one or more other pollutants. Similar data are often not available when developing water quality-based effluent limitations and therefore, the regulation describing this option requires a justification for using the indicator parameter in the permit. There may be cases where effluent limits on an indicator parameter are sufficient to attain and maintain applicable water quality standards for pollutants of concern and EPA does not wish to foreclose this option for water quality-based controls. Therefore EPA is including a third option in paragraph (vi) that allows the permitting authority to use indicator parameters under limited circumstances.

Like options A and B, option C is used only where a state has not adopted a water quality criterion for a pollutant for which the permitting authority has data showing that the pollutant is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above an applicable state narrative water quality criterion. In order to use option C the permitting authority must satisfy four conditions. First, the permit must identify which pollutant is intended to be controlled by the indicator parameter. This condition is similar to the requirement in 40 CFR 125.3(h) describing the use of indicator parameters for technology-based controls. Second, the fact sheet of the NPDES permit must include a finding that the effluent limit for the indicator parameter will attain and maintain applicable water quality standards. This condition is also similar to the requirements in 40 CFR 125.3(h), but is modified to address water quality-based effluent limits. Third, the permit must require all monitoring necessary to show that the limits on the indicator parameter continue to attain and maintain applicable water quality standards. This condition of option C is necessary to ensure that the controls on the indicator parameter are sufficient to attain and maintain applicable water quality standards. Fourth, the permit must contain a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards. This requirement clarifies that a permit may be reopened if the controls on the indicator parameter are insufficient. The type and frequency of monitoring necessary under condition three above would be determined by the permitting authority and would be based on case-specific factors. In general, EPA expects that this monitoring would include

analysis of the effluent for the indicator parameter and the pollutant of concern at a frequency sufficient to verify the correlation for the various operating conditions of the discharger. EPA recognizes that it may be difficult to show a correlation between controls on the indicator parameter and controls on the pollutants of concern. EPA recognizes that in most cases the data probably will not be available to show such a correlation. However, where such data are available EPA believes this option should be available to the permitting authority.

Today's regulations do not allow the permitting authority to use indicator parameters under paragraphs (d)(1) (iii) and (iv). Indicator parameters may not be used to develop effluent limitations under these paragraphs because, under these paragraphs, the state has promulgated a numeric criterion for the pollutant of concern. Such a numeric criterion represents a state's affirmative decision with respect to the maximum allowable ambient concentration for the pollutant. If paragraphs (d)(1) (iii) and (iv) provided for the use of indicator parameters, such provisions could frustrate the state's efforts to promulgate and implement water quality standards. EPA is limiting the use of indicator parameters to paragraph (d)(1)(vi) because this paragraph is intended as an interim measure employed in the absence of a state numeric criterion for the pollutant of concern, and because EPA seeks to allow the states flexibility to interpret their narrative water quality criteria.

There are several additional noteworthy points about developing effluent limitations under option C. In some cases, protecting sensitive test species from observed chronic exposure can protect against human health impacts because EPA's experience with toxicants has shown that values necessary to protect aquatic life are often more stringent than values necessary to protect human health. Thus, in many cases the controls necessary to avoid chronic aquatic effects may also protect against human exposure. However, the regulatory authorities should be cautious if a limit on whole effluent toxicity is used as an indicator parameter. Whole effluent toxicity limits may not necessarily account for carcinogenic compounds or highly bioaccumulative compounds, differences in the bioavailability of a pollutant once discharged to the receiving water, and the toxic effects which can occur from persistent chemicals that accumulate in sediments.

The final point about paragraph (vi) is that in the majority of cases where paragraph (vi) applies waste load allocations and total maximum daily loads will not be available for the pollutant of concern. Nonetheless, any effluent limit derived under paragraph (vi) must satisfy the requirements of paragraph (vii). Paragraph (vii) requires that all water quality-based effluent limitations comply with "appropriate water quality standards," and be consistent with "available" waste load allocations. Thus for the purposes of complying with paragraph (vii), where a wasteload allocation is unavailable, effluent limits derived under paragraph (vi) must comply with narrative water quality criteria and other applicable water quality standards.

Several commenters asked if it was necessary to show in-stream impact, or to show adverse effects on human health before invoking paragraph (vi) as a basis for establishing water quality-based limits on a pollutant of concern. It is not necessary to show adverse effects on aquatic life or human health to invoke this paragraph. The CWA does not require such a demonstration and it is EPA's position that it is not necessary to demonstrate such effects before establishing limits on a pollutant of concern.

Several commenters suggested that option A will create a large resource burden for the states by requiring them to develop numeric criteria. EPA understands that a significant effort is involved in deriving a numeric criterion as the basis for water quality-based effluent limits under option A. However, where a state chooses this option, EPA sees no alternative but to derive a numeric criterion that protects aquatic life and human health. Option A gives the state flexibility in developing numeric criteria, and if the state believes that option A involves too many resources the state is free to use the other, less resource intensive options described in this paragraph.

Several commenters were concerned that the anti-backsliding provisions of section 402(o) of the CWA would apply to the effluent limitations developed under section 304(1). Section 402(o) does not necessarily prevent EPA or the states from reissuing NPDES permits with less stringent effluent limitations than the limits in the prior permit. The amendments establish a process and conditions for determining when less stringent limits are appropriate. These provisions apply to both technology-based and water quality-based effluent limitations. For water quality-based effluent limitations, the applicability of section 402(o) depends on whether the receiving waters are attaining and maintaining applicable water quality standards at the time of permit renewal. While there may be cases where section 402(o) prohibits less stringent effluent limitations, such a result can only be determined on a case-by-case basis.

It is EPA's intent that the three options in subparagraph (vi) will allow the permitting authority to set effluent limits to control discharges (in the absence of state numerical water quality criteria for all pollutants of concern) that interfere with attaining and maintaining designated uses, while at the same time, giving the permitting authority sufficient flexibility to account for site-specific impacts on aquatic life or human health.

A number of commenters indicated some confusion over the applicability of subparagraphs (iii), (iv), (v), and (vi), and some confusion over the relationship between these provisions. Paragraph (iii) is intended to apply when the permitting authority has data on a conventional, nonconventional, or toxic pollutant, indicating that a point source is causing, is expected to cause, or contributes to an excursion above a state numeric water quality criterion for that pollutant. In contrast to paragraph (iii), paragraph (iv) requires only whole effluent toxicity limits, and applies when the permitting authority has either toxicity data, pollutant-specific data, or other data, *and* this data shows that an effluent causes, is expected to cause, or contributes to an excursion above a numeric water quality criterion for toxicity. Paragraphs (iii) and (iv) do not operate to require both whole effluent toxicity limits and chemical-specific limits in every permit, as some commenters suggested. Although paragraph (iii) requires pollutant-specific effluent limits when the permitting authority has sufficient data for that pollutant, paragraphs (iii) and (iv) are consistent with EPA's toxics control strategy which recommends the appropriate combination of whole effluent toxicity and pollutant-specific controls necessary to attain and maintain all applicable water quality standards. EPA also emphasizes that the controls described in paragraphs (iii), (iv), (v), and (vi) are necessary only after the permitting authority has determined, using the principles in paragraph (ii), that water quality-based effluent limits are necessary for a discharge.

Paragraph (v) requires only whole effluent toxicity limits, and is used when the permitting authority relies on a narrative water quality criterion. Unlike paragraph (iv), paragraph (v) applies when the state has not adopted a

numeric water quality criterion for whole effluent toxicity.

Paragraph (vi) applies when the permitting authority has data on a conventional, nonconventional, or toxic pollutant, indicating that a point source is discharging the pollutant at a concentration that is causing, is expected to cause, or contributes to an excursion above an applicable narrative criterion for water quality, *and* the state has not adopted a numeric water quality criterion for the pollutant. Paragraph (vi) requires only effluent limits for individual pollutants (except in those cases where limits on whole effluent toxicity can be used as an indicator parameter). If the permitting authority uses paragraph (vi) to require a pollutant-specific effluent limit, and the permitting authority also has toxicity data indicating a toxicity problem, the permitting authority would use paragraph (iv) or paragraph (v), whichever applies, to require whole effluent toxicity limits. EPA hopes this discussion of these paragraphs clarifies the applicability of these regulations.

Several commenters objected to the references in option A to EPA's Water Quality Standards Handbook and to EPA's water quality criteria documents. The commenters suggested that EPA must incorporate by reference these documents into today's regulation, and solicit public comment on the documents in order to refer to them in the rulemaking. It is not necessary however, to incorporate these documents by reference as part of this rulemaking because option A refers to these documents only as suggested resource materials that may be used as one option in the regulations. The documents do not contain enforceable requrements, and the use of these documents is not mandatory under the regulations. Therefore the documents do not need to be incorporated by reference into these regulations.

The final change to § 122.44(d)(1) is subparagraph (vii). This subparagraph describes two requirements that the permitting authority must use to derive water quality-based effluent limits. The first requirement provides that water quality-based effluent limits shall be derived from water quality standards. Under section 303(c) of the CWA, and Part 131 of EPA's regulations, a state must adopt water quality standards, (including an antidegradation policy) and submit the standards to EPA for review. Although Part 131 describes the process for adopting and reviewing water quality standards, EPA's permitting regulations in Part 122 do not specify that water quality-based effluent limits must be derived from water quality standards, (although this requirement is implied in § 122.44). The language in paragraph (vii) clarifies this requirement of the NPDES permitting regulations.

The second requirement in subparagraph (vii) for deriving water quality-based effluent limits, is that the water quality-based effluent limits must be consistent with wateload allocations (WLAs) developed and approved in accordance with 40 CFR 130.7, if a WLA is available for the discharge. A wasteload allocation is defined at 40 CFR 130.2 and reflects the portion of a receiving water's loading capacity that is allocated to a point source. The requirement to use approved wasteload allocations for water quality-based permit limits is implied in current § 122.44(d) because paragraph (d) requires effluent limits to meet water quality standards. Today's language clarifies EPA's existing regulations by stating that when WLAs are available, they must be used to translate water quality standards into NPDES permit limits. Although subparagraph (vii) requires the permitting authority to use a wasteload allocation if one has been approved under Part 130, today's regulations do not allow the permitting authority to delay developing and issuing a permit if a wasteload allocation has not already been developed and approved.

Deriving water quality-based effluent limits from water quality standards is the only reliable method for developing water quality-based effluent limits that protect aquatic life and human health. Pursuant to section 303(c)of the CWA, the states adopt water quality standards, and then, under section 303(d), develop total maximum daily loads (TMDLs), for water quality-limited segments, to attain and maintain the water quality standards. The TMDLs are used to derive a wasteload allocation for individual pollutants discharged from a point source. This process results in effluent limits that protect aquatic life and human health because the limits are derived from water quality standards.

Subparagraph (vii) does not prescribe detailed procedures for developing water quality-based effluent limits. Rather, the regulation prescribes minimum requirements for developing water quality-based effluent limits, and at the same time, gives the permitting authority the flexibility to determine the appropriate procedures for developing water quality-based effluent limits.

Comments on subparagraph (vii) were generally favorable. The comments supported the concept of deriving water quality-based effluent limits from water quality criteria, and favor the language requiring water quality-based effluent limits to be consistent with a wasteload allocation, if a wasteload allocation is available for the discharge. Therefore, because subparagraph (vii) describes two fundamental principles for deriving water quality-based effluent limits, and because the comments on this regulation were generally favorable, EPA is promulgating this regulation without change from the proposed regulation.

d. Technology-Based Controls on Toxic Pollutants. The final change to § 122.44 is a modification to the title of paragraph (e). The new title reads "Technology-Based Controls on Toxic Pollutants." This title more accurately describes the scope of paragraph (e). Paragraph (e) has been used primarily as a basis for requiring technology-based controls. Although the proposed regulations suggested the title "Toxic Pollutants and Sources of Toxicity," a number of commenters suggested that the proposed changes to paragraph (e) overlapped with the amendments to paragraph (d). EPA is persuaded by these comments, and is therefore clarifying in today's preamble that paragraph (e) applies primarily to technology-based controls, whereas paragraph (d) applies whenever the permitting authority is developing water quality-based controls.

The proposed regulations included a new paragraph (e)(2), but EPA decided it is more appropriate to place this language in paragraph (d)(1). The new language applies to water quality-based controls, not technology-based controls, and the language provides an accurate statement of the controls necessary in an NPDES permit to attain and maintain water quality standards.

The commenters also found the proposed change in paragraph (e)(3)(iii) to overlap with the amendments to paragraph (d). Therefore, EPA decided not to include the proposal in today's final regulations. EPA proposed to add a reference to whole effluent toxicity in paragraph (e), but the proposed language clouded the distinction between paragraph (d) and paragraph (e). To maintain a clear distinction between the applicability of these paragraphs, EPA decided to not carry the language proposed for paragraph (e)(3)(iii) forward into today's final regulations.

Thus, the only change that today's rulemaking makes to paragraph (e) is to change the title of the paragraph to reflect more accurately the scope of the paragraph.

2. State NPDES Program Requirements. The proposed regulations included a new paragraph for § 123.63(a) to clarify EPA's authority to withdraw a state's NPDES program if state fails to develop an adequate program for developing water quality-based effluent limits in NPDES permits. Today's regulations include this language without change from the proposed regulation.

The new language focuses on how well a state's NPDES permits protect water quality. If other elements of a state's surface water toxics control program adversely affect the quality of NPDES permit limits, then EPA may include other program elements in its evaluation of a state's NPDES program. For example, if a state fails to use consistent and defensible procedures for developing water quality-based effluent limits, EPA would consider this deficency when evaluating a state's NPDES program.

Several commenters asked for a detailed decision of the exact meaning of the phrase "adequate regulatory program" as it is used in today's regulations. EPA believes, however, that it is inappropriate to be too prescriptive about the requirements for state surface water toxics control programs. The states have flexibility in developing programs to address toxics, and today's regulations do not affect this flexibility. In its oversight of state programs, EPA has emphasized and will continue to emphasize the importance of toxics control programs, and today's regulations reflect the priority that EPA believes is appropriate for these programs.

EPA is adding this criteria to § 123.63(a) because it is essential for all authorized states to operate effective toxics control programs. An adequate state regulatory program for developing water quality-based effluent limits in NPDES permits should be an integral part of each approved state's NPDES program.

B. Identification of Waters

Section III.A of this preamble discussed the rules for strengthening EPA's ongoing surface water toxics control program. The remainder of this preamble discusses the requirements of section 304(l) of the CWA and how EPA is incorporating these requirements into EPA's toxics control program. This section (III.B) discusses how EPA and the states will administer the listing requirements of section 304(l).

1. Description of the Four Lists

The four lists required by section 304(l)(1), paragraphs (A)(i), (A)(ii), (B), and (C) are described below.

Note. Both paragraphs (A)(i) and (B)(i) use the term "toxic pollutants," however, EPA is implementing the section 304(l)(1)(B) listing and control requirements by relying on the priority pollutants rather than the thousands of pollutants potentially encompassed by the term "toxic pollutants." (See Section II.B of this preamble for further discussion.) Also, ammonia and chlorine are not included within the terms "toxic pollutants," "§ 307(a) toxic pollutants" or "priority pollutants" for the purposes of section 304(l).

Paragraph (A)(i) of section 304(l)(1) requires a list of those waters in each state which, after application of technology-based effluent limits, "cannot reasonably be anticipated to attain or maintain water quality standards for such waters reviewed, revised, or adopted in accordance with section 303(c)(2)(B) of the CWA," due to section 307(a) toxic pollutants. Section 303(c)(2)(B) refers to the adoption by the states of numeric criteria into their water quality standards for section 307(a) toxic pollutants. Therefore, EPA interprets the (A)(i) list to include only those waters where water quality standards with numeric criteria adopted under section 303(c)(2)(B) for priority pollutants are not achieved, or are not expected to be achieved, due to either point or nonpoint sources of pollution, on or before February 4, 1989, after application BAT, pretreatment and new sources performance standards. These are final water quality criteria which have been reviewed, revised and adopted by the state and approved by EPA.

Paragraph (A)(ii) of section 304(l)(1) requires a list of those waters within each state which, after the application of technology-based effluent limitations, "cannot reasonably be anticipated to attain or maintain that water quality which shall assure the protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of shellfish, fish and wildlife, and allow recreational activities in and on the water." EPA interprets this to mean that the state must create a comprehensive list of waters that are impaired or are expected to be impaired as of February 4, 1989 by point or nonpoint source discharges of toxic, conventional, or nonconventional pollutants. This list should include all waters not meeting the goals of the CWA after the application of technology-based effluent limitations, regardless of whether or not a state has adopted numeric criteria within their water quality standards. This includes all waters which are classified for uses that do not meet the "fishable and swimmable" goals of the Act.

Paragraph (B) of section 304(l)(1) requires a list of those waters within each state for "which the state does not expect the applicable standard under § 303 of the CWA will be achieved after the requirements of sections 301(b), 306, and 307(b) are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 307(a)" of the CWA. EPA interprets this list to include all waters which can not achieve or are not expected to achieve, either the numeric or narrative water quality criteria applicable to a priority pollutant due entirely or substantially to discharges from point sources on or before February 4, 1989 after application of BAT, pretreatment and new source performance standards. Waters where impairment is due to discharges of whole effluent toxicity are included on the paragraph (B) list only when the toxicity is due in whole or in large part to one or more of the priority pollutants. (Waters where whole effluent toxicity is observed, but is not attributable to a priority pollutant, are to be included on the paragraph (A)(ii) list.)

For all the waters listed on the paragraph (B) list, the state must identify the point sources discharging the priority pollutant(s) as described below the develop individual control strategies for each point source. (See section III.C. of this preamble for more information on individual control strategies.)

Interpretations of the terms "applicable standard," and "due entirely or substantially to discharges from point sources," which appear in the statutory language of section 304(l)(1)(B), are discussed in the next section (section III.B.2) of this preamble.

Paragraph (C) of section 304(l) describes the fourth list required to be submitted by the states to EPA. It requires, for each of the segments included on the paragraph (B) list, "a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source." EPA interprets this paragraph to mean that for each water on the paragraph (B) list, the state must list each point source within its jurisdiction that is discharging the priority pollutant(s) to the water which is listed, and the amount of each priority

pollutant discharged by each such source. Individual control strategies (ICSs) are to be prepared for each point source discharger on the paragraph (C) list.

Some commenters maintained that individual control strategies are required for all three lists of waters to be developed under section 304(l), and that EPA's interpretation that ICSs are only required for the paragraph (B) list of waters is contrary to Congressional intent. The statutory language indicates that individual control strategies must be developed which will produce a reduction of point source discharges of section 307(a) toxic pollutants in order to achieve applicable water quality standards within three years of establishment of the strategy. In order for such point source controls, in combination with "existing nonpoint source controls," to effectively achieve water quality standards, there is an implicit assumption that such waters are capable of achieving or making significant progress toward achieving water quality standards primarily by controlling point sources of section 307(a) toxic pollutants. Such a scenario corresponds to the paragraph (B) list of waters, and therefore support EPA's interpretation that the ICS requirement applies only to the paragraph (B) list. However, like ICSs, permits for any point source discharges to waters on the paragraphs (A)(i) and (B) lists must still include effluent limits to attain and maintain water quality standards for all parameters of concern including toxic pollutants, through the permits are not subject to the compliance dates of section 304(l).

Note that every state, as defined by EPA at 40 CFR 122.2, is required to submit lists of waters, sources and amounts whether or not the state is authorized by EPA to administer the NPDES program.

Some commenters asked EPA how to assess whether to list waters on the paragraph (B) list which have point sources which do not yet meet either existing permit limits derived from technology-based standards under section 301(b) , 306 and 307(b) of the CWA, or do not yet have such permit limits. EPA requires the state to list any water that was not meeting its applicable water quality standards by February 4, 1989 on one or more of the lists of waters described above, as appropriate.

The only exception to this requirement is provided when a state demonstrates that enforceable permit limits derived from technology-based standards will bring the water into compliance with applicable water quality standards. However, EPA expects that where compliance with technology-based limits cannot be expected within three years of the preparation of the list, there will be too much uncertainty in the determination of whether the limits are adequate to achieve water quality standards in order to demonstrate to EPA that the water should not be listed.

If the existing permit limits are based on water quality standards and those limits are not yet achieved as of February 4, 1989 due entirely or substantially to discharges from point sources, the water should be included on the paragraph (B) list. These waters qualify for the paragraph (B) list even if the permit has a compliance schedule to achieve water quality standards on or before June 4, 1992. In these cases it may not be necessary to modify these existing limits or schedules in the permit to meet the compliance deadlines of section 304(l), and the existing permit may qualify as an ICS. However, the waters and point sources must be listed and the permit authority must still review the existing permit, exercise its judgment to decide if the existing water quality-based limits will meet the section 304(l) compliance dates, and revise the limits if necessary.

2. Explanation of Terms Used in section 304(l)(1)(B)

Paragraph (B) of section 304(l)(1) introduces two terms that EPA believes need further interpretation and explanation to ensure consistency in implementing this paragraph. These terms are "applicable standard," and "due entirely or substantially to discharges from point sources." Paragraphs 130.10(d) (4) and (5) of today's amendments contain these interpretations.

a. *Applicable standard.* For the purposes of listing waters under paragraph (B) of section 304(l)(1), in paragraph 130.10(d)(4) EPA interprets the "applicable standard" to mean numeric criteria promulgated within state water quality standards for priority pollutants. Where a state numeric criterion for a priority pollutant is not promulgated in state water quality standards, for the purposes of listing waters under section 304(l), "applicable standard" means the state narrative water quality criteria to control toxic pollutants (e.g. "no toxics in toxic amounts"). These state narrative water quality criteria can be interpreted, on a chemical-by-chemical basis, by applying a proposed state numeric criterion, or an explicit state policy or regulation for interpreting the narrative criterion, or an EPA water quality criterion published in EPA's water quality criteria guidance documents, supplemented by other relevant information. Other relevant information may include, for example EPA's Integrated Risk Information System (IRIS) database (see EPA document EPA/600/8–86/032), local exposure assessments, and other site-specific information. Among these alternative interpretations of narrative criteria, EPA will give substantial deference to a proposed state numeric criterion, or an explicit state policy or regulation where the interpretation will fully protect the designated uses. In the absence of any such acceptable state interpretations which protect the designated uses, an EPA national water quality criterion must be used for interpreting the state's narrative water quality criteria, supplemented with other relevant information as described above.

Many commenters objected to the proposal to use national water quality criteria to interpret the state's narrative water quality criteria for the purposes of listing waters under section 304(l)(1)(B). To make it clear that EPA's intent is not to undermine or usurp state authority to develop water quality standards, but to establish a minimum baseline for screening waters to be listed, EPA has added language to today's preamble and regulation that encourages a state, whenever possible, to rely on its formally proposed or adopted interpretations, policies, criteria and risk levels as the applicable standard for listing purposes under section 304(l). Only in the absence of these is EPA requiring the use of EPA water quality criteria and specifying the risk level to be used. Furthermore, EPA allows the state to rely on additional or more recent representative scientific data when available to update the information in the EPA water quality criteria documents, such as EPA's Integrated Risk Information System (IRIS) documents.

In the absence of formally proposed or adopted numeric criteria for all of the priority pollutants or explicit state policies which interpret the narrative water quality criteria, EPA needs some criteria or definition of impairment to identify waters for listing. If waters that are exceeding narrative criteria are excluded from the paragraph (B) list, those states that have not yet set numeric water quality criteria for the priority pollutants would effectively be exempted from the requirements of section 304(l)(1)(B), despite the possible presence of significant water quality problems. The section 304(l) statutory language mandates that states and EPA

move forward expeditiously to achieve water quality goals and it does not provide relief from deadlines due to lack of numeric criteria within state water quality standards. One commenter suggested that EPA require each state to establish its own numeric criteria in water quality standards for the section 307(a) toxic pollutants as part of the section 304(l) list development process. The CWA does not provide time for delay in implementing section 304(l) requirements pending state action to establish their own numeric criteria in water quality standards.

After identifying a water for listing on the section 304(l)(1)(B) list by using the EPA criteria, a state may then use other and more site-specific data and criteria to establish appropriate permit limits in the individual control strategies for the point sources on the water. This process is described in § 122.44(d)(1) of today's rule.

EPA received comments arguing that EPA must incorporate its water quality criteria documents by reference in order to require states to list waters in accordance with these documents. The Administrative Procedures Act, 5 U.S.C. 552(a)(1) and 522(a)(1), requires agencies to publish in the Federal Register or incorporate by reference with approval of the Director of the Federal Register, all "substantive rules." EPA has amended § 130.10(d)(4) to allow states to list waters on the basis of their own interpretations of the state narrative criteria, and the use of EPA water quality criteria documents is clearly not mandatory. Therefore, EPA is not incorporating the criteria documents by reference in today's rule. (See the discussion of this issue in section III.A. above.)

Several commenters asked if state narrative water quality criteria apply to all waters regardless of their designated use. Narrative water quality criteria apply to all designated uses at all flows unless specified otherwise in a state's water quality standards. It is EPA's policy that no acutely toxic conditions may exist in any state waters, regardless of designated use. A state's narrative water quality criteria and interpretations of its narrative water quality criteria may be more protective than the levels necessary to prevent acutely toxic conditions. For more information, please refer to EPA's Water Quality Standards Handbook, December, 1983.

One commenter requested that the definition of applicable standard include the water quality standards and limitations established under the Great Lakes Water Quality Agreement of 1978. EPA has not incorporated this comment into today's final rule. Section 304(l)(1)(B) refers to the "applicable standard under section 303 of this Act." Section 303 establishes the process for state adoption of water quality standards and, in those situations where EPA disapproves a state standard, it establishes the process for EPA promulgation of a water quality standard for such state. Provisions of the Great Lakes Water Quality Agreement are not standards "under section 303" of the Clean Water Act.

b. Due Entirely or Substantially to Discharges From Point Sources. Paragraph 130.10(d)(5) describes two conditions that require a water to be listed under paragraph (B) of section 304(l)(1) because the applicable water quality standard is not expected to be met "due entirely or substantially to discharges from point sources." These two conditions are listed below.

In making the determination of whether a water meets either of these conditions, a state should perform a water quality analysis using a design flow specified in state regulation or policy, or the critical design flow as established by EPA guidance or regulation (for example, EPA's Technical Guidance Manual for Performing Wasteload Allocations—Book VI, Design Conditions—Chapter I Stream Design Flow for Steady State Modeling, September 1986 (EPA 440/4–87–004).)

If a water meets either of the conditions below, after the application of the technology-based requirements of sections 301(b), 306, and 307(b), then it must appear on a state's section 304(l)(1)(B) list. (See discussion in section III.B.1 of this preamble on application of technology-based requirements for making listing decisions.)

(a) Existing or additional water quality-based limits on one or more point sources would result in the achievement of an applicable water quality standard for a priority pollutant or;

(b) The discharge of a priority pollutant from one or more point sources, regardless of any nonpoint source contribution of the same pollutant, is sufficient to cause, or is expected to cause, an excursion above the applicable water quality standard for the priority pollutant.

The proposed rulemaking contained three conditions. Many commenters objected to one or more of them; some supported one or more of them. The Agency decided to revise conditions (a) and (b) slightly and delete condition (c) in response to comments.

Many commenters objected to the three conditions in the proposal because the conditions do not consider the proportion of point source contributions to nonpoint source contributions and thereby could require controls on point sources which may be contributing relatively small amounts of the pollutant of concern. Some commenters suggested EPA designate a specific percentage that the point source would have to contribute in order to be listed. EPA decided not to revise the conditions in response to these comments becasuse it is important whenever possible to bring waters into compliance with water quality standards, and if additional controls on point sources will do so, then they should not be delayed or omitted due to contributions from nonpoint sources. Furthermore, proportions are difficult to calculate because they vary widely. For example, rainfall events can change dramatically the proportion of point and nonpoint source contributions by contributing very large but occasional and almost unpredictable loads from nonpoint sources. However, to the extent that relative point and nonpoint source contributions can be determined, a state may make appropriate and cost-effective adjustments to respective control requirements for nonpoint and point sources through the total maximum daily load and wasteload allocation processes established under 40 CFR 130.7.

Many commenters objected to the proposed conditions on the basis that controls on point sources may not necessarily bring the water into compliance with the water quality standard since the nonpoint source contribution alone can cause excursions. In these cases, the commenters argued an NPDES permit would not be able to be issued that meets EPA's definition of an individual control strategy. The conditions were not revised or deleted in response to these comments. In essence, these comments suggest that EPA should list waters on the basis of whether or not the water quality standard can be achieved within the statutory framework of section 304(1), rather than on the basis of the pollutant load to the stream from point sources. EPA believes that the Congressional purpose of controlling point sources which are substantial contributors to a failure to meet water quality standards, would be best accomplished by focusing on the point source discharges to particular waters. If EPA were to define "due * * * substantially to discharges from point sources" to exclude waters where the water quality standards

cannot be met by point source controls alone, then the discharges to some of the most polluted waters may not be controlled. Congress enacted a comprehensive scheme to address waters impaired by both point and nonpoint sources of toxic pollutants. At the same time that it enacted section 304(l), Congress passed section 319 to address nonpoint sources. When section 304(l)(1)(B) is read together with section 319, EPA believes that all waters not achieving water quality standards for priority pollutants should be listed pursuant to at least one or sometimes both sections of the Act. To exclude a water from the section 304(l)(1)(B) list because of nonpoint sources would leave open the possibility of a state excluding the same water from its section 319 list because of point source contributions. The result of such an approach could be that waters needing both point and nonpoint source controls to meet water quality standards might be excluded from both programs.

EPA believes that states should make continuous progress toward the attainment of water quality standards as required by the Act, and that controls on the point source contribution of a priority pollutant should not be delayed or omitted while awaiting effective controls on nonpoint sources of the pollutant. In cases where there are significant loadings of a toxic pollutant from nonpoint sources, and effluent limits on the point sources by themselves may not bring the water into compliance with the applicable water quality standard, an ICS will satisfy the language of section 304(l)(1)(D) if the effluent limits in the ICS are consistent with a wasteload allocation for the discharger. (See section III.D.1 for discussion on why EPA believes that this approach is reasonable and appropriate.)

To address commenters concerns that an ICS does not address nonpoint sources, EPA requires that the supporting documentation for an ICS show evidence that the impact of nonpoint sources on the identified segment has been considered during the preparation of total maximum daily loads (TMDLs) and wasteload allocations (WLAs). EPA also encourages permitting authorities to utilize all available authorities to control nonpoint sources, including section 319 of the CWA.

Many commenters felt that the language in condition (c) in the proposed rule was too subjective, vague and was not authorized by the statute. EPA agrees and has deleted condition (c) in response to these comments.

In addition, EPA has deleted Exhibit A from the final rule. Exhibit A, which appeared in the proposed rule, was an illustration for determining if the concentration of a priority pollutant is entirely or substantially due to discharges from point sources. This chart has been deleted since it caused considerable confusion and because it illustrated only seven of myriad possible discharge scenarios, all of which could not be illustrated.

Finally, the proposed word "initial" has been replaced by the word "existing" in final condition (a). EPA believes the word "initial" is vague, and the word "existing" more clearly describes the situation where existing limits on one or more point sources, if made effective, would bring the water into compliance with an applicable water quality standard, and therefore it should be listed on the paragraph (B) list. This change does not signify an expansion of the listing requirements, but is a correction in the language which makes it consistent with other parts of today's rule. For example, this change is consistent with section III.B.1 of today's preamble which clarifies that if the water was not meeting or was not expected to meet that water quality standard on or before February 4, 1989 due entirely or substantially to discharges from point sources, it must be listed on the paragraph (B) list even if the point sources on a water already have existing water quality-based effluent limitations designed to meet a water quality standard. No commenters requested this change in the language, but EPA believed it was necessary to make the correction for the reasons stated above.

For the purposes of interpreting the term "due entirely or substantially to discharges from point sources," any discharge which meets the definition of a point source under 40 CFR § 122.2 must be considered as such for the purposes of listing waters and point sources under section 304(l)(1)(B), including discharges from combined sewer overflows (CSOs) and discharges from stormwater outfalls. In addition, water quality impairments due to in-place sediments which have been substantially or entirely contaminated or deposited by priority pollutant loadings currently being discharged from an active and operating point source subject to section 402(a) of the CWA, must be listed under paragraph (B) of section 304(l) and the discharger must be listed under paragraph (C). If the sediments have been contaminated or deposited entirely or almost entirely by nonpoint sources or by a facility or site which is no longer in operation or is abandoned, and therefore cannot be issued an NPDES permit, EPA would not consider the contamination to be due to a point source when evaluating whether a water should be listed on the paragraph (B) list. EPA emphasizes that the sediments themselves are not considered point sources, but the contamination or deposition of them by active and operating industrial or municipal facilities is considered as contamination that is due to a point source.

Some commenters asked for clarification on whether to list waters based on exceedances of criteria in the water column or based on biological impairment caused by contaminated sediments. Waters may be listed on either basis. The evaluation for listing on the section 304(l)(1)(B) list is based on whether there is an excursion or expected excursion above an applicable narrative or numeric criterion for a priority pollutant which is designed to protect the designated uses. If the contaminated sediment is causing biological damage it may be impairing the designated uses of a water, and therefore a state's narrative criteria for toxics may be exceeded. Or if the sediment is releasing a priority pollutant back into the water column in amounts that exceed the allowable concentrations, the state's numeric criteria is being exceeded. In either of these situations, the waters, as well as the appropriate dischargers, should be listed, if the contamination is due entirely or substantially to point sources.

Some commenters thought that EPA intended states to list waters where the sediment is contaminated due entirely or almost entirely to nonpoint sources or inactive point source dischargers. EPA does not intend this. Also, EPA did not intend to suggest in the proposed rule, as some commenters believed, that if there is a water quality problem due to in-place sediments which have been contaminated entirely or almost entirely by an abandoned or inactive point source or by nonpoint sources, that the water must be listed if there is *any* active point source of the same priority pollutant. The water would only be listed if the active point source is entirely or substantially contributing to or causing the sediment contamination, which is in turn impairing the uses of the water. Thus, for listing purposes, EPA is treating dischargers which are contaminating sediments in the same manner as other dischargers.

When a state evaluates whether a water is impaired "due entirely or substantially to discharges from point

sources," the evaluation must be based only on the contribution of one priority pollutant at a time from the point sources, and only for priority pollutants. Therefore, a water quality problem due to a pollutant which is not a priority pollutant may not be taken into account when determining whether a water should or should not be listed on the paragraph (B) list for priority pollutants. For example, if a water does not meet the water quality criterion for chromium (a priority pollutant) from point source contributions, nor does it meet the water quality criterion for pH (a conventional pollutant) from either point or nonpoint sources, the state must still list this water on the (B) list, because of the chromium point source contribution. Even though a water may still not meet its designated uses due to another pollutant, EPA does not want the states to delay controlling a priority pollutant of concern from a point source. (As a matter of policy, EPA urges states to attach the same priority to the identification and control of all non-priority pollutants of concern.)

One commenter expressed concern about being able to develop ICSs for combined sewer overflows and stormwater outfalls. EPA acknowledges that writing permits for these sources may be difficult. However, ease in writing the individual control strategy or ability to meet appropriate permit limits is not the basis for listing waters and point sources under section 304(l). Another commenter contended that under section 402 of the CWA urban stormwater discharges do not have to meet permit limits until 1994 at the earliest. EPA disagrees. Section 402(p)(2)(E) of the CWA states that "[a] discharge for which the Administrator or the State determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States" is exempted from the general rule that EPA or the state cannot require a permit for stormwater discharges prior to October 1, 1992. Stormwater discharges listed pursuant to section 304(l) qualify for this exemption. Furthermore, Congress did not specifically exempt any categories of point sources from the requirements of section 304(l).

3. Preparation and Review of the Lists

The CWA requires the states to have submitted the four section 304(l)(1) lists to EPA for review and approval on or before February 4, 1989. Paragraphs 130.10(d)(1)–(3), promulgated as part of EPA's interpretive rule for the Water Quality Act on January 4, 1989 (Federal Register Vol. 54 No. 2 at 216) already require this submission, along with the requirement that these lists be reviewed and approved or disapproved by EPA.

In addition to paragraphs (4) and (5) discussed above, today's rules also add paragraphs (6) through (11) to subsection 130.10(d). Paragraphs (6) and (7) describe the data that each state must use in developing the lists, and the documentation that each must provide to EPA when submitting lists to EPA. Paragraph (8) describes the basis upon which EPA will approve or disapprove a state's lists. Paragraphs (6) through (8) are discussed in this section of the preamble. New paragraphs (9), (10) and (11) discuss public notice and comment procedures and are discussed in section III.D.2 of this preamble.

a. *Use of Existing and Readily Available Data.* Because EPA believes that states should build on the work that has already been done in the continuous process of assessing water quality, today's amendments allow states to use existing and readily available data when they develop their lists. Also, the ambitious deadlines of the CWA require EPA to forgo a requirement for lengthy monitoring designs and extensive collection of new data and to rely on existing and readily available data. The regulation which allows states to rely on existing and readily available data appears in proposed paragraph 130.10(d)(6).

To assist states in deciding what existing and readily available data they should rely on, EPA is designating sixteen categories of waters about which, as a minimum, each state must assemble and evaluate all existing and readily available data. These categories of waters are described in paragraph 130.10(d)(6). EPA considers the existing and readily available information and data about the categories of waters described in paragraph 130.10(d)(6) to be the minimum data and information that a state must assemble and evaluate when preparing lists in order for EPA to have an adequate basis to approve or disapprove the lists. States should obtain any other additional data and information needed to identify and determine as accurately as possible which waters and point sources to list.

These categories reflect what EPA considers to be the minimum existing and readily available water quality data and information that a state and EPA can reasonably obtain. This existing data includes data that states should have developed in the course of reviewing and revising water quality standards, evaluating needs for technology-based or water quality-based controls, developing total maximum daily loads (TMDLs), wasteload allocations and load allocations (WLAs/LAs), issuing permits, and monitoring to determine the effectiveness of pollution controls. Furthermore, EPA is requiring that the states assemble and evaluate this minimum existing and readily available data because it encourages cooperation and communication among the many Federal, state and local government agencies and private organizations that collect, analyze or report water quality data and information.

EPA is requiring that these waters be evaluated for the purposes of developing the three lists of waters required by section 304(l) because they are either waters which have been reported by the state or other government or private sector agencies as failing to meet water quality standards or as having a high potential for not meeting water quality standards, or they are waters which receive point source discharges. EPA believes that if a state evaluates all waters in these categories it will identify virtually all waters that may need to be listed.

Information and data about the categories of waters described in paragraph 130.10(d) are of two general types. The first is existing and readily available data and reports from Federal, state, local and private sectors. The second is dilution calculation results generated by EPA and the states for use as a screening tool. These two types of information are discussed below.

There are many existing lists, reports and assessments that provide valuable information to states when identifying and preparing lists of waters. New paragraph 130.10(d)(6) designates the minimum information and reports which each state must assemble and evaluate in order to identify waters that meet the section 304(l) statutory requirements for listing. These include state section 305(b) reports, Clean Lakes Assessments, the section 319 Nonpoint Source Assessments, the National Priority List prepared under CERCLA, reports of adverse water quality conditions by the International Joint Commission and the Great Lakes Water Quality Board, and the Toxic Chemical Release Inventory developed pursuant to Title III of the Superfund Amendments and Reauthorization Act of 1986, among others. Beyond waters identified by these specific reports, the final rule requires the state to obtain any existing and readily available data about other specific waters which should be considered for listing on one or more of the lists required by section 304(l); for example, waters where fishing

bans and recreational restrictions are in effect, waters which have had repeated fishkills, and waters where there are waterfowl or wildlife consumption advisories or bans. Appendix B of the Final Guidance for Implementation of Requirements under section 304(l) of the Clean Water Act as Amended (March 1988) lists other available data sources that should be consulted.

A few commenters requested that other reports or sources of data be cited in the regulations, to ensure that the states review them. EPA has not named these specific reports in the regulatory language because there are many reports or data sources that a state could use and they can not all be named specifically in the regulations. However, subparagraph 130.10(d)(6)(xiii) is broad enough that it includes any such reports or information sources that report on water quality. Also, EPA has mentioned many of these reports suggested by the commenters as examples of possible data and information sources.

The second general type of information that EPA is requiring that the states consider, as a minimum, is screening information developed using dilution calculations. Dilution calculations should be conducted to indicate possible excursions above numeric water quality criteria within state water quality standards (or EPA water quality criteria where state numeric criteria are not available). Dilution calculations should be performed for, but not limited to, all point source discharges of priority pollutants, ammonia and chlorine to help identify waters and dischargers for listing on any of the lists. At a minimum, waters with primary industrial major and minor point source dischargers, major publicly-owned treatment works (POTWs), and waters with other major point source dischargers must be screened for expected excursions above the water quality criteria by performing dilution calculations using site-specific data, or, if necessary, data based on national estimates. EPA emphasizes that to list a water on the Paragraph (B) list, the state does not necessarily need to have enough data to indicate exactly which point source or sources may be causing any observed or projected criteria excursions or use impairments. It is sufficient that the data indicate that the applicable water quality standards are not being achieved or are not expected to be achieved due entirely or substantially to discharges from point sources. After identifying the water for listing on the paragraph (B) list, the state should then obtain as much discharger-specific data as necessary to identify the dischargers which may be causing or expected to cause the criteria excursions, and then place these dischargers on the paragraph (C) list.

Where ambient data on criteria excursions are being used to identify waters, the state may use the criteria for designated use support outlined in Figure 1 of EPA's Guidelines for the Preparation of the 1988 State Water Quality Assessment section 305(b) Report. Figure 1 provides guidelines to states in determining the degree to which waters are supporting their designated uses based on the frequency of criteria excursions and comparison of mean values to criteria.

Some commenters said that reliance on existing and readily available data could lead to inaccurate or unreliable results and that EPA should clarify that states should make their listing decisions on existing and readily available accurate data. Also, EPA should allow states to use professional judgment in resolution of conflicting data. EPA expects the state to determine as much as possible the accuracy and validity of their existing and readily available data and information about the sixteen categories of waters, or about any other waters, when developing the lists. EPA does not expect the states to rely on old or inaccurate data or information. If the state finds that much of its existing and readily available data is unreliable, EPA strongly encourages the states to obtain more current additional data whenever possible. Also, EPA expects states to exercise best professional judgment when faced with conflicting data.

Some commenters felt that requiring the states to use all existing and readily available data about the sixteen categories of waters was too prescriptive or burdensome. EPA is requiring the states to examine the categories in order to ensure that all possible sources of existing and readily available data are considered. It may be that a state has found that a particular category of data is unsuitable for use. To accommodate this situation, the regulations provide that the state submit its reasons for a decision not to evaluate any particular category of waters. If a state demonstrates to EPA that it has reviewed all existing and readily available data about the sixteen categories as appropriate, it can reduce the "second-guessing" by EPA, which some commenters were concerned about, when EPA reviews the lists.

EPA's intent in requiring that states review and evaluate at a minimum all existing and readily available data on the sixteen categories of water in paragraph 130.10(d), is to be sure that EPA and the states cast a broad net in the list development and review process. The states are expected to review and evaluate these data for accuracy and reliability, determine which waters are candidates for listing, and then review and evaluate and gather, if necessary, more site-specific data on these candidates in order to make their final listing decisions. In short, these categories of waters are the minimum beginning universe of waters which states should evaluate for waters qualified for the section 304(l) lists. These latter would be the waters that the data and information show, after assurance of its reliability and the use of professional judgment, cannot reasonably be anticipated by the state to attain or maintain applicable water quality standards as described in section 304(l)(1) of the CWA.

b. *Documentation of Data and Methodologies.* Paragraph 130.10(d)(7) requires that each state submit to EPA, together with its lists of waters and sources, documentation of all data and methodologies used by the state to develop the lists.

Subparagraph (i) of (d)(7) requires each state to submit a description of the methodology used by the state to develop each of the lists of waters and point sources required by section 304(l). This description of methodology should include assumptions and criteria used by the state when reviewing and analyzing data and information.

Subparagraph (ii) requires the state to provide a description of the data and information used by the state, and to specifically address which of the categories of waters described in paragraph (d)(6) were used. If a state does not assemble and evaluate data about one of these categories, subparagraph (iii) requires the state to provide the rational for deciding not to do so as part of its documentation.

Subparagraph (iv) requires the state to provide any other information that the Regional Administrator requests in order to review the state's submission of lists. Specifically, subparagraph (iv) requires a state, if EPA requests, to demonstrate good cause for not including a water or discharger on one or more of the required section 304(l)(1) lists.

"Good cause" may include, but is not limited to, the following:

- More recent or more accurate data,
- More accurate water quality modeling,

• Flaws in the original analysis that led to the water being identified in one of the categories, or

• Changes in conditions, e.g., new control equipment, or elimination of discharges.

These above documentation requirements are necessary because a Regional Administrator's office may not maintain all the available water quality and discharger data for all of its states. Therefore, part of the review by EPA of a state's submission must necessarily include a review of the data, assumptions and criteria used by the state for listing waters and point sources to ensure that they are consistent with the statutory and regulatory requirements for listing. For example, a state's documentation should reflect that the state considered stormwater outfalls as a point source when determining whether a water is imparied due entirely or substantially to discharges from point sources.

Some commenters said that EPA's request for documentation in § 130.10(d)(7) is burdensome and without statutory authority. Section 304(l) requires EPA to review and approve or disapprove each state's lists. (See section III.D. of this preamble which discusses in detail EPA's authority to approve and disapprove lists.) EPA remains convinced that in order to review a state's lists adequately, the Agency must know on what basis the state made its decisions to list or not list waters and point sources, and must be able to review all existing and readily available data and information used for those decisions. Because this information is crucial to EPA's review of a state's lists, the Agency does not view these requirements to supply documentation on methodologies, criteria and assumptions as overly burdensome and did not revise the regulatory language as commenters requested. In addition, because the state or EPA must provide adequate public participation for these lists, the state should be documenting its decisions and mothodologies for this purpose. Therefore these requirements to develop and submit documentation should not represent a significant additional burden to the states.

Two commenters requested that the language in § 130.10(d)(7)(iv) which allows the Regional Administrator to request any other additional information be revised to restrict the Regional Administrator to requesting information that is reasonable, necessary or pertinent to determine the adequacy of the state's lists. EPA agrees with this comment and has incorporated it into the regulatory language at subparagraph 130.10(d)(7)(iv). Some commenters felt that the "good cause" language in this section is essentially "second-guessing" the state and is burdensome to the state. EPA relies on its rationale for requesting documentation, discussed above, for its decision not to revise this language pursuant to these comments. In addition, EPA views the procedure for a state to submit additional information as a way to ensure that EPA does not disapprove a state's decisions that are founded on an adequate basis. EPA emphasizes that a state does not have to automatically submit "good cause" when submitting its lists to EPA for review, but only when the Regional Administrator requests such information on specific waterbodies or dischargers.

c. *Review of Lists by EPA.* Section 304(1) requires that all states submit all four lists described above to EPA no later than February 4, 1989. Upon receiving the lists from each state, the Regional Administrator is required to review and then approve or disapprove each state's lists. If a state fails to submit a list or if a state submits an inadequate list, then EPA must either entirely or partially disapprove the list. Section 304(1)(2) gives EPA 120 days to approve or disapprove a state's list and where EPA entirely or partially disapproves a state's list, EPA will, in cooperation with the state, develop the final list.

In order for EPA to complete its review of a state's lists, the state must have met the data and documentation requirements in proposed paragraphs (6) and (7). The Regional Administrator will approve each list if the state has met the regulatory requirements for listing under 40 CFR 130.10, and disapprove each list that does not.

If, after reviewing the state lists, available data and any required documentation, the Regional Administrator is satisfied that the state has identified and appropriately listed all waters, then EPA will approve the lists. (See Section III.D of this preamble for a detailed discussion of review and approval and disapproval of lists and individual control strategies.)

Some commenters asked whether EPA is intending to apply these requirements to lists submitted before the final rule becomes effective, and argued that to do so would be to apply the regulation retroactively, which is prohibited. The regulations promulgated today will apply to all Regional decisions issued after the effective date of today's rule. EPA does not view this as applying the regulations retroactively. Rather, EPA is applying the criteria for review of lists to decisions it makes in the future.

Some commenters asked EPA to include in today's rule a procedure for removing waters or point sources from the section 304(l) lists. Listing of waters and point sources under section 304(l) is a one-time activity. Therefore, it is unnecessary to develop regulations for removing waters and point sources from a list. The public comment and review period provided by EPA or the state provides opportunity for waters or point sources to be deleted from, or added to, a list.

C. Individual Control Strategies

In addition to the four lists required by section 304(l)(1), the states must prepare and submit to EPA an individual control strategy (ICS) for each point source on the (C) list. This section describes what EPA will approve as an ICS.

On January 4, 1989, EPA codified sections 304(l)(1)(D), 304(l)(2), and 304(l)(3) of the CWA into a new section in Part 123—§ 123.46. Section 123.46(a) requries the states to submit ICSs to EPA on or before February 4, 1989, and § 123.46(b) requires EPA to approve or disapprove the ICSs by June 4, 1989.

Today's rules add new paragraphs (c)–(f) to § 123.46. Paragraph (c) defines an ICS. Paragraph (d) describes the petitions submitted under section 304(l)(3). Paragraph (e) describes the procedures EPA will use to approve or disapprove ICSs, and paragraph (f) establishes the criteria that EPA will use to evaluate an ICS.

Today's regulations also re-promulgate § 123.46(a). EPA originally promulgated this regulation on January 4, 1989, but it is necessary to amend this language so the regulation more accurately reflects EPA's approach for implementing section 304(l). The new language clarifies that an ICS is required for each point source under section 304(l)(1)(C) rather than each water segment identified under section 304(l)(1)(B).

1. Description of an Individual Control Strategy

Section 304(l)(1)(D) provides that an individual control strategy must "* * * produce a reduction in the discharge of toxic pollutants from point sources * * *" identified under section 304(l)(1)(C), which is "* * * sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than three years after the date of the establishment of such strategy." These elements of an individual control strategy are codified at 40 CFR 123.46(a).

Today's regulations define an ICS as a final NPDES permit, a draft NPDES permit with a schedule for issuing a final permit, or, for an on-site response action under CERCLA, the decision document for the response action. EPA received many comments on the definition of an ICS. The following preamble discussion responds to these comments and clarifies some aspects of the definition.

EPA has determined that, for point source discharges to meet the requirements of section 304(l), an ICS must consist of a draft or final NPDES permit for each point source on the (C) list, plus supporting documentation that the permit has adequately considered the impact from other discharges on the identified segment. ICSs are required for both currently permitted discharges and for point sources identified on the (C) list that do not have NPDES permits. A sufficient ICS, therefore, consists of the controls for each such point source (NPDES permit limitations and a schedule for achieving such limitations if they cannot be achieved upon permit issuance) and documentation which shows that the controls selected are appropriate and adequate (*i.e.*, fact sheets with information on total maximum daily loads and wasteload allocations). Enforcement orders and consent decrees, by themselves, are not adequate substitutes for ICSs. However, an enforcement order or judicial decree based on a final and sufficient NPDES permit may be a part of the supporting documentation for the ICS, provided the ICS satisfies all applicable provisions of section 304(l) of the CWA.

EPA believes this is the correct interpretation of the term "individual control strategy" because paragraph (D) of section 304(l)(1) states that an ICS must reduce discharges of toxic pollutants through "effluent limitations under section 402" of the CWA. Section 402 of the CWA establishes the NPDES program, and the effluent limitations in NPDES permits are the primary control mechanism that EPA and the states use to reduce point source discharges of pollutants. By inserting a reference to the NPDES program in paragraph (D) EPA believes that Congress intended for an NPDES permit to be the essential element of an ICS.

The comments on EPA's definition of an ICS focused on two issues: First, an ICS should include more than just NPDES permits for point sources; and second an ICS should be developed for a water segment, not for each individual point source. EPA considered these comments but decided to promulgate the definition unchanged, for the reasons discussed below.

a. *Types of controls.* In arguing that an ICS should be broader than an NPDES permit, some commenters requested that EPA approve state water quality management plans as ICSs. EPA remains convinced that such plans would not satisfy the requirements of section 304(1) because these plans are not directly enforceable (although they are binding on the states) and therefore they cannot ensure, by themselves, that limitations will be achieved within the deadlines of section 304(l). This problem of enforceability could be solved by defining ICSs to include not only the plans but also the permits necessary to implement them. EPA is rejecting such an approach because the two years allowed by section 304(l) for developing ICSs does not allow for a sequential listing of waters, development of state plans and development of permits based on the plans. To meet the section 304(l) deadlines states would, for the most part, be compelled to develop permits before completing the planning process. EPA believes that this suggestion would not make good use of the planning process, and would consume resources without improving ICSs.

Several commenters argued that EPA's definition of an ICS makes point sources responsible for nonpoint source discharges and urged EPA to require nonpoint source controls as a part of ICSs. EPA agrees with the commenters that nonpoint sources can be an important toxics problem on some of the waters identified for control under section 304(l). EPA is not incorporating nonpoint source controls into ICSs because EPA does not believe that Congress gave EPA the authority to impose nonpoint source controls as a part of an ICS. The statute clearly contemplates the implementation of ICSs through NPDES permits (through the reference to "effluent limitations under section 402"), which only provide point source controls. The legislative history supports this interpretation. *See* Rep. No. 99–1004, 99th Cong., 2d Sess. pages 126–130. Furthermore, Congress added section 319, which addresses nonpoint source programs, at the same time as section 304(l). Section 319 requires identification of waters that need nonpoint source controls to meet water quality standards, and requires submission of management programs which identify, among other things, methods for controlling nonpoint sources of pollution. Because Congress wrote a separate section for nonpoint source programs, EPA does not believe that Congress intended for EPA to establish a nonpoint source control program under section 304(l). As stated in the proposal, EPA urges states to implement nonpoint source controls wherever necessary to meet water quality standards. To further encourage nonpoint source controls EPA interprets the statute's mandate to consider "existing controls on point and nonpoint sources of pollution," section 304(l)(1)(D), as including nonpoint source controls that will be in place by June of 1992. (EPA explains the meaning of this interpretation more thoroughly in the March, 1988 guidance.)

Some commenters argued that EPA's definition of an ICS does not account for multiple discharges to a receiving water. EPA disagrees. An ICS must be consistent with any total maximum daily loads (TMDLs) for the water segment and wasteload allocations developed for the discharge (where the wasteload allocation is approved by EPA pursuant to 40 CFR 130.7). An ICS must also include documentation indicating that a water will meet all applicable water quality standards. EPA believes this definition implements the congressional desire for coordination in the evaluation and control of point sources discharging the same pollutants to the same water segments.

b. *EPA's paint source-based approach.* EPA's definition of an ICS and the amendments to § 123.46(a) require an ICS for each point source on the (C) list. Some commenters noted that section 304(l)(1)(D) requires ICSs for "each such segment" identified in paragraph (B). EPA acknowledges that section 304(l)(1)(D) refers to waterbody segments. EPA considered defining an ICS as the aggregation of all permits and supporting documentation for a water segment. EPA is not adopting this expanded definition of an ICS because congressional intent in enacting section 304(l) is better accomplished by retaining the proposed definition. If permits were aggregated to form an ICS for a water segment then the ICS could not be approved, and in many cases would not be implemented, until all permits for the water segment were developed and incorporated into the ICS. Furthermore, the aggregation of permits would result in the same level of control as single-permit ICSs. Given the deadlines that Congress imposed in section 304(l) it is clear that Congress established a premium on expeditious attainment of water quality standards. EPA sees no reason to delay an ICS until all permits for a water segment are developed. In addition to finalizing the proposed definition, EPA is amending § 123.46(a) to make clear that ICSs should be submitted for each point source on the (C) list.

EPA rejected the idea of creating a new mechanism for controlling point sources under section 304(l) because a new mechanism is not necessary to implement section 304(l), and the deadlines in section 304(l) do not allow enough time to design, promulgate and implement a new mechanism for controlling discharges of pollutants to surface waters.

In urging EPA to take a segment-based approach some commenters argued that such an approach is necessary to account for multiple discharges to a water segment. However, an ICS must be consistent with wasteload allocations and must include documentation indicating that the effluent limitations are sufficient to meet the wasteload allocation. EPA believes that these requirements implement the congressional desire for coordination when evaluating and controlling point sources discharges of the same pollutant to the same water segment.

c. *Approval of permits that are not yet effective.* Where a state demonstrates that a final permit cannot be issued by February 4, 1989, a draft permit and supporting documentation may qualify as an ICS. However, such a draft permit must accompanied by a schedule indicating that the final permit will be issued on or before February 4, 1990. One commenter asked EPA to require a more burdensome showing from states before allowing until February 4, 1990 to issue the final permit. EPA believes that the section 304(l) requirement for achieving controls as soon as possible along with a deadline for issuing a final permit is sufficient to guide the states and regions in meeting the requirements of section 304(l).

EPA's definition of an ICS includes draft permits because the description of an ICS in section 304(l)(1)(D) allows for such an interpretation, and because it is unrealistic to expect final NPDES permits to be prepared for every point source on the (C) lists within the ambitious deadlines of section 304(l). Water quality-based effluent limits can be technically difficult to prepare and are often subject to extensive public comment during the permit development process. Today's proposal to include draft permits in the definition of an ICS requires the permitting authority to prepare the effluent limitations required by § 304(l)(1)(D), but at the same time, gives the states the necessary flexibility to meet the ambitious deadlines of section 304(l).

A draft permit prepared as an ICS under section 304(l) must be issued as a final permit within one year of establishment of the ICS. Therefore, if a state submits a draft permit to EPA on or before February 4, 1989, the ICS must be issued as a final NPDES permit on or before February 4, 1990. In the case of state-issued ICSs, the one year time period allows EPA to exercise its authority under section 304(l)(2) if a state fails to issue a final NPDES permit within the one year time period. In the case of EPA-issued ICSs, the ICS may be a draft permit, and like the states, EPA would also have up to one year in which to issue a final NPDES permit.

Some commenters argued that EPA's choice of a one year deadline for a state to finalize draft permits was arbitrary and the connection to EPA's implementation of section 304(l) was too tenuous to support it. EPA believes that to ensure success of the section 304(l) program no ICS should be unconditionally approved until it represents the state's final decision to implement controls. If an approval contingent upon a final decision by a state must be subsequently disapproved, EPA must have sufficient time to prepare an ICS by its deadline of June 4, 1990. EPA believes that allowing states more than one year to issue final permits would jeopardize EPA's ability to meet the section 304(l) deadlines. In addition, EPA believes that one year is sufficient time for the states to develop final permits from approved drafts.

Where EPA approves a draft permit as an ICS, EPA's approval is automatically conditioned on the state's meeting the schedule for issuing the final permit. If a state fails to meet the schedule for issuing the final permit, then EPA may exercise its authority to disapprove the ICS and implement section 304(l).

An NPDES permit usually becomes effective 30 days after a final decision to issue or modify the permit unless an evidentiary hearing is requested under 40 CFR 124.74. Evidentiary hearings can delay the effective date of the conditions challenged in the permit. Because these potential delays could jeopardize the ability of EPA and the states to meet the deadlines in section 304(l), and because a final permit reflects the final decision of the permitting authority with respect to the permit, EPA will accept a final (but not necessarily fully effective) NPDES permit as an ICS.

d. *CERCLA sites.* As EPA noted in the proposal, it is possible that some CERCLA sites will be subject to section 304(l) because these sites can be point source discharges of a priority pollutant. If a CERCLA site qualifies for the (C) list under section 304(l), then the site must also satisfy section 304(l)(1)(D) relating to ICSs, including the deadlines in section 304(l). For "off-site" response actions, the CERCLA site discharger must obtain an NPDES permit, and will therefore satisfy section 304(l) in the same way as other point sources subject to section 304(l)(1)(C). For "on-site" actions however, the discharger must meet all "applicable or relevant and appropriate requirements" of the CWA, but is exempt under section 121 of CERCLA from the procedural requirements of the NPDES permitting process. Therefore, on-site actions that are subject to section 304(l) will satisfy paragraph (D) of section 304(l) through compliance with applicable or relevant and appropriate requirements under the CWA, as described in the decision document for that on-site response action. Although EPA expects that there will be relatively few CERCLA sites subject to section 304(l), EPA emphasizes that the ICS for any such CERCLA site is subject to the deadlines in section 304(l). The proposed definition of an ICS at § 123.46(c) includes CERCLA decision documents for on-site response actions.

e. *Non-approved states.* A state that is not approved by EPA to administer the NPDES program will fulfill its obligations under section 304(l)(1)(D) by preparing and submitting wasteload allocations to the Regional Offices for EPA review and approval. Under the NPDES program, non-approved states assist EPA in issuing permits by providing EPA with background information, wasteload allocations, and certifications under section 401 of the CWA. EPA uses the wasteload allocations to prepare the NPDES permits for the state. The role of non-approved states with respect to ICSs will be the same as their role with respect to NPDES permits. Non-approved states are responsible for preparing wasteload allocations for each point source on the (C) list. The Regional Offices will prepare and issue, in cooperation with non-approved states, final NPDES permits in the state. EPA received comments both supporting and criticizing this interpretation of the role of non-approved states. One commenter argued that the minimal role of non-approved states undermines EPA's definition of an ICS as an NPDES permit. EPA disagrees with the commenter because section 304(l)(1)(D) provides that individual control strategies are to achieve reductions in discharges from point sources "through the establishment of effluent limitations under section 402." Non-approved states do not have the authority to establish effluent limitations in NPDES permits. Therefore, the role of non-approved states is necessarily different from that of approved states in implementing

section 304(l). Furthermore, a non-approved state's role will not be minimal. Preparing WLA's and providing section 401 certifications requires the state to be fully involved in the preparation of an ICS. Although state certifications under section 401 of the CWA are required for ICSs, EPA's regulations at 40 CFR 124.53 provide that a state will be deemed to waive its right to certify under section 401 of the CWA if the state fails to exercise this right within 60 days from the date that EPA mails the draft permit to the state.

Section 304(l) establishes a three-year deadline for achieving water quality standards, whereas section 301(b)(1)(C) requires water quality standards to be met by July 1, 1977. The different deadlines in the two sections raise the question of how the two sections interact. EPA believes that Congress did not intend for section 304(l) to repeal the July 1977 deadline in section 301(b)(1)(C). Rather, Congress recognized that permittees will need a reasonable amount of time, not to exceed three years, to comply with new effluent limits that are necessary to achieve new water quality standards, or re-interpretations of existing water quality standards. On the other hand, there is no indication that Congress intended for section 304(l) to be an extension for permittees who have already failed to comply with effluent limitations. An ICS may not extend a compliance schedule for achieving effluent limits if the permittee has already failed to abide by the compliance schedule. Also, where new effluent limits will require construction or other activities (*e.g.* wastewater treatment system optimization, pretreatment program implementation, etc.) an ICS may include a compliance schedule for such activities. The reason for this distinction is that section 304(l) requires that water quality standards be met "as soon as possible." If a permit already includes a compliance schedule, then the permitting authority has already given the permittee a reasonable time to comply with effluent limits and therefore achieve water quality standards. Therefore, where a compliance schedule has not been met, the ICS cannot extend the schedule. Rather, an enforcement order may be required as part of the supporting documentation for the ICS.

EPA received comments requesting EPA to extend the deadline for compliance with the effluent limits imposed pursuant to section 304(l). EPA does not have the authority to extend these statutory deadlines. EPA does, however, have the authority to exercise its enforcement discretion. The following discussion explains the range of actions EPA may take in appropriate cases.

It is possible that some permittees may not meet the effluent limits on or before the deadline in section 304(l) for achieving applicable water quality standards. For example, the treatment technology may not be immediately available to reduce the discharge of a priority pollutant to the levels necessary to protect aquatic life and human health. In such cases, the NPDES permit may contain a schedule of compliance that leads to compliance with section 304(l) and other requirements of the CWA. (Note, however, that a schedule of compliance must require compliance no later than applicable statutory deadlines.)

If the permittee does not achieve effluent limits within the time specified in the permit (which must be no later than the applicable deadline in section 304(l)), the CWA provides for a range of enforcement actions. These actions are provided for in section 309 of the CWA and include administrative orders, administrative penalty orders, and civil or criminal judicial actions. The appropriate enforcement response is determined on a case-by-case basis. In limited cases in the past, EPA has issued administrative orders concurrently with an NPDES permit where the effluent limits are effective immediately upon permit issuance. Factors which are considered when determining the appropriate enforcement response include but are not limited to: the potential impact of the discharge on human health or the environment; the compliance history of the permittee; and any good faith efforts by the permittee to achieve compliance.

EPA recognizes that there may be situations where compliance with applicable water quality standards will require ICSs for a number of point sources on a stream segment, or may require nonpoint source controls. More than one point source may contribute the same priority pollutant to a waterbody identified on the "B" list, and therefore, controls on only one point source may not achieve water quality standards. In other cases where there are significant loadings of a toxic pollutant from nonpoint sources, effluent limits for the point sources, by themselves, may not attain and maintain applicable water quality standards. (See the discussion of the phrase "entirely or substantially" in section III.B.2 of this preamble.) In these cases, it is EPA's position that an ICS may satisfy the language in paragraph (D) of section 304(l), and in § 123.46(c), (which require the ICS to achieve water quality standards), if the effluent limits for the point sources are consistent with a wasteload allocation for the point source. This approach allows the permitting authority to develop an ICS for each point source that, together with other point or nonpoint source controls, is designed to attain and maintain applicable water quality standards. This approach is also consistent with EPA's existing surface water toxics control program, in which each point source is obligated to reduce its contribution of a pollutant according to its wasteload allocation. The result of this approach should be substantial reductions in point source contributions of priority pollutants, which is consistent with Congress' intent in enacting section 304(l).

Where a waterbody on the (B) list has a significant nonpoint source of a priority pollutant that could impede progress toward achieving water quality standards, EPA and the states should address the nonpoint source using all available authorities including state and local authorities and section 319 of the CWA. (Note that where point and nonpoint sources on the same waterbody contribute different priority pollutants, the degree of nonpoint source contributions will not affect the decision whether to list the water under paragraph B of section 304(l)(1). For more information see the discussion of the (B) list in section III.B of this preamble.)

Nonpoint source loadings are included in the process of developing water quality-based effluent limits for point sources because nonpoint sources are considered when developing TMDLs and WLAs under section 303(d) of the CWA. EPA's regulations at 40 CFR 130.2 require that TMDLs account for nonpoint source loadings. The regulations also specify that TMDLs provide for "tradeoffs" between point sources and nonpoint sources, and that TMDLs submitted under 40 CFR 130.7 must be approved by EPA. EPA emphasizes that nonpoint source controls can make significant improvements in water quality. For many waters, the most significant sources of pollutants are nonpoint sources. Nonpoint source controls are, in some cases, more cost-effective than point source controls, and the regulations at 40 CFR 130.2 provide that the relative cost of point source and nonpoint source controls may be considered (among other factors such as reliability and technical achievability) when preparing TMDLs for the pollutant

of concern. Where possible, EPA encourages the states to use nonpoint source controls to meet the objectives of section 304(l) of the CWA to the extent that nonpoint source controls are adopted and implemented through appropriate state and Federal authorities.

Section III.B.2 of this preamble explains that a waterbody may qualify for the (B) list if the source of the priority pollutant is sediment deposited or contaminated due to the discharge of an active point source subject to section 402 of the CWA. For example, the effluent from an active point source discharge may contain priority pollutants that are deposited as sediments in the receiving water, or the effluent may contaminate existing sediment in the receiving water. In such cases the sediment can interfere with the designated use of the water, and the releases can cause excursions above other applicable water quality standards. Where contaminated sediment is caused by an active point source, it is EPA's position that the contamination should be characterized as "due to the discharge from a point source". Several commenters said that an NPDES permit could not require dredging of sediments, and that EPA should not attempt to write ICSs for these sources based on contamination of sediments. Today's regulations do not require this. Rather, EPA is requiring ICSs to contain the necessary effluent limits to prevent further contamination of the sediment and water column. It is EPA's goal that the ICSs for these active point sources achieve applicable water quality standrds within the time frames of section 304(l). However, because controls for in-place sediments raise unique problems for the NPDES program, an ICS for such a point source should, at a minimum, prevent additional accumulation or contamination of the sediments that are the source of the toxic pollutant.

Under EPA's interpretation of section 304(l), all permits for point sources subject to section 304(l)(1)(C), including final or effective permits, must be included in the review required by section 304(l). It is EPA's position that section 304(l) gives EPA the authority to reopen a permit before the term of the permit expires regardless of whether the permit has a reopener clause.

EPA's authority under section 304(l) to reopen final and effective permits is supported by the requirement that EPA implement ICSs where EPA disapproves, or the state fails to submit an adequate ICS. Given that ICSs must be implemented through limitations under section 402 the alternatives to reopening permits would not necessarily meet the requirements of section 304(l)(1)(D). The alternatives are: (1) Allow ICSs to be unenforceable plans that might incorporate limitations under section 402 at some later time; (2) omit certain point sources from the section 304(l) process because the permits for these point sources are not due for review under 40 CFR 123.44; or (3) wait until a permit expires (possibly after the deadlines in section 304(l)) to change the terms of the permit. None of these alternatives would satisfy the requirement that ICSs attain water quality standards by the deadlines in section 304(l). Therefore, EPA will review, and possibly disapprove under section 304(l), final or effective permits regardless of whether the permit has a reopener clause.

Some commenters thought it inequitable to reopen a permit before it expires. EPA has attempted to ease the planning problems created by an unanticipated change in permit terms by requiring that the permit be in draft form three years before the permittee is required to comply with the limits, and in final form two or more years before such compliance is required. Furthermore, the definition of an ICS as a draft or final NPDES permit, and the use of compliance schedules, give the permittees added flexibility in meeting the requirements of section 304(l).

One commenter requested that EPA apply the requirements of 40 CFR 123.44 (which describe the procedures for EPA disapproval of state-issued NPDES permits) to disapproval of ICSs in order to implement the congressional requirement that EPA issue the ICSs "in cooperation with the state and after opportunity for public comment." The commenter seemed to indicate that EPA should apply these processes before the June 4, 1989 disapproval of a state's ICS. Although EPA has solicited extensive informal cooperation with the states in the approval/disapproval process, EPA believes that the formal requirement for cooperation with the states applies during EPA's development of an ICS after disapproval. As the following discussion indicates, EPA does not believe that applying the requirements of § 123.44 would be the best way to incorporate the requirement for cooperation with the state in the development of the ICS.

As EPA stated in the proposal, to implement section 304(l), EPA will use existing procedures where possible. However, EPA will use the section 304(l) process where pre-existing regulatory procedures are inconsistent with the section 304(l) review process. EPA is not requiring compliance with § 123.44 (the procedures for EPA's objections to state permits) because it would be inconsistent with the section 304(l) review process. Section 402 of the CWA establishes conditions that are prerequisites to EPA's authority to issue permits in approved states. For example, section 402 requires an approved state to submit a permit to EPA for review and requires EPA to object in writing within ninety days, as prerequisites to EPA's authority to issue the permit. Although the procedures under section 304(l) provide an equivalent opportunity for state-EPA cooperation in the development of permits, section 304(l) also gives EPA the authority to issue permits where the state fails to issue permits that satisfy section 304(l). Under the existing regulations the state submits a proposed permit to EPA, and EPA then has 90 days to object to the terms of the permit. After EPA's objection, the state has 90 days to request a public hearing or to re-submit the permit to EPA. If EPA grants a public hearing, the state may re-submit the permit within 30 days after the Administrator issues the post-hearing decision. If the state does not re-submit the permit within the time limits in § 123.44, the exclusive authority to issue the permit passes to EPA.

These procedures are not appropriate for the section 304(l) review process. First, EPA must review final or effective permits in the ICS review process, not just draft or proposed permits. Second, section 304(l) gives EPA a deadline by which to review an ICS, not the 90 days provided for in § 123.44. Third, section 304(l) makes no provision for the state to re-submit a disapproved ICS. Rather, section 304(l) directs EPA to work in cooperation with the state in preparing and implementing EPA's ICSs. Finally, section 304(l) requires EPA to provide for public notice and an opportunity to comment on the ICSs, not just an opportunity to request a hearing as provided under § 123.44. Taken as a whole the ICS review process is inconsistent with the permit review process under § 123.44. Even though EPA is not requiring the use of the procedures in § 123.46, EPA is sensitive to the commenter's concern that states be as involved as possible in the issuance of any disapproved ICS. EPA regions are required to consult with the state in the development of any ICSs by the language that was codified at § 123.46(a). Although EPA has a limited time in which to develop the ICS, EPA will seek a partnership with the states in the process. If EPA issues the permit the

state would review and certify the permit under section 401 of the CWA. In addition, if EPA issues the permit, EPA will provide for public comment on the ICS through the permit development process, which will provide another opportunity for the state to comment on EPA's proposed ICS.

For disapproved ICSs, EPA will use the existing permit issuance procedures in Part 124 to issue these ICSs. After EPA disapproves an ICS that is a draft or final NPDES permit, the Agency will use the procedures described in 40 CFR Part 124 to issue a final ICS. If EPA disapproves a decision document for an on-site response action under CERCLA, the Agency will use the procedures under CERCLA for issuing these ICSs.

Some commenters asked EPA to explain the status of permits issued by EPA in approved states. EPA intends to treat permits issued by EPA in authorized states in the same manner as EPA-issued permits following EPA objection to a state-issued permit. The Regional Administrator will issue the permit in accordance with 40 CFR Parts 121, 122, and 124 and any other guidelines and requirements of the CWA.

EPA expects that many of the ICSs that are subject to section 304(l) will be final state-issued permits that EPA has previously reviewed under 40 CFR Part 123. When a state submits an ICS to EPA for review under section 304(l), any previous EPA decision to not object to the permit under Part 123 does not waive EPA's authority to review and approve or disapprove the ICS under section 304(l). If EPA reviewed a permit under Part 123, EPA reserves the right to review the same permit under the provisions of section 304(l).

2. Technical Review Criteria. Section 304(l) requires an ICS to achieve applicable water quality standards as soon as possible but not later than three years after the ICS is established. Although this language establishes a general standard for evaluating an ICS, the language says little about the permit conditions necessary to ensure that applicable water quality standards will be achieved. EPA will use the review criteria in 40 CFR 123.46(f) to evaluate whether an ICS meets the requirements of section 304(l). The criteria that EPA will use to review ICSs are the same as the criteria EPA uses to review the water quality-based effluent limits for any permit. Section III.A of this preamble discusses amendments to § 122.44(d). These amendments describe how to establish water quality-based effluent limits in NPDES permits. Effluent limits derived from water quality standards must satisfy § 122.44(d). The regulations at § 123.46(f), provide that ICSs shall be reviewed according to the criteria in § 122.44(d). EPA is also amending § 123.44(c) to incorporate the review criteria for ICSs into EPA's criteria for reviewing other permits not subject to section 304(l). Section 123.44(c) enumerates the criteria that EPA may use to review state-issued permits. By using the same criteria for reviewing ICSs and for reviewing permits that are not subject to section 304(l), EPA is ensuring consistency in reviewing the technical adequacy of these two categories of permits.

Some commenters asked whether EPA was intending to apply these requirements to lists and ICSs submitted before this final rule becomes effective, and argued that to do so would be to apply the regulation retroactively, which is prohibited. The regulations promulgated today will apply to EPA's decisions issued after the effective date of today's regulations. EPA does not view this as applying the regulations retroactively. Rather, EPA is applying the criteria for review of lists and ICSs to decisions it makes after the effective date of these regulations. Therefore, although these regulations will not apply retroactively, EPA anticipates that the concepts embodied in the rule would apply in most cases of EPA's review of lists and ICSs unless the discharger or the state can show why they should not apply.

Where EPA disapproves an ICS, section 304(l)(3) requires EPA to implement section 304(l) in a manner which will achieve applicable water quality standards on or before June 4, 1993. A final permit issued after EPA disapproves the permit under section 304(l) must include language in the fact sheet or statement of basis that identifies the permit as an ICS that satisfies the requirements of section 304(l) of the CWA. This requirement is similar to the language in draft permits subject to section 304(l) which identifies the permit as an ICS. The language in the final permit will identify for the public and the regulated community those ICSs which satisfy the requirements of section 304(l).

D. EPA Review of Lists and Individual Control Strategies

Section 304(l) requires EPA to review and approve or disapprove the lists and ICSs submitted by a state. If a state fails to submit the lists or ICSs, or if a state submits inadequate lists or ICSs, then EPA must disapprove the lists or ICSs. Section 304(l)(2) gives EPA 120 days to approve or disapprove a state's ICSs, and where EPA disapproves an ICS, section 304(l)(3) requires EPA to implement section 304(l)(1) on or before June 4, 1990. Today's rules establish the same review procedures for the lists as for ICSs. Although the deadline established for ICSs does not explicitly apply to EPA's review of lists, EPA determined that it would not be appropriate for EPA to establish different deadlines for the approval of lists. Some commenters argued that EPA does not have the authority to approve or disapprove lists because section 304(l)(2) speaks only of the disapproval of ICSs. EPA believes however that the Agency is authorized to review both the lists and ICSs. First, the introduction in section 304(l)(1) requires all the lists and ICSs to be submitted "to the Administrator for review, approval, and implementation * * *." EPA's final rulemaking of January 4, 1989 codifies this language at 40 CFR 123.46(a) and 130.10(d). Review and approval would be meaningless if the statute did not allow disapproval where the review reveals inadequacies in the lists submitted. Second, section 304(l) requires the Administrator to prepare ICSs where the state fails to submit them. EPA believes that this provision would not make sense if EPA did not also have the authority to disapprove a state's decision to not submit an ICS to EPA for review. Such a disapproval depends on a review and possible disapproval of at least the paragraph (B) lists submitted under section 304(l)(1).

The first step in the review process occurred when the states submitted their lists and ICSs to the Regional Offices for review. (The state's deadline for submitting the lists and ICSs was February 4, 1989.) The Regional Offices must approve or disapprove the lists and ICSs by June 4, 1989.

Several commenters asked how the process subsequent to the initial decision would work. The next steps in the process depend on the Regional Administrator's decision of approval or disapproval. If the Regional Administrator approves a state's decisions with respect to the lists of waters and ICSs, and decides that additional public participation is unnecessary (see paragraph 2 below) the decision will be final and the permits will be implemented according to the normal permitting procedures (including permit appeal, judicial review, enforcement, etc.). If the Regional Administrator takes public comment on the lists and ICSs then the region will consider the comments and issue another decision regarding the lists and ICSs in approximately January of

1990, but may take until June 4, 1990 to issue ICSs (where necessary).

1. Partial Approval and Disapproval of State Submittals

Section 304(l) gives EPA the discretion to approve or disapprove an entire list of waters or point sources, or to approve or disapprove individual waters on the list, or individual point sources on the (C) list. EPA has the same discretion to approve or disapprove one or more ICSs. The basis for this conclusion is the requirement in section 304(l) that EPA implement the listing and ICS requirements of the statute where the state fails to submit an ICS in accordance with paragraph section 304(l)(1). Submission of an ICS in accordance with this paragraph includes listing the water where appropriate, and preparing an adequate ICS. For simplicity EPA has decided to refer to approvals or disapprovals of a listed waterbody rather than an entire list of waterbodies.

As described in section III.B.1 of this preamble, section 304(l) requires each state to submit three lists of waters to EPA. EPA will review each waterbody on each of the three lists. If the waterbody meets the criteria described in the regulations at § 130.10(d) of today's rulemaking, then EPA will approve the state's decision to list that waterbody. If EPA identifies a waterbody that qualifies for one or more of the three lists of waters, and the state had not included the waterbody on the appropriate list(s), then EPA will disapprove the state's decision to not list the waterbody under the applicable paragraph(s) in its notice of approval and disapproval. For example, if a state included a waterbody on the (A)(i) list, but not on the (B) list, and if EPA determined that the waterbody qualified for both lists, then EPA would approve the decision to list the waterbody on the (A)(i) list, but would disapprove the state's decision to not place the waterbody on the (B) list. Another example is where a state does not include a waterbody on any of the three lists, but EPA determines that the waterbody qualifies for one or more of the lists. EPA would disapprove the state's decision to not list the waterbody under each paragraph for which the waterbody qualifies.

EPA also has the authority to disapprove the listing of a waterbody by a state if the waterbody does not qualify for the list. For example, if the state includes a waterbody on the (B) list, and EPA determines that the waterbody does not qualify for the (B) list, EPA would disapprove the state's listing of the waterbody on the (B) list, and indicate this decision in EPA's notice of approval or disapproval.

EPA will also review each point source on the (C) list. EPA will approve the listing of each point source that meets the criteria in section 304(l)(1)(C). EPA will disapprove the listing of any point source that does not satisfy section 304(l)(1)(C), and will disapprove a state's decision to not list any point source that meets the criteria in section 304(l)(1)(C).

Like EPA's review of individual waters, EPA will review each ICS, and will approve each ICS submitted by a state that meets the requirements of an ICS. EPA will also disapprove a state's decision to not submit an ICS if EPA determines that the state should have included the ICS in its submittal to EPA. The notice of approval and disapproval, explained in the following section, will include EPA's decisions with respect to each water, point source, and ICS.

2. Public Participation

The only explicit requirement for public participation in section 304(l) is under section 304(l)(3) of the CWA. Under this section, if a state fails to submit one or more ICSs, or if EPA disapproves one or more ICSs, then EPA must implement the requirements of section 304(l)(1) within one year after notice and opportunity for public comment. This section describes the additional public participation procedures that EPA will conduct during the section 304(l) process. In summary, whether EPA will be required to conduct public participation will depend on two factors: the existence of either factor will be enough to trigger the notice and comment requirements. The first factor is whether the state conducted adequate public participation in its development of the lists and ICSs: if it did not then EPA will do so. The second factor is whether EPA is disapproving any of a state's decisions: any disapprovals will be subject to public comment. In addition, the regulations allow the Regional Administrator to request public comment when he believes that it would be useful. Today's regulations on public participation amend § 130.10(d) (relating to lists of waters), and § 123.46(c) (relating to ICSs).

EPA received a number of comments objecting to what the commenters perceived as a new requirement for public participation in the development of the lists and ICSs under section 304(l). They argued that the states could not comply with such a requirement when it was only proposed a short time before the lists and ICSs were due. Commenters also argued that section 304(l) does not require public participation, and some claimed that EPA does not have the authority under the CWA to take public comment on the lists and ICSs. EPA emphasizes that these regulations do not require any state public participation procedures under section 304(l). Instead the proposed regulations, and the regulations promulgated today, require the Regional Administrators to give the public an opportunity to comment on the lists and ICSs if the state has not provided such an opportunity. Where the state has provided such an opportunity then EPA believes it will be appropriate in many cases to rely on the state's public participation procedures rather than duplicating them. The principal situation in which the Regions will take public comment on the state's section 304(l) submissions is where EPA is disapproving part of a state's submission (in which case EPA will always provide an opportunity for comment on the disapprovals). There may be some cases where the state has provided adequate opportunity for comment, and where the Region approves a state's entire submission but the Regional Administrator believes that additional public comment will be useful. This could occur if, for example, a Region receives a request from the public with reasons why an additional comment period is warranted. In such a case the regulations leave the decision of whether to provide for comment to the discretion of the Regional Administrator.

EPA received comments questioning its authority to conduct public participation where the statute does not specifically require it. EPA believes that section 501 provides authority and section 101(e) encourages EPA to provide an opportunity for public participation.

One commenter argued that EPA should provide for public comment on EPA's decisions for all states. The commenter argued that groups interested in the section 304(l) process did not know that they would be required to rely on only the state participation procedures. EPA is not persuaded by this argument. First, the guidance published in March 1988 alerted interested persons that EPA might rely on state public participation procedures in its review process (see EPA Guidance pp. 35–39). Second, EPA believes that interested persons should present all arguments to the states, where an opportunity is provided. In general EPA has a strong commitment to providing adequate public participation in all programs. At the same time EPA wants to avoid redundant procedures

that may simply waste resources of the states, the public and EPA and delay the implemention of section 304(l).

EPA intends to rely, to the extent possible, on state public participation procedures. EPA has encouraged the states to provide for full public participation when developing their lists and ICSs under section 304(l). Adequate state public participation procedures must, at a minimum, provide for public notice and an opportunity to comment on the state's lists and ICSs. Parts 25 and 124 of EPA's regulations describe procedures for public notice and comment that states may use under section 304(l). Where a state does provide adequate public participation on the lists and ICSs, and where the Regional Administrator approves all of a state's decisions with respect to the lists and ICSs, today's regulations give the Regional Administrator the discretion to forego an additional round of notice and comment on the lists and ICSs.

Where the Regional Administrator determines that a state did not provide for adequate notice and opportunity to comment on the lists and ICSs, EPA's notice of approval or disapproval must include all approvals and disapprovals. Such notice would include all of EPA's approvals and disapprovals for all waters and ICSs subject to section 304(l).

If a state provides for adequate public participation, but the Regional Administrator disapproves any of a state's decisions with respect to the waters, point sources, or ICSs, then EPA's notice must include each of the Agency's disapprovals. In this case it is not necessary for the notice to include EPA's approvals of a state's decisions under section 304(l). However, the Regional Administrator has the discretion to include EPA's approvals in the notice provided under section 304(l). (*See* 40 CFR §§ 123.46(e) and 130.10(d)(7).)

The final rules require the Regional Offices to mail a copy of the notice to the appropriate state Director. The final rule requires the Regional Administrator to publish a notice of availability, either: (a) in a daily or weekly newspaper with state-wide circulation, or (b) in the Federal Register. (*See* 40 CFR 123.46(e) and 130.10(d)(10).) The notice of availability tells the public where to obtain copies of EPA's notice of approval or disapproval, but in most cases will not list all the approvals and disapprovals. Under today's rules, public participation for the lists and ICSs occurs at the same time, and the Regional Offices will probably use the same notice for the lists and ICSs.

EPA is adding the option to substitute Federal Register notice for notice in a state newspaper because in some situations the Federal Register may be a more effective way to reach an interested audience than a state newspaper. Furthermore, some states do not have a newspaper that has statewide circulation. The notice in the Federal Register will not substitute for the notice that is required to be mailed directly to interested persons.

EPA considered providing notice and an opportunity for comment on a state's submittal before issuing a notice of approval or disapproval. EPA rejected this approach because such notice is not required under section 304(l) and because the ambitious deadlines in section 304(l) preclude public notice and comment before EPA approves or disapproves a state's lists and ICSs. Some commenters urged EPA to adopt this approach, but EPA remains convinced that providing an opportunity to comment on decisions during the period for petitions (120 days after June 4, 1989) will be sufficient.

a. Contents of EPA's Notice of Approval or Disapproval. Today's amendments to § 123.46 and to § 130.10(d) describe the contents of the public notice provided under section 304(l). If the Regional Office combines the notice for the lists and ICSs, then each notice would include the following:

1. The name and address of the EPA office that reviews the state's submittals.

2. A brief description of the section 304(l) process. For example, the notice should describe the requirement to identify point sources of toxic pollutants, and should discuss EPA's review of the state's submittal.

3. A list of the waters disapproved under paragraph (A)(i), (A)(ii), and (B), and a short finding that the waters do not meet the applicable review criteria.

4. A list of point sources disapproved under paragraph (C) of section 304(l)(1), and a short finding that the point sources do not satisfy the criteria of paragraph (C).

5. A list of ICSs disapproved under paragraph (D) of section 304(l)(1) and a short finding that the ICSs do not meet the applicable review criteria.

6. If the Regional Administrator determines that a state did not provide adequate public notice and an opportunity to comment on the waters, point sources, or ICSs prepared under section 304(l), or if the Regional Administrator chooses to exercise his or her discretion, a list of approvals and a short finding that the approved waters, point sources, or ICSs meet the applicable review criteria.

7. The name, address, and telephone number of the person at the Regional Office from whom interested parties may obtain more information.

8. The location where interested persons may examine EPA's records of approval or disapproval.

9. Notice that written petitions or comments are due within 120 days.

The contents of these notices are similar to the notices given under 40 CFR 124.10. EPA believes that by using existing procedures wherever possible the agency will minimize the administrative burden of implementing section 304(l).

EPA's notice of approval or disapproval allows 120 days for public comment. The 120-day comment period coincides with the 120 days described in section 304(l)(3), which allows interested persons to petition EPA to list additional waters. Under section 304(l)(3), EPA will consider for listing any navigable water for which any person submits a petition to EPA. Under the statute, interested persons must submit petitions on or before October 4, 1989. Today's rule uses the same 120-day period for receiving petitions and for taking comments on EPA's notice of approval and disapproval. EPA chose to provide a 120-day comment period because it would be impractical to close the public comment period on the notice of approval or disppproval before the statutory deadline for petitions. If EPA closed the comment period before October 4, 1989, it is possible that the Agency would receive petitions for additional listings after the close of public comments.

b. *Public Hearings.* EPA is not proposing new regulations for public hearings under § 304(l). The 120-day comment period allows sufficient public involvement in reviewing EPA's decisions with respect to the lists and ICSs. Furthermore, new regulations for public hearings are not necessary because the Regional Administrator may hold a public hearing if he or she finds a significant degree of public interest in the state's submittal.

c. *Petitions for Additional Listings.* Under section 304(l)(3), EPA must consider petitions from the public for additional listings of navigable waters. Petitions are due within 120 days after disapproval under section 304(l)(3), and should be submitted to the appropriate Regional Administrator. A petition must identify a waterbody with sufficient detail so that EPA is able to determine the location and boundaries of the waterbody. For example, the petition

could identify the waterbody using the name and number assigned to the waterbody by EPA's REACH file. The REACH file is a data base that includes a geographic description of the nation's surface waters, and the information is available from EPA's Regional Offices. Another method for identifying a waterbody is to use the common name for the waterbody, and give the geographic boundaries for the water. The petition must identify the list or lists for which the waterbody qualifies. The petition must include sufficient supporting information or data to show that the waterbody satisfies the criteria in section 304(l) of the CWA and 40 CFR § 130.10(d)(6). EPA needs this information to evaluate the petition. If EPA determines that the petition demonstrates that the water should be listed, and the state has not listed the water, then EPA will disapprove the state's failure to list the water.

EPA received comments that it should require the petitioner to provide extensive information before EPA would consider the petition. EPA is rejecting this suggestion because it does not want the petition requirements to be so burdensome as to discourage interested persons from petitioning EPA with regard to waters that should be listed. At the same time, to grant the petition, EPA needs sufficient information indicating that the water meets the criteria for listing in CWA section 304(l) and 40 CFR 130.10(d)(6). This approach will discourage frivolous petitions while at the same time avoiding a cumbersome process for preparing and submitting petitions.

Petitions submitted to EPA pursuant to section 304(l)(3) are limited to adding waters to one or more of the three lists of waters prepared under section 304(l)(1). Under section 304(l)(3), an interested party may not petition EPA to delete a water, point source, or ICS from the lists prepared under section 304(l). The relevant language describing petitions under section 304(l)(3) limits the petitions to navigable waters "* * * for listing under [section 304(l)]," and does not discuss deleting waters, point sources, or ICSs from the lists prepared under section 304(l). As a result of the statutory language, the public may submit petitions only for adding waters to one or more lists of waters prepared under section 304(l).

d. *Response to Comments and Petitions.* After the close of the public comment period on October 4, 1989 the Regional Offices will provide, as soon as practicable but not later than June 4, 1990, a response to the comments and petitions received. In most cases the response to comments will represent the Agency's final decisions with respect to the content of the lists prepared under section 304(l)(1). The response to comments will be given in the same manner as the first notice. The contents of the response to comments are the same as the first notice of approval or disapproval except for the following changes:

1. The lists of disapproved waters, point sources, and ICSs must reflect any changes made pursuant to comments or petitions received.

2. A brief summary of major comments and petitions received, and EPA's response to the comment or petition.

3. A brief description of the subsequent steps in the section 304(l) process.

Interested persons will have an additional opportunity to comment on disapproved ICSs. Where EPA disapproves an ICS because it does not meet the requirements of section 304(l), or because the state failed to submit the ICS to EPA for review, section 304(l) requires EPA to prepare an ICS in cooperation with the state after notice and an opportunity to comment. The public notice requirements of section 304(l)(3) will be fulfilled by the public notice procedures followed by EPA or the state when issuing the permit that will constitute the ICS. If EPA disapproves one or more ICSs, then EPA or the state may modify, revoke and reissue, or terminate that ICS using the procedures in 40 CFR Part 124. The procedures in Part 124 require the permitting authority to provide for public notice and an opportunity to comment before issuing a final permit. Therefore, if the permitting authority modifies, revokes and reissues, or terminates a disapproved ICS, the permitting authority must provide for public notice and an opportunity to comment. At any time after the Regional Administrator disapproves an ICS (or conditionally approves a draft permit as an ICS), the Regional Office may submit a written notification to the state that the Regional Office intends to issue the ICS. Upon mailing the notification to the state, exclusive authority to issue the permit passes to EPA. This issue is addressed in today's regulations at 40 CFR § 123.46(f). EPA is promulgating this regulation to clarify the time at which exclusive authority to issue ICSs passes to EPA under section 304(l).

3. Subsequent Steps in the section 304(l) Process

a. *EPA Implementation of section 304(l).* Where EPA disapproves a state's decision with respect to a waterbody or an ICS it is under an obligation to implement section 304(l) in cooperation with the state. Some commenters questioned whether EPA's process allowed for full cooperation with the states. EPA proposed, and is finalizing a procedure that will allow EPA to assume the authority to issue a permit that is disapproved as an ICS (or one that the state did not submit). The rule allows EPA's Regional Office to notify the state that it will issue the permit where the ICS is disapproved. EPA rejected requiring the exclusive permitting authority to revert automatically to EPA in order to allow ample opportunity for the region to negotiate with the state regarding each permit. At the same time EPA is mindful of the necessity of expediting the permit-issuance process where agreement cannot be reached with the state, especially considering that Congress has imposed deadlines for the issuance of the ICSs and the implementation of the effluent limits. Therefore EPA is retaining the approach in the proposal which allowed EPA to assume permitting jurisdiction upon notice to the state. In issuing the permit EPA will follow its normal permit-issuance procedures including requesting certification under section 401 of the CWA.

For listing, EPA will solicit public comment on the waters and point sources that were disapproved by EPA. (In most cases, these will be waters and point sources that EPA believes that the state should have included on one or more of its lists, but did not.) If the state has not provided adequate public notice on the lists, EPA will solicit public notice on all waters and point sources, both approved and disapproved. Until EPA takes final Agency action with regard to the lists, EPA will continue to cooperate with the state to decide which waters and point sources should appear on the lists. EPA may add or delete waters in response to public comments or additional data and information received during the time before its final decision on the lists. EPA will make these decisions public as final Agency action as expeditiously as possible after the public comment period closes, but no later than June 4, 1990, in the same manner as it provides public notice in June, 1989. This final Agency action constitutes promulgation by EPA of the lists. EPA believes it is critical that the Agency establishes these lists as final as soon as possible in order to begin development of individual control strategies in time to be finished by June 4, 1990, as required by the CWA.

b. *Judicial Review of Decision Under section 304(l).* As EPA stated in the proposal, judicial review of a disapproved ICS under section 509(b) of the CWA is not available until EPA makes a final decision with respect to the ICS, i.e., a final decision on the EPA-issued NPDES permit under Part 124 of EPA's regulations. One commenter argued that EPA's position on this issue further undermined its definition of an ICS by making 509(b)(1)(G) redundant. Within the limits of the Act, the Agency has the discretion to define ICSs as discussed above in Section C.1. The Agency continues to believe that its definition is the best reading of the statute, and Congress gave EPA discretion in determining what exact definition to use. Congress' addition of section 509(b)(1)(G) to the Act shows Congress' intent that EPA's promulgation of an ICS, however defined, be reviewed in the courts of appeals more than any intent to preclude or restrict EPA's interpretation that an NPDES permit be an ICS. Therefore, EPA believes that the permits that EPA issues as ICSs are reviewable in the court of appeals. Review of any other actions by EPA under section 304(l) must be obtained in a district court.

IV. Effective Date

This rule became effective on May 26, 1989. Title 5 U.S.C. 553(d) provides that regulations should take effect 30 days after their publication in the Federal Register, unless EPA finds and publishes good cause for a shorter time. In determining that good cause exists in this case, EPA weighed the necessity for an immediate effective date against problems it would cause for those subject to the rules. The need for an immediate effective date arises from the statute's deadline for EPA decisions on state submissions. It is critical that today's rule be effective when EPA's Regional Offices make their decisions under section 304(l). Today's regulations are important to ensure consistency and certainty in regional decisions.

V. Regulatory Analysis

A. Executive Order 12291

Under section 3(b) of Executive Order 12291 the agency must judge whether a regulation is major and thus subject to the requirements of a Regulatory Impact Analysis. The regulation published today is not major because the rule will not result in an effect on the economy of $100 million or more, will not result in increased costs or prices, will not have significant adverse effects on competition, employment, investment, productivity, and innovation, and will not significantly disrupt domestic or export markets.

EPA received comments arguing that the regulations were in fact major. EPA disagrees. The regulations specify what factors states must use to determine whether permits will achieve water quality standards, while the determination of what the standards are and what permit limits are necessary to comply with the standards remains principally with the states. Compliance with the water quality standards has been required by the Clean Water Act since July 1, 1977. Many of the limits that are imposed as a result of the procedures in today's rule are to implement standards that were in place long ago. The reporting requirements discussed in today's rule require no additional monitoring, and preparing the reports will not result in an effect on the economy of $100 million or more.

Therefore, the Agency has not prepared a Regulatory Impact Analysis under the Executive Order. EPA submitted this regulation to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

B. Paperwork Reduction Act

There is no information collection requirement after the effective date of this rulemaking, and, therefore, no information collection request and clearance are needed. An information collection request for the proposed rulemaking, submitted by EPA to the Office of Management and Budget (OMB) was disapproved by OMB because the information had already been submitted to EPA pursuant to the statutory deadline of February 4, 1989, and EPA did not formally submit the ICR in a timely manner after the proposed rule was published (*see* PRA regulations 5 CFR 1320.13 (b) and (d)).

The comments from OMB regarding the ICR for the proposed rule are available from the Chief, Information Policy Branch, PM-223, U.S. EPA, 401 M Street SW., Washington, DC 20460; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

C. Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.), Federal agencies must, when developing regulations, analyze their impact on small entities (small businesses, small government jurisdictions, and small organizations). This analysis is unnecessary, however, where the agency's administrator certifies that the rule will not have a significant economic effect on a substantial number of small entities. The agency has concluded that this rule will not have a significant economic effect on a substantial number of small entities because today's rulemaking imposes no new requirements for the regulated community. Today's regulations merely establish the procedures for implementing section 304(1) of the CWA, and clarify certain elements of EPA's surface water toxics control program.

List of Subjects

40 CFR Part 122

EPA Administered Permit Programs: The National Pollutant Discharge Elimination System.

40 CFR Part 123

State program requirements.

40 CFR Part 130

Water quality planning and management.

Date: May 26, 1989.

F. Henry Habicht II,

Acting Administrator.

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for Part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 122.2 is amended by adding in alphabetical order a new definition as follows:

§ 122.2 Definitions.

* * * * *

Whole effluent toxicity means the aggregate toxic effect of an effluent measured directly by a toxicity test.

3. Paragraph (d)(1) of § 122.44 is revised to read as follows:

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(d) * * *

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the

reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

(iii) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

(iv) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.

(v) Except as provided in this subparagraph, when the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

(vi) Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 307(a) of the CWA, supplemented where necessary by other relevant information; or

(C) Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

(*1*) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(*2*) The fact sheet required by § 124.56 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(*3*) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(*4*) The permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

(vii) When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:

(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

(B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.

* * * * *

4. The title of paragraph (e) of § 122.44 is revised to read as follows:

* * * * *

(e) *Technology-based controls for toxic pollutants.* * * *

PART 123—STATE PROGRAM REQUIREMENTS

1. The authority citation for Part 123 continues to read as follows:

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 123.44 is amended by adding paragraph (c)(8) to read as follows:

§ 123.44 EPA review of and objections to State permits.

* * * * *

(c) * * *

(8) The effluent limits of a permit fail to satisfy the requirements of 40 CFR 122.44(d).

* * * * *

3. In § 123.46 paragraph (a) is revised and paragraphs (c), (d), (e) and (f) are added, as follows:

§ 123.46 Individual control strategies.

(a) Not later than February 4, 1989, each State shall submit to the Regional Administrator for review, approval, and implementation an individual control strategy for each point source identified by the State pursuant to section 304(l)(1)(C) of the Act which will produce a reduction in the discharge of toxic pollutants from the point sources identified under section 304(l)(1)(C) through the establishment of effluent limitations under section 402 of the CWA and water quality standards under section 303(c)(2)(B) of the CWA, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than three years after the date of the establishment of such strategy.

* * * * *

(c) For the purposes of this section the term individual control strategy, as set forth in section 304(l) of the CWA, means a final NPDES permit with supporting documentation showing that effluent limits are consistent with an approved wasteload allocation, or other documentation which shows that applicable water quality standards will be met not later than three years after the individual control strategy is established. Where a State is unable to

issue a final permit on or before February 4, 1989, an individual control strategy may be a draft permit with an attached schedule (provided the State meets the schedule for issuing the final permit) indicating that the permit will be issued on or before February 4, 1990. If a point source is subject to section 304(l)(1)(C) of the CWA and is also subject to an on-site response action under sections 104 or 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), (42 U.S.C. 9601 et seq.), an individual control strategy may be the decision document (which incorporates the applicable or relevant and appropriate requirements under the CWA) prepared under sections 104 or 106 of CERCLA to address the release or threatened release of hazardous substances to the environment.

(d) A petition submitted pursuant to section 304(l)(3) of the CWA must be submitted to the appropriate Regional Administrator. Petitions must identify a waterbody in sufficient detail so that EPA is able to determine the location and boundaries of the waterbody. The petition must also identify the list or lists for which the waterbody qualifies, and the petition must explain why the waterbody satisfies the criteria for listing under CWA section 304(l) and 40 CFR 130.10(d)(6).

(e) If the Regional Administrator disapproves one or more individual control strategies, or if a State fails to provide adequate public notice and an opportunity to comment on the ICSs, then, not later than June 4, 1989, the Regional Administrator shall give a notice of approval or disapproval of the individual control strategies submitted by each State pursuant to this section as follows:

(1) The notice of approval or disapproval given under this paragraph shall include the following:

(i) The name and address of the EPA office that reviews the State's submittals.

(ii) A brief description of the section 304(l) process.

(iii) A list of ICSs disapproved under this section and a finding that the ICSs will not meet all applicable review criteria under this section and section 304(l) of the CWA.

(iv) If the Regional Administrator determines that a State did not provide adequate public notice and an opportunity to comment on the waters, point sources, or ICSs prepared pursuant to section 304(l), or if the Regional Administrator chooses to exercise his or her discretion, a list of the ICSs approved under this section, and a finding that the ICSs satisfy all applicable review criteria.

(v) The location where interested persons may examine EPA's records of approval and disapproval.

(vi) The name, address, and telephone number of the person at the Regional Office from whom interested persons may obtain more information.

(vii) Notice that written petitions or comments are due within 120 days.

(2) The Regional Administrator shall provide the notice of approval or disapproval given under this paragraph to the appropriate State Director. The Regional Administrator shall publish a notice of availability, in a daily or weekly newspaper with State-wide circulation or in the **Federal Register**, for the notice of approval or disapproval. The Regional Administrator shall also provide written notice to each discharger identified under section 304(l)(1)(C), that EPA has listed the discharger under section 304(l)(1)(C).

(3) As soon as practicable but not later than June 4, 1990, the Regional Offices shall issue a response to petitions or comments received under section 304(l). The response to comments shall be given in the same manner as the notice described in paragraph (e) of this section except for the following changes:

(i) The lists of ICSs reflecting any changes made pursuant to comments or petitions received.

(ii) A brief description of the subsequent steps in the section 304(l) process.

(f) EPA shall review, and approve or disapprove, the individual control strategies prepared under section 304(l) of the CWA, using the applicable criteria set forth in section 304(l) of the CWA, and in 40 CFR Part 122, including § 122.44(d). At any time after the Regional Administrator disapproves an ICS (or conditionally aproves a draft permit as an ICS), the Regional Office may submit a written notification to the State that the Regional Office intends to issue the ICS. Upon mailing the notification, and notwithstanding any other regulation, exclusive authority to issue the permit passes to EPA.

4. Section 123.63 is amended by adding paragraph (a)(5) to read as follows:

§ 123.63 Criteria for withdrawal of state programs.

(a) * * *

(5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.

PART 130—WATER QUALITY PLANNING AND MANAGEMENT

1. The authority citation for Part 130 continues to read as follows:

Authority: 33 U.S.C. 1251 et seq.

* * * * *

2. Section 130.10 is amended by adding paragraphs (d)(4), (d)(5), (d)(6), (d)(7), (d)(8), (d)(9), (d)(10), and (d)(11) to read as follows:

§ 130.10 State submittals to EPA.

* * * * *

(d) * * *

(4) For the purposes of listing waters under § 130.10(d)(2), "applicable standard" means a numeric criterion for a priority pollutant promulgated as part of a state water quality standard. Where a state numeric criterion for a priority pollutant is not promulgated as part of a state water quality standard, for the purposes of listing waters "applicable standard" means the state narrative water quality criterion to control a priority pollutant (e.g., no toxics in toxic amounts) interpreted on a chemical-by-chemical basis by applying a proposed state cirterion, an explicit state policy or regulation, or an EPA national water quality criterion, supplemented with other relevant information.

(5) If a water meets either of the two conditions listed below the water must be listed under § 130.10(d)(2) on the grounds that the applicable standard is not achieved or expected to be achieved due entirely or substantially to discharges from point sources.

(i) Existing or additional water quality-based limits on one or more point sources would result in the achievement of an applicable water quality standard for a toxic pollutant; or

(ii) The discharge of a toxic pollutant from one or more point sources, regardless of any nonpoint source contribution of the same pollutant, is sufficient to cause or is expected to cause an excursion above the applicable water quality standard for the toxic pollutant.

(6) Each state shall assemble and evaluate all existing and readily available water quality-related data and information and each state shall develop the lists required by paragraphs (d)(1), (2), and (3) of this section based upon this data and information. At a minimum, all existing and readily available water quality-related data and information includes, but is not limited to, all of the existing and readily available data about the following categories of waters in the state:

(i) Waters where fishing or shellfish bans and/or advisories are currently in effect or are anticipated.

(ii) Waters where there have been repeated fishkills or where abnormalities (cancers, lesions, tumors, etc.) have been observed in fish or other aquatic life during the last ten years.

(iii) Waters where there are restrictions on water sports or recreational contact.

(iv) Waters identified by the state in its most recent state section 305(b) report as either "partially achieving" or "not achieving" designated uses.

(v) Waters identified by the states under section 303(d) of the CWA as waters needing water quality-based controls.

(vi) Waters identified by the state as priority waterbodies. (State Water Quality Management plans often include priority waterbody lists which are those waters that most need water pollution control decisions to achieve water quality standards or goals.)

(vii) Waters where ambient data indicate potential or actual exceedances of water quality criteria due to toxic pollutants from an industry classified as a primary industry in Appendix A of 40 CFR Part 122.

(viii) Waters for which effluent toxicity test results indicate possible or actual exceedances of state water quality standards, including narrative "free from" water quality criteria or EPA water quality criteria where state criteria are not available.

(ix) Waters with primary industrial major dischargers where dilution analyses indicate exceedances of state narrative or numeric water quality criteria (or EPA water quality criteria where state standards are not available) for toxic pollutants, ammonia, or chlorine. These dilution analyses must be based on estimates of discharge levels derived from effluent guidelines development documents, NPDES permits or permit application data (e.g., Form 2C), Discharge Monitoring Reports (DMRs), or other available information.

(x) Waters with POTW dischargers requiring local pretreatment programs where dilution analyses indicate exceedances of state water quality criteria (or EPA water quality criteria where state water quality criteria are not available) for toxic pollutants, ammonia, or chlorine. These dilution analyses must be based upon data from NPDES permits or permit applications (e.g., Form 2C), Discharge Monitoring Reports (DMRs), or other available information.

(xi) Waters with facilities not included in the previous two categories such as major POTWs, and industrial minor dischargers where dilution analyses indicate exceedances of numeric or narrative state water quality criteria (or EPA water quality criteria where state water quality criteria are not available) for toxic pollutants, ammonia, or chlorine. These dilution analyses must be based upon estimates of discharge levels derived from effluent guideline development documents, NPDES permits or permit application data, Discharge Monitoring Reports (DMRs), or other available information.

(xii) Waters classified for uses that will not support the "fishable/swimmable" goals of the Clean Water Act.

(xiii) Waters where ambient toxicity or adverse water quality conditions have been reported by local, state, EPA or other Federal Agencies, the private sector, public interest groups, or universities. These organizations and groups should be actively solicited for research they may be conducting or reporting. For example, university researchers, the United States Department of Agriculture, the National Oceanic and Atmospheric Administration, the United States Geological Survey, and the United States Fish and Wildlife Service are good sources of field data and research.

(xiv) Waters identified by the state as impaired in its most recent Clean Lake Assessments conducted under section 314 of the Clean Water Act.

(xv) Waters identified as impaired by nonpoint sources in the *America's Clean Water: The States' Nonpoint Source Assessments* 1985 (Association of State and Interstate Water Pollution Control Administrators (ASIWPCA)) or waters identified as impaired or threatened in a nonpoint source assessment submitted by the state to EPA under section 319 of the Clean Water Act.

(xvi) Surface waters impaired by pollutants from hazardous waste sites on the National Priority List prepared under section 105(8)(A) of CERCLA.

(7) Each state shall provide documentation to the Regional Administrator to support the state's determination to list or not to list waters as required by paragraphs (d)(1), (d)(2) and (d)(3) of this section. This documentation shall be submitted to the Regional Administrator together with the lists required by paragraphs (d)(1), (d)(2), and (d)(3) of this section and shall include as a minimum:

(i) A description of the methodology used to develop each list;

(ii) A description of the data and information used to identify waters and sources including a description of the data and information used by the state as required by paragraph (d)(6) of this section;

(iii) A rationale for any decision not to use any one of the categories of existing and readily available data required by paragraph (d)(6) of this section; and

(iv) Any other information requested by the Regional Administrator that is reasonable or necessary to determine the adequacy of a state's lists. Upon request by the Regional Administrator, each state must demonstrate good cause for not including a water or waters on one or more lists. Good cause includes, but is not limited to, more recent or accurate data; more accurate water quality modeling; flaws in the original analysis that led to the water being identified in a category in § 130.10(d)(6); or changes in conditions, e.g., new control equipment, or elimination of discharges.

(8) The Regional Administrator shall approve or disapprove each list required by paragraphs (d)(1), (d)(2), and (d)(3) of this section no later than June 4, 1989. The Regional Administrator shall approve each list required under paragraphs (d)(1), (d)(2), and (d)(3) of this section only if it meets the regulatory requirements for listing under paragraphs (d)(1), (d)(2), and (d)(3) of this section and if the state has met all the requirements of paragraphs (d)(6) and (d)(7) of this section.

(9) If a state fails to submit lists in accordance with paragraph (d) of this section or the Regional Administrator does not approve the lists submitted by such state in accordance with this paragraph, then not later than June 4, 1990, the Regional Administrator, in cooperation with such state, shall implement the requirements of CWA section 304(l) (1) and (2) in such state.

(10) If the Regional Administrator disapproves a state's decision with respect to one or more of the waters required under paragraph (d) (1), (2), or (3) of this section, or one or more of the individual control strategies required pursuant to section 304(l)(1)(D), then not later than June 4, 1989, the Regional Administrator shall distribute the notice of approval or disapproval given under this paragraph to the appropriate state Director. The Regional Administrator shall also publish a notice of availability, in a daily or weekly newspaper with state-wide circulation or in the **Federal Register**, for the notice of approval or disapproval. The Regional Administrator shall also provide written notice to each discharger identified under section 304(l)(1)(C), that EPA has listed the discharger under section 304(l)(1)(C).

The notice of approval and disapproval shall include the following:

(i) The name and address of the EPA office that reviews the state's submittals.

(ii) A brief description of the section 304(l) process.

(iii) A list of waters, point sources and pollutants disapproved under this paragraph.

(iv) If the Regional Administrator determines that a state did not provide adequate public notice and an opportunity to comment on the lists prepared under this section, or if the Regional Administrator chooses to exercise his or her discretion, a list of waters, point sources, or pollutants approved under this paragraph.

(v) The name, address, and telephone number of the person at the Regional Office from whom interested persons may obtain more information.

(vi) Notice that written petitions or comments are due within 120 days.

(11) As soon as practicable, but not later than June 4, 1990, the Regional Office shall issue a response to petitions or comments received under paragraph (d)(10) of this section. Notice shall be given in the same manner as notice described in paragraph (d)(10) of this section, except for the following changes to the notice of approvals and disapprovals:

(i) The lists of waters, point sources and pollutants must reflect any changes made pursuant to comments or petitions received.

(ii) A brief description of the subsequent steps in the section 304(l) process shall be included.

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June 2, 1989

Part VII

Department of Education

Jacob K. Javits Gifted and Talented Students Education Program; Invitation for Applications for New Awards for Fiscal Year 1989; Notice

DEPARTMENT OF EDUCATION

[CDFA No. 84.206A]

Jacob K. Javits Gifted and Talented Students Education Program Notice Inviting Applications for New Awards for Fiscal Year (FY) 1989

Note to applicants: This notice is a complete application package. Together with the statute authorizing the program and the Education Department General Administrative Regulations (EDGAR), the notice contains information, application forms, and instructions needed to apply for a grant under this program.

Purpose of program: Provides financial assistance to State and local educational agencies, institutions of higher education, and other public and private agencies and organizations, to encourage research, demonstration projects, personnel training, and similar activities designed to help build a nationwide capability in elementary and secondary schools to identify and meet the special educational needs of gifted and talented students.

Deadline for transmittal of application: July 31, 1989.

Deadline for intergovernmental review: September 29, 1989.

Available funds: $6.2 million.

Estimated range of awards: $200,000–$310,000.

Estimated average size of awards: $248,000.

Estimated number of awards: 25.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Budget Period: 12 months.

Applicable regulations: The following regulations apply to the Gifted and Talented Program:

The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations), Part 75 (Direct Grant Programs), Part 77 (Definitions that apply to Department Regulations), Part 79 (Intergovernmental Review of Department of Education Programs and Activities), Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), Part 81 (General Education Provisions Act: Enforcement), and Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

Description of the Program:

The Gifted and Talented Program is authorized by the Jacob K. Javits Gifted and talented Students Education Act of 1988, Title IV, Part B of the Elementary and Secondary Education Act of 1965, as amended.

Definitions

The following definitions apply to the terms used in this notice:

(a) "Gifted and talented students" means children and youths who—

(1) Give evidence of high performance capability in such areas as intellectual, creative, artistic, or leadership capacity or in specific academic fields; and

(2) Require services or activities not ordinarily provided by the school in order to develop such capabilities fully.

(b) "Hawaiian native" means any individual any of whose ancestors were natives prior to 1778 of the area that now comprises the State of Hawaii.

(c) "Hawaiian native organization" means any organization recognized by the Governor of the State of Hawaii primarily serving and representing Hawaiian natives.

(d) "Institution of higher education" has the same meaning given such term in section 435(b) of the Higher Education Act of 1965, as amended.

Eligible Parties

The following are eligible to apply under this program:

(a) State educational agencies.

(b) Local educational agencies.

(c) Institutions of higher education.

(d) Other public agencies and private agencies and organizations (including Indian tribes and organizations as defined by the Indian Self-Determination and Education Assistance Act and Hawaiian native organizations).

Uses of Funds

(a) Projects assisted under this program may include—

(1) Preservice and inservice training (including fellowships) for personnel (including leadership personnel) involved in the education of gifted and talented students;

(2) Establishment and operation of model projects and exemplary programs for the identification and education of gifted and talented students, including summer programs and cooperative programs involving business, industry, and education;

(3) Strengthening the capability of State educational agencies and institutions of higher education to provide leadership and assistance to local educational agencies and nonprofit private schools in the planning, operation and improvement of programs for the identification and education of gifted and talented students; and

(4) Programs of technical assistance and information dissemination.

(b) Grantees must use funds received under this program to supplement and make more effective the expenditure of State and local funds, and of Federal funds made available under Chapter 2 of Title I and Title II of the Elementary and Secondary Education Act of 1965 for the education of gifted and talented students.

Participation of Private School Students

Applicants must make provision for the equitable participation of students and teachers in private nonprofit elementary and secondary schools, including the participation of teachers and other personnel in preservice and inservice training programs supported under the Act.

Priorities

Absolute Priorities

In accordance with 34 CFR 75.105(c)(3), the Secretary gives an absolute preference to applications that meet one or both of the following priorities:

(a) Applications that propose to identify gifted and talented students who may not be identified through traditional assessment methods (including economically disadvantaged individuals, individuals of limited English proficiency, and individuals with handicaps) and provide education programs designed to include gifted and talented students from such groups; or

(b) Applications that propose programs and projects designed to develop or improve the capability of schools in an entire State or region of the Nation through cooperative efforts and participation of State and local educational agencies, institutions of higher education, and other public and private agencies and organizations (including business, industry, and labor), to plan, conduct, and improve programs for the identification and education of gifted and talented students.

Under 34 CFR 75.105(c)(3), the Secretary funds under this competition only applications that meet one or both of these absolute priorities.

Service Priority

In approving applications under this program, the Secretary ensures that at least one half of the applications approved contain a component designed to serve gifted and talented students who are economically disadvantaged individuals.

Invitational Priorities

In accordance with EDGAR, 34 CFR 75.105(c)(1), the Secretary is particularly interested in applications that meet one or more of the following invitational priorities:

(a) Inservice and preservice training that enables classroom teachers to provide individualized instruction to gifted and talented children;

(b) Inservice and preservice training, including fellowships, that enhance teacher ability and school capacity to instruct gifted and talented children in particular disciplines;

(c) Projects that serve gifted and talented children through schools of choice, including magnet school programs;

(d) Projects that seek to discover and cultivate the potential of highly able students within the regular classroom;

(e) Model projects that are based on relevant research and literature for identifying and instructing the gifted and talented student populations that will be served;

(f) Model projects that use multiple criteria for selecting highly able students for admission into a gifted and talented program, rather than a single measure such as a standardized test;

(g) Projects that encourage highly able students who are not being identified through traditional assessment methods to develop and display their skills and talents over an extended period in order to increase their prospects for admission into a gifted program;

(h) Training for parents of gifted and talented students in nurturing their children's gifts and talents.

An application that addresses one or more of these invitational priorities does not receive from the Secretary competitive or absolute preference over other applications.

Selection Criteria

(a)(1) The Secretary uses the following selection criteria to evaluate applications for new grants under the Gifted and Talented Program.

(2) The maximum score for all of these criteria is 100 points.

(3) The maximum score for each criterion is indicated in parentheses.

(b) *The criteria.*—(1) *Meeting the purposes of the authorizing statute.* (30 points) The Secretary reviews each application to determine how well the project will meet the purpose of the Jacob K. Javits Gifted and Talented Students Education Act of 1988, including consideration of—

(i) The objectives of the project; and

(ii) How the objectives of the project further the purposes of the authorizing statute.

Note to Applicants: A statement of the purposes of the authorizing statute is found in the Purpose of Program section of this notice.

(2 *Extent of need for the project.* (20 points) The secretary reviews each application to determine the extent to which the project meets specific needs recognized in the statute that authorizes the program, including consideration of—

(i) The needs addressed by the project;

(ii) How the applicant identified those needs;

(iii) How those needs will be met by the project; and

(iv) The benefits to be gained by meeting those needs.

(3) *Plan of operation.* (15 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(i) The quality of the design of the project;

(ii) The extent to which the plan of management is effective and ensures proper and efficient administration of the project;

(iii) How well the objectives of the project relate to the purpose of the program;

(iv) The quality of the applicant's plan to use its resources and personnel to achieve each objective;

(v) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or handicapping condition; and

(vi) For grants under a program that requires the applicant to provide an opportunity for participation of students enrolled in private schools, the quality of the applicant's plan to provide that opportunity.

(4) *Quality of key personnel.* (10 points)

(i) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(A) The qualifications of the project director (if one is to be used);

(B) The qualifications of each of the other key personnel to be used in the project;

(C) The time that each person referred to in paragraph (b)(4)(i) (A) and (B) will commit to the project; and

(D) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping condition.

(ii) To determine personnel qualifications under paragraphs (b)(4)(i) (A) and (B), the Secretary considers—

(A) Experience and training in fields related to the objectives of the project; and

(B) Any other qualifications that pertain to the quality of the project.

(5) *Budget and cost effectiveness.* (6 points) The Secretary reviews each application to determine the extent to which—

(i) The budget is adequate to support the project; and

(ii) Costs are reasonable in relation to the objectives of the project.

(6) *Evaluation plan.* (15 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(i) Are appropriate to the project; and

(ii) To the extent possible, are objective and produce data that are quantifiable.

(Cross-reference: See 34 CFR 75.590 Evaluation by the grantee.)

(7) *Adequacy of resources.* (4 points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

Intergovernmental Review of Federal Programs

This program is subject to the requirements of Executive Order 12372 (Intergovernmental Review of Federal Programs) and the regulations in 34 CFR Part 79.

The objective of the Executive order is to foster an intergovernmental partnership and to strengthen federalism by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance.

Applicants must contact the appropriate State Single Point of Contact to find out about, and to comply with, the State's process under Executive Order 12372. Applicants proposing to perform activities in more than one State should immediately contact the Single Point of Contact for each of those States and follow the procedure established in each State under the Executive order. If you want to know the name and address of any State Single Point of Contact, see the list published in the **Federal Register** on November 18, 1987, pages 44338–44340.

In States that have not established a process or chosen a program for review, State, areawide, regional, and local

entities may submit comments directly to the Department.

Any State Process Recommendation and other comments submitted by a State Single Point of Contact and any comments from State, areawide, regional, and local entities must be mailed or hand-delivered by the date indicated in this notice to the following address: The Secretary, E.O. 12372—CFDA #84.206A, U.S. Department of Education, Room 4161, 400 Maryland Avenue, SW., Washington, DC 20202–0125.

Proof of mailing will be determined on the same basis as applications (see 34 CFR 75.102). Recommendations or comments may be hand-delivered until 4:30 p.m. (Washington, DC time) on the date indicated in this notice.

Please note that this address is not the same address as the one to which the applicant submits its completed application. *Do not send application to the above address.*

Instructions for Transmittal of Applications

(a) If an applicant wants to apply for a grant, the applicant shall—

(1) Mail the original and two copies of the application on or before the deadline date to: U.S. Department of Education, Application Control Center, Attention: (CFDA #84.206A), Washington, DC 20202–4725

or

(2) Hand deliver the original and two copies of the application by 4:30 p.m. (Washington, DC time) on the deadline date to: U.S. Department of Education, Application Control Center, Attention: (CFDA #84.206A), Room #3633, Regional Office Building #3, 7th and D Streets SW., Washington, DC.

(b) An applicant must show one of the following as proof of mailing:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

(c) If an application is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Notes: (1) The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

(2) An applicant wishing to know that its application has been received by the Department must include with the application a stamped, self-addressed postcard containing the CFDA number and title of this program.

(3) The applicant *must* indicate on the envelope and—if not provided by the Department—in Item 10 of the Application for Federal Assistance (Standard Form 424) the CFDA number—and letter, if any—of the competition under which the application is being submitted.

Application Instructions and Forms

The appendix to this application is divided into three parts plus a statement regarding estimated public reporting burden and various assurances and certifications. These parts and additional materials are organized in the same manner that the submitted application should be organized. The parts and additional materials are as follows:

Part I: Application for Federal Assistance (Standard Form 424 (Rev. 4–88)) and instructions.

Part II: Budget Information—Non-Construction Programs (Standard Form 424A) and instructions.

Part III: Application Narrative.

Additional Materials.

Estimated Public Reporting Burden.

Assurances—Non-Construction Programs (Standard Form 424B).

Certification regarding Debarment, Suspension, and Other Responsibility Matters: Primary Covered Transactions (ED Form GCS–008) and instructions.

Certification regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion: Lower Tier Covered Transactions (ED Form GCS–009) and instructions. (NOTE: ED Form GCS–009 is intended for the use of grantees and should not be transmitted to the Department.)

Cetification Regarding Drug-Free Workplace Requirements: Grantees Other than Individuals (ED 80–0004).

An applicant may submit information on a photostatic copy of the application and budget forms, the assurances, and the certifications. However, the application form, the assurances, and the certifications must each have an *original signature.* No grant may be awarded unless a completed application form has been received.

Interactive Audio Conference

The U.S. Department of Education in cooperation with participating State departments of education will hold an interactive audio conference to provide prospective applicants and interested parties with information related to the development and submission of applications for the FY 1989 Gifted and Talented discretionary grant competition. The 1 and ½ hour audio conference will be held in two time slots on June 19, 1989—2:00 pm and 3:30 pm Eastern Daylight Time. If your State would like to participate or you would like additional information, contact Gloria Herbert by June 12, 1989 at (202) 357–6187.

FOR FURTHER INFORMATION CONTACT: L. Ann Benjamin, U.S. Department of Education, Office of Educational Research and Improvement, 555 New Jersey Avenue, NW, Washington, DC 20208–5643; Phone: (202) 357–6187.

Program Authority: 20 U.S.C. 3061–3068.

Dated: May 26, 1989.

Bruno V. Manno,

Acting Assistant Secretary, Office of Educational Research and Improvement.

BILLING CODE 4000-01-M

OMB Approval No. 0348-0043

APPLICATION FOR FEDERAL ASSISTANCE

1. TYPE OF SUBMISSION: Application ☐ Construction ☒ Non-Construction; Preapplication ☐ Construction ☐ Non-Construction	2. DATE SUBMITTED	Applicant Identifier
	3. DATE RECEIVED BY STATE	State Application Identifier
	4. DATE RECEIVED BY FEDERAL AGENCY	Federal Identifier

5. APPLICANT INFORMATION

Legal Name:	Organizational Unit:
Address (give city, county, state, and zip code):	Name and telephone number of the person to be contacted on matters involving this application (give area code)

6. EMPLOYER IDENTIFICATION NUMBER (EIN): ☐☐ – ☐☐☐☐☐☐☐

7. TYPE OF APPLICANT: (enter appropriate letter in box) ☐

A. State
B. County
C. Municipal
D. Township
E. Interstate
F. Intermunicipal
G. Special District
H. Independent School Dist.
I. State Controlled Institution of Higher Learning
J. Private University
K. Indian Tribe
L. Individual
M. Profit Organization
N. Other (Specify): _____

8. TYPE OF APPLICATION:

☒ New ☐ Continuation ☐ Revision

If Revision, enter appropriate letter(s) in box(es): ☐ ☐

A. Increase Award B. Decrease Award C. Increase Duration
D. Decrease Duration Other (specify): _____

9. NAME OF FEDERAL AGENCY:

U.S. Department of Education

10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: 8 4 . 2 0 6

TITLE: Jacob K. Javits Gifted and Talented Students Education Act

11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:

12. AREAS AFFECTED BY PROJECT (cities, counties, states, etc.):

13. PROPOSED PROJECT:		14. CONGRESSIONAL DISTRICTS OF:	
Start Date	Ending Date	a. Applicant	b. Project

15. ESTIMATED FUNDING:		
a. Federal	$	.00
b. Applicant	$	.00
c. State	$	.00
d. Local	$	.00
e. Other	$	.00
f. Program Income	$	.00
g. TOTAL	$	.00

16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?

a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON:

DATE _____

b. NO. ☐ PROGRAM IS NOT COVERED BY E.O. 12372

☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?

☐ Yes If "Yes," attach an explanation. ☐ No

18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT. THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED

a. Typed Name of Authorized Representative	b. Title	c. Telephone number
d. Signature of Authorized Representative		e. Date Signed

Previous Editions Not Usable

Standard Form 424 (REV 4-88)
Prescribed by OMB Circular A-102

Authorized for Local Reproduction

INSTRUCTIONS FOR THE SF 424

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

Item:	Entry:
1.	Self-explanatory.
2.	Date application submitted to Federal agency (or State if applicable) & applicant's control number (if applicable).
3.	State use only (if applicable).
4.	If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank.
5.	Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application.
6.	Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service.
7.	Enter the appropriate letter in the space provided.
8.	Check appropriate box and enter appropriate letter(s) in the space(s) provided: — "New" means a new assistance award. — "Continuation" means an extension for an additional funding/budget period for a project with a projected completion date. — "Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation.
9.	Name of Federal agency from which assistance is being requested with this application.
10.	Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested.
11.	Enter a brief descriptive title of the project. if more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project.
12.	List only the largest political entities affected (e.g., State, counties, cities).
13.	Self-explanatory.
14.	List the applicant's Congressional District and any District(s) affected by the program or project.
15.	Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate *only* the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15.
16.	Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process.
17.	This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes.
18.	To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.)

BUDGET INFORMATION — Non-Construction Programs

OMB Approval No. 0348-0044

SECTION A – BUDGET SUMMARY

Grant Program Function or Activity (a)	Catalog of Federal Domestic Assistance Number (b)	Estimated Unobligated Funds		New or Revised Budget		
		Federal (c)	Non-Federal (d)	Federal (e)	Non-Federal (f)	Total (g)
1.		$	$	$	$	$
2.						
3.						
4.						
5. TOTALS		$	$	$	$	$

SECTION B – BUDGET CATEGORIES

6 Object Class Categories	GRANT PROGRAM, FUNCTION OR ACTIVITY				Total (5)
	(1)	(2)	(3)	(4)	
a. Personnel	$	$	$	$	$
b. Fringe Benefits					
c. Travel					
d. Equipment					
e. Supplies					
f. Contractual					
g. Construction					
h. Other					
i. Total Direct Charges (sum of 6a - 6h)					
j. Indirect Charges					
k. TOTALS (sum of 6i and 6j)	$	$	$	$	$
7. Program Income	$	$	$	$	$

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Standard Form 424A (4-88)
Prescribed by OMB Circular A-102

SECTION C - NON-FEDERAL RESOURCES

(a) Grant Program	(b) Applicant	(c) State	(d) Other Sources	(e) TOTALS
8.	$	$	$	$
9.				
10.				
11.				
12. TOTALS (sum of lines 8 and 11)	$	$	$	$

SECTION D - FORECASTED CASH NEEDS

	Total for 1st Year	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
13. Federal	$	$	$	$	$
14. NonFederal					
15. TOTAL (sum of lines 13 and 14)	$	$	$	$	$

SECTION E - BUDGET ESTIMATES OF FEDERAL FUNDS NEEDED FOR BALANCE OF THE PROJECT

(a) Grant Program	FUTURE FUNDING PERIODS (Years)			
	(b) First	(c) Second	(d) Third	(e) Fourth
16.	$	$	$	$
17.				
18.				
19.				
20. TOTALS (sum of lines 16 -19)	$	$	$	$

SECTION F - OTHER BUDGET INFORMATION

(Attach additional Sheets if Necessary)

21. Direct Charges:	22. Indirect Charges:
23. Remarks	

SF 424A (4-88) Page 2
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INSTRUCTIONS FOR THE SF-424A

General Instructions

This form is designed so that application can be made for funds from one or more grant programs. In preparing the budget, adhere to any existing Federal grantor agency guidelines which prescribe how and whether budgeted amounts should be separately shown for different functions or activities within the program. For some programs, grantor agencies may require budgets to be separately shown by function or activity. For other programs, grantor agencies may require a breakdown by function or activity. Sections A,B,C, and D should include budget estimates for the whole project except when applying for assistance which requires Federal authorization in annual or other funding period increments. In the latter case, Sections A,B, C, and D should provide the budget for the first budget period (usually a year) and Section E should present the need for Federal assistance in the subsequent budget periods. All applications should contain a breakdown by the object class categories shown in Lines a-k of Section B.

Section A. Budget Summary
Lines 1-4, Columns (a) and (b)

For applications pertaining to a *single* Federal grant program (Federal Domestic Assistance Catalog number) and *not requiring* a functional or activity breakdown, enter on Line 1 under Column (a) the catalog program title and the catalog number in Column (b).

For applications pertaining to a *single* program *requiring* budget amounts by multiple functions or activities, enter the name of each activity or function on each line in Column (a), and enter the catalog number in Column (b). For applications pertaining to multiple programs where none of the programs require a breakdown by function or activity, enter the catalog program title on each line in *Column* (a) and the respective catalog number on each line in Column (b).

For applications pertaining to *multiple* programs where one or more programs *require* a breakdown by function or activity, prepare a separate sheet for each program requiring the breakdown. Additional sheets should be used when one form does not provide adequate space for all breakdown of data required. However, when more than one sheet is used, the first page should provide the summary totals by programs.

Lines 1-4, Columns (c) through (g.)

For new applications, leave Columns (c) and (d) blank. For each line entry in Columns (a) and (b), enter in Columns (e), (f), and (g) the appropriate amounts of funds needed to support the project for the first funding period (usually a year).

Lines 1-4, Columns (c) through (g.) (continued)

For continuing grant program applications, submit these forms before the end of each funding period as required by the grantor agency. Enter in Columns (c) and (d) the estimated amounts of funds which will remain unobligated at the end of the grant funding period only if the Federal grantor agency instructions provide for this. Otherwise, leave these columns blank. Enter in columns (e) and (f) the amounts of funds needed for the upcoming period. The amount(s) in Column (g) should be the sum of amounts in Columns (e) and (f).

For supplemental grants and changes to existing grants, do not use Columns (c) and (d). Enter in Column (e) the amount of the increase or decrease of Federal funds and enter in Column (f) the amount of the increase or decrease of non-Federal funds. In Column (g) enter the new total budgeted amount (Federal and non-Federal) which includes the total previous authorized budgeted amounts plus or minus, as appropriate, the amounts shown in Columns (e) and (f). The amount(s) in Column (g) should not equal the sum of amounts in Columns (e) and (f).

Line 5 — Show the totals for all columns used.

Section B Budget Categories

In the column headings (1) through (4), enter the titles of the same programs, functions, and activities shown on Lines 1-4, Column (a), Section A. When additional sheets are prepared for Section A, provide similar column headings on each sheet. For each program, function or activity, fill in the total requirements for funds (both Federal and non-Federal) by object class categories.

Lines 6a-i — Show the totals of Lines 6a to 6h in each column.

Line 6j – Show the amount of indirect cost.

Line 6k – Enter the total of amounts on Lines 6i and 6j. For all applications for new grants and continuation grants the total amount in column (5), Line 6k, should be the same as the total amount shown in Section A, Column (g), Line 5. For supplemental grants and changes to grants, the total amount of the increase or decrease as shown in Columns (1)-(4), Line 6k should be the same as the sum of the amounts in Section A, Columns (e) and (f) on Line 5.

INSTRUCTIONS FOR THE SF-424A *(continued)*

Line 7 – Enter the estimated amount of income, if any, expected to be generated from this project. Do not add or subtract this amount from the total project amount. Show under the program narrative statement the nature and source of income. The estimated amount of program income may be considered by the federal grantor agency in determining the total amount of the grant.

Section C. Non-Federal-Resources

Lines 8-11 – Enter amounts of non-Federal resources that will be used on the grant. If in-kind contributions are included, provide a brief explanation on a separate sheet.

Column (a) – Enter the program titles identical to Column (a), Section A. A breakdown by function or activity is not necessary.

Column (b) – Enter the contribution to be made by the applicant.

Column (c) – Enter the amount of the State's cash and in-kind contribution if the applicant is not a State or State agency. Applicants which are a State or State agencies should leave this column blank.

Column (d) – Enter the amount of cash and in-kind contributions to be made from all other sources.

Column (e) – Enter totals of Columns (b), (c), and (d).

Line 12 — Enter the total for each of Columns (b)-(e). The amount in Column (e) should be equal to the amount on Line 5, Column (f), Section A.

Section D. Forecasted Cash Needs

Line 13 – Enter the amount of cash needed by quarter from the grantor agency during the first year.

Line 14 – Enter the amount of cash from all other sources needed by quarter during the first year.

Line 15 – Enter the totals of amounts on Lines 13 and 14.

Section E. Budget Estimates of Federal Funds Needed for Balance of the Project

Lines 16 - 19 – Enter in Column (a) the same grant program titles shown in Column (a), Section A. A breakdown by function or activity is not necessary. For new applications and continuation grant applications, enter in the proper columns amounts of Federal funds which will be needed to complete the program or project over the succeeding funding periods (usually in years). This section need not be completed for revisions (amendments, changes, or supplements) to funds for the current year of existing grants.

If more than four lines are needed to list the program titles, submit additional schedules as necessary.

Line 20 – Enter the total for each of the Columns (b)-(e). When additional schedules are prepared for this Section, annotate accordingly and show the overall totals on this line.

Section F. Other Budget Information

Line 21 – Use this space to explain amounts for individual direct object-class cost categories that may appear to be out of the ordinary or to explain the details as required by the Federal grantor agency.

Line 22 – Enter the type of indirect rate (provisional, predetermined, final or fixed) that will be in effect during the funding period, the estimated amount of the base to which the rate is applied, and the total indirect expense.

Line 23 – Provide any other explanations or comments deemed necessary.

BILLING CODE 4000-01-C

Instructions for Part III—Application Narrative

Before preparing the application narrative, an applicant should read carefully the description of the program, the information regarding priorities, and the selection criteria the Secretary uses to evaluate applications.

The Narrative should encompass each function or activity for which funds are being requested and should:

1. Begin with an abstract, that is, a summary of the proposed project;

2. Describe the proposed project in light of each of the selection criteria in the order in which these criteria are listed in this notice;

3 Describe how the proposed project will meet one or both of the absolute priorities and any of the invitational priorities listed in this notice;

4. Clearly identify any component of the project that will serve gifted and talented students who are economically disadvantaged.

5. According to EDGAR, 34 CFR 75.591, grantees are required to cooperate in any Federal evaluation of their projects. Recipients of funds under the Jacob K. Javits Gifted and Talented Students Education Program shall collect the following data for evaluation, and applicants shall describe in their grant application their plan for collecting this data:

Demographic information on participants, including number of participants, grade level, racial/ethnic composition, socio-economic composition, and evidence of special needs;

A description of services provided to participants; and

Measures which demonstrate the progress made in achieving the project's stated goals and objectives, such as increased enrollment of students in gifted and talented programs, academic achievement and improvements in teacher's skills and attitudes.

This data will be used in evaluating project effectiveness and in evaluating continuation applications.

6. Include any other pertinent information that might assist the Secretary in reviewing the application, including the scope and degree of service and when it will be delivered. The application should enable reviewers to make clear linkage between the proposed project and specific project tasks, operation, and service delivery

Please limit the application narrative to no more than 30 double-spaced, typed pages (on one side only). Supplemental documentation (not to exceed 25 pages) may be attached to the program narrative and is not counted as part of the 30 pages of narrative.

Estimated Public Reporting Burden

Under terms of the Paperwork Reduction Act of 1980, as amended, and the regulations implementing that Act, the Department of Education invites comment on the public reporting burden in this collection of information. Public reporting burden for this collection of information is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. You may send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S Department of Education, Information Management and Compliance Division, Washington, DC 20202–4651; and to the Office of Management and Budget, Paperwork Reduction Project 1850–0635, Washington, DC 20503.

(Information collection approved under OMB control number 1850–0635. Expiration date: May 31, 1992.)

BILLNG CODE 4000-01-M

OMB Approval No. 0348-0040

ASSURANCES — NON-CONSTRUCTION PROGRAMS

Note: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.
2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.
3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.
4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.
5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§ 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).
6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C.§§ 6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse, (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made. and (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.
7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally assisted programs These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.
8. Will comply with the provisions of the Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.
9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§ 276a to 276a-7), the Copeland Act (40 U.S.C. § 276c and 18 U.S.C. §§ 874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333), regarding labor standards for federally assisted construction subagreements.

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10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program andto purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 et seq.); (f) conformity of Federal actions to State (Clear Air) Implementation Plans under Section 176(c) of the Clear Air Act of 1955, as amended (42 U.S.C. § 7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (P.L. 93-523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (P.L. 93-205).

12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§ 1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 et seq.).

14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.

15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. 2131 et seq.) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.

16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§ 4801 et seq.) which prohibits the use of lead based paint in construction or rehabilitation of residence structures.

17 Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act of 1984.

18 Will comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE
APPLICANT ORGANIZATION	DATE SUBMITTED

SF 424B (4-88) Back

Assurances -- Jacob K. Javits Gifted and Talented Students Education Program

The applicant hereby assures and certifies that it will:

1. If it provides for service delivery, provide for the equitable participation of students and teachers in private nonprofit elementary and secondary schools, including the participation of teachers and other personnel in preservice and inservice training programs supported under the Act;

2. Use the funds received under the Javits program to supplement and make more effective the expenditure of State and local funds, and of Federal funds made available under Chapter 2 of Title I and Title II of the Elementary and Secondary Education Act of 1965 for the education of gifted and talented students.

_____
Signature

_____
Name

_____
Title

_____
Date

GIFTED AND TALENTED PROGRAM

Data Sheet

Please check the priority or priorities your proposed program or project will address.

ABSOLUTE PRIORITIES: (The application must address one or both of these priorities.)

_____ The identification of gifted and talented students who may not be identified through traditional assessment methods (including economically disadvantaged individuals, individuals of limited English proficiency, and individuals with handicaps) and the provision of education programs designed to include gifted and talented students from such groups; and

_____ Programs and projects designed to develop or improve the capability of schools in an entire State or region of the Nation through cooperative efforts and participation of State and local educational agencies, institutions of higher education, and other public and private agencies and organizations (including business, industry, and labor), to plan, conduct, and improve programs for the identification and education of gifted and talented students.

SERVICE PRIORITY:

_____ The application contains a component designed to serve gifted and talented students who are economically disadvantaged individuals.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters Primary Covered Transactions

This certification is required by the regulations implementing Executive Order 12549, Debarment and Suspension, 34 CFR Part 85, Section 85.510, Participants' responsibilities. The regulations were published as Part VII of the May 26, 1988 Federal Register (pages 19160-19211). Copies of the regulations may be obtained by contacting the U.S. Department of Education, Grants and Contracts Service, 400 Maryland Avenue, S.W. (Room 3633 GSA Regional Office Building No. 3), Washington, D.C. 20202-4725, telephone (202) 732-2505.

(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON REVERSE)

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Organization Name PR/Award Number or Project Name

Name and Title of Authorized Representative

Signature Date

ED Form GCS-008, (REV.12/88)

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to whom this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion--Lower Tier Covered Transactions," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding
Debarment, Suspension, Ineligibility and Voluntary Exclusion
Lower Tier Covered Transactions

This certification is required by the regulations implementing Executive Order 12549, Debarment and Suspension, 34 CFR Part 85, Section 85.510, Participants' responsibilities. The regulations were published as Part VII of the May 26, 1988 Federal Register (pages 19160-19211). Copies of the regulations may be obtained by contacting the person to which this proposal is submitted.

(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON REVERSE)

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Organization Name PR/Award Number or Project Name

Name and Title of Authorized Representative

Signature Date

ED Form GCS-009, (REV. 12/88)

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion--Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Drug-Free Workplace Requirements Grantees Other Than Individuals

This certification is required by the regulations implementing the Drug-Free Workplace Act of 1988, 34 CFR Part 85, Subpart F. The regulations, published in the January 31, 1989 Federal Register, require certification by grantees, prior to award, that they will maintain a drug-free workplace. The certification set out below is a material representation of fact upon which reliance will be placed when the agency determines to award the grant. False certification or violation of the certification shall be grounds for suspension of payments, suspension or termination of grants, or governmentwide suspension or debarment (see 34 CFR Part 85, Sections 85.615 and 85.620).

The grantee certifies that it will provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing a drug-free awareness program to inform employees about--

(1) The dangers of drug abuse in the workplace;
(2) The grantee's policy of maintaining a drug-free workplace;
(3) Any available drug counseling, rehabilitation, and employee assistance programs; and
(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will--

(1) Abide by the terms of the statement; and
(2) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;

(e) Notifying the agency within ten days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction;

(f) Taking one of the following actions, within 30 days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted--

(1) Taking appropriate personnel action against such an employee, up to and including termination; or
(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

Organization Name _____ PR/Award Number or Project Name _____

Name and Title of Authorized Representative _____

Signature _____ Date _____

ED 80-0004

[FR Doc. 89-13137 Filed 6-1-89; 8:45 am]
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federal register

Friday
June 2, 1989

Part VIII

Department of Transportation

Federal Aviation Administration

14 CFR Part 71

Proposed Establishment of the Phoenix Terminal Control Area and Revocation of the Phoenix Radar Service Area, Arizona; Notice of Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 88-AWA-8]

Proposed Establishment of the Phoenix Terminal Control Area and Revocation of the Phoenix Airport Radar Service Area, Arizona

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish a Terminal Control Area (TCA) at the Phoenix Sky Harbor International Airport, AZ. The TCA would consist of airspace from the surface or higher within a 25-mile radius of Phoenix Sky Harbor International Airport to and including 10,000 feet above mean sea level (MSL). Establishment of this TCA would impose certain operating rules and pilot/equipment requirements, including requirements for an operable two-way radio, a 4096 transponder with automatic altitude-reporting equipment, and an operable very high frequency omni-directional radio range (VOR) or tactical air navigational aid (TACAN) receiver; and restrictions on student pilot operations. This action is intended to increase the capability of the air traffic control (ATC) system to separate all aircraft in the terminal airspace arpund the Phoenix Sky Harbor International Airport. It is based on data indicating that a high percentage of near midair collisions reported to the FAA in terminal areas involves visual flight rules (VFR) aircraft that are not required to be under the control of ATC. The objective of this proposal is to substantially increase safety while accommodating the legitimate concerns of airspace users. Phoenix Sky Harbor International Airport is currently served by an Airport Radar Service Area (ARSA), which would be rescinded concurrent with the establishment of this TCA.

DATES: Comments must be received on or before August 1, 1989.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket [AGC-10], Airspace Docket No. 88-AWA-8, 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.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

FOR FURTHER INFORMATION CONTACT: Betty W. 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) 267-9255.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy 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-8." 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.

Related Rulemaking Actions

On May 21, 1970, the FAA published FAR Amendment 91-78 (35 FR 7782) which enabled the establishment of TCA's. On October 14, 1988, the FAA published a final rule which revised the classification and pilot/equipment requirements for conducting operations in a TCA (53 FR 40318). Specifically, the rule: (a) Establishes a single-class TCA; (b) requires the pilot-in-command of a civil aircraft operating within a TCA to hold at least a private pilot certificate, except for a student pilot who has received certain documented training; and (c) eliminates the helicopter exception from the minimum navigational equipment requirement.

The FAA published a final rule on June 21, 1988 which requires Mode C equipment when operating within 30 miles of any designated TCA primary airport from the surface to 10,000 feet MSL, except for operations by certain aircraft types specifically excluded (53 FR 23356).

On February 3, 1987, the FAA published a final rule which established requirements pertaining to the use, installation, inspection, and testing of Air Traffic Control Radar Beacon System (ATCRBS) and Mode S transponders in U.S.-registered civil aircraft (53 FR 3380). The rule adopted continues to require a transponder for operation in each TCA.

Background

The TCA program was developed to reduce the midair collision potential in the congested airspace surrounding an airport with high density air traffic by providing an area in which all aircraft will be subject to certain operation rules and equipment requirements.

The density of traffic and the type of operation being conducted in the airspace surrounding major terminals increases the probability of midair collisions. An extensive study in 1970 found that the majority of midair collisions occurred between a general aviation (GA) aircraft and either an air carrier, military or another GA aircraft. The basic causal factor common to these conflicts was the mix of uncontrolled aircraft operating under VFR and controlled aircraft operating under instrument flight rules (IFR). TCA's provide a method to accommodate the increasing number of IFR and VFR operations. The regulatory requirements

of TCA airspace afford the greatest protection for the greatest number of people by providing ATC with an increased capability to provide aircraft separation service, thereby minimizing the mix of controlled and uncontrolled aircraft.

On August 22, 1987, the Secretary of Transportation announced nine locations for which the FAA would issue notices of proposed rulemaking (NPRM's) proposing establishment of TCA's. The nine candidates cited qualify for TCA status by meeting the criteria published in FAA Handbook 7400.2, "Procedures for Handling Airspace Matters." The criteria for establishing a TCA are based on factors which include the number of aircraft and people using that airspace, the traffic density, and the type or nature of operations being conducted. Accordingly, guidelines have been established to identify TCA locations based on two basic elements—the number of enplaned passengers and the number of aircraft operations.

To date, the FAA has established a total of 23 TCA's. The FAA is proposing to take action to modify or implement the application of these proven control techniques to more airports to provide greater protection of air traffic in the airspace regions most commonly used by passenger-carrying aircraft.

PRE-NPRM Public Input

Airspace Meetings

Two Pre-NPRM airspace meetings were held (June 30 and July 28, 1988) to allow local aviation interests and airspace users an opportunity to present input on the design of the proposed Phoenix TCA. During the course of these meetings, there were presentations from the Air Line Pilots Association (ALPA), two local user groups (Arizona Airspace Utilization Committee (AAUC) and Arizona Pilots Association (APA)), private pilots, and concerned citizens.

ALPA supported a "generic" FAA design for the Phoenix TCA, stating that the lateral limits should extend to 30 miles and vertical limits should be at least 10,000 feet MSL. ALPA's concerns centered on ensuring turbojet containment within the TCA, taking into consideration aircraft performance during hot weather. ALPA stated that the Sky Harbor Airport (PHX) must have a very high frequency omni-directional radio range and distance measuring equipment (VOR/DME) or VORTAC on the field. Further, the Association endorsed the establishment of a north-south VFR transition route.

The AAUC presented its design of the proposed Phoenix TCA in the two public meetings and in a subsequent meeting between an AAUC subcommittee and FAA representatives on February 22, 1989. The boundaries of this proposal were based almost exclusively on visual landmarks (roads, rivers and mountains). This design was based upon the fact that the largest sector of users in the state operate under VFR. The lateral limits of the AAUC proposal extended to 20 miles, with vertical limits of 10,000 feet MSL. The AAUC recommended that the FAA make a commitment to install a VOR/DME or VORTAC on the airport. This group initially supported a north-south VFR corridor.

The APA, a member of the AAUC, made a separate proposal. The APA's proposal is based upon the "core" of AAUC's design. This group felt that the 20-mile arcs to the north and south (as per AAUC's design) were not necessary for this TCA. APA stated that the size of a TCA is determined by IFR and air carrier operations, but boundaries must be established along identifiable visual landmarks readily seen by VFR pilots wishing to avoid the TCA. The APA supported a design with vertical limits at 8,000 feet MSL on condition that provisions can be made for sailplanes and nonelectrical aircraft to operate without Mode C equipment up to 10,000 feet MSL, outside the TCA and within 30 miles of Sky Harbor Airport. If these operations cannot be accommodated by the FAA, the top of the TCA should be set at 10,000 feet MSL with provisions for a north-south VFR corridor. The APA also recommended that a VOR/DME be installed on the airport before TCA implementation.

The majority of the private pilots' comments supported the concepts of the AAUC or APA proposals.

A resident from the area (nonpilot) supported a "generic" FAA TCA design.

Written Comments

The FAA accepted written comments of this Pre-NPRM proposal until August 15, 1988. A total of 22 comments were received during this period. These letters included: 15 supporting AAUC's proposal, 5 endorsing APA's design, and 2 other proposals submitted by private pilots.

The comments received are summarized as follows:

1. A VOR/DME or VORTAC should be installed on the airport prior to TCA implementation.

2. Provisions should be made for non-Mode C-equipped helicopters to operate at specified altitudes.

3. The implementation of the TCA should be delayed until July 1, 1989, to coincide with Final Rule 88–2 regarding Mode C.

4. Measures should be taken to ensure that the Phoenix TRACON is adequately staffed and has sufficient equipment.

5. An exemption should be granted to student pilots using the Sky Harbor Airport after TCA implementation, given proper Certified Flight Instructor or Certified Flight Instructor Instrument endorsements.

6. Design of the TCA should be based on use of visual landmarks.

The FAA evaluated all the comments and designs received on this proposal. A common recommendation in the comments was the use of visual landmarks to distinguish TCA boundaries. Since the weather in Phoenix is predominantly VFR, the proposed design utilizes as many visual landmarks as practical to define the various segments of the TCA.

Another issue mentioned frequently was the installation of a VOR/DME or VORTAC on the airport. The FAA is in the process of identifying a suitable site on or near the Sky Harbor Airport for this equipment. The proposed installation is scheduled for a mid-1990 completion date. Even though a TCA can be established with the VORTAC in the present location with no derogation of safety, the FAA is considering relocating the VORTAC on airport property. Until then, pilots will be able to use existing electronic navigational facilities as well as prominent visual landmarks. This system is currently in effect at other TCA's.

An uncontrolled VFR corridor was requested by several user groups. This request was considered in developing the proposed design. Due to traffic flows and airspace sectorization, an uncontrolled corridor was not feasible. Establishment of this type of airspace would result in air traffic transiting portions of the TCA utilized by turbojet arrivals without being identified and without being required to contact Phoenix approach control or Phoenix tower. As an alternative to the VFR corridor, the FAA has developed a transition route that it believes will be safer than the corridor and will meet the needs of the users for a convenient north/south route.

The VFR transition route, which does not require rulemaking, would be established through the proposed Phoenix TCA for VFR aircraft. Pilots requesting a designated VFR transition route would comply with all TCA requirements including an ATC authorization. The VFR transition route

would be published on the Phoenix Terminal Area Chart.

The proposed VFR transition route, Biltmore, extends from the southeast along Interstate 10, then north over the Phoenix Sky Harbor International Airport. The altitudes available on the Biltmore transition route would be 3,500 feet MSL to 5,500 feet MSL as assigned by ATC.

The AAUC recommended that the TCA extend to 10,000 feet. This suggestion is encompassed in the proposed design. The proposed design extends to 25 miles from the primary airport which differs from AAUC's recommendation of a 20-mile extension. The added distance was necessary to ensure turbojet departure containment during hot or inclement weather.

The Proposal

The FAA is considering an amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to establish a TCA at Phoenix Sky Harbor International Airport, AZ. The 1987 passenger enplanements for the Phoenix Sky Harbor International Airport were 8,911,660 which is more than double the established criteria of 3.5 million. Additionally, within the proposed boundaries, 435,836 flight operations were conducted of which 244,309 were air carrier. Consequently, the FAA has determined that establishment of a TCA at Phoenix Sky Harbor International Airport is in the interest of flight safety and will result in a greater degree of protection for the greatest number of people during flight in that terminal area. Phoenix Sky Harbor International Airport is currently served by an ARSA, which would be rescinded concurrent with the establishment of this TCA. Additionally, within the lateral boundaries of the TCA proposed herein, there are two nonregulatory airspace areas, Alert Area A–231 and the Williams 1 Military Operations Area (MOA), AZ. Adoption of the proposed TCA would result in adjustments to the airspace and operations conducted within both of these areas.

Section 91.90 of Part 91 of the Federal Aviation Regulations (14 CFR Part 91) defines TCA's and prescribes operating rules for aircraft in airspace designated as a TCA. The TCA rule provides, in part, that prior to entering the TCA, any aircraft arriving at any airport within the TCA or flying through a TCA must: (1) Obtain appropriate authorization from ATC; (2) unless otherwise authorized by ATC, all large turbine engine-powered aircraft operating to or from a primary airport shall operate above the designated floors of the TCA; (3) comply with any procedures established by ATC for such operations as pilot training at an airport within a TCA; (4) hold at least a private pilot certificate; (5) meet the requirements of § 61.95 if the aircraft is operated by a student pilot; (6) have an operable VOR or TACAN receiver; (7) have an operable two-way radio capable of communications with ATC on appropriate frequencies for that TCA; and (8) be equipped with the applicable operating transponder and automatic altitude reporting equipment specified in paragraph (a) of § 91.24, except as provided in paragraph (d) of that section. Any aircraft departing from an airport located inside the TCA is required to receive a clearance from ATC prior to takeoff.

All aircraft operating within a TCA 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 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. Ultralight vehicle operations and parachute jumps in a TCA may only be conducted under the terms of an ATC authorization.

Definitions, operating requirements, and specific airspace designations applicable to TCA's may be found in §§ 71.12, 71.401, and 71.403 of Part 71 (14 CFR Part 71) and §§ 91.1 and 91.90 of Part 91 (14 CFR Part 91).

The standard configuration of a TCA consists of 3 concentric circles centered on the primary airport extending to 10, 20, and 30 miles respectively. The vertical limits of the TCA are 12,500 feet above MSL, with the floor established at the surface in the inner area and at levels appropriate to containment of operations in the outer areas. Variations of these criteria may be authorized contingent upon terrain, adjacent regulatory airspace, and factors unique to the terminal area. The airspace configuration contained herein is the result of an extensive staff study conducted by the local FAA authority after obtaining public input from informal airspace meetings and coordinating with the FAA regional office. The FAA has determined the following proposed TCA airspace configuration is consistent with TCA objectives and allows consideration of terminal area flight operations and terrain as follows:

1. That airspace extending upward from the surface to and including 10,000 feet MSL bounded on the north by Camelback Road on the east by Pima/Price Road, on the south by Guadalupe Road and Interstate 10, and on the west by 51st Avenue. This airspace is necessary to contain large turbine-powered aircraft within the confines of the TCA while operating to and from the primary airport.

2. That airspace on the east and west of the Phoenix Sky Harbor International Airport, excluding that airspace in paragraph 1, extending from 3,000 feet MSL to and including 10,000 feet MSL bounded on the north by Glendale Avenue and Indian Bend Road, on the east by Gilbert Road, on the south by Chandler Boulevard and an extension of Chandler Boulevard, on the west by Litchfield Road and the Agua Fria River This airspace is needed to provide sufficient room for vectoring aircraft arriving and departing the Phoenix Sky Harbor International Airport.

3. That airspace north, east and south of Phoenix Sky Harbor International Airport extending from 4,000 feet MSL to and including 10,000 feet MSL, excluding that airspace described in paragraphs 1 and 2, bounded on the north by Thunderbird Road, on the east by a 20-mile arc from the ILS localizer antenna and the Williams 1 MOA, on the south by Riggs Road and an extension of Riggs Road, on the west by the Gila River until intercepting an extension of Chandler Boulevard, then an extension of Chandler Boulevard until intercepting Litchfield Road, then Litchfield Road until the Agua Fria River. This configuration takes into consideration the terrain and is necessary to provide additional airspace for aircraft on downwind, and for approaches and departures to the north.

4. That airspace north and south of Phoenix Sky Harbor International Airport within a 20-mile radius extending from 6,000 feet MSL to and including 10,000 feet MSL, excluding that airspace described in paragraphs 1–3. This area is utilized extensively for departures to the north and south. Within this area a mix of traffic exists due to operations to/from airports in the Phoenix terminal area.

5. That airspace within a 25-mile radius of Phoenix Sky Harbor International Airport extending from 8,000 feet MSL to and including 10,000 feet MSL, excluding that airspace described in paragraphs 1–4; and that airspace west of Phoenix Sky Harbor International Airport extending from 6,000 feet MSL to and including 10,000 feet MSL bounded by an extension of Chandler Boulevard clockwise until intersecting Camelback Road. This airspace is impacted by high terrain and allows adequate airspace for nonparticipating aircraft conducting

VFR operations. This configuration would provide an area to contain aircraft during climb and descent profiles while transitioning between the terminal and en route structure.

The preceding general summary of the proposed TCA airspace configuration identifies that airspace which is necessary to contain large turbojet aircraft operations at Phoenix Sky Harbor International Airport. ATC will provide control and separation of all flights within the proposed airspace boundaries. Furthermore, ACT authorization is requisite to aircraft operations within that airspace. Establishment of this TCA will greatly enhance the safety of flight within the congested airspace overlying the Phoenix metropolitan area by facilitating the separation of controlled and uncontrolled flight operations. Section 71.403 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 4, 1988.

Regulatory Evaluation Summary

The FAA is required to assess the benefits and costs of each proposed rulemaking action to assure that the public is not burdened with rules whose costs outweigh their benefits. The section contains an analysis which quantifies, to the maximum possible extent, the costs and benefits of establishing at TCA at Phoenix, AZ.

This proposal is intended to lower the likelihood of midair collisions by increasing the capability of the ATC system to separate all aircraft in terminal airspace around the Phoenix Sky Harbor International Airport. This action was prompted by data indicating that a high percentage of near midair collisions reported to the FAA in terminal areas involve VFR aircraft that are not required to be under the control of ATC. Thus, the overall objective of this proposal is to substantially increase safety while accommodating the legitimate concerns of airspace users.

Costs-Benefits Analysis

a. Costs

The FAA estimates the total cost expected to accrue from implementation of the proposed rule to be $1.2 million ($1 million, discounted) in 1987 dollars. Approximately $471,000 (discounted) or 46 percent of the total estimated costs would be incurred by the FAA primarily for training and additional equipment. The remaining costs would be incurred by small GA aircraft operators who would be required under this proposal to equip their aircraft with Mode C transponders sooner than they would have for the ARSA under the previous FAA rule: "Transponder With Automatic Altitude Reporting Capability Requirement (Mode C)" (53 FR 23356, June 21, 1988). This rule became effective June 21, 1989, and will be implemented in two phases. Phase I, to begin in July 1989, will require a transponder with Mode C at and above 10,000 feet MSL and in the vicinity (30 nautical miles) of TCA primary airports. There are currently 23 TCA's. Phase II will implement a transponder with Mode C requirement in the airspace in the vicinity (10 nautical miles) of ARSA primary airports. Phase II becomes effective on December 30, 1990, and will affect over 135 ARSA's. Also in Phase II, a transponder with Mode C will be required at other designated airports for which either a TCA or ARSA has not been adopted. Consequently, it would be very difficult for any aircraft to fly without entering within 30 nautical miles of a primary TCA airport, within 10 nautical miles of a primary ARSA airport, or within controlled airspace of other designated airports that would also require Mode C transponders. Thus, this evaluation, as well as the Mode C rule, assumes that all aircraft without Mode C would acquire such equipment rather than circumnavigate the subject airport. The only aircraft without this equipment would be non-electrical and antique types. Costs to these types of aircraft operators have already been accounted for by the Mode C rule. As a result, aircraft operators impacted by this proposal would only incur the opportunity costs of capital by requiring them to acquire, install, and maintain Mode C transponders one and a half years earlier than they would be required to do so in accordance with Phase II of the Mode C rule.

b. Benefits

This proposed rule is expected to generate potential benefits primarily in the form of enhanced safety to the aviation community and the flying public. Such safety, for instance, would take the form of reduced casualty losses (namely, aviation fatalities and property damage) resulting from a lowered likelihood of midair collisions because of increased positive control in airspace to be established by the TCA. In addition, potential benefits are expected to accrue in the form of improved operational efficiency on the part of FAA air traffic controllers.

Ordinarily, the potential benefits of this proposal would be the reduction in the probability of midair collisions resulting from converting the existing ARSA to a TCA. However, because of the recent Mode C rule (and to some extent, the Traffic Alert and Collision Avoidance (TCAS) rule, 54 FR 940, January 10, 1989), the number of potential midair collisions avoided by this proposal is expected to be significantly lower. Nevertheless, this proposal is still expected to accrue benefits in terms of enhanced safety, though on a much smaller scale. This point can be illustrated with the use of statistical models based on actual and projected critical NMAC incidents in lieu of actual midair collisions. (A critical NMAC is an event involving two aircraft coming within 100 feet of each other; the fact that they do not collide is not due to an action on the part of either pilot; but, rather, purely to chance.) Since midair collisions involving Part 135 aircarft and especially Part 121 aircraft are rare, the use of critical NMAC's will serve to illustrate, to some degree, the potential improvements in aviation safety of implementing this proposal. Simple regression analyses were prepared for this evaluation which focused on critical NMAC's and aircraft operations in the 23 existing TCA's and in a random sample of 23 of the exisitng 79 ARSA's (as of 1986 and 1987). The results of these analyses indicated that TCA's have approximately 32 percent fewer critical NMAC's annually, on average, than ARSA's. While there is no demonstrated relationship between NMAC's and actual midair collisions, the lower NMAC rate does indicate a more efficient separation of aircraft in congested airspace.

As the result of these findings, if the existing Phoenix ARSA were to remain unchanged (and the recent Mode C and TCAS rules were not in effect), the Phoenix Terminal Area would be expected to experience approximately 2.6 critical NMAC's annually (or 41 critical NMAC's over the next 15 years). If, however, the ARSA were to become a TCA, this figure would reduce to approximately 0.8 critical NMAC's annually (or 13 critical NMAC's over the next 15 years). Thus, over the next 15 years, this proposal could result in the reduction of approximately 28 critical NMAC's. However, it is important to note that many, if not most, of these potential critical NMAC's would never materialize as predicted primarily because of the "Mode C" rule as it is applied to the Phoenix ARSA and, to some extent, the "TCAS" rule.

According to Phase II of the Mode C rule, all aircraft operating within 10 nautical miles (except for flights under the outer 5-mile "shelf") of an ARSA primary airport must be equipped with the Mode C Transponder. Phase I of the Mode C rule requires, as of July 1989,

aircraft operating within 30 nautical miles of a TCA to be equipped with a Mode C transponder. These requirements are expected to significantly reduce the risk of midair collisions in ARSA's and TCA's. For this reason, the primary safety benefit of this proposal to create a TCA in 1989 at Phoenix is that the safety enhancements of the Mode C and TCAS requirements will occur one and a half years earlier than they otherwise would be expected without this proposal. A second safety benefit would be in terms of the lowered likelihood of midair collisions as the result of expanding the lateral boundaries of positive ATC by 20 nautical miles through replacing the Phoenix ARSA with a TCA.

Thus, the safety benefits of the establishment of a new TCA, while positive, would be less than would otherwise accrue in the absence of the Mode C and TCAS rules. Since this proposal essentially extends the effects of the Mode C rule, virtually all of its potential safety benefits are assumed to be part of that rule. Such benefits cannot be estimated separately and, therefore, are considered to be inextricably linked primarily to the Mode C rule. Over a 15-year period, the Mode C rule is expected to generate total potential safety benefits of $344 million (discounted, in 1987 dollars). (The Mode C rule benefits estimated of $310 million for 10 years has been adjusted to a 15-year period for the purpose of comparability with the TCAS rule and other FAA rulemaking actions.) It is important to note that part of these safety benefits would be attributed to the TCAS rule. Thus, the potential safety benefits of this proposal, and the Mode C and TCAS rules are considered to be inextricably linked.

Another potential benefit of the proposed rule would be improved operational efficiency on the part of FAA air traffic controllers. Under the proposed rule, Mode C transponder requirements would ease controller workload per aircraft being controlled because of the reduction in radio communications. It would also make potential traffic conflicts more readily apparent to the controller. As the result of improved operational efficiency, the impact of the controller workload increased by separation requirements in the proposed TCA would be somewhat offset because of the controller's ability to adjust the volume of VFR traffic in any given portion of the TCA. Improved operational efficiency should generate other types of benefits in the form of significant reductions in the number of VFR aircraft requests denied and VFR aircraft delayed during busy periods. As the result of converting the existing Phoenix ARSA to a TCA, the improved operational efficiency would accrue because of the additional equipment (such as flight data input-output, dedicated communication link, and video mapper). If the Phoenix ARSA were to remain intact, such equipment would not be required. The potential benefits of improved operational efficiency, which is not considered to be quantifiable in this evaluation, would be attributed to this proposal.

c. Comparison of Benefits and Costs

The total cost that would accrue from implementation of the proposed rule is estimated to be $1 million (discounted, in 1987 dollars). Approximately, half of this total cost estimate would fall on those GA aircraft operators without Mode C transponders in the form of opportunity costs by requiring them to acquire such avionics equipment one and a half year sooner than they otherwise would under the status quo. The typical individual GA aircraft operator impacted would incur an estimated one-time cost ranging from $120 to $280 (discounted) under the proposed rule. The potential benefits of the proposed rule would be the lowered likelihood of midair collisions from the conversion of the existing ARSA to a TCA. The number of midair collisions avoided and their respective monetary values cannot be estimated for this proposal independent of the Mode C and TCAS rules, but the FAA believes the risk would be substantially reduced. An FAA analysis prepared for this evaluation, however, has shown that critical near midair collisions occur approximately one-third less frequently ina TCA than within an ARSA. The FAA believes that even after the aviation community complies with the Mode C and TCAS rules, locations converting from ARSA's to TCA's would continue to experience reduced critical NMAC's. In addition, the proposed rule would generate improved operational efficiency benefits on the part of FAA air traffic controllers, though they are not considered to be quantifiable in monetary terms.

The Regulatory Evaluation that has been placed in the docket contains additional detailed information related to the costs and benefits that are expected to accrue from the implementation of this NPRM.

Initial Regulatory Flexibility Determination

The Regulatory Fexibility Act of 1980 (RFA) was enacted to ensure that small entities are not unnecessarily and disproportionately burdened by Government regulations. The RFA requires agencies to review rules which may have "a significant economic impact on a substantial number of small entities."

The small entities which could be potentially affected by the implementation of this proposed rule are unscheduled operators of aircraft for hire who own nine or fewer aircraft.

Virtually all of the aircraft operators impacted by this proposed rule would be those who acquire Mode C transponder capability. The FAA believes that all unscheduled aircraft operators (namely, air taxi operators) potentially impacted by this proposed rule already have Mode C transponder due to the fact that such operators fly regularly in or near airports where radar approach control service has been established. Even if some of these operators were to acquire, install, and maintain Mode C transponders, the cost would not have a significant economic impact on a substantial number of them. The annual FAA threshold for significant economic impact is $3,700 (1987 dollars) for a small entity. According to FAA Order 2100.14A (Regulatory Flexibility Criteria and Guidance), the definition of a small entity, in terms of an air taxi operator, is one with nine aircraft owned, but not necessarily operated.

If we were to assume that a particular aircraft operator had nine aircraft without transponders, then the one-time cost per aircraft would be approximately $243. This figure represents the annualized cost for each impacted aircraft. The total cost per small entity would amount to an estimated $2,187. Thus, the annual worst case cost for a small entity would fall far below the FAA's annual threshold of $3,700. Therefore, the FAA believes this proposed rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The proposed rule would neither have an effect on the sale of foreign aviation products or services in the United States, nor would it have an effect on the sale of U.S. products or services in foreign countries. This is because the proposed rule would only potentially impact small GA aircraft operators without Mode C, and not aircraft manufacturers. The averge cost of acquiring Mode C capability is estimated to range from $900 (to upgrade from a Mode A transponder) to $2,000 (to acquire a Mode C transponder without having a Mode A transponder). The cost of acquiring Mode C capability

is not considered to be high enough to discourage potential buyers of small GA airplanes.

Federalism Implications

This regulation would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, preparation of a Federalism assessment is not warranted.

Conclusion

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 it is certified that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. This rule is considered a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 2?, 1979).

List of Subjects in 14 CFR Part 71

Aviation safety, Terminal control areas, 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.

§ 71.403 [Amended]

2. Section 71.403 is amended as follows:

Phoenix, AZ [New]

Primary Airport

Phoenix Sky Harbor International Airport (lat. 33°26'10" N., long. 112°00'32" W.)
Phoenix Sky Harbor International Airport Runway 8R Instrument Landing System (ILS) Localizer Antenna (lat. 33° 25'52" N., long. 111°59'11" W.)

Boundaries

Area A. That airspace extending upward from the surface to and including 10,000 feet MSL within the area bounded on the north by a point at lat. 33°30'34" N., long. 112°10'05" W. (intersection of 51st Avenue and Camelback Road), extending east along Camelback Road until a point at lat. 33°30'07" N., long. 111°53'26" W., (intersection of Camelback Road and Pima/Price Road), on the east by Pima/Price Road until a point at lat. 33°21'49" N., long. 111°53'34" W. (Pima/Price Road and Guadalupe Road), on the south by Guadalupe Road to a point at lat. 33°21'50" N., long. 111°58'05" W. (intersection of Guadalupe Road and Interstate 10), direct to a point at lat. 33°21'48" N., long. 112°06'17" W., direct to a point at lat. 33°21'46" N., long. 112°10'06" W., on the west by 51st Avenue to the point of beginning.

Area B. That airspace extending upward from 3,000 feet MSL to and including 10,000 feet MSL within an area bounded on the north by a point at lat. 33°30'29" N., long. 112°21'26" W., (intersection of Litchfield Road and Camelback Road), extending east on Camelback Road to a point at lat. 33°30'27" N., long. 112°18'14" W., (Camelback Road and Agua Fria River), north along Agua Fria River to a point at lat. 33°32'11" N., long. 112°18'23" W., (Agua Fria River and Glendale Avenue), extending east on Glendale Avenue to a point at lat. 33°32'19" N., long. 112°06'42" W (intersection of Glendale Avenue and Interstate 17), on the east by Interstate 17 to a point at lat. 33°30'34" N., long. 112°06'42" W (intersection of Interstate 17 and Camelback Road), west on Camelback Road to a point at lat. 33°30'34" N., long. 112°10'05" W. (intersection of Camelback Road and 51st Avenue), south of 51st Avenue to a point at lat. 33°21'46" N., long. 112°10'06" W., east to a point at lat. 33°21'48" N., long. 112°06'27" W., south to a point at lat. 33°18'18" N., long. 112°06'27" W., on the south by an extension of Chandler Boulevard extending west to a point at lat. 33°18'18" N., long. 112°21'26" W., on the west by Litchfield Road and an extension of Litchfield Road to the point of beginning.

Area C. That airspace extending upward from 3,000 feet MSL with the airspace bounded on the north by a point at lat. 33°32'18" N., long. 111°53'26" W. (intersection of Indian Bend Road and Pima/Price Road), east on Indian Bend Road and an extension of Indian Bend Road until a point at lat. 33°32'20" N., long. 112°47'20" W. (extension of Indian Bend Road intercepts Gilbert Road), on the east by Gilbert Road and an extension of Gilbert Road to a point at lat. 33°18'18" N., long. 111°47'20" W. (extension of Gilbert Road intercepts Chandler Boulevard), on the south by Chandler Boulevard to a point at lat. 33°18'19" W., long. 111°58'18" W. (intersection of Chandler Boulevard and Interstate 10), on the west by Interstate 10 to a point at lat. 33°21'50" N., long. 111°58'05" W., then east on Guadalupe Road to a point at lat. 33°21'49" N., long. 111°53'34" W. (intersection of Guadalupe Road and Pima/Price Road), then north on Pima/Price Road until the point of beginning.

Area D. That airspace extending upward from 4,000 feet MSL to and including 10,000 feet MSL within an area bounded by a point at lat. 33°36'32" N., long. 112°18'12" W. (Agua Fria River and Thunderbird Road), extending east on Thunderbird Road and Cactus Road until intersecting the 20-mile arc from the ILS localizer antenna clockwise to the Williams 1 MOA, AZ, boundary, then south along the Williams 1 MOA boundary until intersecting Riggs Road and an extension of Riggs Road, extending west on Riggs Road and an extension of Riggs Road to a point at lat. 33°12'00" N., long. 112°09'00" W. (intersection of Valley Road and Riggs Road), north on Valley Road to a point at lat. 33°15'15" N., long. 112°09'00" W. (intersection of Valley Road and Gila River), north along Gila River until intercepting an extension of Chandler Boulevard at lat. 33°18'18" N., long. 112°12'00" W., extending east on an extension of Chandler Boulevard to a point at lat. 33°18'18" N., long. 112°06'27" W., north to a point at lat. 33°21'48"N., long. 112°'27" W., east to a point at lat. 33°21'50" N., long. 111°58'05" W. (intersection of Guadalupe Road and Interstate 10), south on Interstate 10 to a point at lat. 33°18'19" N., long. 111°58'18" W. (intersection of Chandler Boulevard and Interstate 10), east on Chandler Boulevard to a point at lat. 33°18'19" N., long. 111°47'20" W. (intersection of Gilbert Road and Chandler Boulevard), north on Gilbert Road and an extension of Gilbert Road to a point at lat. 33°32'20" N., long. 111°47'20" W. (intersection of Gilbert Road and Indian Bend Road), west on Indian Bend Road to a point at lat. 33°32'18" N., long. 111°53'26" W (intersection of Indian Bend Road and Pima/Price Road), south on Pima/Price Road to a point at lat. 33°30'07" N., long 111°53'26" W. (intersection of Camelback Road and Pima/Price Road), west on Camelback Road to a point at lat. 33°30'34" N., long. 112°06'42" W. (intersection of Camelback Road and Interstate 17), north on Interstate 17 to a point at lat. 33°32'19" N., long. 112°06'42" W. (Interstate 17 and Glendale Avenue), west on Glendale Avenue to a point at lat. 33°32'11" N., long. 112°18'23" W. (intersection of Glendale Avenue and Agua Fria River), north on Agua Fria River until the point of beginning.

Area E. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a point at the Agua Fria River and the 20-mile arc of the ILS, clockwise until intercepting Thunderbird Road and an extension of Cactus Road, west on an extension of Cactus Road and Thunderbird Road until a point at lat. 33°36'32" N., long. 112°18'15" W. (intersection of Agua Fria River and Thunderbird Road), north along Agua Fria River until the point of beginning.

Area F. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a point at lat. 33°12'00" N., long. 112°09'00" W., (intersection of Valley Road and Riggs Road) and an extension of Riggs Road until intercepting the 20-mile arc of the ILS localizer antenna clockwise until intercepting a point at lat. 33°07'30" N., long. 112°09'05" W., on Valley Road, north on Valley Road until the point of beginning.

Area G. That airspace extending upward from 6,000 feet MSL to and including 10,000 feet MSL within an area bounded by a point on the 25-mile arc of the ILS localizer antenna and Camelback Road, east on Camelback Road to a point at lat. 33°30'29" N., long. 112°21'26" W., (intersection of Camelback

Road and Litchfield Road) south on Litchfield Road to a point at lat. 33°18'18" N., long. 112°21'26" W., (intersection of Litchfield Road and an extension of Chandler Boulevard) west on an extension of Chandler Boulevard to a point on the 25-mile arc of the ILS localizer antenna, clockwise until the point of beginning.

Area H. That airspace extending upward from 8,000 feet MSL to and including 10,000 feet MSL within an area bounded by a point on the 25-mile arc of the ILS localizer antenna and the Agua Fria River clockwise to the Williams 1 MOA, west along the Williams 1 MOA until intercepting the 20-mile arc of the ILS localizer antenna and the Agua Fria River, north along the Agua Fria River until the point of beginning, excluding that airspace between Interstate 17 and the 008° bearing from the ILS localizer antenna.

Area I. That airspace extending upward from 8,000 feet MSL to and including 10,000 feet MSL within an area bounded by a point at lat. 33°05'40" N., long. 111°59'50" W., on the 20-mile arc of the ILS localizer antenna counterclockwise to the Williams 1 MOA south along Williams 1 MOA to the 25-mile arc of the ILS localizer antenna counterclockwise to a point at lat. 33°00'35" N., long. 111°59'50" W., (power transmissin line) north along the power transmission line to the point of beginning.

§ 71.501 [Amended]

3. Section 71.501 is amended as follows:

Phoenix Sky Harbor International Airport, AZ [Removed]

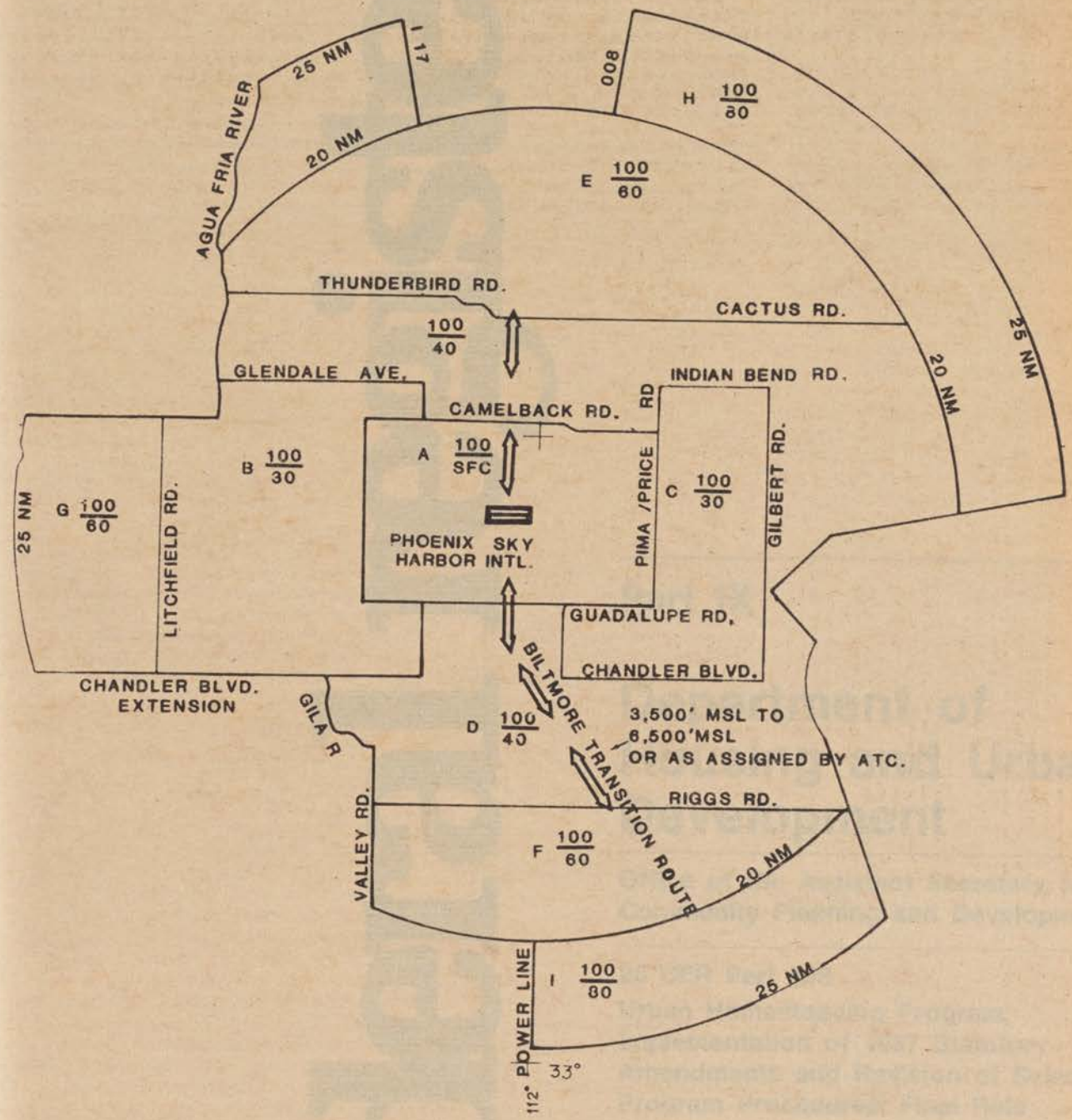
Issued in Washington, DC., on May 26, 1989.

Harold W. Becker,

Manager, Airspace Rules and Aeronautical Information Division.

BILLING CODE 4910-13-M

PROPOSED PHOENIX TCA



PHOENIX TCA
1:500,000 SCALE

[FR Doc. 89-13135 Filed 6-1-89; 8:45 a.m.]

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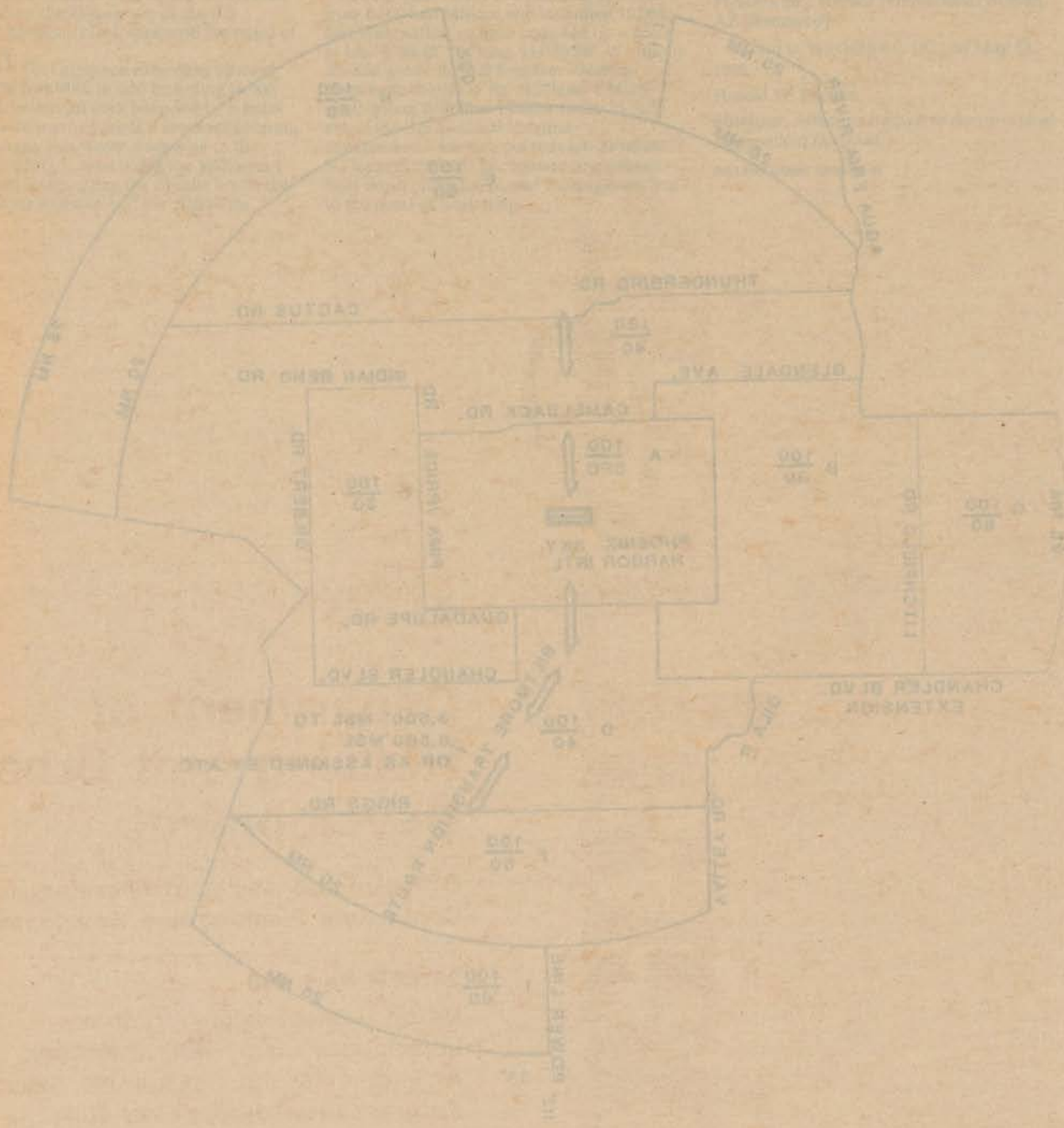

federal register

Friday
June 2, 1989

Part IX

Department of Housing and Urban Development

Office of the Assistant Secretary for Community Planning and Development

24 CFR Part 590

Urban Homesteading Program; Implementation of 1987 Statutory Amendments and Revision of Selected Program Procedures; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

24 CFR Part 590

[Docket No. R-89-1413; FR-2461]

RIN 2506-AA79

Urban Homesteading Program; Implementation of 1987 Statutory Amendments and Revision of Selected Program Procedures

AGENCY: Office of Community Planning and Development, HUD.

ACTION: Final rule.

SUMMARY: This rule implements amendments to the Urban Homesteading Program regulations made by sections 517 (c) and (d) of the Housing and Community Development Act of 1987 ("1987 Act"). In accordance with section 517(c) of the 1987 Act, the rule eliminates the former three pronged "special priority" test for the selection of homesteaders and substitutes a single priority selection criterion—that the prospective homesteader should be a "lower-income" person or family. The rule also implements section 517(d) of the 1987 Act, which authorizes States and units of general local government participating in the program to enter into agreements with designated "qualified non-profit organizations" to perform functions under the local urban homesteading program, including selecting homesteaders and properties, and accepting title to and conveying the properties to homesteaders. Finally, the rule also makes a number of specific changes in program procedures, such as specifying certain additional documents that must be submitted with a locality's urban homesteading application, setting a guideline that a local urban homesteading agency should generally anticipate homesteading a minimum of five properties per year in order to participate effectively in the program, and raising the existing limit on the values of properties selected for homesteading from $20,000 to $25,000 for one-unit properties, and form $5,000 to $8,000 per additional unit in two- to four-unit properties. In addition, the program's fund reservation system is being changed from an annual reservation based on estimated annual needs to a system of first-come, first-served reservations for specific properties.

EFFECTIVE DATE: July 17, 1989.

FOR FURTHER INFORMATION CONTACT: Marion F. Connell, Director, Urban Homesteading Program, Rehabilitation Loans and Homesteading Division, Office of Urban Rehabilitation, U.S. Department of Housing and Urban Development, 451 7th Street, SW., Room 7178, Washington, DC 20410. Telephone: (202) 755-5324. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**. Until the information collection requirements have been approved and assigned an OMB control number, no person may be subjected to a penalty for failure to comply with these information collection requirements. Public reporting burden for each of these collections of information is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under the Preamble heading, *Findings and Certifications*. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 7th Street, SW., Room 10276, Washington, DC 20410, and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Background

Section 517 of the Housing and Community Development Act of 1987 (Pub. L. 100-242) amended section 810 of the Housing and Community Development Act of 1974, 12 U.S.C. 1706e ("1974 Act"), which authorizes the Urban Homesteading Program, as follows.

Section 517(c) eliminates the former three-pronged "special priority" test for the selection of homesteaders and substitutes a single priority selection criterion—that the homesteader selected should be a "lower-income" person or family.

Section 517(d) authorizes States and units of general local government to designate a "qualified non-profit organization," or a public agency, to act as the local urban homesteading agency (LUHA)—including accepting title to and conveying properties to homesteaders if they so choose.

In addition to the amendments made by sections 517 (c) and (d) of the 1987 Act, section 517(a) amends the 1974 Act to extend the authority for the local property and the multifamily property urban homesteading demonstrations. These demonstrations would be implemented by Notice, rather than by permanent regulations, if they were reinstated. However, the Department is not currently planning to implement either of these demonstrations in FY 1989.

Also, section 517(b) amends section 106(d)(3)(A) of the 1974 Act to allow State participants in the Urban Homesteading Program to use Community Development Block Grant (CDBG) funds for urban homesteading administrative expenses, consistent with the authority available to CDBG grantees other than States. This provision will be implemented by an appropriate revision to the State CDBG Regulations, rather than in this rule. However, this provision is self-executing, and, therefore, it does not require regulatory action to be effective. States participating in the Urban Homesteading Program may charge eligible administrative expenses incurred after February 5, 1988 (the effective date of the 1987 Act) in operating their urban homesteading programs to their otherwise available State CDBG administrative funds, provided such administrative expenditures would satisfy other Title I requirements.

Other changes to Part 590 in this rule are being promulgated at HUD's initiative. Generally, these changes stem from the need to update certain provisions in keeping with comments received from Congressional committee reports, comments from local officials, and HUD's own experience in administering the program since the last major revision of the regulations (see 50 FR 25941, June 24, 1985).

The principal amendments to Part 590 are discussed below in the order that they appear in the final rule. Other technical amendments are in the following sections of Part 590: Sections 590.1 (a) and (b); 590.5 (definitions of "Act" and "LUHA" are amended; new definitions of "lower-income families" and "qualified community organization are added; and definition of "locally owned property" is deleted); §§ 590.7; 590.11 (c) and (d); 590.13; 590.15; 590.17; 590.19; 590.23; 590.29; and 590.31. These technical amendments have not been separately discussed below, since they

are either editorial in nature, or they are conforming changes to make the amended provision consistent with one of the principal amendments in the proposed rule.

Amendments to Part 590

In § 590.7, "Program requirements," the final rule adds guidance that, in general, local agencies shall select neighborhoods so as to be able to anticipate homesteading a minimum of five properties per year, in order for their programs to be cost-effective and have discernible impact. Under § 590.13, "Standards for HUD review and approval of a local urban homesteading program", compliance with this and other requirements of Part 590 will be considered by HUD in determining whether to approve an applicant's initial application or annual request for program participation. These provisions are established in view of the high demand for scarce program funds in order to establish a reasonable threshold level necessary for continued program participation. Regional economic conditions dictate not only the availability of federally-owned properties but also their price range. These factors, in turn, influence the feasibility of homesteading in the region. Over time, economic conditions shift within regions of the country, so that homesteading may become infeasible in a previously active area due to a lack of foreclosed single-family properties in the HUD, VA, and FmHA inventories, or the increased cost of such properties. Conversely, as more properties become available or their values decrease, homesteading may become very active in an area previously inactive. Without a threshold program level, communities could continue indefinitely in the program, operating ineffective, expensive, low level programs, while other areas with greater need for program resources find it difficult or impossible to obtain funding.

Under "Program requirements" at § 590.7(b)(2), the homesteader selection section is being modified to conform the regulations to section 517(c) of the 1987 Act. The three existing priority selection criteria are deleted and one priority criterion set forth, which gives priority to eligible "lower-income families or individuals," as defined by 24 CFR Part 813. Since HUD has already advised local urban homesteading agencies that this provision is considered self-executing, local agencies should already be selecting homesteaders in accordance with the new single criterion for priority. However, homesteaders notified of their selection in accordance with the previous special priority before February 5, 1988 (the effective date of the 1987 Act) remain entitled to properties, if they have not received them yet. The final rule makes no change in the basic effect to the statutory priority from existing rules, apart from the simplification of the criterion for priority selection itself. Specifically, a local urban homesteading agency (LUHA) still may not select a homesteader who is not entitled to priority if there is an available priority homesteading candidate who has applied and is qualified for the particular property involved. However, as discussed under "Public Comments—Selection Criteria" below, HUD now explicitly recognizes in the final rule that determining who is qualified for a particular property requires reasonably matching the size of the household selected as homesteaders to the bedroom size of the property available.

Finally, a new provision, designated (iii), was added to § 590.7(b)(2) of the proposed rule and has not been changed in the final rule. This new requirement provides that membership in, or ties to, particular private organizations shall not be made a factor affecting homesteader selection. With the advent of non-profit community organizations being designated as LUHAs, HUD believes it is important to specify that membership in any private organization, doing business with such an organization, or any other ties to a particular private organization, are not made criteria for homesteader selection.

Also under "Program requirements" in § 590.7, amendments to subparagraphs (b)(4) and (b)(6) have been made in order to clarify the LUHA's responsibility to assist in securing compliance with Section 312 Program loan terms and to find a replacement homesteader where it appears that the initial applicant has defaulted on a section 312 loan during the homesteader's conditional title period: During this period, foreclosure of the section 312 loan is generally not a viable option, since it either results in undue loss to HUD, if HUD forecloses only on the homesteader's interest in the property, or it results in the property being lost to the homesteading program, if the LUHA gives up its reverter interest in the property and allows HUD to foreclose and then to sell the property on the open market. The best option both to minimize HUD's loss and to preserve the property for homesteading is for the local agency to identify a successor homesteader who will assume the section 312 loan, or as much of the loan as the property's value at the time of assumption will support. The amendments are designed to give local agencies clearer regulatory notice of this policy, which is more fully described in CPD Notice 88-21 on this subject issued under HUD's Unified Issuances System. Also, the amendments to § 590.7(b)(6) allow HUD to shorten the homesteading period required of the successor homesteader under that section, if that is necessary to attract a successor homesteader.

Under "Program requirements" in § 590.7, a new paragraph (c) is added entitled "Designation of LUHA." As at present, the applicant State or unit of general local government may act as its own local urban homesteading agency (LUHA), conducting the program and accepting and conveying title to federally owned properties in its own name, or it may designate a legally separate and independent public agency to do so. Similar to present practice, the designation is approved by HUD as part of the program application approval process, and it remains in effect until a new LUHA is designated by the applicant by a program amendment approved by HUD, or the local urban homesteading program is closed out. Finally, also as already permitted (although not specified in the regulation in effect prior to this rule), the final rule specifies that the LUHA itself may carry out its program functions through one or more third party contractors, consultants, or agents, except for the acceptance and conveyance of title to properties. The final rule makes clear that the third party agreements must be in writing, and it may not relieve the LUHA or the applicant of responsibility for the conduct of the program.

In addition, based on section 517(d) of the 1987 Act, HUD also is allowing qualified community organizations to act as LUHAs, under § 590.7(c)(2)(iii) of the final rule. As provided by the 1987 Act, the final rule defines "qualified community organizations" as non-profit corporations whose directors serve without pay and which qualify as IRS section 501(c)(3) tax exempt organizations (See § 590.7(c)(4)). Consistent with present practice, any designated LUHA (whether public or private) must have legal authority to accept and convey title to properties for homesteading purposes. The final rule specifically provides in § 590.7(c)(1) that this key function may not be passed on to another entity by the LUHA unless HUD approves a program amendment designating a new LUHA, because up to three Federal agencies must know on a day-to-day basis what local entity they are authorized to deal with in conveying properties, and to assure that the LUHA

remains properly accountable for the properties it obtains, both to HUD and to the homesteaders who deal with the LUHA.

Finally, the final rule requires a written agreement between the LUHA and the applicant, and it specifies at § 590.7(c)(3) certain provisions which the agreement must contain at a minimum. HUD believes that a written agreement detailing the responsibility of the LUHA is essential for non-profits to act as LUHAs. HUD also believes that program responsibilities will be clarified and accountability strengthened if designated public agencies are also required to enter into such agreements with the responsible States and units of general local government, and the final rule so provides at § 590.7(c)(2)(ii).

Under "applications" at § 590.11, the final rule requires local urban homesteading agencies applying for the first time to submit additional information in their application package. HUD is now requesting a description of the applicant's proposed homesteader selection procedures which complies with the 1987 Act and § 590.7(b)(2) of the regulations, copies of the applicant's proposed legal documents complying with §§ 590.7(b) (3), (5) and (7), an estimate of the number of properties to be acquired during the program year, and a copy of the applicant's written agreement designating any local urban homesteading agency in compliance with § 590.7(c). Receipt of these specific documents is necessary to avoid serious flaws in program design which HUD has found more difficult to correct after the fact. The Department still wishes to offer maximum latitude to local agencies administering the program, but several recent applicants have commented that they prefer more specificity on these matters at program startup. Similarly, in § 590.11(b), HUD is requiring previously approved applicants to submit the information newly required by §§ 590.11(a) (4), (5), (7), (8), and (9) for the first program year following the effective date of the final rule.

Under "Standards for HUD review and approval of a local urban homesteading program" at § 590.13, HUD is adding language changing the point at which environmental review occurs. That will now occur when an urban homesteading neighborhood is approved under this section.

Under "Transfer of HUD-owned property" at § 590.17(b)(4) and under "Reimbursement to FmHA and VA" at § 590.18(c)(1), the administratively imposed maximum amount that may be charged to section 810 appropriations for acquisition of federally-owned, single-dwelling unit properties is being raised from $20,000 to $25,000, in keeping with suggestions from the House-Senate Conference Committee on H.J. Res. 395 (FY 1988 Appropriations Act) in House of Representatives Report No. 100–498 at page 843. This will help keep pace with inflation in real estate market values being experienced in some areas of the country. This cost cap has not been adjusted since 1985. HUD is, however, amending §§ 590.17 and 590.18 to delete HUD Field Office authority to grant local program-wide exceptions to this acquisition cost cap, because of the need to further target the limited program funds to sections of the nation experiencing softer real estate markets. Under the final rule, the price paid for a property shall be the as-is fair market value, not to exceed $25,000, or a negotiated lesser amount, unless an exception for an individual property is granted by a HUD Field Office. An additional amount up to $8,000 per unit may also be charged to section 810 funds for properties with two to four dwelling units. This is an increase from $5,000 per additional dwelling unit, a figure which had not been adjusted since the inception of the program. In addition, the 30 day time frame for which HUD/FHA has been obligated to suspend its routine property disposition activity in urban homesteading neighborhoods is shortened to 21 days to reflect actual program experience and realize economies for the Department.

In § 590.17(b)(2), § 590.18(b), § 590.17(c) and § 590.18(d) changes of a similar nature are made for the purpose of clarifying when the reservation of funds to reimburse HUD, VA, or FmHA for the transfer of a specific property, and how long the reservation may remain outstanding. These changes are necessitated by the change from an annual to a property specific reservation system, which is discussed below under "Public Comments—Reservation of Funds".

At § 590.23, "Program close-out," the final rule gives HUD specific authority to terminate a local urban homesteading program if the LUHA has not acquired any properties for the last two fiscal years and local market conditions demonstrate that an insufficient number of properties will be available for the next fiscal year. Section 590.23(c) is also revised to make clear the LUHA's obligation to continue to monitor, enforce, and implement existing agreements with homesteaders after close-out.

Finally, at § 590.31(e), the final rule clarifies the remedial standard under which HUD may direct the LUHA to repay HUD for homestead properties that the LUHA has mishandled. The former standard on its face dealt only with properties that the LUHA had "converted to its own use." This standard clearly covered properties that the LUHA had sold, rented, or used for its own purposes without HUD approval; it did not as clearly cover situations in which the LUHA's negligent failure to preserve and protect the property permitted deterioration that made it infeasible to homestead the property, or where the LUHA simply did nothing with the property for more than a year, unless excused by HUD under § 590.7(b)(3) of the final rule. The revised language of the final rule corrects these oversights.

A proposed rule was published for comment on October 19, 1988, at 53 FR 41026. The public comments received and the disposition of those comments are discussed below.

Public Comments

HUD received seven public comments: four from cities, one from a county, one from a technical consulting firm, and one from a HUD Field Office. The principal issues raised are summarized below, with HUD's response following each issue.

Five Property Threshold—§ 590.7(a)

One commenter misinterpreted the five property guideline for annual program participation levels by thinking that this threshold would be applicable to each approved homesteading neighborhood. In fact, the five property threshold is meant to apply on a program-wide basis, for each LUHA, and not on a neighborhood basis, in order for their efforts to be more cost effective and have discernible impact in the community.

Selection Criteria—§ 590.7(b)(2)

One commenter objected to the provision in paragraph (v) of § 590.7(b)(2) of the proposed rule that appeared to require that a single head of household could not occupy a property having more than two (2) bedrooms because the number of family members could increase during the five (5) year occupancy requirement.

As of § 590.7(b)(2)(v) in the proposed rule (concerning "other reasonable selection criteria"), the final rule divides this provision into two parts and renumbers the paragraphs of § 590.7(b)(2). New paragraph (iv) now contains the provisions formerly in paragraph (v) with respect to locally-adopted criteria designed to reasonably match homesteader household size to the bedroom size of the property for which the homesteader is being

selected. Former paragraph (iv) (concerning selection priority for lower income families) has been redesignated as paragraph (v), and the rest of former paragraph (v) (other reasonable selection criteria) has been redesignated as paragraph (vi).

With respect to the public comment cited above, the revised language of paragraph (iv) now states that a one-person household may not "receive" (as opposed to "occupy") a homestead property with more than two bedrooms, unless there are no longer households on the waiting list. Since the provision in question is a selection requirement, the word "occupy" was inappropriate in context. Generally, once a homesteader receives a property, there is no further Federal requirement that the homesteader continue to meet regulatory criteria that relate only to selection, such as the household/property size matching provision, or the provision that a homesteader may not own any other residential property (see paragraph (i) of § 590.7(b)(2)). Of course, after a homesteader does receive (take title to) a property, he or she must continue to comply with the ongoing requirements of the homesteader agreement under § 590.7(b)(5), such as continuing to occupy the property as his/her personal residence for at least five years.

New paragraph (iv) of § 590.7(b)(2) contains another apparent change from the proposed rule, which concerns the relationship of household/property size matching criteria to the lower income selection priority in paragraph (v), as redesignated in the final rule. HUD views the household/property size matching criteria as necessary, eligibility-based selection requirements, which override the "priority" in paragraph (v), and the language following "notwithstanding" at the end of paragraph (vi) in the final rule is intended to make that clear. On the other hand, the "other reasonable selection criteria" concering locally-adopted residency preferences, which are referred to in paragraph (vi) of § 590.8(b)(2) of the final rule, are not intended to override the lower income priority. That is, a lower-income prospective homesteader on the waiting list should receive a property before anyone on the waiting list who is *not* entitled to the lower-income priority, even if the lower-income household is not entitled to local residency preference and the non-lower-income household does not have local residency preference. Such locally-adopted residency preferences may operate *only* among classes of prospective homesteaders having the same priority status.

Timely Conveyance to Homesteaders—§ 590.7(b)(3)

One commenter urged that the rule discuss the timely conveyance of properties to homesteaders because it is in a LUHAs' best interests to convey properties to homesteaders shortly after acquisition. Therefore, at § 590.7(b)(3), language has been added to state that the time frame between transfer of a homesteading property from HUD to the LUHA and the LUHA's conditional conveyance to a homesteader shall be within one year, or less, of title transfer to the LUHA unless otherwise approved by HUD in writing prior to the expiration of the one-year period.

Acquisition Cost Cap—§ 590.17(b)(4)(i)

Two cities commented on the increase of the acquisition cost cap per property to $25,000 and requested that it be higher. Both of their LUHAs have been using program-wide high cost exceptions in the recent past which enabled them to purchase properties closer to $35,000, and they wish to continue this practice. In making this change, the Department realize that not every community may be able to continue participation in the Urban Homesteading Program indefinitely. However, the limited program resources available compared to the national demand for section 810 funding mitigates against a further increase in the acquisition cost cap at this time or a continuation of the use of program-wide high cost approvals. As a basis of comparison, the average acquisition cost per property in FY 1988 was only $18,043, so the majority of LUHAs are able to obtain suitable properties under $25,000. For LUHAs who wish to continue in the program, and who can not find properties in this range, they are always free to add CDBG, or other local funds, to the $25,000 in Section 810 funds to cover higher cost acquisitions (although these additional funds cannot be repaid by the homesteader).

Transfer of HUD-Owned Property (Exceptions)—§ 590.17(c)

One city expressed concern about the possibility of losing potential homesteading properties to "emergency housing needs." This issue became more important to LUHAs after the issuance of a temporary restraining order in the case of *Deborah Lee v. Kemp*, Civil Action No. 88–2395–OG (D.D.C.), which for a short time prohibited FHA from selling properties until the court heard oral arguments to determine whether a preliminary injunction should issue. While that restraining order has been lifted, the case is still in litigation and, of course, HUD would have to comply with any court ordered action. While the Department understands the commenter's concern, it would be neither prudent nor effective for the Department to attempt to restrict the disposition of FHA-owned properties in such a manner that emergency housing needs are not considered. However, it appears likely that there will be an ample supply of properties appropriate for homesteading in most regions of the country even if some of the FHA inventory is used to help alleviate the homeless situation.

Also, in response to two commenters' concerns as to how much time a LUHA has after acceptance to close on the property, clarifying language has been added to § 590.17(c)(1), where it had not been clear that a LUHA has 30 days from its *acceptance* of HUD's offer of a property to accept title and close on the tranaction.

Reservation of Funds—§ 590.21

The proposed rule formalized major changes in how program budget authority is made available for the use of participating LUHAs. The former system provided that each LUHA would be given an "annual reservation." Over the course of the fiscal year, the LUHAs could then identify properties and acquire them with reimbursement in the appropriate amount per property to the applicable Federal housing loan fund, up to the amount of its "annual reservation." The proposed rule would have changed the funding mechanism to a "first-come, first-served" reservation system for individual properties, "subject to available fund limitations." In response to public comments and discussions with local officials, the final rule retains, but modifies and clarifies, the "first-come, first-served" system contemplated by the proposed rule.

With respect to the basic decision to change to the first-come, first-served system, HUD continues to believe it is generally more efficient and equitable than the former system. In particular, the former system tended to "lock-in" relative funding levels among LUHAs early in the fiscal year, and these levels were based on even earlier data on past fund use and property availability. In reality, however, the supply of properties available to each LUHA during the fiscal year from the HUD, FmHA, and VA inventories may fluctuate significantly, leading to imbalances between the funding authority available to particular LUHAs and the relative numbers of properties

available to them. Previously, complicated adjustments were required to revise relative funding levels at the end of each fiscal year. Furthermore, the older system tended to favor LUHAs that had been in the program longer, since they had more opportunity to build up a high program level in the past, even though some may now have relatively smaller numbers of properties available for homesteading. The modified first-come, first-served system in the final rule continues to make funding generally more competitive among LUHAs, while making changes to improve the fairness of the system, compared to the proposed rule.

One commenter opposed the first-come, first-served system, urging a more stringent priority for large inventory cities, and stating that a strict first-come, first-served policy favored LUHAs closer to the applicable field office. Another commenter agreed with the new system in general, but suggested that the strict first-come, first-served policy favored larger LUHAs, and that smaller LUHAs needed at least a brief initial set-aside in order to effectively identify and request fund reservations for specific properties.

HUD has considered these comments, and the final rule permits HUD field offices to establish, for not more than 60 days, minimum initial allocations of section 810 funding authority for each participating LUHA in their jurisdiction, against which each LUHA will be exclusively authorized to request reservations for specific properties under either § 590.17 (HUD-owned property) or § 590.19 (VA and FmHA owned-property) for that period. After these temporary allocations are used up or have expired, the LUHA will compete on an equal basis with other LUHAs in the field office jurisdiction for reservations from the field office subassignment. This procedure provides an initial opportunity for smaller LUHAs, or those farther from the field office, to obtain properties on a less competitive basis. Thereafter, however, LUHAs which are more efficient in seeking properties, and which have more properties available from which to choose, will find it easier to obtain funding.

Furthermore, HUD's fund assignments to HUD Regional and Field Offices, from which LUHAs request reservations, are in part based upon past funding levels and in part upon projected demand. Therefore, LUHA's which have larger inventories, and which are also efficient in requesting and homesteading properties, will gradually help increase assignments made to their field offices and will, thereby, be able to obtain a greater share of program resources.

Miscellaneous

A HUD Field Office commenter asked for clarification of eligible expenses for FmHA and VA properties. This will be handled in the handbook for this program.

The same commenter recommended that the definition of "eligible applicant" be expanded to include legally formed regional planning agencies and development districts. With proper coordination, a regional planning or development agency, if it has the authority to accept and convey properties to homesteaders in its own name and otherwise to carry out a local homesteading program under Part 590, could prepare and submit concurrent applications on behalf of several units of general local government, as their joint "designated agency-LUHA". However, the units of general local government would have to sign the applications themselves as a formal matter. Also, such an agency could be designated to act as a LUHA for the State in which it is located. Given these options, as well as the general Federal policy embodied in the Intergovernmental Cooperation Act of 1968, which favors applications for Federal assistance from states and cities or counties, rather than special purpose bodies, HUD is not disposed to change Part 590 to allow regional agencies directly to apply on their own behalf for homesteading program participation.

Findings and Certifications

The collection of information requirements contained in this rule have been submitted to OMB for review under section 3504(h) of the Paperwork Reduction Act of 1980. Sections 590.11 (a), (b), (c) and (d); 590.17(b); 590.18; 590.21; 590.25; and 590.29(c) of this final rule have been determined by the Department to contain collection of information requirements. Information on these requirements is provided as follows:

ANNUAL REPORT BURDEN

FINAL RULE—URBAN HOMESTEADING PROGRAM

Description of information collection	Section of 24 CFR affected	Number of respondents	Number of responses per respondents	Total annual responses	Hours per responses	Total hours
Application (2506–0042)	590.11(a) and (d)	20	1.00	20	30.00	600
Amendment (2506–0042)	590.11(c)	13	1.00	13	4.00	52
Annual request for program participation (2506–0042)	590.11(b)	112	1.00	112	2.33	260
Verification of fund availability, HUD–40050 (2506–0042)	590.17(b), 590.18, 590.21	132	4.00	528	0.25 (15 min.)	132
Homesteading property addition, HUD–40063 (UHPMIS) (2506–0042)	590.29(c)	132	4.00	528	0.50 (30 min.)	264
Quarterly property* report (UHPMIS) (2506–0042)	590.29(c)	132	1.34	176	0.25 (15 min.)	44
Quarterly progress report (UHPMIS) (2506–0042)	590.29(c)	192	4.00	768	1.00	768
Recordkeeping for local urban homesteading programs	590.25	192	1.00	192	3.00	576
Total Annual Burden						2,696

*This report replicates data submitted on the HUD–40063. LUHAs do not submit it if it is correct. Less than one-third make additional corrections.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection during regular business hours (7:30 a.m. to 5:30 p.m. weekdays) in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276,

Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291. Analysis indicates that it does not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) 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.

In accordance with 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule implements several statutory provisions that improve the Urban Homesteading Program. These changes have neither a significant economic impact on, nor an effect on, a substantial number of small entities.

Executive Order 12612, Federalism. The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that this rule does not have "federalism implications" because it does not have substantial direct effects on the States (including their political subdivisions), or on the distribution of power and responsibilities among the various levels of government. This rule primarily relaxes and simplifies the criteria for selecting homesteaders. The provision under this rule that authorizes States and units of general local government to designate qualified non-profit organizations or public agencies to act as urban homesteading agencies is merely a function of delegation and does not affect the powers and responsibilities of the States or units of general local government.

Executive Order 12606, the Family. The General Counsel, as the Designated Official under Executive Order 12606, *the Family*, has determined that this rule does not have potential significant impact on family formation, maintenance, and general well-being because it does not affect the mechanics and benefits of the Urban Homesteading Program so far as the beneficiaries of the program are concerned. The rule primarily simplifies some of the requirements and makes procedural changes which do not affect the intended beneficiaries.

The Catalog of Federal Domestic Assistance Program number is 14.230.

This rule was listed as item number 995 in the Department's Semiannual Agenda of Regulations published on April 24, 1989 (54 FR 16708) under Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR Part 590

Urban homesteading, Administrative practice and procedure, Grant programs: Housing and community development, Low and moderate income housing.

Accordingly, the Department revises 24 CFR Part 590 to read as follows:

PART 590—URBAN HOMESTEADING

Sec.

590.1 Scope and purpose of regulation.
590.3 Waiver authority.
590.5 Definitions.
590.7 Program requirements.
590.9 Listing of HUD-owned, VA-owned, and FmHA-owned properties.
590.11 Applications.
590.13 Standards for HUD review and approval of a local urban homesteading program.
590.15 Urban homesteading program participation agreement.
590.17 Transfer of HUD-owned property.
590.18 Reimbursement to FmHA and VA.
590.19 Use of section 810 funds.
590.21 Reservation of funds.
590.23 Program close-out.
590.25 Retention of records.
590.27 Audit.
590.29 HUD review of LUHA performance.
590.31 Corrective and remedial actions.

Authority: Sec. 810, Housing and Community Development Act of 1974 (12 U.S.C. 1706e); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 590.1 Scope and purpose of regulation.

(a) *Scope.* This part applies to the Urban Homesteading Program authorized under section 810(b) of the Housing and Community Development Act of 1974. The program is generally administered through the Department's field offices, which can provide information to the public about the States and localities participating, as well as technical assistance to participants about applying for and operating the program.

(b) *Purpose.* The purpose of the Urban Homesteading Program is to use existing housing stock to provide homeownership opportunities, primarily for lower income families, thereby encouraging public and private investment in selected neighborhoods and assisting in their preservation and revitalization. The program provides for the transfer without payment to a local urban homesteading agency (LUHA) of federally owned properties for use in a HUD-approved local urban homesteading program.

§ 590.3 Waiver authority.

HUD may waive any requirement of this part not required by law whenever it determines that undue hardship would result from applying the requirement, or where applying the requirement would adversely affect achievement of the purposes of the program.

§ 590.5 Definitions.

"Act" means section 810 of the Housing and Community Development Act of 1974, as amended from time to time.

"Applicant" means any State or unit of general local government that applies for HUD approval of a local urban homesteading program under these regulations.

"Federally-owned property" means any real property to which the Secretary of HUD, the Secretary of Agriculture or the Secretary of Veterans Affairs holds title and which is:

(1) Improved with a one- to four-family residence;

(2) Unrepaired and not the subject of an outstanding repair or sales contract; and

(3) Not occupied by an individual or family under a lease. (Property of this nature is also referred to as "HUD-owned property," "FmHA-owned property," or "VA-owned property" when the context requires identification of the particular agency.)

"FmHA" means the Farmers Home Administration, an agency within the U.S. Department of Agriculture.

"Homesteader" means an individual or family that participates in a local urban homesteading program by agreeing to rehabilitate and occupy a property in accordance with § 590.7(b)(5).

"HUD" means the U.S. Department of Housing and Urban Development.

"Local urban homesteading agency" (LUHA) means a State, a unit of general local government, or a public agency or qualified community organization designated in accordance with § 590.7(c) by a State or a unit of general local government.

"Local urban homesteading program" means the operating procedures and requirements developed by a LUHA and approved by HUD in accordance with this part for selecting and conveying federally-owned properties to qualified homesteaders.

"Lower income families" means those families and individuals whose adjusted incomes do not exceed 80 per centum of

the median income for the area, as determined by the Secretary under section 3(b)(2) of the United States Housing Act of 1937. Under the provision of 24 CFR Part 813, the Secretary's income limits for this purpose are updated annually and are are available from the Housing Management Division in HUD field offices.

"Qualified community organization" has the meaning specified in § 590.7(c)(4).

"Section 810 funds" means funds available to reimburse HUD, FmHA, or VA (as applicable) for federally-owned property transferred to LUHAs in accordance with this part.

"State" means any State of the United States, any instrumentality of a State approved by the Governor, and the Commonwealth of Puerto Rico.

"Unit of general local government" means any city, county, town, township, parish, village, or other general purpose political subdivision of a State, Guam, the Virgin Islands, or American Samoa, or any general purpose political subdivision thereof; the District of Columbia; the Trust Territory of the Pacific Islands; and Indian tribes, bands, groups, and nations of the United States, including Alaska Indians, Aleuts, and Eskimos.

"Urban homesteading neighborhood" means any geographic area approved by HUD for the conduct of a local urban homesteading program that meets the requirements of this part.

"VA" means the U.S. Department of Veterans Affairs.

§ 590.7 Program requirements.

(a) *Designation of urban homesteading neighborhood; coordinated approach toward neighborhood improvement.* The applicant shall designate the neighborhood or neighborhoods in which it will carry out its local urban homesteading program, and it shall develop a plan that provides for the improvement of these neighborhoods through the homesteading program and the upgrading of community services and facilities, and through other measures needed to assure a suitable living environment, in combination with any other public or private revitalization efforts affecting the neighborhood. In general, the applicant should select neighborhoods so that it can reasonably anticipate homesteading a minimum of five (5) properties per year for the LUHA's overall program during its first full year of operation and each program year thereafter.

(b) *Development of local urban homesteading program.* The applicant shall develop, in compliance with this part, a local urban homesteading program containing the following major elements:

(1) *Selection and management of properties.* The program shall include procedures for selecting federally-owned properties suitable for homesteading and for managing the properties before conditional conveyance to homesteaders. The program shall also provide that, by accepting title to a property under this part, the LUHA assumes liability for injury or damage to persons or property by reason of a defect in the dwelling, its equipment or appurtenances, or for any other reason related to ownership of the property.

(2) *Homesteader selection.* The program shall include equitable procedures for homesteader selection which:

(i) Exclude prospective homesteaders who own other residential property;

(ii) Take into account a prospective homesteader's capacity to make or cause to be made the repairs and improvements required under the homesteader agreement, including the capacity to contribute a substantial amount of labor to the rehabilitation process, or to obtain assistance from private sources, community organizations, or other sources;

(iii) Provide that membership in, or other ties to, any private organization (including a qualified community organization) may not be made a factor affecting selection as a homesteader;

(iv) Include locally adopted criteria reasonably matching family size to the number of bedrooms in each property for which a homesteader is being selected, provided that a prospective homesteader who is a one person household shall not be permitted to receive a property having more than two bedrooms, unless there are no larger households on the waiting list, notwithstanding the relative standing of the respective households under the lower income priority (see § 590.7(b)(2)(v)).

(v) Provide that, before a property is offered to other prospective homesteaders who are eligible, the property will be offered to eligible lower income families; and

(vi) Include other reasonable selection criteria which are consistent with this § 590.7(b)(2) and which shall be specified in the applicant's application pursuant to § 590.11(a) and approved by HUD under § 590.13. Such selection criteria may include preferences for the selection of neighborhood residents or other local residents, but only to the extent that they are not inconsistent with this section and with affirmative marketing objectives under § 590.11(d)(5)(ii). Such preferences based on residential location may not be based upon the length of time the prospective homesteader has resided in the jurisdiction or the neighborhood. Also, persons who are employed, or who have been notified that they have been hired, in the jurisdiction shall be extended any preference available to current residents.

(3) *Conditional conveyance.* The program shall provide for the conditional conveyance of federally-owned properties to homesteaders without any substantial consideration within one year, or less, of title transfer to the LUHA, unless otherwise approved by HUD in writing prior to the transfer.

(4) *Financing.* The program shall provide procedures for the LUHA to undertake, or to assist the homesteader in arranging, financing for the rehabilitation required under the homesteader agreement. Where direct Federal loans under section 312 of the Housing Act of 1964 (42 USC 1452b) are used as a rehabilitation financing resource by the LUHA, the LUHA shall make reasonable efforts to assist HUD in monitoring and securing compliance with the terms of the loan during the homesteader's conditional title period.

(5) *Homesteader Agreement.* The program shall provide for the execution, concurrent with or as a part of the conditional conveyance, of a homesteader agreement between the LUHA and the homesteader which shall require the homesteader:

(i) To repair, within one year from the date of conditional conveyance of the property to the homesteader, any defects that pose a substantial danger to health and safety;

(ii) To make or cause to be made additional repairs and improvements necessary to meet the applicable local standards for decent, safe, and sanitary housing within three years from the date of conditional conveyance of the property to the homesteader, and to comply with any energy conservation measures designated by the LUHA as part of the repairs;

(iii) To occupy the property as his or her principal residence for not less than five consecutive years from the date of initial occupancy except as otherwise approved in writing by HUD on a case-by-case basis when emergency conditions make compliance with this requirement infeasible;

(iv) To permit reasonable inspections at reasonable times by employees or designated agents of the LUHA to

determine compliance with the agreement; and

(v) To surrender possession of, and any interest in, the property upon material breach of the homesteader agreement (including default on any rehabilitation financing secured by the property), as determined by the LUHA in accordance with this part.

(6) *Monitoring and selecting successor homesteaders.* The program shall provide that the LUHA will monitor the homesteader's compliance with the homesteader agreement, will revoke the conditional conveyance and homesteader agreement upon any material breach by the homesteader, and, to the extent necessary and practicable, will select one or more successor homesteaders for the property. The LUHA shall make reasonable efforts to assure that any proposed successor homesteader assumes any section 312 loan on the property, subject to HUD approval of the terms of the assumption. If the LUHA selects a successor homesteader, it shall require the successor homesteader to assume the original homesteader's remaining obligations under his/her homesteader agreement and conditional conveyance in compliance with this part. However, the LUHA shall require the successor homesteader to occupy the property for at least five consecutive years after he/she assumes these obligations unless the LUHA requests and HUD approves a lesser occupancy period where necessary to facilitate assumption of a Federal rehabilitation loan under section 312 of the Housing Act of 1964 (42 USC 1452b) or any other public or private financing. Such period will not be less than the greater of (i) two additional years, or (ii) the remaining amount of the original occupancy period.

(7) *Fee simple title.* The program shall provide for the conveyance of fee simple title to the property from the LUHA to the homesteader, or successor homesteader, without substantial consideration upon compliance with the terms of the homesteader agreement and conditional conveyance.

(8) *Homesteading infeasible; alternative use.* If completion of homesteading proves, in the judgment of HUD, to be infeasible for any reason after a LUHA has accepted title to a federally-owned property, the LUHA shall not demolish, dispose of, rent or otherwise convert the property to its own use until HUD approves an alternative use consistent with the coordinated approach to neighborhood improvement.

(c) *Designation of LUHA*—(1) *Responsibilities.* Under the requirements of this § 590.7(c), the applicant shall designate a LUHA, which shall have primary responsibility for administering the local urban homesteading program for the applicant. The LUHA shall be the legal entity that accepts title in its own name to federally-owned properties conveyed by the applicable Federal agency with reimbursement from section 810 funds and which conveys title to such properties to homesteaders under paragraph (b) of this § 590.7. Although the applicant may at any time amend its local urban homesteading program to designate a new LUHA, subject to HUD approval as described in §§ 590.13–.15 of this part, neither the applicant nor the designated LUHA may delegate or contract out to another legal entity the function of accepting and conveying in its own name title to properties for homesteading purposes under this part. To the extent permitted by the applicant, the LUHA may use third parties as contractors, consultants, or agents to assist if in carrying out other functions and responsibilities with respect to the local urban homesteading program, by entering into a written agreement between the LUHA and the third party. No such agreement shall be deemed to relieve the LUHA or the applicant of responsibility for the thrid party's actions in connection with the local urban homesteading program.

(2) *Identity of LUHA.* The LUHA must have legal authority to carry out a local urban homesteading program as described in this part, including the authority to accept and convey title to properties under paragraph (b) of this § 590.7. To the extent consistent therewith, the applicant State or unit of general local government may:

(i) Act as LUHA in its own name, while identifying within its administrative organization a lead department or agency to act as the primary contact point for HUD, VA and FmHA as described in § 590.11(a)(7);

(ii) Designate, and enter into a written agreement with, a legally separate public body or agency to act as LUHA in accordance with this part; or

(iii) Designate and enter into a written agreement with, a qualified community organization (as defined in § 590.7(c)(4)) to act as LUHA in accordance with this part.

(3) *Content of Agreement with Designated Public Agency or Qualified Community Organization.* The applicant's written agreement with its designated public agency or qualified community organization shall contain at least the following provisions, and nothing inconsistent therewith:

(i) The agreement of the LUHA to carry out the local urban homesteading program, including the acceptance and conveyance of title to properties for homesteading purposes, in accordance with the Act, this part, and the applicant's HUD-approved urban homesteading application;

(ii) The agreement of the LUHA to hold title (and the right of reverter or other interest retained after conveyance of conditional title to a homesteader) to former federally-owned properties conveyed to it under this part in trust, solely for the purpose of conveying such title to homesteaders (or for such alternative use as may be approved by HUD) pursuant to this part, and not to convey, encumber or otherwise deal with such property for its own benefit or account;

(iii) The agreement of the LUHA promptly to assign or convey title and or other interests in properties held under this part to the applicant, or to such new LUHA as may be designated by the applicant and approved by HUD, if the applicant terminates the LUHA's designation; and

(iv) The agreement of the applicant and the LUHA that the LUHA's designation shall not relieve the applicant of full responsibility to HUD for the conduct of the local urban homesteading program, and that HUD may take any corrective or remedial action under this part against the applicant, the LUHA, or both, solely at HUD's option.

(4) *Definition of Qualified Community Organization.* As used in this part, the term "qualified community organization" means a private non-profit corporation which is:

(i) Incorporated under applicable State or local enabling legislation and which has the authority necessary to carry out the program;

(ii) Controlled by a board to directors whose members receive no compensation of any kind for the performance of their duties; and

(iii) Is organized exclusively for charitable, educational, or scientific purposes, or the promotion of social welfare, and qualifies as an exempt organization under paragraph (3) or (4) of section 501(c) of the Internal Revenue Code of 1986.

§ 590.9 Listing of HUD-owned VA-owned, and FmHA-owned properties.

In order to facilitate planning for local urban homesteading programs, HUD, FmHA, and VA, upon request by a LUHA, each shall provide the LUHA

with a listing of all residential one- to four-unit properties in the LUHA's jurisdiction to which they hold title and which are not subject to executed repair or sale contracts or leases. The LUHA shall give the public access to the list during ordinary business hours at the offices of the LUHA.

§ 590.11 Applications.

(a) *Initial application requirements.* Applicants may submit an initial application under this part to the responsible HUD Field Office at any time during the year. Applications shall consist of:

(1) Standard Form–424;

(2) A map of each proposed urban homesteading neighborhood with geographic boundaries indicated and census tracts shown;

(3) A brief statement of the local goals for the homesteading program for each neighborhood selected;

(4) A description of the applicant's proposed homesteader selection procedures which complies with § 590.7(b)(2);

(5) The applicant's proposed legal documents which when read together comply with § 590.7(b) (3), (5), and (7);

(6) An estimate of the amount of section 810 funds to be used during the current Federal fiscal year and a statement concerning the basis for the estimate, including the number of properties expected to be acquired during the year, prepared after consultation with HUD/FHA, FmHA or VA as appropriate;

(7) The applicant's written agreement designating its LUHA which complies with § 590.7(c), or, if the applicant proposes to act as its own LUHA, identification of the lead agency primarily responsible for administration of the program;

(8) The certifications required by paragraph (d) of this section; and

(9) Any additional documentation HUD specifically requests after review of the initial application under § 590.13.

(b) *Annual Requests for Program Participation.* (1) An applicant that has previously submitted and received approval of an initial application under paragraph (a) of this section shall notify the HUD Field Office in writing on or before August 1 of each succeeding fiscal year if it wishes to continue in the program. At the same time, the applicant shall notify HUD of its estimate of the section 810 funds to be used during the upcoming Federal fiscal year, along with an explanation of the basis for the estimate, including the number of properties expected to be acquired during the year, prepared after consultation with HUD/FHA, FmHA or VA as appropriate.

(2) Participants with previously approved applications will be required to submit the items described in paragraphs (a) (4), (5), (7), (8), and (9) of section 590.11 with their annual request for program participation for the first Federal fiscal year following the effective date of this regulation. Except for those items, HUD will deem the initial application still in effect as it was finally approved, unless the applicant concurrently submits other amendments under paragraph (c) of this section.

(c) *Amendments.* If the applicant wishes to change any element of its local urban homesteading program that is specifically described in the HUD-approved application (such as the identification of urban homesteading neighborhoods or the designation of the LUHA to carry out the program), the applicant shall submit its proposal to the HUD Field Office for approval before making any such change. The proposal shall identify specifically the elements to be changed, and shall set forth the proposed amendment. Proposed amendments may be submitted with an annual request for program participation or at any other time during the program year.

(d) *Certifications.* As part of its application, the applicant shall certify that:

(1) Except for States, the applicant's governing body has duly adopted or passed an official act, resolution, motion, or similar action authorizing the filing of the application, including all understandings and assurances contained in these certifications.

(2) The LUHA possesses the legal authority to and will carry out the local urban homesteading program described in its approved application in accordance with this part, including the specific program requirements described in § 590.7(b).

(3) The LUHA has:

(i) An adequate administrative organization capable of carrying out the program in a timely and cost effective manner;

(ii) Procedures for selecting and accepting property suitable for homesteading and rehabilitation as required by § 590.7(b)(1);

(iii) Procedures to assist in arranging, or for itself to undertake, rehabilitation financing for property conveyed to homesteaders, as required by § 590.7(b)(4).

(iv) Procedures for monitoring the homesteader agreement and for revoking a conditional conveyance upon material breach of the agreement, and for selecting a successor homesteader as required by § 590.7(b)(6); and

(v) Procedures for conveying fee simple title to the residential property received from HUD, FmHA or VA without substantial consideration to the homesteader upon his or her full compliance with the agreement required in § 590.7(b)(7).

(4) The applicant or the LUHA has, before submission of the application:

(i) Developed a plan for a coordinated approach toward neighborhood improvement as required by § 590.7(a); and

(ii) Provided citizens an adequate opportunity to express preferences about the proposed location of the urban homesteading neighborhood or neighborhoods, and to comment on the plan for a coordinated approach toward neighborhood improvement.

(5) The applicant and LUHA will:

(i) Assure non-discrimination in the selection of homesteaders and that no eligible person is denied equal opportunity for housing, or excluded from equal participation in the homestead program, on the basis of race, creed, color, national origin, age, sex or handicapping condition and that it will comply with all requirements of Title VI of the Civil Rights Act of 1964; Executive Order 11063; Title VIII of the Civil Rights Act of 1968, as amended; section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, section 562 of the Housing and Community Development Act of 1987, and all applicable regulations issued under these authorities, in any activity in its local urban homestead program; and

(ii) Employ affirmative marketing procedures in the advertising of homesteading properties.

(6) The LUHA will comply with the lead-based paint procedures set forth in 24 CFR Part 35 for properties constructed or substantially rehabilitated prior to 1978.

(7) (i) The LUHA will submit any information which HUD requests for the purpose of assisting HUD in meeting its environmental responsibilities under 24 CFR Part 50 and the Coastal Barrier Resources Act of 1982.

(ii) The use of any funds provided under this part shall be subject to sections 102(a) and 202(a) of the Flood Disaster Protection Act of 1973 which respectively requires owners of assisted flood-prone property to purchase flood insurance and requires participation by the community in the National Flood Insurance Program.

(8) The applicant and its designated LUHA will give HUD and the

Comptroller General, through their authorized representatives, access to and the right to examine all records, books, papers, or documents related to the local urban homesteading program.

(9) The LUHA will maintain in writing and on file a description of its approved local urban homesteading program for public information and review.

§ 590.13 Standards for HUD review and approval of a local urban homesteading program.

(a) *Applications.* The appropriate HUD Field Office will review an applicant's initial application and the Field Office Manager will approve the proposed local urban homesteading program, unless the Field Office Manager determines that the program does not comply with the Act, this part or other applicable laws and regulations, or that it is plainly inappropriate or plainly inconsistent with available facts and data. If the program is disapproved, HUD shall notify the applicant in writing of the specific reasons.

(b) *Annual requests for program participation and program amendments.* The HUD Field Office will review any proposed application amendments and an applicant's annual request for program participation and will approve the applicant's submission unless the Field Office Manager determines that the proposal does not comply with the Act, this part, or other applicable laws and regulations, is plainly inappropriate or plainly inconsistent with available facts and data, or that the applicant's past performance does not meet the standards of § 590.29(a). HUD will notify the applicant in writing of the specific reasons for any disapproval. Program amendments will be considered approved as of the date of HUD's written notification of approval to the applicant. Annual requests for program participation will be considered approved as of the date of HUD's written notification to the applicant of approval, or notice of satisfaction of any approval conditions, whichever is later.

§ 590.15 Urban homesteading program participation agreement.

Upon approval of an application, HUD, the State or unit of general local government and the designated LUHA, if any, will execute an urban homesteading program participation agreement in the form prescribed by HUD. The agreement authorizes the LUHA to request HUD, VA, and FmHA to transfer properties to the LUHA under the provisions of this part, to the extent that funds available are sufficient to reimburse the Federal agency for the properties. The agreement also obligates the LUHA to use the properties in accordance with the Act, this part, other applicable laws and regulations, and its approved application. However, the agreement does not obligate HUD, FmHA or VA to transfer a specific number of properties or particular properties identified in a program application, or a program amendment.

§ 590.17 Transfer of HUD-owned property.

(a) *Property disposition assistance.* HUD's property disposition activity shall support local urban homesteading programs as follows:

(1) After execution of its initial urban homesteading agreement, but before the initial selection of any HUD-owned property, a LUHA may request HUD to suspend its routine property disposition activity for up to 45 days for HUD-owned properties listed under § 590.9 and identified by the LUHA as located in a HUD-approved urban homesteading neighborhood. Based upon this request, HUD shall state in writing the starting and closing dates of the suspension of property disposition activity for all such identified HUD-owned properties. During this period, the LUHA may notify the HUD Field Office of specific HUD-owned properties that it intends to use in its local urban homesteading program under this part.

(2) With respect to properties coming into HUD's inventory later, the HUD Field Offices shall develop and implement property disposition plans for HUD-owned properties located in HUD-approved urban homesteading neighborhoods. These plans shall include the following procedures:

(i) As soon as feasible, but in no event later than ten days after HUD receives a notice of property transfer and application for insurance benefits for a HUD-owned property located in a HUD-approved urban homesteading neighborhood, the HUD Field Office shall notify the LUHA in writing of the potential availability of the property for homesteading.

(ii) The HUD Field Office shall not approve a property disposition program for a HUD-owned property until the LUHA has informed the Field Office, in writing, whether or not it intends to use the property in the local urban homesteading program, or until 21 days from the date of HUD's notice, whichever comes first. The Field Office Manager may extend the 21-day deadline if the Field Office Manager makes a written determination that notification by the LUHA within 21 days is impracticable.

(b) *Conditions for transferring HUD-owned properties.* Except as provided in paragraph (c) of this section, HUD shall offer to transfer the title of a HUD-owned property to a LUHA, without payment, if:

(1) The property is located in a HUD-approved urban homesteading neighborhood;

(2) The LUHA has notified the HUD Field Office, within the applicable period specified in paragraph (a)(1) or (a)(2)(ii) of this section, that it intends to use the property in the local homesteading program;

(3) HUD has reserved section 810 funds in an amount sufficient to reimburse the applicable housing loan or mortgage insurance accounts for the estimated as-is fair market value of the property, or a negotiated lesser amount, plus closing costs as approved by HUD; and

(4) The HUD Field Office determines that the requested property is suitable for the approved local urban homesteading program, as follows:

(i) The agreed-upon transfer value of the property does not exceed $25,000 (excluding closing costs) for a one-unit single family residence and an additional $8,000 for each additional unit of two- to four-family residences; or

(ii) The Field Office Manager authorizes, on a property-by-property basis, the transfer of a HUD-owned property where the agreed-upon transfer value exceeds the preceding limitations if the benefit to the community expected from the expedited occupancy of the property, and the expected reduction of difficulties and delays (such as vandalism to the property) that HUD typically encounters in the disposition and sale of property, warrant the additional cost to the Federal government.

(c) *Exceptions.* (1) If a LUHA fails to accept title within 30 days of its acceptance of HUD's offer of a property for a specific price in accordance with paragraphs (b) (1)–(4) of this section, HUD may approve an alternative disposition plan for the property. The HUD Field Office Manager may extend, for a reasonable period of time, this 30-day deadline if the HUD Field Office Manager makes a written determination that acceptance of title by the LUHA within 30 days of property selection is impracticable. A reservation made under paragraph (b)(2) of this section may be cancelled by HUD if the closing for the applicable property does not occur within the time permitted under this paragraph (c)(1).

(2) A property otherwise eligible for transfer to a LUHA may be used to meet higher priority needs if the Field Office Manager makes a determination in

writing that the property is essential to meet an existing legal obligation such as:

(i) Settlement of a sales warranty claim;

(ii) Settlement of a claim under section 518 of the National Housing Act for critical structural defects in certain one- to four-family dwellings;

(iii) Emergency housing needs (disaster housing and urgent public housing needs, such as providing shelter for the homeless);

(iv) Reconveyance for noncompliance with 24 CFR 203.363;

(v) Reconveyance pursuant to a Civil Frauds Act settlement;

(vi) Reconveyance where the mortgage was never insured; and

(vii) Other legal obligations as determined by HUD.

§ 590.18 Reimbursement to FmHA and VA.

The Secretary shall reimburse FmHA or VA from a LUHA's section 810 funds in an amount agreed to between the LUHA and FmHA or VA for FmHA- or VA-owned property plus approved closing costs, under the following conditions:

(a) The property is located in a HUD-approved urban homesteading neighborhood;

(b) HUD has reserved section 810 funds in an amount sufficient to support the agreed reimbursement, including closing costs;

(c) The reimbursement (excluding closing costs) does not exceed the lesser of the amounts specified in paragraphs (c) (1) or (2) of this section;

(1)(i) $25,000 for a one-unit single family residence, plus $8,000 for each additional unit of a two- to four-family residence; or

(ii) An amount greater than the amount in paragraph (c)(1)(i) of this section, if authorized by the HUD Field Office Manager on a property-by-property basis, where the benefit to the community expected from the expedited occupancy of the property, and the expected reduction of difficulties and delays (such as vandalism to the property) that HUD typically encounters in the disposition and sale of similar property, warrant the additional cost to the Federal government; or

(2) The amount certified by FmHA or VA to be a fair value for the property based on the lesser of the market value or the amount of FmHA's or VA's claim plus the expenses connected with Federal ownership; and

(d) The property has been conveyed to a LUHA for use in a HUD-approved local urban homesteading program. The closing shall occur not longer than 30 days after the reservation is made under paragraph (b) of this section, and the reservation may be cancelled by HUD if it does not.

§ 590.19 Use of section 810 funds.

Section 810 funds may be used to reimburse HUD, VA or FmHA for federally-owned properties. Section 810 funds may not be used to reimburse LUHAs for administrative costs, nor may they be used to acquire property other than through reimbursement for federally-owned property. Participants receiving Community Development Block Grant (CDBG) funds may charge eligible administrative expenses incurred in operating their urban homesteading programs to their otherwise available CDBG administrative funds, provided such administrative expenditures would satisfy other Title I requirements.

§ 590.21 Reservation of funds.

After execution of the applicant's urban homesteading program participation agreement during the first program year, and thereafter following approval of the applicant's annual request for program participation, HUD will reserve funds to reimburse the FHA Fund, HUD's Rehabilitation Loan Fund, FmHA, and VA when specific properties are identified for transfer to the LUHA, as stated in § 590.17 or § 590.18. Funds will be reserved by HUD on a first-come, first-served basis subject to availability from the applicable field office subassignment, except that field offices may designate a temporary, minimum initial allocation of section 810 funds to be exclusively available for each participating LUHA for a period not to exceed 60 days from the date the LUHA is notified of such temporary allocation. During the term of the temporary allocation, all reservations made under § 590.17 or § 590.18 on behalf of the particular LUHA for specific properties shall be charged to the allocation. After the temporary allocation has been used, or has expired, the LUHA shall compete for reservations from the balance of the Field Office subassignment with other LUHAs in the Field Office jurisdiction. At any time during a fiscal year, HUD may decline making funds available when in HUD's judgment the LUHA's performance does not meet the standards set out in § 590.29(a) or when, due to market conditions in the area, there are an insufficient number (generally less than five) of affordable, federally-owned properties available to warrant continuation in accordance with § 590.7(a) and § 590.13.

§ 590.23 Program close-out.

(a) *Initiation of close-out.* This section prescribes procedures for program close-out when continuing a program is no longer feasible or where the beneficial results are not commensurate with the further expenditure of section 810 funds in a locality's designated urban homesteading neighborhoods. The LUHA will institute close-out procedures, in accordance with HUD instructions, when one or more of the following occurs:

(1) The LUHA determines that it does not have the capacity to continue administering the program in a timely and cost-effective manner;

(2) HUD terminates the LUHA's program because the LUHA's performance does not meet the standards specified in § 590.29(a); or

(3) HUD terminates the LUHA's program because the LUHA did not acquire any federally-owned properties in the previous two Federal fiscal years and because local market conditions demonstrate that an insufficient number of affordable, federally-owned properties is likely to be available for the next Federal fiscal year.

(b) Close-out may be subject to later audit in accordance with § 590.27(b).

(c) *Close-Out Conditions.* Upon completion of HUD close-out review, HUD will send the LUHA a letter of completion, which HUD may condition. Conditions may reflect unmet obligations, deadlines to meet them, and a statement of any required interim reporting procedures. In addition to any other conditions that may be specifically set forth in the letter of completion, the LUHA remains reponsible after close-out to take whatever actions may be necessary to enforce the homesteader agreement and complete final fee simple conveyance to the homesteader or a successor homesteader, or to obtain alternative use approval from HUD under § 590.7(b)(8), for properties conveyed to the LUHA for homesteading prior to close-out. LUHAs are required to report to HUD on a quarterly basis until each property has been conveyed in fee simple title to the homesteader.

(d) *Monitoring of closed-out programs.* HUD shall monitor closed-out programs to determine compliance with any conditions imposed under paragraph (c) of this section, the certifications under § 590.11(d), the Act, this part and other applicable Federal laws and regulations until the LUHA transfers fee simple title to all federally-owned properties to the homesteader, or until HUD approves an alternative use and the LUHA implements it under § 590.7(c).

§ 590.25 Retention of records.

The LUHA shall maintain adequate financial records, property disposition documents, supporting documents, statistical records, and all other records pertinent to the local urban homesteading program until fee simple title has been conveyed to all homesteaders, generally a five-year period. The LUHA will also maintain current and accurate data on the race and ethnicity of program beneficiaries.

§ 590.27 Audit.

(a) *Access to records.* The Secretary, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to all books, accounts, records, reports, files, and other papers or property of LUHAs pertaining to funds or property transferred under this part, for the purpose of making surveys, audits, examinations, excerpts, and transcripts.

(b) *Audit.* The LUHA's financial management system shall provide for audits in accordance with 24 CFR Part 44.

§ 590.29 HUD review of LUHA performance.

(a) HUD shall review the performance of each LUHA that has an urban homesteading program participation agreement at least once each Federal fiscal year to determine whether:

(1) The program complies with the urban homesteading program participation agreement and certifications, the Act, this part, and other applicable Federal laws and regulations;

(2) The LUHA is carrying out its program substantially as approved by HUD;

(3) The federally-owned properties the LUHA selects are suitable for homesteading and rehabilitation;

(4) The LUHA is making reasonable progress in moving properties through the stages of the homesteading process, including acquisition, homesteader selection, conditional conveyance, rehabilitation, and final conveyance, and is not making an unreasonable number of requests for extension of the time periods specified in § 590.17 (a)(2)(ii) and (c)(1);

(5) The improvements in neighborhood public facilities and services provided for in the coordinated approach toward neighborhood improvement are occurring on a timely basis; and

(6) The LUHA has a continuing administrative and legal capacity to carry out the approved program in a cost-effective and timely manner.

(b) In reviewing a LUHA's performance, HUD will consider all available evidence, which may include, but need not be limited to, the following:

(1) Records maintained by the LUHA;

(2) Results of HUD's monitoring of the LUHA's performance;

(3) Audit reports, whether conducted by the LUHA or by HUD auditors;

(4) Records of comments and complaints by citizens and organizations; and

(5) Litigation history.

(c) LUHAs shall supply data and make available records necessary for HUD's annual evaluation of the LUHA's local urban homesteading program.

§ 590.31 Corrective and remedial action.

When HUD determines on the basis of its review that the LUHA's performance does not meet the standards specified in § 590.29(a), HUD shall take one or more of the following corrective or remedial actions, as appropriate in the circumstances:

(a) Issue a letter of warning that advises the LUHA of the deficiency and puts it on notice that HUD will take more serious corrective and remedial action if the LUHA does not correct the deficiency, or if it is repeated;

(b) Advise the LUHA to suspend, discontinue or not incur costs for identified defective aspects of the local program;

(c) Condition the approval of the annual request for program participation if there is substantial evidence of a lack of progress, noncompliance, or a lack of continuing capacity. In such cases, HUD shall specify the reasons for the conditional approval and the actions necessary to remove the conditions;

(d) In cases of continued substantial noncompliance, terminate the urban homesteading program participation agreement, close out the program and advise the LUHA of the reasons for such action; or

(e) Where HUD determines that a LUHA has, contrary to its obligations under § 590.7(b), converted a property received under this part to its own use, failed to adequately preserve and protect the property, failed to timely secure a homesteader for the property, or received excessive consideration for conveyance of the property, HUD may direct the LUHA to repay to HUD either the amount of compensation HUD finds that the LUHA has received for the property or the amount of section 810 funds expended for the property, as HUD determines appropriate.

Dated: May 23, 1989.

Audrey E. Scott,

General Deputy, Assistant Secretary for Community Planning and Development.

[FR Doc. 89-13176 Filed 6-1-89; 8:45 am]

BILLING CODE 4210-29-M

federal register

Friday
June 2, 1989

Part X

Department of Education

National Assessment Governing Board; Meeting; Notice

Legal Register

Friday
June 2, 1989

Part X

Department of Education

National Assessment Governing Board; Meeting; Notice

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Partially Closed Meeting

AGENCY: National Assessment Governing Borad.

ACTION: Notice of Partially Closed Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Executive Committee of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act.

DATE: June 19, 1989.

TIME: 10:00 A.m. Until adjournment. 10:00–10:30 a.m. (Open session); 10:30 until adjournment (Closed session).

Location: U.S. Department of Education, National Assessment Governing Board, Suite 4060, Mary E. Switzer Building, 330 C Street, SW., Washington, DC 20202–7583.

FOR FURTHER INFORMATION CONTACT: Roy Truby, Executive Staff Director, National Assessment Governing Board, Suite 600, 555 New Jersey Avenue, NW., Washington, DC 20208, Telephone: (202) 357–6050.

SUPPLEMENTARY INFORMATION: The National Assessment Governing board is established under section 406(i) of the General Education Provisions Act (GEPA) as amended by section 3403 of the National Assessement of Educational Progress Improvement Act (NAEP Improvement Act). Title III–C of the Augustus F. hawkins—Robert T. Stafford Elementary and Secondary School Improvement Admendments of 1988 (Pub. L. 100–297); 20 USC 1221e–1).

The Board is established at advise the Commissioner of the National Center of Education Statistics on policies and actions needed to imporve the form and use of the National Assessment of Educational Progress, and develop specifications for the design, methodology, analysis and reporting of test results. The Board also is responsible for selecting subject areas to be assessed, identifying the objectives for each age and grade tested, and establishing standards and procedures for interstate and national comparisons.

The Executive Committee of the National Assessment Governing Board will meet via teleconference on Monday, June 19, 1989, from 10:00 a.m. until the completion of business. Because this is a teleconference meeting, facilities will be provided so the public will have access to the Board's deliberations during the open session which will take place from approximately 10:00 a.m. to 10:30 a.m. The proposed agenda includes discussion of the Board's by-laws.

A portion of the meeting will be closed to the public. From 10:30 a.m. until the completion of business the meeting will be closed and the Executive Committee will discuss qualifications of candidates for nominations to the Board and qualifications of specific individuals for key positions on the Board's staff. Discussion will touch upon matters that would disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy if conducted in open session. This portion of the meeting of the Executive Committee will be closed under the authority of Section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. Appendix 2) and under exemption (6) of section 552b(c) of the Government in the Sunshine Act (Pub. L. 94–409; 5 U.S.C. 552b(c)(6).

A summary of the activities at the closed session and related matters which are informative to the public consistent with Title 5 U.S.C. 552b will be available to the public within fourteen days of this meeting.

Records are kept of all Board proceedings, and until a permanent office site for the Board has been established, are available for public inspection at the U.S. Department of Education, Office of Educational Research and Improvement, 555 New Jersey Avenue NW., Room 600, Washington, DC, from 8:30 a.m. to 5:00 p.m., Monday through Friday.

Dated: May 31, 1989.

Bruno V. Manno,

Acting Assistant Secretary for Educational Research and Improvement.

[FR Doc. 89–13336 Filed 6–1–89 10:57 am]

BILLING CODE 4000–01–M

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Vol. 54, No. 105
Friday, June 2, 1989

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Public Laws

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